



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/03106/2019

THE IMMIGRATION ACTS

Heard at Birmingham CJC

**Decision & Reasons
Promulgated**

On 10 January 2020

On 12 February 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**TAOFEEK [A]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a Nigerian national born on 9 January 1975, raises a challenge to the decision of First-tier Tribunal Judge Broe promulgated on 17 June 2019.
2. Permission to appeal was granted by First-tier Tribunal Judge Swaney on 16 October 2019. In material part the grant of permission to appeal is in these terms:

"The Appellant applied for further discretionary leave to remain as evidenced by the application form contained in the Respondent's bundle. He completed form FLR(DL) which was the appropriate form

for him to complete, as he was first granted discretionary leave to remain on 26 October 2011. The application form specifically states that the application will be considered pursuant to the published Asylum Policy Instruction on Discretionary Leave. That instruction contains transitional provisions which state that the policy will continue to apply through to settlement in cases where a grant of discretionary leave was made before 9 July 2012. Appendix FM does not apply in such cases.

The failure to consider the correct policy amounts to a misdirection of law and it is material because the Appellant's appeal has been determined in relation to requirements and criteria that are not applicable".

3. Consequent to the grant of permission to appeal, on 23 October 2019 the Respondent filed a Rule 24 response in material part in these terms:

"The Respondent does not oppose the Appellant's application for permission to appeal because the Judge had failed to have regard to the Respondent's discretionary leave policy (version 7) - dated 18 August 2015. The Respondent invites the Tribunal to remit the matter afresh for a de novo hearing before the First-tier Tribunal as findings of fact will need to be made afresh".

Mrs Aboni confirmed that that was the position of the Respondent today.

4. In those circumstances, and essentially for the reasons given by Judge Swaney, I am content to find error of law, set aside the decision of First-tier Tribunal Judge Broe, and direct that the decision in the appeal now be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Broe.
5. Given the nature of the concession by the Respondent it is unnecessary for me to rehearse herein in any great detail the facts and circumstances that form the background to this case. I do comment, however, that the problem in respect of the erroneous approach identified above is not limited to the approach of the First-tier Tribunal. The Respondent's 'reasons for refusal' letter ('RFRL') of 21 January 2019 also fails to have regard to the Respondent's own policy; the Respondent's decision-maker evaluated the Appellant's application by reference, in the first instance, to the Immigration Rules and in particular Appendix FM. As such, the decision of the Secretary of State is in itself in error of law.
6. Not so very long ago this Tribunal had jurisdiction to allow an appeal on such a basis, and in effect to determine that the original application

remained outstanding before the Secretary of State and required to be decided in accordance with the law. The current appeal regime affords me of no such power. In the circumstances, as I say the appeal must be sent back to the First-tier Tribunal.

7. It will now be a matter for the Respondent to consider whether, in light of the circumstances described, the decision of 21 January 2019 should be withdrawn with a view to the Respondent re-determining the application in accordance with its discretionary leave policy, or alternatively to supplement the decision of 21 January 2019 by way of a further 'reasons' letter explaining why, if at all, the decision is to be maintained notwithstanding consideration of the discretionary leave policy. In the event that the matter comes back before the First-tier Tribunal without any such reconsideration by the Respondent, the First-tier Tribunal will in effect become the first instance decision-maker in respect of the discretionary leave policy and how that impacts the available 'Article 8' ground of appeal.
8. There is one further matter to which I draw attention. It is a feature of the Appellant's case that he has relied upon a relationship with a British citizen whose details are a matter of record on file. He attended the hearing before the First-tier Tribunal without his claimed partner, albeit that there were various items of documentary evidence before the Tribunal that related to her. When asked about her non-attendance he gave answers which suggested it had been a matter of his choice not to have her attend in support of the hearing (e.g. see paragraph 12 of the Decision of the First-tier Tribunal). The Appellant will now be aware from the substance of the Decision of the First-tier Tribunal that his partner's "*absence weighs heavily in the balance*" (paragraph 21).
9. I also drew to the Appellant's attention that if his partner were not present at any further hearing of his appeal without good reason (and indeed without there being supporting evidence of any such good reason), it was a very real possibility that the next Judge would draw an adverse inference from her absence as to whether the relationship was genuine and subsisting. The matter having again been brought to the Appellant's attention, it is now a matter for him as to how he may wish to conduct his appeal: but he can be in no doubt of - and has been alerted to - the importance of the attendance of his claimed partner to support any aspect of his case based on a claimed relationship.

Notice of Decision

10. For the reasons given the decision of the First-tier Tribunal is set aside for material error of law.

11. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Broe.

12. No anonymity direction is made. (Although a direction was previously made it is unclear to me why, and I can see no basis presently for continuing it. In the event that facts and evidence in the appeal in due course touch more directly on the circumstances of any of the children of the Appellant's purported partner, particularly in the event that any such children are still minors, the issue of 'anonymity' can be re-visited.)

Signed:

Date: 8 February 2020

Deputy Upper Tribunal Judge I A Lewis