Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/47506/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th February 2016	**On 2nd March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWAMAKIWA OLUDOLAMU FOLARIN
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer
For the Respondent: Mr A Alexander of Counsel instructed by ATM Law Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge Gibb of the First-tier Tribunal (the FTT) promulgated on 28th January 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the FTT and I will refer to him as the Claimant.

3. The Claimant is a male Nigerian citizen born 1st April 1967 who arrived in the United Kingdom illegally in 2003. He applied for leave to remain in January 2012, his application was based upon his marriage to a person with settled status, and he relied upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). The application was refused on 18th March 2013 without a right of appeal. On 8th November 2013 the Secretary of State made a decision to remove the Claimant from the United Kingdom.

4. The Claimant appealed against that decision and his appeal was heard by the FTT on 7th January 2015. The FTT found that because the application for leave to remain had been made in January 2012, it was appropriate to consider the application with reference to Article 8 outside the Immigration Rules, as the application pre-dated the introduction into the Immigration Rules of Appendix FM and paragraph 276ADE(1).

5. The FTT allowed the appeal under Article 8 outside the Immigration Rules. This prompted the Secretary of State to make an application for permission to appeal to the Upper Tribunal.

6. In summary it was contended that the FTT had erred by considering the appeal with reference to Article 8 outside the Immigration Rules, and should initially have considered the appeal with reference to Appendix FM and paragraph 276ADE.

7. It was also contended that the FTT had erred in assessing Article 8 outside the Rules, and had failed to lawfully engage with section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

8. Permission to appeal was granted by Upper Tribunal Judge Kebede in the following terms;

> "2. Although the judge considered Appendix FM in the alternative, it is arguable that his view of the applicability of the new Rules, now clarified by the judgment in Singh v Secretary of State for the Home Department [2015] EWCA Civ 74 as being erroneous, affected his decision so that his starting point, in considering Article 8 outside the rules, was arguably inconsistent with relevant case law. It is arguable that the judge did not take full and proper account of the weight of the public interest considerations in s117B of the Nationality, Immigration and Asylum Act 2002.
> 3. The grounds are arguable."

9. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision must be set aside.

Oral Submissions

10. Mr Nath relied upon the grounds contained within the application for permission to appeal.

11. Mr Alexander accepted that the FTT had erred by considering Article 8 outside the Immigration Rules and should have initially considered the application under the Immigration Rules, notwithstanding that the application was made before the introduction of the new Immigration Rules, including Appendix FM and paragraph 276ADE.

12. Mr Alexander however contended that the error was not material because the FTT had considered all the evidence, and would have reached the same conclusion, had the appeal been considered with reference to Appendix FM.

My Conclusions and Reasons

13. I announced at the hearing that the FTT had erred in law, and the error was material, and the decision of the FTT must be set aside, for the following reasons.

14. The approach of the FTT to the issues in the appeal was wrong in law. The FTT erred in paragraph 6 in stating;

> "The correct legal approach, therefore, was to consider the application under the legal structure that existed before the introduction of Appendix FM."

15. This point of law was clarified by the Court of Appeal in Singh [2015] EWCA Civ 74. It was stated in paragraph 56 that with effect from 6th September 2012 the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE-276DH in deciding private or family life applications even if they were made prior to 9th July 2012. The only exception to this would be in relation to decisions taken between 9th July 2012 and 6th September 2012, which does not apply in this case. It is only fair to the FTT to point out, that this issue was not clear when the FTT heard this appeal, and Singh was published after the FTT decision was promulgated.

16. However Singh makes it clear that the FTT did approach this appeal in a legally incorrect way, and should have considered firstly, Appendix FM in relation to family life, and paragraph 276ADE in relation to any private life claim.

17. The Court of Appeal in Agyarko [2015] EWCA Civ 440 (also published after the FTT decision had been promulgated) gave some guidance on the insurmountable obstacles test, to which there was reference in the FTT decision. For ease of reference I set out below paragraph 21 of Agyarko:

> "21. The phrase insurmountable obstacles as used in this paragraph of the rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom."

18. In Agyarko, it was found that the mere fact that the Sponsor, who had lived all his life in the United Kingdom and had employment here, and hence might find it difficult and might be reluctant to relocate outside the United Kingdom to continue family life, could not constitute insurmountable obstacles to his doing so.

19. The FTT should only have gone on to consider Article 8 outside the Immigration Rules, according to the principles in SS (Congo) [2015] EWCA Civ 387, which is another decision published after promulgation of the FTT decision, if compelling circumstances existed, which were not covered by the Immigration Rules.

20. The FTT erred in considering Article 8 outside the Immigration Rules, by not adequately considering the provisions of section 117B of the 2002 Act.

21. The FTT failed to adequately explain the findings in paragraph 26, in which proportionality was considered, and why the balance fell in favour of the Claimant. The FTT referred to section 117B but did not demonstrate that it had properly engaged with the provisions contained therein. Section 117B contains the public interest considerations which are applicable in all cases when Article 8 of the 1950 Convention is considered outside the Immigration Rules. It provides that;

> "(1) The maintenance of effective immigration controls is in the public interest.
> (4) Little weight should be given to –
> (a) a private life, or
> (b) a relationship formed with a qualifying partner,
> that is established by a person at a time when the person is in the United Kingdom unlawfully."

22. The Claimant had been in the United Kingdom unlawfully since his illegal entry in 2003. The FTT therefore must have attached little weight to his private life, and his relationship with his partner, and the FTT has not adequately explained why if that is the case, the balance when considering proportionality fell in favour of the Claimant.

23. The Court of Appeal commented in Agyarko at paragraph 28, that where an individual, seeking leave to remain under Article 8 outside the Rules, established a family life in the knowledge that he or she had no right to be in the United Kingdom, they could only succeed under Article 8 if their case was exceptional.

24. For the above reasons, the decision of the FTT is unsafe and is set aside with no findings preserved.

25. Mr Alexander accepted that it would be appropriate to remit the appeal to the FTT to be heard again. I indicated, having considered paragraph 7 of the Senior President's Practice Statements that this would be appropriate, because of the nature and extent of judicial fact-finding that will be necessary in order for the decision to be remade.

26. The appeal will be heard at the Taylor House Hearing Centre and the parties will be advised of the time and date in due course. The appeal is to be heard by an FTT Judge other than Judge Gibb.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FTT with no findings preserved.

Anonymity

The FTT made no anonymity direction and there was no request to the Upper Tribunal for an anonymity order. I see no need to order anonymity.

Signed Date 18th February 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The issue of any fee award will need to be considered by the FTT.

Signed Date 18th February 2016

Deputy Upper Tribunal Judge M A Hall