Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10828/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd September 2021	**On 21st October 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR SAMPSON AHANWA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None
For the Respondent: Mr Chris Avery, Home Office Presenting Officer

DECISION AND REASONS

The appellant, a national of Nigeria born on 25th December 1967, appeals against the decision of First-tier Tribunal Judge Webb promulgated on 6th May 2020 in which he dismissed the appellant's appeal against the Secretary of

State's refusal, on 10th June 2019, of his application for leave to remain under paragraph 276ADE(1). The Secretary of State's refusal was on the basis that he was no longer in a subsisting relationship with his former partner, and he could not satisfy the requirements of the Rules for leave as a parent because his son was over 18 at the date of the application.

The reasons for refusal noted that the appellant on 17th May 2019 made a human rights claim under Appendix FM to the Immigration Rules on the basis of his family life with his partner, Veronica Jayee Doe (not his son).

It recorded that the appellant had entered the UK on 26th April 2006 without valid leave and had applied for leave to remain on 29th July 2013 as a parent which was granted, with leave valid until 27th February 2016.

The appellant then applied for further leave to remain on 25th February 2016 [as a partner] which was refused.

He applied for further leave to remain as a spouse or partner on 23rd December 2016 which was granted until 13th June 2019.

On 17th May 2019 he applied for further leave to remain as a spouse/partner. The Secretary of State refused that application on the basis that he failed to fulfil the eligibility relationship requirements, under paragraphs E-LTRP.1.1 to 1.12 because he had separated from his partner, and they had not lived together since November 2018.

The Secretary of State also considered paragraph EX.1.(a) of Appendix FM but it was noted that his child was not under the age of 18 at the date of the application.

Finally, the application was considered under paragraph 276ADE(1) but it was noted that he had lived in the UK for only thirteen years, not the twenty years as required and that there were no very significant obstacles to his integration into Nigeria, from where he could support his son. It was also considered there were no unjustifiably harsh consequences on his return.

First-tier Tribunal Judge Webb set out at paragraph 26 of his decision the argument based on the appellant's family life as a parent of a child in the UK under Section R-LTRPT as follows:

> *"26. The requirements to be granted leave to remain as a parent of a child in the UK are set out at Appendix FM of the Immigration Rules. The relevant sections and paragraphs that have relevance to the fact of this case are as follows:*
>
> > *'R-LTRPT.1.1. The requirements to be met for limited leave to remain as a parent are –*
> >
> > *(a) the applicant and the child must be in the UK;*

(b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either

(c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
(ii) the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent, or

(d) (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and
(ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2 - 2.4. and E-LTRPT.3.1 - 3.2.; and
(iii) paragraph EX.1. applies.

Relationship requirements

E-LTRPT.2.2. The child of the applicant must be -

(a) Under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;

(b) .....; and

(c) .....; or

(d) .....

E-LTRPT.2.3. Either -

(a) .....; or

(b) (i) .....;

(ii) .....;

(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

.....'

27. This Tribunal has not been supplied with papers relating to the 29 July 2013 or the 25 February 2016 applications. On the limited information available to me it appears that the Appellant lodged an application for leave to remain as the parent of a child (Berkeley Okoraofor) on 29 July 2013 on the basis of which he

was granted leave on 27 August 2013. However, between those two dates, on 24 August 2013 he married a woman (Veronica Jayee Doe). It is unclear from the evidence before me whether or not Ms Doe was settled in the UK by that date, but it is not in dispute that she possessed indefinite leave to remain by 12 February 2016 (see the BRP at AAB page 63). This was prior to the next application of the Appellant submitted on 25 February 2016 which was refused. I do not have a copy of the Notice of Refusal/Reasons for Refusal relating to that application. Assuming that it was refused on substantive grounds (rather than a procedural irregularity such as a non-payment of the filing fee, etc.), I presume that the Respondent would either have raised paragraph E-LTRPT.2.2.(a) (on the basis that the child had both reached 18 and was living an independent life) and/or paragraph E-LTRPT.2.3.(b)(iii) (the Appellant being able to make an alternative application for leave to remain as a partner). However, this is speculation on my part in the absence of evidence.

