



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

Appeal Number: HU/00924/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 25 September 2018**

**Decision & Reasons
Promulgated
On 16 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**OFFOR DANIEL OKPANACHI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. O. Adebayo, David & Vine Solicitors

For the Respondent: Ms. A. Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Walters, promulgated on 11 December 2017, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse leave to remain on human rights grounds.
2. Permission to appeal was granted as follows:
"The respondent at the second page of the reasons for her decision found that the appellant did not "currently" meet eligibility

("immigration status") requirements. In so doing, the relevant time was taken as that of the application, 29/10/15, not of decision, 17/12/15.

Between those dates, on 18/11/15, the appellant was placed on temporary admission.

The appellant appealed to the FtT on the basis that he met the eligibility requirements when he applied. However, the issues of the legally relevant date, and of the correct application of the "immigration status requirements" in appendix FM, do not seem to have been well focused in the FtT by either party.

The Judge found at paragraph 14 that it did not matter that the appellant was on temporary release because he arrived in the UK more than 6 months prior to his application. That is not the reason the respondent gave, and arguably not a good one in terms of the rules."

3. The Appellant and Sponsor attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Error of Law

4. It was established at the outset of the hearing that there was no agreement between the Appellant and Respondent as to the "legally relevant date". I have carefully considered whether the date on which the Appellant's immigration status fell to be considered was the date of application or the date of decision. The Respondent did not address this specifically in the reasons for refusal letter, but considered whether paragraph E-LTRP.2.2 applied at the date of decision.

5. It was submitted by Mr. Adebayo, by way of comparison to the other requirements, that the immigration status requirement was relevant as at the date of application not decision.

6. Ms. Fijiwala provided the "Statement of Changes in Immigration Rules" dated 29 October 2015. She referred to the third paragraph on page 2 which states as follows:

"The changes to Part 8 and Appendix FM set out in paragraphs 8.1 to 8.2 and FM1 to FM8 of the statement shall take effect from 19 November 2015 and apply to all applications decided on or after that date regardless of the date of application."

7. She then referred me to page 39. Under the heading "Changes to Appendix FM" at FM5 it provides for the substitution of paragraph E-LTRP.2.2 (a). The version which is to apply is that as set out by the Respondent in the reasons for refusal letter. I find that the Statement of Changes makes clear that, from 19 November 2015, the substituted version of paragraph E-LTRP.2.2(a) as set out in the Statement of Changes applies at the date of decision, not at the date of application, irrespective of when the application was made.

8. I therefore find that, although at the time of application, 29 October 2015, the Appellant was not on temporary release, by the time of the decision, 17 December 2015, when paragraph E-LTRP.2.2(a) fell to be considered, he was on temporary release. Therefore, in order to meet paragraph E-LTRP.2.2(a), he must have arrived in the United Kingdom more than six months prior to the date of application **and** paragraph EX.1 must apply. There is therefore no error in the Judge's consideration of this paragraph, and the Respondent was correct to consider the position of the Appellant as at the date of the decision. There is therefore no error in the Judge considering the Appellant's appeal with reference to paragraph EX.1.
9. It appears from the decision, as was referred to in the grant of permission, that there was no full discussion of this point in the First-tier Tribunal. However, with reference to the Statement of Changes which makes clear that paragraph E-LTRP.2.2 falls to be considered as at the date of decision for all applications decided on or after 19 November 2015, regardless of the date of application, the "legally relevant date" was the date of decision.
10. The Judge set out at [12] the Appellant's representative's submission that "at the time of the visit of the Immigration Officers to the Appellant's home on 18.11.15 the Appellant had only been without leave since 22.10.15". I find that this does not make any difference to consideration of paragraph E-LTRP.2.2(a). At [14] the Judge states:

"I therefore find that it matters not that the Appellant was on Temporary Release because the Appellant had arrived in the U.K. more than six months prior to the date of application (29.10.15) and therefore the only remaining issue is whether paragraph EX.1 applies."
11. The way that the Judge has phrased this is not particularly clear, given that it does matter that the Appellant was on temporary release. However, it is not material as the Judge correctly identified that the only issue remaining is whether paragraph EX.1 applies.
12. He considered paragraph EX.1 at [15] to [21]. Ms. Fijiwala submitted that there had been no challenge to the Judge's consideration of paragraph EX.1, and there was no error of law in his consideration. I considered the grounds of appeal before me, and at [4], [6] and [7] there is reference to paragraph EX.1. There is no error identified at [4] as I have found above that the Judge was correct to consider paragraph EX.1. At [6] it states that the Judge erred in law in his assessment of whether it was unreasonable or not to remove the Appellant from the UK. At [7] it states that he erred at [15] where he stated that the only issue was whether there would be very significant difficulties for the Appellant and his wife continuing their family life outside the UK.
13. While I accept that the Judge has not used the phrase "insurmountable obstacles" as set out in paragraph EX.1(b), this does not matter as at [15] he has referred to the definition of "insurmountable obstacles" as set out

in paragraph EX.2. There is therefore no error of law identified at [7] of the grounds of appeal.

14. Although at [6] of the grounds it states that Judge erred in law in his assessment of whether it was unreasonable or not to remove the Appellant from the UK, this was not pursued at the hearing before me. In any event, the issue before the Judge was whether paragraph EX.1 applied, and he correctly identified at [15] what he needed to consider in this assessment. There was no challenge to the matters which the Judge took into account in considering whether there were insurmountable obstacles to family life continuing outside the United Kingdom under paragraph EX.1. The Judge considered the evidence before him. There is no error in his consideration of paragraph EX.1(b).
15. It was submitted for the first time at the hearing that there had not been a fair hearing in the First-tier Tribunal because the Appellant's wife could not attend the hearing. I find there is no merit in this. Mr. Adebayo submitted that good grounds had been given for the Appellant's wife's failure to attend. However at [18] and [19] the Judge found that it was not clear why the Appellant's wife did not attend to give evidence as her medical appointment was "two days in the future from the date of hearing". He noted that there was no application for an adjournment. Contrary to Mr. Adebayo's submissions, he did not consider that a good reason was provided for the failure of the Appellant's wife to attend. The Judge took into account the Appellant's wife's witness statement [20]. There is no error of law in his consideration of her evidence, nor in his proceeding to hear the appeal in her absence, especially given that no application was made for an adjournment.
16. I find that the Judge was correct to consider paragraph EX.1. The Appellant was on temporary release at the date of the decision and therefore the Judge had to apply paragraph E-LTRP.2.2(a), which requires consideration of paragraph EX.1. The decision does not involve the making of an error of law.

Notice of Decision

17. The decision does not involve the making of a material error of law and I do not set the decision aside.
18. The decision of the First-tier Tribunal stands.
19. No anonymity direction is made.

Signed

Date 10 October 2018

Deputy Upper Tribunal Judge Chamberlain