Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/02016/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 February 2016	**On 30 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR SOLOMON DAVID MSAKI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms S Sreeraman, Senior Home Office Presenting Officer
For the Respondent: Mr Msaki

DECISION AND REASONS

The Appeal

1. Although the appellant at this hearing is the Secretary of State, for the purposes of this decision I refer to the parties as they were in the First-tier Tribunal. This is a resumed hearing. The Upper Tribunal, at a hearing on 30 November 2015, found an error of law and set aside the decision of the First-tier Tribunal promulgated on 21 May 2015. The error of law decision is appendixed to this Decision and Reasons.

Remaking the Decision

2. I rely on the background to this case set out in the appendixed error of law decision. Although the panel hearing the error of law decision had been initially disposed to remake the decision on the available evidence, the panel concluded that the case should be re-listed for a further hearing.

3. In particular, it was noted that the appellant's sponsor claimed to have two British Citizen children one of whom lived with her and the appellant. However, this was not a feature of the appellant's claim that was alluded to by the First-tier Tribunal although it clearly bears relevance to an assessment both under paragraph EX.1. of Appendix FM and potentially Article 8 outside of the Rules.

4. The panel therefore made directions set out in the appendixed decision requiring the appellant to file and serve a bundle with copies of the birth certificates and passports of the sponsor's children and evidence in relation to the current circumstances of the children. It was also envisaged that witness statements would be provided from both the appellant and sponsor. The Secretary of State was directed to file and serve a bundle of any further evidence to be relied on.

5. The resumed hearing therefore came before me. Directions were not complied with by either party. Mr Msaki was in attendance with the sponsor. However, he had written a letter to the Tribunal dated 30 January 2016 requesting the Upper Tribunal to discontinue or not to resume the appeal as it was indicated that Mr Msaki had submitted a fresh application to the Home Office and did not wish to pursue the appeal before the Upper Tribunal as he considered the fresh application to be the preferred remedy. In reply the Tribunal wrote to the appellant on 2 February 2016 advising him that it was the Home Office's appeal which was before the Upper Tribunal and the appellant was therefore not in a position to withdraw the appeal. It was indicated that the Tribunal would have required confirmation from the Home Office that they wished to withdraw the appeal.

6. Ms Sreeraman took instructions at my direction and indicated that the Home Office was not minded to withdraw the initial decision of 12 December 2014 as this would potentially cause greater difficulties for the appellant, who now had a fresh application before the respondent. It was noted that Ms Sreeraman was aware that this was in the system although it had initially been returned to the appellant on the basis of a technicality. The appellant indicated before me that this technicality had been resolved and the application had been resubmitted.

7. Mr Msaki confirmed to me that he had not complied with the directions alluded to above as he was of the view that he wished to pursue only the fresh application before the respondent and he indicated to me that he did not wish to give evidence before the Tribunal. I considered that the appellant was not legally represented before me. However the appellant has had considerable opportunity to take advice, if required, in relation to his immigration matters and to provide any evidence or information that he might want to be considered in connection with this appeal (including as set out in the Decision on Error of Law and Directions promulgated on

4 January 2016. I was satisfied that there was no unfairness to the appellant in proceeding.

8. In terms of remaking the decision I considered the respondent's refusal letter and Ms Sreeraman's submissions together with Mr Msaki's lack of compliance with the relevant directions and the lack of any evidence before me that might address the issues the Tribunal set out in our decision on the error of law dated 22 December 2015. In particular, although I took into consideration that Mr Msaki and his sponsor were available before the Tribunal, there was no evidence, as directed, in relation to the circumstances of the children (for example witness statements, reports from their schools or similar and/or information or evidence from the children's father and/or evidence as to their relationship with the appellant).

9. It was not disputed that the appellant did not meet the terms of Appendix FM, in particular the terms of Appendix FM-SE in relation to demonstrating that his sponsor's income was as claimed. The specified evidence was not provided. I also note, as indicated in the error of law decision, that although the judge was satisfied that at the date of appeal the appellant had shown that his sponsor was earning £20,564.88 per annum, this was on the basis of an inaccurate assessment of the evidence.

10. Although the appellant indicated before me that he did not attend the last hearing because he did not receive the letter, nevertheless the appellant was in a position to produce documents including a skeleton argument and an appendixed bundle for that previous hearing. I did not accept that explanation.

11. I accept Ms Sreeraman's argument that the appellant had not demonstrated that he met the requirements of Appendix FM in relation to his partner. I also accept that it had not been demonstrated that the appellant met the requirements of the parent route under Appendix FM.

12. In relation to Appendix FM EX.1. the following requirements need to be met:

> "EX.1. This paragraph applies if
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> (a)
>
> (i) the applicant has a genuine and subsisting parental relationship with a child who -
>
> (aa) is under the age of 18 years; or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

13. In light of the lack of adequate evidence before me I am not satisfied that it has been demonstrated that the appellant has a genuine and subsisting parental relationship with either of the sponsor's children (and, as noted in the error of law decision, it was stated that only one of the sponsor's children lives with the appellant and the sponsor). In addition it was also not established given the failure to comply with directions that the appellant has demonstrated that his sponsor does indeed have children and that those children are British citizens. Therefore the appellant is not in a position to meet paragraph EX.1.(a).

14. In relation to EX.1.(b), although I accept that the appellant has a genuine and subsisting relationship with a partner, again, in light of the lack of any evidence before me I am not satisfied that it has been demonstrated that there are insurmountable obstacles to family life with that partner continuing outside the UK, bearing in mind the lack of any adequate evidence before me. I have also taken into account the relevant jurisprudence including that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K and that there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. However it for the individual to provide evidence that any such temporary separation will interfere disproportionately with protected rights. (R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – Chikwamba – temporary separation – proportionality) *IJR* [2015] UKUT 189 (IAC) applied).

15. There was no evidence before me of any hardship that might be caused in requiring the appellant to make an application outside the UK, as the evidence indicated that he still has family in Tanzania and there was no adequate evidence that it would cause undue hardship. I am not satisfied that it has been demonstrated that the appellant can meet either of the limbs of EX.1. I am further not satisfied, given the lack of any adequate evidence before this Tribunal, that it has been demonstrated

that there is anything not sufficiently considered under Appendix FM which would require an assessment outside of the Immigration Rules in respect of Article 8.

16. Further, in the alternative, I am not satisfied that any assessment of Article 8 outside of the Immigration Rules would produce a different result, and I have considered Section 117 of the 2002 Act. I am satisfied that any interference with family or private life would be proportionate. The appeal is therefore dismissed in the alternative under Article 8.

17. Therefore, as indicated at the hearing, I dismiss the appellant's appeal; as noted above the appellant intends to rely on a fresh application before the respondent. That is not a matter for this Tribunal.

Notice of Decision

The Judge of the First-tier Tribunal made an error of law and his decision to allow the appeal under Article 8 is set aside. I remake the decision dismissing the appeal under the Immigration Rules.

No anonymity direction was sought or made.

Signed Date: 24 February 2016

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 24 February 2016

Deputy Upper Tribunal Judge Hutchinson