28. *I do not need to speculate on the basis on which leave to remain was later granted to the Appellant on 13 December 2016. The confirmation of leave itself was unequivocally stated on both the BRP and letter from the Home Office dated 13 December 2016 (see AAB pages 61 and 48). The Home Office letter further states that the Appellant submitted '**an application for limited leave to remain** [in the] **partner route …… and** [has] **been granted a period of 30 months limited leave to remain under paragraph D-LTR …… as we are satisfied that you meet the requirements of paragraphs R-LTRP.1.1.(a), (b) and (c) of those Rules**'. As the last grant of leave to the Appellant was under the 'partner route' rather than the 'parent route', I find that the first part of paragraph E-LTRPT.2.2.(a) cannot be satisfied. Nevertheless, I can appreciate that one can interpret that part of the paragraph in a different manner."*

At paragraph 28 the judge specifically stated and found that the appellant could not meet the requirement in relation to the age of the child or where over the age of 18 years the child had formed an independent life. : "As the last grant of leave to the appellant was under the 'partner route' rather than the 'parent route', I find that the first part of paragraph E-LTRPT.2.2.(a) cannot be satisfied."

The judge had found that the leave granted to the appellant on 13th December 2016 was unequivocally stated on the BRP and the letter from the Home Office such that the appellant submitted

> "*an application for limited leave to remain [in the] partner route …… and [has] been granted a period of 30 months' limited leave to remain under paragraph D-LTR …… as we are satisfied that you*

meet the requirements of paragraphs R-LTRP.1.1.(a), (b) and (c) of those Rules".

The grounds of appeal

The first ground of appeal stated that the judge had noted that the appellant had been granted leave to remain as a parent in 2013 but misdirected himself because he stated that the appellant's last leave had been granted as a partner, not as a parent. However, paragraph E-LTRPT.2.2.(a) expressly provided for the possibility that the child of an applicant may have turned 18 since the applicant was first granted entry clearance or leave to remain as a parent but it did not say that the applicant must have had continuous leave as a parent or even that his leave at the date of the application must be as a parent. It was pointed out that this could be prejudicial to the human rights of a parent and child because where someone is granted leave as a parent and thereafter while maintaining a relationship also forms a relationship with the settled partner, he does not have the option of his continuing the leave under the parent route. Eligibility under E-LTRPT.2.3 to apply as a partner disqualifies him from applying as a parent and thus the judge's conclusion could not be sustained.

There was a further challenge to the decision of Judge Webb in relation to the assessment of the son's independent life. It was clear that the application was made after the child was aged 18 and it was asserted in the grounds that the judge made no finding that the appellant or his son was dishonest. It was submitted that the son was at Loughborough University and studying which made independence less likely. He had broken off his studies and started again because of his mother's death and hence his age. He had been a student for a longer period than the normal three years. Indeed, the son had provided a witness statement which confirmed his reliance financially and emotionally on his father as his only remaining parent and the oral and written evidence was that the appellant was providing both financial and emotional support, indicating that his son remained dependent. The judge failed adequately to consider or direct himself about this evidence and thus misdirected himself. It was acknowledged, however, in the grounds that the transfer of monies was not necessarily formalised.

At the hearing before me, the appellant appeared in person and relied on the comprehensive written grounds of appeal.

Mr Avery submitted that it was entirely open to the judge to say that when there was a break in the leave under the Rule, it did not meet the requirements of the particular Rule in question. The focus of the stay in the UK had moved on and the appellant had applied for leave as a spouse (even after the son's mother had died) and it did not make sense to interpret the Rule as it was suggested. Indeed, his applications suggested that the focus of his life had changed. The question was how the Rule should be interpreted.

