



Upper Tribunal
(Immigration And Asylum Chamber)

Appeal Number: IA/24193/2014

THE IMMIGRATION ACTS

Heard at: Field House

Decision & Reasons

Promulgated

On: 14 July 2015

On: 14 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FEMI SUNDAY OYEWALE
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr A Adeolu, Lonsdale & Mayall Solicitors

DETERMINATION AND REASONS

1. I shall refer to the appellant as the secretary of state and the respondent as "the claimant".
2. The claimant is a national of Nigeria. His appeal against the decision of the secretary of state dated 28 May 2014 to refuse to vary his leave to remain in the UK and to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006 was allowed by First-tier Tribunal Judge A A Wilson, in a determination promulgated on 6 February 2015.
3. The claimant applied on 1 October 2013 for further leave to remain as the spouse of a person present and settled in the UK.

4. It was noted that the claimant entered the UK as a student in September 2010 and was granted further leave as a Tier 1 HS Post Study Migrant until 28 October 2013.
5. His application was considered under Appendix FM R-LTRP 1.1 (c) of the rules. This requires that for limited leave to remain as a partner the applicant must not fall foul for refusal under Section S-LTR: Suitability Leave to Remain - and meets all the requirements of eligibility to remain as a partner. The relationship between the applicant and his partner must be genuine and subsisting and they must intend to live together permanently in the UK.
6. The secretary of state stated that the claimant and his partner, Ms Omotayo-Amoa Barnidele, were interviewed in May 2014. There were many discrepancies noted between their accounts. The secretary of state was thus not satisfied that the marriage is subsisting or that they intended to live together permanently.
7. The secretary of state did not determine whether the claimant met the minimum income requirements under R-LTRP 1.1as she had an outstanding legal challenge before the courts relating to the income threshold requirement. However, regardless of whether the minimum income requirement had been met, his application fell for refusal under the rules.
8. The secretary of state considered the application under EX.1 but it was not accepted that their relationship was genuine and subsisting and they therefore failed to fulfil EX.1 (b) of Appendix FM.
9. The application was also refused under paragraph 276ADE(1) of the rules.
10. Nor were there any exceptional circumstances warranting consideration by the secretary of state of a grant of leave outside the requirements of the Immigration Rules.
11. The claimant's grounds of appeal to the First-tier Tribunal asserted that the claimant's relationship with his sponsor is genuine and subsisting and they intend to live together permanently in the UK. It was also asserted that the sponsor's combined salary and self employment income exceeds the required financial level requirement of £18,600 per annum.
12. Judge Wilson referred to the decision to call the claimant and his spouse for an interview. It was not accepted that the relationship with his partner is genuine and subsisting. Judge Wilson stated that "you therefore failed to fulfil EX.1 (b) of Appendix FM of the rules"[2].
13. However, as noted, the secretary of state had refused his application under the five year route and was not satisfied that he met the requirements of R LTRP.1.1 (c) setting out the requirements for limited leave to remain as a partner.
14. In his application on FLR (M) the claimant claimed on the basis of his being married to his partner. He asserted that the financial requirements were met. His

sponsor's total combined income from salaried employment was stated to be £30,727.36.

