IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29728/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd November 2015	**On 29th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADEPEJU AWORENI ADESOLA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms N Willocks-Briscoe of the Specialist Appeals Team
For the Respondent: Mr J Nkwocha of Pillai & Jones, solicitors

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as "the Applicant" is a citizen of Nigeria, born on 7 November 1977. The Applicant states she arrived in the United Kingdom in 2002: it would appear without any documentation. She made an application for leave on 7 January 2011 which was refused on account of a failure to pay the requisite fees. A further application was made and on 10 October 2013 and was refused with no in-country right of appeal. Further representations were made on behalf of the Applicant

which resulted in a decision by the Appellant (the SSHD) on 2 July 2014 to refuse her claim based on her rights protected by the European Convention and to remove her to Nigeria. The SSHD gave reasons for the decision in a letter of 2 July 2014 (the reasons letter).

The SSHD's Decision

2. The SSHD noted the Applicant's three children were born in the United Kingdom in 2005, 2010 and 2012 and for the purposes of the decision were her dependants. She noted their father held a permanent residence card as the family member of an EEA national, Sabrina Belaala, a French citizen. That relationship had been ended by a divorce pronounced on 23 January 2012. He was the father of the Applicant's three children and the Applicant claimed their relationship was of some considerable duration.

3. The SSHD concluded the Appellant did not meet the definition of "partner" defined in Section GEN1.2 of Appendix FM of the Immigration Rules.

4. The SSHD went on to find that in any event the Applicant could not meet all the requirements of Section R-LTRP.1.1 of Appendix FM, especially sub-paragraph (d) which refers to Section E-LTRP although in the reasons letter she did not specify which paragraphs of Section E-LTRP the Applicant failed to meet. It would appear from paragraph 18 of the reasons letter that the SSHD did not accept the relationship between the Applicant and Mr Owagoke was genuine and subsisting. He would also not appear to meet the requirements of E-LTRP.1.2 because he is not a British citizen, is not present and settled in the United Kingdom within the meaning of the Immigration Rules nor is he a person granted international surrogate protection. Further with reference to paragraph GEN.1.2 he was not the Applicant's partner.

5. Further, the Applicant had failed to establish there was any durable relationship between them because at the time he was said to have fathered the Applicant's children he was married to Sabrina Belaala.

6. Paragraph Section EX.1 did not apply because the Applicant did not satisfy the requirements of Section R-LTRP1.1(d). However, this would appear to contradict what was said at paragraph 22 of the reasons letter when the SSHD accepted the Applicant met the requirements of Section S-LTR.1.1-3.1 (being the entire Section). However the SSHD had already considered that the Applicant did not have a partner within the meanings of the relevant Sections of Appendix FM and so on that ground could not meet the requirements of Section R-LTRP.1.1 which the SSHD mentioned at paragraph 23 of the reasons letter.

7. The SSHD went on to consider whether the Applicant could succeed in her application for leave as a parent. It was accepted she was the mother of her three children but because she could not meet the requirements of Section R-LTRPT.1.1(d) Section EX.1 could not apply. The requirements of Section R-LTRPT.1.1(d)(i) are that the applicant meets the requirements of

Section S-LTR which the SSHD had accepted at paragraph 22 of her reasons letter the Applicant met and that she satisfies the requirements of paragraphs E-LTRPT.2.2-2.4 and 3.1-3.2. These Sections state:-

Relationship Requirements

E-LTRPT.2.2. The child of the applicant must be-

(a) under the age of 18 years at the date of application, or where the child has turned 18 years of age 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;

(b) living in the UK; and

(c) a British Citizen or settled in the UK; or

(d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

E-LTRPT.2.3. Either-

(a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK); 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.

E-LTRPT.2.4.

(a) The applicant must provide evidence that they have either-

(i) sole parental responsibility for the child, or that the child normally lives with them; or

(ii) access rights to the child; and

(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

Immigration status requirement

E-LTRPT.3.1. The applicant must not be in the UK-

(a) as a visitor;

(b) with valid leave granted for a period of 6 months or less, unless that leave was granted pending the outcome of family court or divorce proceedings;

(c) on temporary admission or temporary release (unless paragraph EX.1. applies).

E-LTRPT.3.2. 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."

The Respondent did not state which of these requirements the Applicant did not satisfy.

8. The SSHD went on to consider whether the Applicant was entitled to leave by reason of her private life. Paragraph 32 of the reasons letter includes references to Appendix FM and also, but without express reference, the requirements of paragraph 276ADE(1) of the Immigration Rules. The Applicant had grown up and been educated in Nigeria with which she maintained cultural ties and so could return. Reference was made to the private lives of the Applicant's three children and the State's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to their best interests. The SSHD referred to the background evidence about Nigeria and concluded it would not be a breach of the United Kingdom's obligations under Article 8 if the Applicant and her three children were returned to Nigeria.

The Appeal to the First-tier Tribunal

9. On 21 July 2014 the Applicant and her three children lodged notices of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds refer to their private and family lives, paragraph 276ADE of the Immigration Rules and Appendix FM as well as Article 8 of the European Convention but without reference to any particular circumstances or aspects of their individual and family situations.

