



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/40656/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 3rd July 2014

Determination Promulgated
On 7th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

MR RICHMOND KOFI YAWSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss K Smith instructed by Paragon Law
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Ghana who entered the United Kingdom as a visitor of 9th February 2013. On 18th July 2013 he applied for further leave to remain in the United Kingdom but his application was refused by the Respondent on 13th September 2013. An appeal against that refusal was allowed by Judge of the First-tier Tribunal Nixon on 9th April 2014. The First-tier Judge found that the Appellant

satisfied the requirements of the Immigration Rules and that the Respondent had also failed to apply Section 55 of the Borders, Citizenship and Immigration Act 2009.

2. The Respondent's representative applied for permission to appeal and permission was granted in the First-tier Tribunal on 15th May 2014. The judge who granted permission noted that the appeal was allowed by reference to paragraph EX.1 of Appendix FM. The First-tier Judge found that the Appellant was entitled to rely on EX.1 despite his failure to meet the requirements of E-LTRP.2.1 or 2.2. It was considered arguable that the First-tier Judge misdirected herself in law in failing to follow Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 00063 (IAC).
3. The factual background to this appeal is conveniently set out at paragraph 6 of the First-tier Tribunal's determination. The Appellant and his wife, who has indefinite leave to remain, married in Ghana on 3rd April 2010. Mrs Yawson remained in Ghana until February 2011, when she returned to the UK for six weeks to seek medical attention. She discovered that she was pregnant in May 2011 and returned to the UK in September 2011. Their first child, a British citizen, was born in January 2012. The Appellant came to the UK in February 2013, in order to assist his wife with childcare having regard to her health difficulties. They discovered that Mrs Yawson was pregnant again in May 2013 and accordingly the Appellant made an application for further leave in order to assist her.
4. The determination further records that the Appellant stated that he had not applied to come to the UK as a partner as he had not intended to remain in the UK, no decision having been made as to where he and his wife would ultimately live. He stated that if, after his wife had recovered from her first pregnancy, they decided to settle in the UK, he would return to Ghana and make the appropriate application but they had not anticipated that she would fall pregnant a second time.
5. In submissions before me, Mr McVeety adopted the grounds submitted in support of the application for permission to appeal. The grounds argue that the First-tier Judge made a material error in law in allowing the appeal on the basis of EX.1 of Appendix FM. The First-tier Judge noted (paragraph 14) that the Appellant was within the UK as a visitor. It was conceded on behalf of the Appellant that he could not meet the eligibility requirements of Appendix FM, specifically E-LTRPT3.1. In applying EX.1 the grounds submit that the First-tier Judge made a material error of law because the provisions of EX.1 are not freestanding as established in Sabir.
6. In his oral submissions, Mr McVeety pointed out that there was no cross appeal on behalf of the Appellant. He also made reference to paragraph 16 of the determination and submitted that it is not for the First-tier Judge to interpret the Rules or to speculate as to Parliament's intention. Mr McVeety submitted that this appeal was "on all fours" with Sabir and that, as a reported Upper Tribunal decision, Sabir should be followed.
7. For the Appellant, Miss Smith relied upon a Rule 24 response which had been drafted by her colleague who represented the Appellant before the First-tier Tribunal. She submitted that the First-tier Judge had allowed the appeal on a different basis to the decision in Sabir. She submitted that paragraph EX.1 must apply to E-LTRPT.3.1 as well as E-LTRPT.3.2.

8. Miss Smith pointed out that the First-tier Judge had addressed the decision in Sabir and that the determination disclosed no error of law.
9. After hearing submissions on the error of law issue I reserved my decision which I now give.
10. There appears to be no dispute of any significance concerning the factual background to this appeal. The issue relates to the application of EX.1.
11. I have looked carefully at the immigration status requirements which are as follows:
E-LTRP.2.1 – The applicant must not be in the UK –
 - (a) as a visitor;
 - (b) with valid leave granted for a period of six months or less, unless that leave is a fiancé or proposed civil partner, or was granted pending the outcome of Family Court or divorce proceedings; or
 - (c) on temporary admission or temporary release (unless paragraph EX.1. applies).E-LTRP.2.2 – The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1. applies.
12. The question appears to be does EX.1 apply to 2.2 but only to sub-paragraph (c) of 2.1, or to all three elements of 2.1? If it only applies to sub-paragraph (c) then one is left with a potential situation where an overstayer, or illegal entrant, could be in a better position under the Rules than someone who is lawfully in the UK as a visitor. This is addressed by the First-tier Judge at paragraph 16 of her determination. Perhaps the use of the word “nonsense” is a little strong but it is difficult to disagree with the sentiment expressed.
13. It is clear from the determination that Judge Nixon was referred to the decision in Sabir by both representatives and that she took it into account. In my view, this is not a case where she has attempted to apply EX.1 as a freestanding provision, contrary to the Upper Tribunal’s guidance in Sabir.
14. Having given the matter careful thought, I have concluded that I am in agreement with Miss Smith’s submission. I find that the making of the decision by the First-tier Tribunal did not involve the making of an error on a point of law. I therefore uphold the determination and dismiss the Respondent’s appeal.

No anonymity direction is made.

Signed

Date 22nd July 2014

Deputy Upper Tribunal Judge Coates