15. Judge Wilson did not expressly refer to the fact that the secretary of state refused the application as he did not meet the requirements of R-LTRP.1.1(c) of the Rules.
16. Judge Wilson had regard to the claimant's interview, noting the discrepancies relied on.
17. The claimant and his sponsor attended the hearing and gave evidence. There was no supporting evidence from his wife's family or his stepchildren. They had wished for the son to attend but he had to commence work at noon. The matter could only be dealt with by Judge Wilson as a float later on.
18. Both the claimant and his spouse were extensively questioned by the Home Office Presenting Officer. It was accepted through photographs produced at the hearing that there clearly had been a wedding ceremony attended by various persons and friends. There was some documentation in relation to utility bills to the same address, which however post dated the decision.
19. Mr Adeolu who also represented the claimant before the First-tier Tribunal submitted that there was a genuine marriage and in accordance with the normal rules if leave was granted it would be for a limited period.
20. The Judge stated that this was an application under the Immigration Rules and that the burden was on the claimant to show that he satisfied the requirements [12]. There was a burden on him to show that the marriage is subsisting. He had regard in that respect to all the circumstances. Both parties stated that they met before the marriage and after marriage they are indeed living together.
21. The Judge found that apart from their age difference, there was no evidence that could lead to a finding that this was a marriage of convenience. On the balance of probabilities, he was satisfied that the parties are in a genuine relationship. Accordingly, he was satisfied that the respondent's decision was made on an erroneous assessment of the facts.
22. Following submissions, he required the parties to submit whether the case should then be remitted to the secretary of state for a further decision if his finding was in favour of the claimant or whether he should make the decision himself. The difficulty was that the secretary of state had not considered whether the minimum income requirements had been met as the claim fell under the primary consideration of the rules [13].
23. As this had not been considered at all by the secretary of state, he was satisfied that this was an appropriate case for the matter to be returned to the secretary of state for a lawful decision.

24. Judge Wilson then stated under the heading "Notice of Decision" that the "appeal [is] allowed." In a further paragraph below that he found that EX.1 (b) was satisfied in that the claimant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen settled here and there are insurmountable obstacles to family life with the partner continuing outside the UK.
25. On 26 February 2012, Designated Judge of the First-tier Tribunal Garratt granted the secretary of state permission to appeal.
26. The grounds submitted in the application for permission contended that the Judge had erred in applying the burden of proof, which constituted a flawed approach. However, Mr Whitwell however stated that he did not seek to rely on the first ground. I agree that there is no error such error.
27. The second ground referred to the Judge's conclusion that the claimant is in a genuine and subsisting marriage and that the appellant had satisfied the provisions of paragraph EX.1(b). However, it is contended that the Judge had not established that there were insurmountable obstacles in this case. No reference was made to any factors that would preclude the parties from enjoying their family life together outside the UK. That constituted a material error.
28. Judge Garratt stated that the consideration of section EX.1 is arguably flawed because of the Judge's failure to consider the second limb of that requirement.
29. Mr Adeolu submitted that the application was made under Appendix FM and not under EX.1. The claimant was required to show that there was a subsisting and genuine relationship. The issue on appeal was whether or not there was a genuine relationship and that the parties intended to live together permanently in the UK.
30. Having assessed the evidence, the Judge was satisfied that the claimant had shown that the marriage was subsisting. The Judge considered the facts presented and has giving proper reasons justifying that finding.
31. He submitted that there was no reason for the Judge to add, after allowing the appeal, that he found that EX.1(b) was satisfied, namely that there was a genuine and subsisting relationship and that there are insurmountable obstacles to family life continuing outside the UK.
32. Mr Adeolu submitted that the facts were in any event properly "pleaded" before the Judge. He referred to the witness statements presented to the Judge. The claimant set out in detail the effect of a move to Nigeria. He had established himself in employment within the limit of the law and scope of his leave (paragraph 12). His family cannot move to Nigeria as his wife and children are all British citizens. He will not be able to look after them. He will not be able to secure employment there. He has no savings in Nigeria or a home there. His family would be subjected to living in degrading and inhuman conditions. If removed, this would have a devastating effect on his wife and stepchildren and on the family as a whole. It

would have a detrimental psychological and emotional effect on them as well as himself.

