IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003035

First-tier Tribunal Nos: HU/56748/2021
IA/15811/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4 October 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mr Isaiah Osenmhen Eromomene
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms S Iqbal instructed by Courtland Solicitors
For the Respondent: Miss E Everett, Home Office Presenting Officer

Heard at Field House on 8 August 2023

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Shakespeare promulgated on 23rd May 2022, having been heard on 12th May 2022.

2. The grounds are twofold. It is contended, first, that the judge erred in concluding that the appellant could not meet EX.1 as he was in breach of the immigration requirements under Appendix FM. As an overstayer the appellant's case fell to be considered, with reference to R-LTRP.1.1. However, as the judge highlighted at [26], paragraph E-LTRP.2.2 states that the appellant must not be in the UK in breach of immigration laws unless paragraph EX.1 applies and thus despite being in breach of the Immigration Rules, where EX.1 applies, the appellant would be in a position to meet the immigration status requirements contrary to the judge's finding. If the appellant could demonstrate he faced

insurmountable obstacles, owing to his family life continuing with the sponsor in Nigeria, he could meet Appendix FM. The judge erred in his application of EX.1.

3. In ground 2 the judge went on to consider the issue of proportionality generally at [30] and [32], concluding that the relationship, financial and English language requirements were met and thus it was almost certain he would qualify for entry clearance as a partner, but it was submitted that the judge's further analysis of this case was irrational, as per **R (Iran) [2005] EWCA Civ 982**. In particular, at [36] the judge, when considering the public interest factors, found it a weighty factor that the couple's relationship started in August 2016 when the appellant was in the UK unlawfully after his leave expired in September 2015. However, as to the contrary, there was no consideration of the fact that the appellant met his partner in October 2014 at a time he was lawfully in the UK and the relationship developed naturally as a result of his time lawfully in the UK.

4. This was certainly a relevant consideration as per **Rhuppiah [2018] UKSC [58]** which confirmed that the judge was seized of a limited degree of flexibility when considering Section 117 of the Nationality Immigration and Asylum Act 2002.

5. It was therefore submitted that the judge's failure even to consider the flexibility within Section 117 tainted his conclusions at [37] that the public interest weighed heavily in favour of removal.

6. Additionally, when the flexibility is considered cumulatively with the findings made by the judge at [33] that the appellant would be separated from his wife for a period of six to nine months together with the difficulties and suffering of the appellant's wife during IVF, this would affect the assessment of weight of the public interest. The approach was in error.

7. At the hearing before me Ms A Everett, Home Office Presenting Officer conceded that the judge had erred in law in relation to ground 1. Although initially she hesitated as to whether this error was in fact material to the overall proportionality assessment, she did concede that the erroneous approach to EX.1, which can apply where an appellant is in breach of the immigration status requirements would ultimately also affect the article 8 assessment.

8. I find the judge wholly omitted to consider the relevant factors in relation to insurmountable obstacles to the appellant's family life with his sponsor under EX.1 because he assumed that the appellant could not avail himself of this provision because he was here unlawfully. That was incorrect and EX.1 could apply. Although it is recorded at [32] that the sponsor was very clear in her evidence, she would not accompany the appellant if he were required to return to Nigeria, the judge nevertheless omitted to make a fact-sensitive assessment of whether there would indeed be any insurmountable obstacles to the sponsor going to Nigeria because of the flawed approach to EX.1 of the Immigration Rules. In conjunction with the judge's approach to the appellant's ability to make an entry clearance application, I consider the judge erred in speculating on the prospects of success particularly in view of the fact that it is quite clear that the appellant commenced his relationship with his spouse after his status became unlawful, see [17]. The decision clearly states that evidence was given by the sponsor that she and the appellant met in October 2014, but their relationship started in August 2016 (she was told of his status in September 2016). Prior to August 2016, the appellant had become an overstayer.

9. It is not clear that the judge's approach to paragraph EX.1 and the Immigration Rules did not taint the consideration of proportionality in relation to Ground 2 and I find overall that there was a material error of law. This decision demonstrates the dangers of failing properly to consider the Immigration Rules which set out the position of the Secretary of State in any subsequent proportionality assessment. That is the structure that should be adopted and was not the case here. As such I found a material error of law in the decision. Both representatives agreed that extensive fact-finding was required.

10. The Judge erred in law for the reasons identified, and, in a manner which could have a material effect on the outcome. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26th September 2023