



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

Appeal Number: IA/04116/2015

THE IMMIGRATION ACTS

**Heard at the Royal Courts of Justice
On 8 February 2016**

Decision & Reasons Promulgated

On 25 February 2016

Before

Upper Tribunal Judge Southern

Between

THERESA ADESIDA ADENIKAWO

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M. Vidal of counsel, instructed by Haris Ali, solicitors
For the Respondent: Mr K. Norton, Senior Home Office Presenting Officer

DECISION

1. The Appellant, who is a citizen of Nigeria born on 11 June 1975, claims to have arrived in the United Kingdom as a child in 1991. Her partner, Mr Alaka, is also a Nigerian citizen and their three children, born in the United Kingdom while both parents were unlawfully present are also, of course, citizens of Nigeria. She appealed against a decision of the respondent, made on 15 January 2015, to refuse to grant the whole family leave to remain on the basis of rights protected by Article 8 of the

ECHR. For reasons that are not relevant for present purposes, the appellant has an in-country right of appeal whereas her partner and their children, although present in the United Kingdom, may appeal only after they have left the United Kingdom.

2. The history of previous applications is set out in the grounds drafted by counsel for the appellant goes unchallenged and so I take the following summary from them. Applications for leave to remain had initially been made on 18 December 2009 and refused on 21 April 2010 with no right of appeal. The respondent agreed to reconsider that decision but maintained the refusal, this time providing a decision that carried a right of appeal that the appellant exercised. The respondent withdrew that decision and again reconsidered the matter with the resulting decision of 15 January 2015 that is subject to challenge in these proceedings.
3. In the decision of 15 January 2015 the respondent placed reliance upon the submission of false documents in support of the original application that had been made in December 2009. In so doing, she reproduce the relevant provision of the rules, under a heading “suitability and saying, so far as is relevant (with emphasis added):

“In order for your client to be eligible for consideration for limited leave to remain under Appendix FM and/or Paragraph 276ADE of the Immigration Rules, your client must not be excluded on the grounds of Suitability under Appendix FM S-LTR 1.1-3.1, which state:

...

S-LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.4 apply

S-LTR2.2. Whether or not to the applicant’s knowledge-

- a) False information, representations or documents have been submitted in relation to the application...

...

It is considered that your client does not meet the Suitability requirements for consideration of limited leave to remain in the United Kingdom ... because your client has previously submitted false documents to the Home Office in support of her application. The bank statements from Nationwide Building Society and the Cooperative Bank submitted within Chidys Solicitors letter dated 18 December 2009 have been confirmed to be false and that no such accounts exist with either institution. It is noted that your client claims to know nothing about these bank statements and they were submitted by Chidys Solicitors without her knowledge, however, even if the bank statements were submitted without your client’s knowledge it is your client’s responsibility to check the actions that any representative elected by her to act on her behalf

Your client therefore fails to meet the requirements for leave to

remain because Paragraph S-LTR.2.2.(a) of Appendix FM of the Immigration Rules applies.”

4. Pausing there, it might be thought that the reasoning leading to that conclusion is not without difficulty. Unlike other provisions of the rules, refusal is not a mandatory and inevitable consequence of the engagement of the provision. S-LTR.2.1 provides that where the provisions apply the application will *normally* be refused. Therefore, there will be cases where that will not be the outcome and so there is a discretion to be exercised. The provision raises specifically the distinction between cases where the false documents are submitted with and without the applicant’s knowledge. If they had been submitted without the applicant’s knowledge then, plainly, that would inform the decision as to whether this was within the category of applications that should normally be refused.
5. Second, the respondent has expressed herself in a manner that suggests that the question of whether the applicant knew that false documents had been submitted was immaterial because, in every case, it was her responsibility to ensure that false documents had not been submitted. That suggests that no consideration has been given to the question of whether discretion should have been exercised in this case, if it were to be accepted that the appellant was not someone who was dishonestly complicit in the reliance upon false documents. Therefore, on that approach, a person who had instructed solicitors to carry out a task within their professional competence would be equally responsible for an unauthorised and inappropriate act of a professional representative in whom she was entitled to have confidence that he would not do so. If that were correct it would render otiose what was plainly intended to be a qualification to the normal outcome where false documents were submitted.
6. This was one of the issues to be resolved in the appeal before the First tier Tribunal. The judge said this, at paragraph 10 of his decision:

“The respondent’s bundle contained two Document verification reports regarding Nationwide and Cooperative bank statements that were submitted with the appellant’s application of 2009. These conclude that the documents were not issued by either bank for reasons that are set out within the DVRs. Neither the appellant nor her partner sought to dispute the DVRs but explained that neither of them were aware that the documents had been submitted and placed the blame on their previous legal representatives. Notwithstanding any finding of complicity I am satisfied that Paragraph S-TRR.2.2.(a) (*sic*) is relevant whether or not the applicant was aware of the submission of the false information. Mr Alexander did not seek to persuade me otherwise.”

Apart from the incorrect paragraph number of the rule he was discussing, so far so good, but the judge continued:

“I am therefore satisfied that the appellant cannot satisfy the requirements of Paragraph 276ADE(1)(i) and cannot meet the

requirements of the Immigration Rules. “

Paragraph 276ADE(1)(i) provides:

‘276ADE (1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application, the applicant:

(i) Does not fall for refusal under any of the grounds in Section S-LTR.1.2 to S-LTR2.3 ...’

7. The judge was simply wrong in his approach because it did not necessarily follow from the fact that false documents had been submitted that the appellant could not meet the suitability requirement of S-LTR.2.2(a), even if that would be the normal outcome. Because the judge had misunderstood the suitability requirement in play, he did not make a finding of fact concerning the submission of false documents and so we do not know whether or not he accepted the appellant’s evidence that she was wholly unaware that any false documents had been submitted. Nor do we know whether, but for that error, the outcome of the assessment of the claim under the rules would have been any different. That is not simply relevant to the outcome of the judge’s decision on the appeal under the immigration rules but, when he turned to consider the article 8 claim outside the rules he said:

“I have also given weight to the fact that the family does not meet the requirements of the Immigration Rules.”

which indicates that he had come to his proportionality balancing exercise with the scales weighted against the appellant in that respect when that may have been inappropriate.

8. That, in my judgement, is sufficient to establish that the decision of the judge cannot stand. The appellant is entitled to see that her claim under article 8 of the ECHR is assessed correctly, both within and, should it be necessary, outside the rules. This has not occurred and so the decision of the judge will be set aside and the appeal remitted to the First-tier Tribunal to be determined afresh. Ms Vidal pursued a second ground of challenge, concerning a failure by the judge to make a clear finding of fact as to when the appellant first arrived in the United Kingdom and so what is her overall period of residence. As the appeal is to be revisited, it is sufficient to say that it will be necessary for those matters to be subject to clear findings also.

Signed



Date: 8 February 2016

Upper Tribunal Judge Southern