Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14249/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 January 2019	**On 31 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

MR M L
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Aborisade, solicitor
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge S Taylor ("the FTTJ") promulgated on 31 August 2018, in which he dismissed the appellant's appeal against the refusal of his application for further leave to remain in the UK as the spouse of a British citizen.

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2. Whilst no anonymity direction was made in the First-tier Tribunal, I make such a direction because of my references to the appellant's and her husband's personal circumstances.

Background

3. The appellant was born on 7 May 1969 and is a citizen of Nigeria. He entered the UK on 21 October 2014 with leave to do so as a spouse. He applied for further leave to remain on that basis but his application was refused on 30 October 2017 because he had failed to meet inter alia the English language requirements of Appendix FM of the Immigration Rules (paragraphs E-LTRP.4.1 to 4.2): he had failed to provide an appropriate English language certificate.

4. The appellant appealed to the First-tier Tribunal. At the appeal hearing the appellant produced an appropriate ELT certificate and the FTTJ found "the appellant has demonstrated that he is now able to meet that requirement". Nonetheless the FTTJ dismissed the appeal in the following terms at [14]:

> "With little or no disruption to his family life the appellant is in a position to re-apply for leave as a spouse. The immigration rules are designed to be compliant with article 8 ECHR and I am not satisfied that the refusal necessarily results in an interference with family life and contrary to article 8 ECHR. Additionally no evidence was submitted as to why the parties could not continue their family life outside of the UK."

5. Permission to appeal to this tribunal was granted because "it was arguable that the Judge ought to have considered the Article 8 position in light of the new certificate".

6. Hence the matter came before me.

Submissions

7. At the outset of the hearing, Ms Cunha, for the respondent, accepted that the FTTJ had erred materially in law for the reasons identified in the grant of permission to appeal. She conceded that the decision should be set aside and remade: in particular a proper proportionality assessment undertaken with regard to the public interest factors in s117A-s117D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). For the appellant, Mr Aborisade, did not demur from the respondent's position.

Discussion

8. The facts were not in dispute before the FTTJ. The appellant had demonstrated he met all the relevant criteria in Appendix FM with the exception of providing, with his application, the correct English language certificate. An appropriate certificate had, however, been provided by the date of the hearing. It is correct that this late provision did not assist the appellant in demonstrating that he met the provisions of E-LTRP.4.1 to 4.2. However, it was relevant in a proportionality assessment pursuant to Article 8 outside the Rules.

9. It was conceded by Ms Cunha before me that the FTTJ failed to undertake an appropriate proportionality assessment for the purposes of Article 8. I agree. The FTTJ refers briefly to the Immigration Rules being "designed to be compliant with article 8 ECHR" but in **R (Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)** it was held 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. It was noted there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. This is potentially such a case and the FTTJ has failed to address this issue, merely stating at [14] that "the appellant is in a position to re-apply for leave as a spouse". He does not state how the appellant would do so or the impact of a fresh application on the appellant's protected rights.

10. The FTTJ further states that he was "not satisfied that the refusal necessarily results in an interference with family life and contrary to article 8 ECHR. Additionally no evidence was submitted as to why the parties could not continue their family life outside of the UK". The latter suggests the FTTJ has failed to take into account the evidence of the appellant and his wife in the application form; this is to the effect that they are both in permanent employment in the UK. Thus the FTTJ has failed to take into account material evidence of relevance in the proportionality assessment.

11. The FTTJ makes no reference at all to relevant public interest factors, contrary to the provisions of s117A of the 2002 Act. This is a material error of law.

12. With the agreement of the parties' representatives, I set aside the decision. I adopt the FTTJ's finding that the appellant produced the requisite language certificate at the hearing and that he had therefore demonstrated he met the provisions of paragraphs E-LTRP.4.1 to 4.2. It follows that the appellant has demonstrated he meets the criteria for the grant of further leave to remain as a spouse. In the circumstances, the interference with the appellant's and his wife's protected rights is not outweighed by the public interest in the maintenance of effective immigration control.

13. I remake the decision of the FTTJ and allow the appeal against the refusal of further leave to remain.

Decision

14. The making of the decision of the First-tier Tribunal did involve a material error on a point of law.

15. I set aside the decision the remake it by allowing the appeal.

A M Black Date 24 January 2019

Deputy Upper Tribunal Judge A M Black

Anonymity Direction

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Fee Award

The FTTJ did not make a fee award. I have considered making a fee award because I have allowed the appeal but do not make such an award. The appellant succeeded largely because he was able to produce at the hearing the requisite documentary evidence to demonstrate he met the criteria in the Immigration Rules.

A M Black Date 24 January 2019
Deputy Upper Tribunal Judge A M Black