



**Upper Tribunal
(Immigration and Asylum Chamber)
Numbers: IA/25721/2015**

Appeal

THE IMMIGRATION ACTS

**Heard at Manchester
On November 22, 2017**

**Decision & Reasons
Promulgated
On December 05, 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MR ELECHI EDEH
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not present

For the Respondent: Mr McVeetie, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction in this matter.
2. The appellant is a citizen of Nigeria and on May 20, 2015 he applied for leave to remain in the United Kingdom on family and private life grounds. The respondent considered the application but refused it on June 24, 2015.
3. The appellant appealed that decision on July 8, 2015 and the appeal came before Judge of the First-tier Tribunal Ransley on October 28, 2016. In a decision promulgated on January 27, 2017 she refused the appeal under both the Immigration Rules and on human rights grounds.

4. The appellant appealed that decision on February 9, 2017 arguing that the Judge had erred in her approach. In short, she argued the Judge failed to consider the appeal under section EX.1 of Appendix FM of the Immigration Rules and by failing to attach more weight to the arguments advanced.
5. Judge of the First-tier Tribunal Boyes considered the grounds of appeal on August 25, 2017 and found there was an error of law in respect of the applicability of section EX.1 of Appendix FM of the Immigration Rules and gave permission generally.
6. Neither the appellant nor his legal representatives attended the hearing. Contact was made with the solicitors who faxed a letter stating (a) they believed the appellant was leaving the country and (b) they were no longer instructed.
7. By 12 noon the appellant had not arrived. The respondent's file did not suggest the appellant had left the country although it seemed he wanted to. The notice had been properly served so I proceeded with the hearing.
8. The grounds argued that the Judge erred by failing to consider section EX.1 of Appendix FM of the Immigration Rules before considering article 8 ECHR. It was also argued that the outcome of the proportionality assessment should have been different.
9. At the hearing before me Mr McVeetie adopted the Rule 24 letter dated September 26, 2017 and submitted there was no material error. Whilst the Judge should have considered the appeal under section EX.1 of Appendix FM of the Immigration Rules it was not material because she had gone on to consider the appeal on article 8 grounds which was a lower threshold. Section EX.1 of Appendix FM of the Immigration Rules required the Judge to consider "insurmountable obstacles to family life" whereas article 8 was a proportionality assessment. He further submitted the Judge properly considered all factors being finding it would be proportionate for him to return to Nigeria.

FINDINGS

10. Having heard submissions I indicated to Mr McVeetie that there was no material error.
11. Whilst the Judge clearly erred in not looking at section EX.1 of Appendix FM of the Immigration Rules in circumstances where she was required to, it did not amount to a material error.
12. The Judge wrongly concluded that section EX.1 of Appendix FM of the Immigration Rules did not apply because he was an overstayer but this is one of the exceptions (see Section E-LTRP 2.2(b)) allowed when considering section EX.1 of Appendix FM of the Immigration Rules.
13. However, the test under that heading is higher than the test applied on article 8 ECHR. If the appellant could not satisfy article 8 ECHR then he

could not succeed under section EX.1 of Appendix FM of the Immigration Rules.

14. The Judge considered all the facts and her findings under article 8 ECHR were open to her.
15. Accordingly, there is no material error.

NOTICE OF DECISION

16. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. The original decision shall stand.

Signed

Date 22/11/2017



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award because I have dismissed the appeal.

Signed

Date 22/11/2017



Deputy Upper Tribunal Judge Alis