UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: HU/04395/2015**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 25 January 2018	**On : 21 February 2018**

Before

Deputy Upper Tribunal Judge Mailer

Between

MR EBENEZER DELE OJO
ANONYMITY DIRECTION NOT MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: **Ms J Bezzam, counsel (instructed by London South Law Chamber)**
For the Respondent: **Mr S Kotas, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The appellant is a national of Nigeria, born 22 August 1962. His appeal against the decision of the respondent dated 4 August 2015 refusing him leave to remain in the UK was dismissed under the Rules and on human rights (Article 8) grounds, by First-tier Tribunal Judge Cockrill. His decision was promulgated on 6 March 2017.

2. The Judge noted that the respondent refused his application under the partner and parent routes. He did not show that he had sole responsibility for his daughter, Blessing Ojo who had been granted discretionary leave and had an outstanding application. She had spent more than seven years in the UK prior to the human rights application made by her father. His immigration situation was not settled. Blessing was 17 at the date of the refusal and was thus nearly an adult. It was a matter for her where she chooses to live and how she manages her life [12]. There were no insurmountable obstacles under paragraph 276ADE of the Rules to the appellant being integrated into Nigeria – [13].

3. Judge Cockrill heard evidence from the appellant as well as Ms Blessing Ojo. He did not accept that the appellant had exercised sole responsibility in relation to Blessing. She had not been living with the appellant for a number of years, but with her mother. It is her mother who is 'quite clearly' the person who has been influential in her life [31].

4. The very highest that could be said is that responsibility has been shared between them. It is more likely however that given that Blessing has lived with her mother since 2008, the latter's relationship is a stronger one than that with her father [32]. He sees Blessing reasonably frequently. He was not able to name the church she attends with her mother.

5. Judge Cockrill found that the situation with Blessing is that she is on the threshold of adulthood. She is hoping to go to university in September (2017) and although she looks to her father for some sort of guidance and support, he has not been the person with sole responsibility. She can choose to go out and see the appellant when he has to go back home to Nigeria [32].

6. The Judge assessed the relationship between the appellant and his current wife. Her daughter is an adult now and there is nothing to suggest that there is anything particularly close in the relationship between the appellant and his stepdaughter [33].

7. As regards the appellant' wife, she has made the UK “very much her home” [33]. She has been here for a substantial period. Her daughter lives here as a young adult. As far as she is concerned she would very much hope to continue living in the UK. She is faced with a dilemma as the appellant has not demonstrated that by returning to Nigeria there would be a breach of a protected human right [33].

8. He found that there would not be insurmountable obstacles to family life continuing between the appellant and his present wife in Nigeria [34]. He consequently found that the appellant did not meet the requirements under the Rules.

9. In considering the matter outside the rules on Article 8 grounds, he came to the same conclusion having regard to the totality of the circumstances. He followed the Razgar guidance. He noted that the critical issue is proportionality. He found that

the decision would be proportionate. He took into account the factors set out under s.117B of the 2002 Act [35].

10. He stated at [36] that it should not be forgotten that the appellant had been in the UK for some time with a precarious status. He entered into a relationship with his present wife when his immigration situation was not settled. He cannot rely on that relationship which she enjoys with Blessing to provide a basis for being permitted to remain in the UK given Blessing's age and circumstances. The fact that he is married now to a British citizen does not itself mean that he should be prevented from being returned to Nigeria, a country of which he is a national. In the circumstances he was satisfied that the respondent's decision is proportionate to the need for the maintenance of effective immigration control [36].

11. In the grounds seeking permission to appeal it was contended that the key issue was whether the appellant had sole responsibility for his daughter. The Judge did not properly consider all the relevant factors. It is also contended that the Judge applied the wrong test in relation to whether the appellant's wife faces an issue of insurmountable obstacles.

12. On 25 October 2017, Upper Tribunal Judge Lindsley found that it was arguable that the Tribunal did not lawfully determine the appeal under Article 8. It should have been first considered whether the appellant could meet the requirements of the Rules which arguably had not taken place.

13. She stated that 'in this instance', EX.1 of Appendix FM is arguably the most pertinent provision, particularly where the appellant has a genuine and subsisting parental relationship at the date of his application with a child who is either a British citizen or who has lived in the UK for a period of seven years. It is arguable that these requirements are met in the relationship with the appellant's daughter, Blessing, having regard to what is set out at [32] of the decision where it was apparently accepted that responsibility of the daughter was shared with the mother.

14. She stated that it should have been considered whether it was reasonable to expect her to leave the UK. It was arguable that it was not as she had been granted discretionary leave by the respondent.

15. Ms Bezzam adopted and relied on paragraphs 4 and 5 of Judge Lindsley's decision granting permission to appeal. She did not seek to make any further submissions after Mr Kotas completed his submissions.

16. Mr Kotas contended in his oral and written submissions that on a proper construction, EX.1 was not applicable to the appellant's case.

17. This is a human rights appeal and whilst the appellant's child may have just been short of the age of 18 at the date of application she was over 18 at the date of the decision.

18. The appellant could not succeed under EX.1(a). EX.1 requires that the appellant has a genuine and subsisting parental relationship with the child who is under 18 years, "or" was under 18 when the applicant was first granted leave on the basis that this paragraph applied.

Assessment

19. As noted by Mr Kotas, EX.1 is not a free standing provision - Sabir (Appendix FM – EX.1 not free standing) Pakistan [2014] UKUT 63.