33. In his wife's witness statement, she too set out from paragraphs 13 onwards what the effect of his removal would be. He would not be able to maintain their relationship. She would not be able to visit him in Nigeria as frequently as she would wish, having regard to the costs. He would obviously not be able to visit the UK for the same reason.
34. She referred to the emotional and psychological effects of his removal. Her children would be adversely affected as they are beginning to enjoy having a father in their life.
35. Mr Adeolu submitted that in the circumstances, although no reasons were given at the end of the determination, it is evident from the evidence presented and the Judge's acceptance of their evidence that there would be insurmountable obstacles to family life with his partner continuing outside the UK.
36. Mr Adelou also submitted that in the reasons for her refusal the secretary of state considered paragraph EX.1. She did not accept that the relationship was genuine and subsisting. There had been no reference to the insurmountable obstacles component in EX.1(b) as part of that decision.
37. He further submitted that even assuming that there is an error of law, in the circumstances it was not material.
38. With regard to the financial requirements, it had been agreed between the parties that the maintenance requirement in the application remained outstanding.
39. Mr Whitwell noted that the claimant stated in his application that he was applying as the spouse of a person present and settled in the UK. Mr Whitwell also submitted that the secretary of state had in fact refused the application under EX.1(b), which included the requirement that there be insurmountable obstacles to family life continuing abroad.

Assessment

40. The secretary of state refused the claimant's application under the relationship requirements of Appendix FM, finding that he had not met the suitability requirements for leave to remain. That was because she was not satisfied that the marriage was subsisting and that they intended to live together permanently as husband and wife. The secretary of state went on to consider the claim under EX.1 also finding that they did not have a genuine and subsisting relationship.
41. It also appears that the secretary of state stated in terms that he failed to fulfil EX.1(b) of Appendix FM without limiting herself to the nature of the relationship. I do not accept Mr Adeolu's submission that there was a concession, implied or

otherwise, that there were insurmountable obstacles to family life continuing abroad.

42. Judge Wilson found that the claimant had however met the requirements of Appendix FM R-LTRP.1.1 (c) and that the marriage was subsisting. He has given full reasons for coming to that conclusion and in granting permission to appeal Judge Garratt in fact refused permission on the grounds asserting that there had been a material misdirection regarding the finding that the marriage was genuine.
43. Permission was given only in relation to EX.1 which was arguably flawed for the failure to consider the second limb of that requirement.
44. It is evident that the claimant applied on the appropriate form for leave to remain as the spouse of a person present and settled in the UK. The secretary of state considered his application on that basis.
45. Judge Wilson found that the secretary of state's assertion that the relationship was not genuine and subsisting and that they did not intend to live together permanently as husband and wife in the UK, was wrong.
46. He found that the claimant had therefore satisfied the relevant requirements for limited leave to remain as a partner in section R-LTRP.
47. Having come to that conclusion Judge Wilson decided that the issue of maintenance should be returned to the secretary of state for consideration, and ordered that a full lawful decision should be made. That was the only matter outstanding. That was a course that had been agreed as appropriate by the parties at the hearing.
48. Judge Wilson further stated after expressly allowing the appeal that he was satisfied that EX.1(b) was satisfied and that included the fact that there were insurmountable obstacles to family life continuing outside the UK.
49. It may not have been necessary for Judge Wilson to find that EX.1 had been satisfied, having already concluded that the claimant met the relevant requirements for limited leave to remain as a partner and R-LTRP.1.1(c).
50. However, he was also satisfied that EX.1 (b) had been met and in particular that there were insurmountable obstacles to family life with his partner continuing outside the UK.
51. Although there are no reasons set out in the paragraph at the end of the determination, it is evident that he had had regard to the evidence given by both the claimant and his spouse. There had been extensive cross examination by the Home Office Presenting Officer.

52. Part of that evidence related to the reasons given by both the claimant and his wife in their witness statement as to the devastating effect that his return to Nigeria would have both on the claimant himself as well as on his spouse and stepchildren.
53. Although it might have been advisable to set this out again, I find that the decision as a whole makes sense, having regard to the material which was accepted by the Judge.
54. I have had regard to the decision in Shizad (Sufficiency of reasons: Set aside) [2013] UKUT 00085(IAC). The Tribunal also stated that although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal when there has been no misdirection of law, the fact finding process cannot be criticised and the relevant country guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material errors of law and shall accordingly stand.

No anonymity direction is made.

Signed

Date: 11August 2015

Deputy Upper Tribunal Judge Mailer