Analysis

The appellant's initial application for leave to remain as a partner under Appendix FM was refused because the partnership no longer was subsisting. Nonetheless the Secretary of State considered the application in the alternative on the basis of the appellant being a parent but refused on the basis that the child was not under 18 years.

Nowhere in the Rule does it state that the appellant must have had continuous leave as a parent, and I note that at paragraph R-LTRPT.1.1 requirements to be met for limited leave to remain as a parent are:

The applicant and the child must be in the UK;

the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either

the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent

...

and the relationship requirements under E-LTRPT.2.2 are set out.

Nowhere in the Immigration Rule does it say the last grant of leave to the appellant must be under the "partner route" rather than the "parent route" and nowhere does the Rule stipulate that there must be continuous leave as the parent. Indeed, the Rule itself under R-LTRPT.1.1.(b) suggests that the appellant can make an application under either route.

The text reads in relation to the child that the child of the applicant should be under the age of eighteen, '*or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix must not have formed an independent family unit or be leading an independent life'.* The condition is that leave must have been granted under Appendix FM and although there is no comma or disjunction between 'entry clearance or leave to remain as a parent', the specification and qualification, inter alia, has a reference to 'first' granted entry clearance and no reference to 'last' as the judge identified. The initial grant appears to be the qualification. There is no specification as to the type of leave which needed to have been granted in the interim nor indeed the 'last' leave granted. There is no reference to the 'focus' of the stay in the UK.

I note the refusal decision of the Secretary of State did not state that the application was refused on the basis that he did not have continuous leave as a

parent, although I accept, it was assumed that the application was refused under the parent route because the child was not under 18 years.

The further qualification however is that the child should not be living independently and any misinterpretation as to the provision of E-LTRPT 2.2(a) is not material to this applicant's position because of the stipulation under E-LTRPT.2.2.(a) is that where the child has turned 18 since the first grant of leave that child must not have formed an independent family unit or be leading an independent life.

As Mr Avery pointed out, the judge at paragraph 29 found in the alternative that if his interpretation was incorrect the question was whether the child was leading an independent life. The judge stated as follows at paragraph 29:

> *"29. Should I be incorrect in my view that the correct interpretation of E-LTRPT.2.2.(a) should be that an applicant seeking further leave as a parent in respect of a child who is now aged 18 or over must demonstrate that their last period of leave must have been granted as a parent (rather than a far earlier grant of leave having been granted as a parent), it is sensible for me to also consider the second part of paragraph E-LTRPT.2.2.(a). This states that the adult child in question '**must not ..... be leading an independent life**'. Mr Berkeley Okoraofor was at the date of this hearing an adult man of almost 23 years of age. He lives in Loughborough where he is pursuing a university course. During vacation periods he returns to London but not to the Appellant's home (see paragraph 9 of this Decision & Reasons). Although the Appellant said that he gives his son financial support '**when he needs it**', no further oral evidence was given on this point, and I was not referred to any documentary evidence such as bank statements showing transfer of funds from the Appellant to his son. Mr Berkeley Okoraofor did not attend this hearing to give oral evidence and he provided only a very short statement dated 02 June 2019 (see AAB page 124). This states that '**I rely on my father for emotional and financial support**' but, once again, no details are provided. I remind myself that the burden of proof is on the Appellant.*
>
> *30. I therefore find that the Appellant's son is an adult man who is leading an independent life so meaning that the requirement of paragraph E-LTRPT.2.2.(a) is not met. In turn, this means that the Appellant cannot satisfy either R-LTRPT.1.1.(c)(ii) or R-LTRPT.1.1.(d)(ii) and so does not meet the requirements for leave to remain as a parent of a child living in the UK."*

The judge was evidently aware, as recorded at paragraph 29, that the appellant's son was living in Loughborough, where he was pursuing a university course, and added that:

