Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number IA/47820/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons promulgated**
On 30 September 2014	**On 18 June 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Onabamiro Goddy Onojobi
(Anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Mr S Osifeso of Lannex Immigration & Legal Advice Services.
For the Respondent: Mr P Duffy, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Thew promulgated on 16 July 2014 dismissing the Appellant's appeal against the decision of the Respondent dated 18 October 2013 to refuse to issue a residence card pursuant to the Immigration (European Economic Area) Regulations 2006.

Background

2. The Appellant is a national of Nigeria born on 10 February 1974. Brief details of his personal and immigration histories are set out at paragraphs 1, 3, and 7 of the

determination of the First-tier Tribunal. For present purposes what is particularly pertinent is that the Appellant is the father of Onoyemifrancesco John Onojobi, an Italian national born in the UK on 9 June 2007. By way of form EEA2 signed on 18 September 2012, and an accompanying cover letter from his representatives dated 8 November 2012, the Appellant applied "*for leave to remain in the UK under regulation 15A of the Immigration (European Economic Area) Regulations 2006*". The application was treated by the Respondent as application for a residence card as the parent/carer of an EEA national child.

3. The Respondent refused the application for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 18 October 2013 and a Notice of Immigration Decision was issued in consequence.

4. The Appellant appealed to the IAC.

5. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in her determination, both under the EEA Regulations and on human rights grounds.

6. The Appellant sought permission to appeal which was granted by First-tier Tribunal Judge Grant-Hutchison on 15 August 2014. In the grounds in support of the application for permission to appeal the Appellant pleaded matters relevant to Article 8, and did not pursue his case in respect of the EEA Regulations which he had conceded before the First-tier Tribunal.

7. The Respondent has filed a Rule 24 response dated 26 August 2014 resisting the challenge to the decision of the First-tier Tribunal.

Consideration: Error of Law

8. The specific domestic arrangements of the Appellant are not manifestly clear in his application. In particular nothing overt is stated in respect of the Appellant's son's mother. The address of the Appellant's son is given as the same address as the Appellant; there are some supporting documents showing the same address for 'Miss M Monterisi', and there are a number of family photographs which appear to show mother, father, and child. In the Grounds of Appeal to the First-tier Tribunal attached to the Notice of Appeal reference is made to the separation of the Appellant from his son's mother. Further, in the event, at the appeal hearing it was evident that the Appellant had separated from his son's mother – Ms Maria Monterisi - in May 2012 (paragraph 7), and the Appellant had weekend staying contact, as well as seeing his son at other times during the week (paragraph 8).

9. It is not clear whether such matters were previously apparent to the Respondent, who refused the application under the EEA Regulations only on the basis of the absence of comprehensive sickness insurance. Be that as it may, it is clear that the Appellant could not have met the requirements of regulation 15A because he was not the primary carer of his son. As much was conceded before the First-tier Tribunal Judge by the Appellant's representative, and reliance was placed on Article 8 of the ECHR: see paragraph 15.

10. I pause to note in this context that once the Judge had permitted amendment of the Grounds of Appeal, the Respondent did not apparently seek to challenge the jurisdiction of the Tribunal to consider Article 8 issues in the context of an appeal against an EEA decision. There has been no cross-appeal in this regard, and no jurisdictional issue raised in the Rule 24 response or in oral submissions before me. It appears to have been common ground throughout that the approach taken in **JM (Liberia)**, to the effect that the ground of appeal under section 84(1)(g) is available notwithstanding the absence of an actual removal decision, applies

11. Having set out preliminary paragraphs concerning the nature of the appeal, and paragraphs recording the evidence at the hearing, the Judge set out her 'Analysis of Evidence and Conclusions' at paragraphs 14–35.

12. In particular the Judge made findings that:

    (i) The Appellant's ex-partner was the primary carer of their child, was in a new relationship, and had a further child from that relationship;

    (ii) The Appellant had extensive contact with his son pursuant to a schedule of arrangements set out in an order from the Edmonton Family Court which included taking him to school every morning from his mother's house, picking him up after school on Wednesdays to take into gym classes, and staying contact on alternate weekends beginning with connection from school on Friday and ending with returning him to school on Monday.

    (iii) Ms Monterisi had in her recent post-natal period experienced mental health problems, including suicidal ideation ("*a significant decline in her mental state including thoughts about ending her life*") and a panic attack. Mental health team professionals considered she suffered "*significant anxiety, panic episodes and low mood*".

    (iv) A letter from his school describes the Appellant's son as having "*supportive parents*".

    (v) The Appellant produced evidence of earnings of £11,000 to the year ending April 2014. His bank statements showed that he made payments to support his son.

13. Further to the above in the context of considering section 55 of the Borders, Citizenship and Immigration Act 2001 the Judge found, at paragraph 31:

> "There is no doubt that that contact is of benefit and importance to the child, given that he lived in the same household with his father and mother until she left the address where the appellant still lives, in May 2012. Since that time the child has seen his father regularly and the terms of the court order include staying access. Without question there would be an impact on the child if he were not able to have the level of contact with the appellant that he currently has."

14. The Judge found that the Appellant did not satisfy those requirements of the Immigration Rules that addressed private life and family life pursuant to Article 8 of the ECHR. The conclusion in respect of private life under paragraph 276 ADE

(paragraph 34) appears inevitable and is not disputed. The conclusion in respect of family life under Appendix FM with particular reference to Section EX (paragraph 30) is, in my judgement far less clear: see further below.

15. At paragraphs 32 and 33 the Judge set out passages from the case of **Gulshan [2013] UKUT 00640 (IAC)**. In my judgement, however, it is not apparent how the Judge applied such case law to the facts of this particular appeal. Be that as it may, the Judge in any event, at paragraph 34, essentially addressed the first four **Razgar** questions (without making express reference to **Razgar**) and identified that the issue of proportionality needed to be addressed: "*I now turn to the issue of proportionality and whether the respondent has established that the decision was a proportionate one and whether the appellant has established that there are compelling circumstances not sufficiently recognised under the Rules*".

16. I pause to note that in addressing the first two **Razgar** questions the Judge made reference to the existence of "*private life that engages Article 8*" without referring to family life. This is a surprising reference in circumstances where this case was so very obviously about family life. However, in context, and given that the Judge has otherwise addressed the relationship between the Appellant and his son I am inclined to the view that such a reference is by way of a slip rather than indicative of a failure to address the pertinent issues in the appeal.

17. The Judges 'proportionality' evaluation is set out at paragraph 35. I find that I am wholly unable to understand the basis of her conclusion from that paragraph. The Judge in effect says no more than that she has taken into account the circumstances, but that they do not amount to compelling circumstances not sufficiently recognised under the immigration rules: "*On the evidence before me I conclude that they do not*". However, she does not go on to say *why*: no reason is offered for such a conclusion. In this context whilst I note that Mr Duffy valiantly sought to defend the decision of the Judge – submitting that in the effect the Judge was saying that notwithstanding the positive features in the case they were 'not enough' - he acknowledged that it might be reasonably inferred that the Judge having directed herself to the case of **Gulshan** she must, in thereafter going on to consider Article 8, have at the very least satisfied herself that there were arguably good grounds for granting leave to remain outside the Rules, (irrespective of whether such an 'intermediate' step was a proper part of the relevant test). Further, he acknowledge that thereafter the Judge had not really 'spelt out' the basis of her ultimate conclusion.

18. In my judgement this lack of clear reasoning is compounded by deficiencies in the Judge's analysis of the Rules in respect of family life – which necessarily impacted upon her approach to the question of the extent to which the Appellant's circumstances were sufficiently recognised under the Rules.

19. The Judge did not expressly address section R-LTRPT – requirements for limited leave to remain as a parent – but considered paragraph EX.1 in isolation, even though it is well established that it is not a freestanding provision: see paragraph 30. That in itself would not be a material error given that the Appellant would have had

to satisfy paragraph EX.1 in any event (at least because he could not meet the immigration requirements of E-LTRPT.3.2), and also given that those matters in respect of which the Judge was not satisfied on EX.1 would also have been germane in respect of the 'relationship requirements' specified at E–LTRPT.2.2. The Judge was not satisfied in respect of the requirement that the child have "*lived in the UK continuously for at least the 7 years immediately preceding the date of application*". The Judge took the date of application to be 9 November 2012, the date of the EEA application. In my judgement this was in error.

20. R-LTRPT.1.1(b) specifies a requirement that the applicant have made a valid application for limited leave to remain as a parent. The EEA application was not such an application. Whilst at first blush this would appear to mean that the Appellant could not possibly meet the requirements for limited to leave as a parent under the Rules, paragraph GEN.1.9(iv) obviates the need to have made a valid application when the Article 8 claim is raised in an appeal.

21. This begs the question of exactly when such an 'application' is deemed to be made: it might potentially be the date upon which the appeal is lodged, or it might be as late as the hearing of the appeal. On the facts of this particular case it is to be noted that the substance of the case under Appendix FM was advanced in terms in the letter dated 12 June 2014 sent on 13 June 2014 applying to amend the grounds of appeal: see determination at paragraph 14. Necessarily this, just, post-dates the Appellant's son's seventh birthday and therefore his seven years of residence in the UK.

22. Whether that is the correct approach or not, the Judge's approach to the Rules was such that in effectively evaluating the period of time the Appellant's son had spent in the UK by reference to the date of the EEA application, she determined (without recognising it) that the Rules did not recognise the reality of the situation that by the date of the hearing before the First-tier Tribunal the Appellant's son had been in the UK for a further 20 months and in any event for more than 7 years.

23. Nor did the Rules in this regard fully cover or consider the reality of the Appellant's particular circumstances. Paragraph EX.1 involves an evaluation of the disruption to the private life of a child in the event of having to quit the UK in consequence of the removal of the principal adult applicant: paragraph EX.1(a)(ii) makes this particularly apparent. In a situation such as the Appellant's where the relevant child is residing with another parent from whom the applicant is separated, and where it is clear that it would not be reasonable to expect the child to leave the UK for reasons other than the length of time he has been residing here, the Rules give no such recognition or weight to the unreasonableness of expecting the child to leave the UK and/or thereby not recognise or accord weight to the consequent separation of adult applicant and child.

24. In the circumstances I find that the Judge's analysis of Appendix FM was in error, and in consequence she failed to appreciate when considering Article 8 that the Appellant's circumstances – and indeed those of his EEA national son – were not sufficiently recognised under the Rules. In my judgement this, together with the

absence of any clear reason at paragraph 35, is such that the decision in the appeal is flawed for error of law and must be set aside

Re-making the decision

25. Although I have found error of law in respect of the First-tier Tribunal Judge's reasoning and more particularly the absence of any clear reasons in respect of proportionality – no similar criticism is to be made of the Judge's primary fact finding. As noted above the Judge has set out in some detail the evidence and her findings in respect of the circumstances of the Appellant and in particular his relationship with his son, and the circumstances of his son's mother. Accordingly, it was common ground before me that the decision in the appeal could be remade before the Upper Tribunal and without the need to call further evidence. I therefore proceeded by way of submissions from the representatives.

26. Accordingly, I 'take forward' the First-tier Tribunal Judge's findings of primary fact. Given those findings of fact, and my own consideration and evaluation of the evidence, I note in particular the following:

    (i) In circumstances where the Appellant's son is an EEA national, as is his mother, and where his mother is in a new relationship and has had a child within that new relationship, I find that plainly it would not be reasonable to expect the Appellant's son to leave the UK. The son's relocation would either involve him leaving in the company of the Appellant but without his mother and half sibling, or the relocation of his mother and her new family.

    (ii) The family life enjoyed between the Appellant and his son is significant and of a high quality. This is no case of a substantially absent father, or a father who has only awakened interest in contact with his son in the face of possible removal. From birth until May 2012 the Appellant and his son were part of the same household. Since the separation of the Appellant and Ms Monterisi there has been extensive contact between father and son, and such contact now continues pursuant to court order. The Appellant and his son see each other virtually every day, with father picking up from the mother's home to take his son to school every morning, additional contact on Wednesdays, and weekend staying contact on alternate weekends. I also take into account that it is more likely than not that the bond between father and child has been particularly important and significant during the period of the mother's establishing a new family, and yet more particularly given the circumstances of her mental health issues post-natally. The removal of the Appellant would destroy the nature of the family life between father and son and could not remotely be replicated by 'modern means of communication' or occasional visits. For a child coming to terms with the separation of his parents and perhaps trying to understand his place within his mother's new family such an additional disruption would likely cause considerable upset and consternation.