20. In Sabir, Upper Tribunal Coker was considering the "partner" route under Appendix FM. She found at [15] that it is plain from the architecture of the Rules that EX.1 is "parasitic" on a Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free standing element irrespective of R-LTRP it would have been identified as R-LTRP.1.1(e) or some other mechanism of identification which would have been used. The structure of the Rules as presently drafted requires it to be a component part of R-LTRP.1.1(d).

21. I accept Mr Kotas's contention that it is therefore necessary to work "methodically" through the Rules within Appendix FM in order to see whether or not EX.1 can apply.

22. With regard to the requirements for limited leave to remain as a parent as set out at R-LTRPT 1.1, this includes the requirement at R-LTRPT 1.1(d)(i) that the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and (ii) that the applicant meets the requirements of paragraphs E-LTRPT.2.2 – 2.4 and E-LTRPT.3.1; and (iii), paragraph EX.1 applies.

23. E-LTRPT.1.1, which relates to the eligibility for limited leave to remain as a parent provides that to qualify for limited leave to remain as a parent, all the requirements of paragraphs E-LTRPT.2.2 to 5.2 must be met.

24. The relationship requirements are set out at E-LTRPT.2.2 and accordingly the applicant's child must be under the age of 18 at the date of application or where the child has turned 18 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 child must be living in the UK and is a British citizen or settled in the UK; or has lived in the UK continuously for at least seven years immediately preceding the date of application and EX.1 applies.

25. E-LTRPT.2.3 provides that either

(a) the applicant must have sole parental responsibility for the child, or the child normally lives with the applicant and not the other parent (who is a British citizen or settled in the UK) and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix; or

(b) the parent or carer with whom the child normally lives must be

(i) a British citizen in the UK or settled in the UK;

(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and

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

26. I accept Mr Kotas's submission that the appellant cannot meet the requirements of E-LTRPT.2.3 which is a necessary prerequisite before there can be reliance on EX.1 which, as he notes, is made clear by R-LTRPT.1.1(d)(ii) where the operative word "and EX.1 applies."

27. In this respect the First-tier Tribunal Judge found at [31-32] that the appellant is unable to demonstrate either that he has sole responsibility for his child or that the child normally lives with him as required at E-LTRPT.2.3 (a).

28. Nor can the appellant show that the parent or carer with whom the child normally lives with is either British or settled in the UK – E-LTRPT.2.3(b)(i). The child lives with her mother, a Nigerian national, with limited leave to remain.

29. Further, it is evident that the appellant is eligible to apply for leave to remain as a partner under Appendix FM and therefore falls foul of E-LTRPT.2.3 (b)(iii).

30. I have considered whether, as contended, the appellant can succeed under EX.1(a) as he satisfies the requirements which enable him to rely on EX.1 via the partner route.

31. Mr Kotas has very properly referred the Tribunal to Home Office guidance contained in the Immigration Directorate Instruction: Family Migration: Appendix FM Section 1.0(b), Family Life (As a partner or parent) and Private life: Ten Year Routes.

32. At 11.2.1 it is noted that where the application is being considered under paragraph EX.1 (a) in respect of the ten year partner or parent routes, the decision maker must decide whether the applicant has a "genuine and subsisting parental relationship" with the child. This will be particularly relevant to cases where the child is the child of the applicant's partner, or where the parent is not living with the child.

33. It is however further provided at paragraph 3.5 that a ten year parent route is available to those who are in the UK and who meet all of the suitability and eligibility requirements at every stage.

34. It is made clear at page 37 of the guidance which provides that applicants being considered under the ten year parent route must meet the requirements set out at EX.1(a). They cannot qualify for leave to remain under the parent route on the basis of EX.1(b).

35. Even if the requirements in EX.1(a) are met, the applicant will not qualify for leave to remain as a parent under the ten year parent route if they do not also meet all the other requirements of paragraph R-LTRPT.1(a)(b) and (d) of the Immigration Rules,

including both the suitability requirements set out in paragraph R-LTRPT.1.1(d)(i) and the eligibility requirements set out at paragraph R-LTRPT.1.1(d)(ii).

36. The guidance thus confirms that EX.1 is not a free standing provision and even if the appellant gets gets to EX.1 he must still meet the eligibility requirements for the "parent" route which is consistent with the analysis of the Tribunal in Sabir supra.

37. Accordingly the assessment of "reasonableness" within the framework of EX.1 cannot be assessed in isolation of the preceding suitability and eligibility requirements. As noted by Mr Kotas, if that were the position, the requirements under the parent route would be rendered otiose.

38. Further, under the partner route EX.1 only applies if the child is under 18 or was under 18 when the applicant was first granted leave on the basis that EX.1 applied. In the appellant's case however, the relevant child was over 18 at the date of hearing and the appellant was never been granted leave under EX.1 and he thus cannot place himself within EX.1.

39. I also accept the contention of Mr Kotas, that in an in country appeal Article 8 is to be assessed at the date of hearing. The relevant Rules applicable in this case expressly refer to the facts which must apply as at the date of the application. A child who turns 18 at the date of the appeal will have their position preserved. The wording of EX.1 has no similar provision.

40. Accordingly as at the date of hearing the child was over 18 and the appellant cannot succeed under EX.1(a) nor as submitted by Mr Kotas, under s.117B(6) of the 2002 Act.

41. Judge Cockrill has considered the Article 8 claims and has given sustainable reasons for concluding that the respondent's decision was proportionate.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed Date 15 February 2018

Deputy Upper Tribunal Judge C R Mailer