> *"During vacation periods he returns to London <u>but not to the appellant's home [my underlining].</u> … Although the appellant said that he gives his son financial support 'when he needs it', no further oral evidence was given on this point, and I was not referred to any documentary evidence such as bank statements showing transfer of funds from the appellant to his son. Mr Berkeley Okoraofor did not attend this hearing to give oral evidence and he provided only a very short statement dated 2nd June 2019. … This states that 'I rely on my father for emotional and financial support' but, once again, no details are provided. I remind myself that the burden of proof is on the appellant."*

It was thus entirely open to the judge on the basis of the evidence before him, including the lack of financial documentation, the son living apart even during the holidays, the very brief witness statement from the son and his absence, that the appellant's son was an adult man who was leading an independent life and his assessment was entirely in line with **<u>Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; [2003] INLR 31</u>**. In the case of adults in the context of immigration control there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8(i). Although family life is not to be construed too restrictively there should be shown real or committed or effective support which represents 'the irreducible minimum of what family life implies'; there needed to be both financial and emotional support. It was not a question as to whether the appellant or his son was dishonest (and indeed none was found here). It is necessary for the appellant to prove his case with evidence on the balance of probabilities. He did not.

As Mr Avery pointed out, the focus of the appellant's applications had been, even after the appellant's son's mother had sadly died, on the basis of his partner/spousal relationship, not on the basis of his relationship with his son. The last application was made on 17th May 2019 and the mother died on Although it was asserted in the grounds that the appellant's son had no home of his own or evidence of other income or support, the judge found at paragraph 9 that the appellant gave evidence that

> *"outside of term time his son stays in London with one of his friends". The appellant then added that when he buys a house his son can come and live with him but as he (the appellant) is currently living with a friend, there is no additional room for his son".*

The weight to be given to the evidence is a matter for the judge and it was open for the judge to find that the appellant's son was leading an independent life and thus failed to fulfil the Immigration Rules.

The grounds asserted that the error in relation to the judge's consideration of Article 8 outside the Rules and whether family life existed related to whether the appellant and his son had a family life and the weight to be accorded to it.

As noted, however, the judge accepted that a young adult living independently of his parents may not have family life for the purposes of Article 8. I have found that the conclusion that there was no family life at paragraph 29 was sustainable and thus the later criticism of the judge's analysis is not sustainable.

The judge accepted there was a relationship (albeit not protected by Article 8), and it was open to the judge to assess the strength of ties in relation to family life and factor those into the proportionality assessment which is what he did. The judge was fully aware that family life was established largely in the period since 2018 when the appellant was here lawfully. The judge was fully aware that the son was born on 28th March 1997 and had lived with his mother, and she died in 2017. The fact is that the judge had found that there was no family life *for the purposes of Article 8,* not that there was no family life at all and the weight in those circumstances accorded to that family life by the judge was open to him when conducting the proportionality assessment. The judge returns to the finding as to whether the son was living an independent life at paragraph 36 and concluded that "modern methods of communication and transportation enable people to remain in contact with friends and relatives living in different countries" and that "I presume that this is precisely how the appellant currently remains in contact with his adult daughter who resides in Nigeria". The judge was entitled to find and cogently reasoned

> *"that the appellant has the 'normal emotional ties' that one would usually expect between an adult child and his surviving parent (to adopt the language used by the Court of Appeal in* ***Kugathas v Secretary of State for the Home Department*** *[2003] EWCA Civ* ***31****) but this, by itself, does not amount to 'family life' sufficient to acquire the protection of Article 8 ECHR".*

The judge stated in the alternative that if he were incorrect in adopting that approach, he would in the alternative find that the "degree of family life that does exist should be attributed limited weight in the proportionality assessment". Even if he had found Article 8 protected life on the facts as they were, that direction and approach was entirely sustainable. The son had furnished a very brief statement dated 2nd June 2019 and did not attend to support the appeal.

As set out in **UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095** at paragraph 26

> *'In R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19, Lord Hope said (at paragraph 25):*
>
> > *"It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined'.*

I find no material error of law in the decision.

Notice of Decision

The decision of the First-tier Tribunal shall stand and the appellant's appeal remains dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 23rd September 2021

Upper Tribunal Judge Rimington