



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal
IA/00770/2014**

Number:

THE IMMIGRATION ACTS

**Heard at Field House
On November 19, 2014**

**Determination Promulgated
On November 21, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR GREG MICHAEL
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Avery (Home Office Presenting Officer)

For the Respondent: Mr Harding, Counsel, instructed by J McCarthy Solicitors

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The Appellant, citizen of Nigeria, was born on February 10, 1976. In September 2006 the appellant entered the United Kingdom as a visitor and should have left the United Kingdom by April 2007. He remained and in October 2012 he underwent a traditional marriage ceremony before marrying his partner on December 21, 2013. He applied to

remain under Section R-LTRP of Appendix FM relying on Section EX.1 of that Appendix. The respondent refused this application on November 23, 2013 disputing the appellant satisfied the relationship criteria and arguing there were no insurmountable obstacles to removal. He also issued removal directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. On December 17, 2013 the Appellant appealed to the First-tier Tribunal under Section 82(1) Nationality, Immigration and Asylum Act 2002 (hereinafter called the 2002 Act), as amended. The matter came before Judge of the First-tier Tribunal Majid (hereinafter called "the FtTJ") on August 8, 2014 and he allowed the appeal after an oral hearing in a determination promulgated on August 26, 2014.
4. The respondent lodged grounds of appeal on September 2, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Colyer on October 7, 2014. He found it arguable there was an error of law because the FtTJ had failed to make any substantive findings of fact and the determination was utterly inadequate.
5. The matter came before me on the date set out above. The appellant was in attendance and represented by his counsel.
6. The appellant had not filed a Rule 24 response.

SUBMISSIONS ON ERROR IN LAW

7. Mr Avery submitted the determination was utterly inadequate and adopted his grounds of appeal. There was no consideration of the evidence or any public interest consideration. The FtTJ failed to demonstrate that he knew what he was considering. The FtTJ failed to address the suitability requirements set out in the Immigration Rules with regard to the time they were together. Whilst they were now married they had not been together for two years and the respondent had disputed the extent of that relationship it was incumbent on the FtTJ to make a finding on the relationship and he had failed to do so. He had also failed to have regard to the Immigration Act 2014 and in particular section 19 that introduced Section 117A-C of the 2002 Act.
8. Mr Harding accepted the determination was not ideal but submitted that the as this was an appeal governed by Section EX.1 of Appendix FM then the FtTJ was merely concerned with whether there were insurmountable obstacles and section 117A and B of the 2002 Act were not a material consideration if the appeal was allowed under the Rules. He allowed the appeal because he placed great weight on the wife's British citizenship, the fact she was receiving IVF treatment, the safety of the appellant's partner because of the Boko Haram and Ebola problems. Whilst the decision was not perfect it was nevertheless open to him.

ERROR OF LAW ASSESSMENT

9. This was a respondent appeal and the main thrust of the grounds was

that the FtTJ failed to make any findings. I have read the determination carefully and whilst the FtTJ recounted the appellant's case and submissions made on his behalf he failed to make any findings whatsoever on the issues that were before him.

10. In particular, the respondent raised the issue of their relationship in her refusal letter. She disputed the relationship and he took issue with the appellant's claims about insurmountable obstacles. The refusal letter also addressed the issue of paragraph 276ADE.
11. The FtTJ made no findings about the respondent's concerns about the relationship and did not consider any of the issues raised by the respondent in her refusal letter. The FtTJ's decision does not consider the application under the Rules in any shape or form but what the FtTJ did was to embark on a partial examination of article 8 jurisprudence. No findings on the material issues were undertaken and the only finding exercise undertaken was an assessment of whether removal was proportionate.
12. Mr Harding argued today that a proportionality examination was unnecessary as the application was granted under the Rules as evidenced by the FtTJ's finding at paragraph [28].
13. I indicated in Court that I was satisfied there had been an error made and I referred to the lack of findings and an issue over whether he was a qualifying person having regard to Section R-LTRP. It may well be that having married his partner under English law the two year partner rule is no longer a relevant consideration but I am satisfied that the FtTJ's failure to address any of the issues raised at the hearing and in the refusal letter means there has been an error in law.
14. Having established there was an error in law I invited submissions on what should happen to the appeal. Both representatives agreed fresh oral evidence and findings would be necessary. I considered Part 3, Section 7.1 to 7.3 of the Practice Statement.
15. Part 3, Section 7.1 to 7.3 of the Practice Statement states:

"Where under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.”

- 16. In light of the Practice Direction I agreed the case should be remitted to the First-tier Tribunal to be reheard on all matters including Appendix FM, paragraph 276ADE and article 8 ECHR. Consideration would also have to be given to the Immigration Act 2014.
- 17. No additional directions are needed as there is a full bundle on the court file.
- 18. The parties should ensure compliance with any directions issued in light of the fact the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 will apply to this appeal from hereon.

Decision

- 19. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I have set aside the decision.
- 20. The appeal is remitted back to the First-tier Tribunal for a fresh appeal hearing under Section 12 of the Tribunals, Courts and Enforcement Act 2007.
- 21. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order has been made and no application has been made to alter the position.

Date: **November 21, 2014**

DEPUTY UPPER TRIBUNAL JUDGE ALIS
IMMIGRATION AND ASYLUM CHAMBER