



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17014/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6th June 2018

Decision & Reasons Promulgated
On 25th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR ADEBOLA TAIWO ADEBOWALE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Ariyo, Apex Solicitors

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Nigeria, appealed to the First-tier Tribunal against a decision of the Secretary of State of 23rd June 2016 to refuse his application for indefinite leave to remain as the spouse of a person settled in the UK. First-tier Tribunal Judge Kainth dismissed the appeal in a decision dated 24th November 2017. The Appellant now appeals to this Tribunal with permission granted by Designated Judge Macdonald on 23rd April 2018.
2. At the hearing before me Mr Deller accepted that the decision made by First-tier Tribunal Judge Kainth was not sustainable. He pointed to a number of issues which he considered undermined the decision. I agree with his analysis.

3. The Appellant applied for indefinite leave to remain as a spouse on 19th October 2013. As the Appellant had previously been granted leave to remain as a spouse on 24 October 2011, before the introduction of Appendix FM of the Immigration Rules, the application made in October 2013 was considered under paragraph 287 of the Immigration Rules. The Secretary of State raised a number of issues in the Reasons for Refusal letter including the maintenance requirements. The Secretary of State went on to consider that paragraph 322 of the Immigration Rules applied because the Appellant was convicted of using a controlled article to commit fraud for which he was sentenced to ten months' imprisonment. In the view of the Secretary of State this brought the Appellant within provisions of paragraph 322(1C) (iii) of the Immigration Rules. In the Reasons for Refusal letter the Secretary of State then went on to consider the appeal within the terms of Appendix FM.
4. In considering this appeal the judge should have considered the Appellant's position in relation to the Immigration Rules first. The starting point in this case would have been an analysis of paragraph 287 of the Immigration Rules. Although it is noted at paragraph 11 of the decision that the Appellant's representative conceded that the Appellant could not meet paragraph 287 it is not clear on what basis this concession was made.
5. More importantly, the judge did not undertake any analysis of Appendix FM of the Immigration Rules. At paragraph 17 the judge noted that the Presenting Officer had argued that the decision complies with Appendix FM and the Immigration Rules and that the Appellant's representative had argued the contrary position. The judge noted this in the context of the third question of **Razgar**.
6. However, it appears that the judge undertook no analysis of Appendix FM in order to determine whether the Appellant met the requirements of Appendix FM before going on to undertake a freestanding analysis of Article 8. Mr Deller pointed out that the Appellant may not have met the provisions of Appendix FM in relation to indefinite leave to remain on the basis of his conviction but the appeal nonetheless should have been considered in terms of whether he could qualify for a further period of 30 months under Appendix FM despite his conviction. The judge undertook no analysis of Appendix FM.
7. In my view there is also a further issue in the decision in at the judge made a number of findings of fact at paragraphs 12-13 and then at paragraph 14 he accepted that there was "limited family life" and therefore the first **Razgar** question had been met. However, the judge gave no reasons for finding that there was limited family life. It is also not clear what the judge meant by limited family life. Having found that there was limited family life, the judge went on to consider the rest of Article 8 through the **Razgar** steps and finished with a proportionality assessment.
8. However, the judge effectively concluded that the marriage was not genuine and subsisting. It is therefore unclear in light of the later findings how the judge could sustain a finding that the Appellant had limited family life at paragraph 14. I accept therefore that there is an apparent inconsistency between the finding at paragraph 14 and the later findings at paragraphs 20 and 21. The judge appears to have endeavoured to conduct an assessment in relation to Appendix FM at paragraphs 19

to 20. However, the basis on which the judge has decided that the Appellant did not meet Appendix FM is not entirely clear. As set out above, the judge should have started with an assessment of the Appellant's appeal under the Immigration Rules. If the Appellant met the requirements this would have determined the Article 8 issue and if he had not this would have been a significant factor to be weighed against him in the proportionality assessment. A lack of clear findings on the applicability of the Immigration Rules inhibits a proper proportionality assessment.

9. In my view, the error in the judge's approach to the assessment of the issues to be determined in this appeal is material in that it goes to the fundamental issue in dispute. In these circumstances I set aside the decision of the First-tier Tribunal.
10. The parties agreed with my view that, in light of the nature and extent of the findings of fact to be made in order for the decision in the appeal to be re-made, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal Judge contains a material error of law.

I set that decision aside in its entirety.

I remit the decision to the First-tier Tribunal to be heard by a different judge.

No anonymity direction is made.

Signed

Date: 22nd June 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT **FEE AWARD**

As this matter is yet to be determined the issue of a fee award is a matter for the First-tier Tribunal Judge upon remittal.

Signed

Date: 22nd June 2018

Deputy Upper Tribunal Judge Grimes