The First-tier Tribunal's Decision

10. Following a hearing on 9 March 2015 at which the SSHD was not represented, Judge of the First-tier Tribunal S Taylor allowed the appeals by reference to the Immigration Rules.

11. On 19 May 2015 Judge of the First-tier Tribunal P J M Hollingworth refused the SSHD application for permission to appeal which the SSHD renewed to the Upper Tribunal and on 23 July 2015 Upper Tribunal Judge Kopieczek granted permission to appeal because it was arguable the Judge appeared to have dealt with the claim by way of an approach more akin to a consideration of a claim under Article 8 of the European Convention outside the Immigration Rules.

The Upper Tribunal Hearing

12. The Applicant attended the hearing with two male friends. I was informed that neither of them was her husband. I explained to her the purpose of and the procedure to be adopted at the hearing.

Submissions for the SSHD

13. Ms Willocks-Briscoe relied on the permission grounds. These refer to the Judge's finding that the Applicant was not in a genuine and subsisting relationship with Mr Owagoke although he continued to live in the family home and shared joint responsibility for the children. The Judge had concluded that the Applicant could not therefore succeed under "the partner route". She also did not satisfy the requirements of the Immigration Rules to succeed in a claim based on her private life in the United Kingdom. The Judge had found it would be reasonable for the eldest child to leave the United Kingdom but had failed to take account of the fact the Applicant would be returning to Nigeria with her three children. Reference was made to the judgment in *EV (Philippines) v SSHD [2014] EWCA Civ 874.*

14. The permission grounds also assert that given the Judge found the Applicant does not meet the requirements of the Immigration Rules his conclusion allowing the appeal under the Immigration Rules is erroneous. Finally, the grounds assert the Judge made no findings in respect of the Applicant's two younger children and specifically stated he did not consider any claim under Article 8 of the European Convention outside the Immigration Rules.

15. At paragraphs 11-13, the Judge made several findings to the effect that the Applicant could not meet the requirements of the Immigration Rules. Having come to that conclusion it was necessary for him to consider whether he should look at the circumstances of the entire family with reference to Article 8 outside the Immigration Rules. He had not made a holistic assessment of the situation of the Applicant and her children and whether it was reasonable for her to return and whether Mr Owagoke would continue his financial support of the children. The Judge had conflated his treatment of the Immigration Rules and a consideration of any Article 8 claim outside the Rules as evidenced at paragraph 14 of his decision. In his dealing with the factors identifying the public interest contained in ss.117A-D of the 2002 Act he had failed to consider whether the children's father was a qualifying partner within the meaning of s.117B(6) of the 2002 Act. He had also not taken into account the jurisprudence in *EV (Philippines)*.

16. The Judge at paragraph 15 of his decision had referred to the Applicant's medical condition and the evidence of available treatment in Nigeria. It appears he had overlooked the middle part of paragraph 15 in the decision. The conclusion reached there obviated any need to consider any claim under Article 8 of the European Convention outside the Immigration

Rules. Ms Willocks-Briscoe concluded the decision could not stand and should be set aside.

Submissions for the Applicant

17. Mr Nkwocha referred to the delay between the SSHD's decision of 2 July 2014 and the hearing of the appeal in the First-tier Tribunal on 9 March 2015. He stated the evidence showed the Applicant and Mr Owagoke lived in the same property and shared responsibility for the children. The Judge had found the children were close to both their parents although I note the finding is that the Applicant and Mr Owagoke share the responsibility of looking after the children: see para.15 of the Judge's decision.

18. He continued that the Judge had properly addressed the claims under Article 8. He made no reference to any specific part of the Judge's decision. The Applicant was receiving treatment for cancer and the decision should stand. Ms Willocks-Briscoe had nothing to add by way of response and I reserved my decision.

Consideration and Findings

19. The Judge at paras.11-13 of his decision made several findings that the Applicant could not meet the requirements of the Immigration Rules. It would appear that para.11 sought to address the requirements of paragraph 286 of the Immigration Rules and Appendix FM. At para.12 he appears to have focussed on the requirements of paragraph 298 and Appendix FM and at para.13 on paragraph 276ADE(1) of the Rules but the decision is far from clear. Further, the Judge did not address many of the specific reasons for refusal given in the reasons letter of 2 July 2014.

20. In the light of *Dube (ss.117A-117D) [2015] UKUT 90* which was promulgated less than two weeks before the Judge heard this appeal, his treatment of the factors referred to in ss.117A-D of the 2002 Act is inadequate. The Judge also failed to deal adequately with the jurisprudence in *EV (Philippines)*.

21. For these reasons, I find the decision of the First-tier Tribunal contains material errors of law such that it should be set aside in its entirety and the appeal heard afresh.

22. Having regard to the nature and extent of the fact-finding which will be required on a hearing afresh and s.12(2) Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), I find the matter should be remitted to the First-tier Tribunal for the hearing afresh.

Anonymity

23. No anonymity direction had been made before the date of the Upper Tribunal hearing. There was no request for an anonymity direction and having heard the appeal I consider none is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained material errors of law and is set aside. The appeal is remitted to the First-tier Tribunal for hearing afresh before a Judge other than Judge S Taylor.

Signed/Official Crest Date: 14. xii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal