Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/02399/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 8 April 2015	**On 13 April 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Entry Clearance Officer - Abuja
[No anonymity direction made]

Appellant

and

Olubukolan Adefunke Senaike

Claimant

Representation:
For the claimant: The sponsor Mr F Adetunji
For the appellant: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Entry Clearance Officer against the decision of First-tier Tribunal Judge Napthine promulgated 12.12.14, allowing under Article 8 ECHR the claimant's appeal against the decision of the Entry Clearance Officer, dated 23.4.14, to refuse her application made on 17.4.14 for entry clearance to the United Kingdom as a general visitor pursuant to paragraph 41 of the Immigration Rules. The Judge heard the appeal on 27.11.14.

2. First-tier Tribunal Judge Pirotta granted permission to appeal on 11.2.15.

3. Thus the matter came before me on 8.4.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below I find that there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Napthine should be set aside.

5. The application was refused because the Entry Clearance Officer was not satisfied that the claimant was a genuine visitor who intended to leave the UK on the conclusion of her visit. The claimant was served with a notice of limited rights of appeal.

6. Judge Napthine made findings that the claimant and her husband the sponsor were separated and she wanted to visit him in the UK to decide whether to establish their family life in the UK or Nigeria, where she has two daughters, the younger of which is the child of the sponsor. The claimant has a business in Nigeria, established with funds provided by the sponsor, who visits his family in Nigeria twice a year.

7. The judge found that the decision of the Entry Clearance Officer was a clear breach of the claimant's and the sponsor's rights to a family life and was "excessive and unreasonable."

8. The grounds of application for permission to appeal assert that the First-tier Tribunal Judge failed to recognise that the ambit of the appeal was limited by section 84(1)(b) & (c) of the Nationality Immigration and Asylum Act 2002. The grounds further complain that the judge failed to take into account the existing pattern of private and family life in Nigeria, which did not exist in the UK. It is submitted that the proportionality assessment is entirely inadequate, as the decision failed to explain why it would be a disproportionate interference with Article 8 to refuse a temporary visit to the UK. It remained open to the sponsor to continue to visit the claimant in Nigeria, or a third country.

9. It is clear that the judge confused an assessment under Article 8 private and family life with an assessment as to whether the appellant met the requirements of the Immigration Rules, even though there is no right of appeal against the decision on immigration grounds. For example, the judge went through the various requirements of paragraph 41, finding at §25 that the claimant could meet them and "therefore the refusal of her application was a clear breach of her and the sponsor's rights to a family life and that interference was excessive and unreasonable."

10. The decision appears to recognise at §25 that the only effective ground of appeal is under Article 8 ECHR, but the judge appears to have relied on a finding that the claimant met the requirements of the Rules in order to reach a conclusion that the decision was in breach of Article 8 ECHR. As held in Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC), "in the case of appeals brought against refusal of entry clearance under Article 8 ECHR the claimant's ability to satisfy the Immigration Rules is not the question to be determined by a Tribunal, but is capable

of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control."

11. At §26 the judge went further, finding that the claimant had "discharged the burden of proof and the reasons given by the respondent do not justify the refusal. Therefore the respondent's decision is not in accordance with the law." Those statements are in error of law. If the judge took the view that the decision was not in accordance with the law the correct course would be to allow the appeal to the limited extent that the decision was not in accordance with the law and it remains for the Entry Clearance Officer to make a decision in accordance with the law.

12. Further, the Article 8 assessment, such as one can be detected, was flawed. There was no reference to proportionality in the decision. There was no consideration of the fact that such family life as existed between the sponsor and the claimant could continue by the regular visits of the sponsor to Nigeria. The claimant and the sponsor had chosen to live separate lives, with the claimant in Nigeria and the sponsor choosing to remain in the UK, even though he has a wife and at least one child between them in Nigeria. The refusal of the visit visa did not prevent that level of family life continuing. Paragraph 41 is not a route to settlement and is intended only to provide for short family visits to the UK. It remained open to the claimant to make a fresh application for such a visit, taking care to address the substantive reasons for refusal. There are also other routes for settlement to the UK, which are open to the claimant. In the circumstances, the refusal decision cannot amount to a disproportionate interference to such family life as exists.

13. In the circumstances, I set the decision aside and proceeded to remake it.

14. Mr Adetunji explained that it was a deliberate decision to keep his wife and the children in Nigeria. He wanted them to be raised in Nigeria. He would continue to visit regularly, but as he was in full-time employment he had only 4 weeks leave a year. He wanted his wife to be able to visit him in the UK from time to time. He had chosen not to make a settlement application, but believed that he would qualify under Appendix FM. He also recognised that his wife could make a further visit visa application, taking care to ensure that satisfactory evidence is submitted with the appellant. He insisted that the decision was in breach of his human rights.

15. However, applying the Razgar stepped approach, I am not satisfied that the decision to refuse the visit visa application is such a grave interference with the Article 8 family rights so as to engage Article 8 at all. The status quo of the appellant in Nigeria and the sponsor in the UK is the family life that they have chosen for themselves. He can continue to visit them in Nigeria. Even if Article 8 is engaged, having regard to the public interest considerations under section 117B of the 2002 Act, in which immigration control is in the public interest, I find that in the proportionality balancing exercise between on the one hand the rights of the appellant and the sponsor and on the other the legitimate and necessary public interest in protecting the economic well-being of the UK through immigration control, the balance comes firmly down in favour of the decision being proportionate

and not disproportionate to those rights. In reaching that conclusion I bear in mind that the family life status quo chosen by the appellant and the sponsor continues. He can continue to visit his family in Nigeria. It is open to her to make a fresh application for a visit visa, or for them to make an application for settlement. In those circumstances, I fail to see how the decision could ever be regarded as disproportionate to the actual family life enjoyed by the appellant and the sponsor. She is not being prevented indefinitely from visiting the sponsor in the UK. Further, given that there has been no challenge to the positive factual findings in the decision of Judge Napthine, the appellant will be able to rely on those in any further application, perhaps enclosing copies of that decision and this decision.

Conclusions:

16. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed
Deputy Upper Tribunal Judge Pickup

Dated 13 April 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed
Deputy Upper Tribunal Judge Pickup

Dated **13 April 2015**