



IAC-FH-AR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/35826/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27 August 2015**

**Decision & Reasons Promulgated
On 7 September 2015**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**DOSUMU KAYODE QOOZEEM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Miss A Fijiwala, Home Office Presenting Officer

For the Respondent: Mr O Jibowu, Counsel, instructed by M J Solomon & Partners

DECISION AND REASONS

1. The Respondent, who was born on 17 July 1988, is a national of Nigeria. He entered as a Tier 4 (General) Student Migrant on 18 March 2013 with leave to remain until 25 July 2014. On 29 May 2014 he married his wife who he had already known from Nigeria. She had been born in Nigeria but was granted indefinite leave to remain in the United Kingdom on 8 November 2012. On 11 July 2014 the Respondent applied for leave to remain as the partner of a person who is settled here. This application

was refused on 27 August 2014 on the basis that he did not meet the financial requirements within Appendix FM of the Immigration Rules.

2. He appealed on 10 September 2014 and his first ground of appeal was that the decision was wrong in law as he was able to demonstrate that his wife had earned £367.57 per week consistently for three months immediately preceding his application. His second ground of appeal was that the refusal was an unlawful interference with his and his wife's private and family life.
3. First-tier Tribunal Judge Hendry heard the case on 9 March 2015 and on 15 April 2015 he allowed the appeal. He took into account the totality of the evidence available at the hearing and concluded that the Respondent's partner's projected annual income amounted to £19,122 and that, therefore, the Respondent was able to meet the requirements of paragraph E-LTRP.3.1. of Appendix FM.
4. On 23 April 2015 the Secretary of State for the Home Department appealed and on 18 June 2015 First-tier Tribunal Judge Holmes granted permission to appeal on the basis that the Respondent did not (and could not) produce the evidence required by Appendix FM-SE of the Immigration Rules. He also went on to note that the First-tier Tribunal Judge had not considered Article 8 in the alternative but noted that, if he had, he would have been obliged to apply paragraph 276ADE, ss117A-D and the guidance to be found in *AM (s117B) Malawi* [2015] UKUT 260.
5. The Home Office Presenting Officer noted that the Respondent's partner only started working for the A(24) Group on 17th February 2014 and for Emprise on 29th March 2014. Therefore, she had not been in employment for six months when the Respondent applied for leave to remain as her partner. She also submitted that he was not able to meet the evidential requirements of paragraph 13(b) of Appendix FM-SE.
6. Counsel for the Respondent then replied and asserted that, as the Respondent was entitled to an in-country right of appeal, the First-tier Tribunal Judge was able to take into account evidence that post-dated the Respondent's application. He also noted that at the First-tier Tribunal hearing the Home Office Presenting Officer had not objected to this evidence being taken into account. However, at paragraph 29 of the First-tier Tribunal Judge's decision and reasons the Home Office Presenting Officer had submitted that the evidence provided did not satisfy the requirements of Appendix FM-SE. Counsel also argued that the First-tier Tribunal Judge could take into account evidence which was for less than 12 months if the Respondent was able to meet the substance of the requirement. He also argued that as the Respondent would have succeeded under Article 8 of the European Convention on Human Rights any error was not a material one.
7. I accept that the Respondent did have a right to an in-country right of appeal and that Section 85(4) of the Nationality, Immigration and Asylum Act 2002 states that the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

8. However, the Respondent had applied for leave to remain as the partner of a person who was settled in the United Kingdom and, therefore, had to meet the financial requirements contained in paragraph E-LTRP.3.1. of Appendix FM of the Immigration Rules which states that an applicant must provide specified evidence from the sources listed in paragraph E-LTRP.3.2., which include the income of a partner from employment. It also states that the applicant has to show a specified gross annual income of at least £18,600.
9. Appendix FM-SE of the Immigration Rules outlines the nature of the specified evidence referred to in Appendix FM. In particular, paragraph 13(b) of Appendix FM-SE explains that where a person has been in employment for less than six months at the date of the application, he or she had to provide evidence of the gross annual salary from employment at the date of the application plus the gross amount of any specified non-employment income or pension.
10. Instead, the Respondent sought to rely upon evidence from before and after the date of the application and had not provided the necessary specified evidence. The First-tier Tribunal Judge looked at the evidence and calculations provided to him but did not remind himself of the relevant requirements of Appendix FM and Appendix FM-SE of the Immigration Rules.
11. Counsel for the Respondent had not been able to refer me to any relevant case law but in paragraph 51 of *SS (Congo) & Others v Secretary of State for the Home Department* [2015] EWCA Civ 387 indicated that an applicant had to meet the requirements of both Appendix FM and Appendix FM-SE.
12. Therefore, the failure by the First-tier Tribunal Judge to remind himself of the requirements of both Appendix FM and Appendix FM-SE of the Immigration Rules was an error of law. Counsel for the Respondent argued that it was not a material error of law, as he would have been able to show that if Article 8 of the ECHR had been considered, his appeal would have been allowed.
13. However, the First-tier Tribunal Judge did not consider Article 8 in the alternative and paragraph 33 of his decision and reasons does not indicate that the Respondent's counsel had addressed him on relevant case law or the appropriate parts of Sections 117A-D. Therefore, it is not the case that an alternative breach of Article 8 could have been successfully established.
14. Therefore, I conclude that there was a material error of law in the First-tier Tribunal Judge's decision and reasons and that I must allow the Secretary of State for the Home Department's appeal.

Notice of Decision

1. The Secretary of State for the Home Department's appeal is allowed.
2. The Respondent's appeal is remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge Hendry for a *de novo* hearing.

3. No anonymity direction is made.

A handwritten signature in black ink that reads "Nadeine Finch". The letters are cursive and somewhat slanted to the right.

Signed

Date 28th August 2015

Upper Tribunal Judge Finch