    (iii) I endorse the Judge's observations at paragraph 31 in respect of 'best interests', but reach a more emphatic conclusion than there specified. In my judgement it is plainly in the Appellant's son's best interests that he maintain contact at a

similar level to the current contact. In so concluding I recognise and acknowledge that in immigration terms 'best interests', whilst a primary consideration, are not a paramount or determinative consideration.

27. I also take forward into my own analysis of Article 8 the comments and observations in respect of Appendix FM above. On the face of it, the only reason the Appellant might fail to satisfy the requirements of the Rules is by reference to the date of application. In so far as the Rules only apply to circumstances where a child has been living in the UK for seven years, they do not otherwise recognise the unreasonableness of expecting the Appellant's son to leave the UK given his particular circumstances.

28. I take into account the public interest in maintaining effective immigration control – and more particularly in doing so through the consistent and fair application of a published set of Rules. I also take into account that the Appellant appears to have become an overstayer in 2001, and apparently made no attempt to regularise his status until a previous EEA application was made in July 2008. His immigration history is not to his credit, and is an adverse factor in any proportionality balance. However, this circumstance is ameliorated to some extent by the fact that the Appellant appears to have been self-supporting through work as a kitchen porter, and is currently self-supporting through work as a cleaner. Indeed in this context it is to be noted that he makes financial contributions to support his son out of his annual earnings of approximately £11,000.

29. I have noted the amendments to the Nationality, Immigration and Asylum Act 2002 introduced from 28 July 2014 by section 19 of the Immigration Act 2014. It is a curiosity that the amended Part 5A does not apply to EEA appeals brought under regulation 26 of the 2006 Regulations because Schedule 1 of those Regulations has not been amended and does not refer to the provisions in Part 5A. Be that as it may, given that the amendments by way of sections 117A–117D set out in effect the Respondent's views – and in turn Parliament's views – on public interest considerations, it seems appropriate to have regard to such considerations even where they might not have the direct force of application by statute. In doing so I remind myself that the factors identified as relevant public considerations in Part 5A of the 2002 Act are not individually inevitably determinative of any particular case, and are not collectively an exhaustive list of relevant considerations.

30. Accordingly: as noted above I have taken into account the public interest in the maintenance of effective immigration control (117B(1)); I note that the Appellant speaks English (117B(2)); I also note that the Appellant is financially independent (117B(3). I also note that little weight should be given to *private* life established at a time when a person is in the UK unlawfully or when his immigration status is precarious (117B(4) and (5)). The same is not stated in respect of *family* life, and indeed where not liable to deportation the public interest does not require removal if there is a genuine and subsisting parental relationship with a qualifying child (117B(6)). The Appellant's son is a qualifying child within the meaning of section 117D(1).

31. On the very particular facts of this case it seems to me wholly uncontroversial to conclude that the first two **Razgar** questions should be determined in the Appellant's favour: indeed I do not understand the Respondent to dispute as much. Further, there is no issue between the parties in respect of the third and fourth **Razgar** questions. In respect of proportionality, I am satisfied that notwithstanding the imperative of maintaining effective immigration control, and the circumstances of the Appellant's poor immigration history, given that otherwise there are no countervailing factors by reference to language or lack of financial independence, the circumstances of the Appellant's son and the very strong relationship between the Appellant and his son is such as to tip the proportionality balance considerably in favour of the Appellant. In this regard, and for the avoidance of any doubt, I do not consider that the Appellant's and his son's circumstances are adequately reflected in the Rules, and I also conclude that the nature of the father-son relationship in all of the circumstances of this particular case provides a compelling reason to depart from the strictures of the Rules.

32. Accordingly I conclude that the removal of the Appellant in consequence of the Respondent's decision would be in breach of both his and his son's Article 8 rights.

Notice of Decision

33. The decision of the First-tier Tribunal contained a material error of law and is set aside in respect of the appeal on human rights grounds.

34. The decision of the First-tier Tribunal in respect of the EEA Regulations did not contain any error of law and stands.

35. I remake the decision in the appeal on human rights rounds. The appeal is allowed.

36. No anonymity order is sought or made

Deputy Judge of the Upper Tribunal I. A. Lewis **20 May 2015**