



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04858/2014**

THE IMMIGRATION ACTS

**Heard at Field House
On 10th December 2015**

**Decision & Reasons
Promulgated
On 4th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

**MR EMMNEL SEUN AKINBO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Osifeso
For the Respondent: Ms Isherwood

DECISION AND REASONS

Introduction

1. The Appellant born on 19th May 1980 is a citizen of Nigeria. The Appellant was represented by Mr Osifeso the Respondent was represented by Ms Isherwood a Presenting Officer.

Substantive Issues under Appeal

2. On 16th January 2014 the Appellant sought entry clearance as the dependent partner of a Tier 2 points-based system migrant for a three year period. His application was refused on 28th February 2014 by the

Respondent because his Sponsor's entry clearance had been revoked on 31st January 2014 and accordingly as the Appellant's application had no basis that application was refused under paragraph 319C(b)(i) of the Immigration Rules. The Appellant appeals that decision and the appeal was heard by First-tier Tribunal Judge Clough sitting at Hatton Cross on 13th February 2015. The judge dismissed the appeal on all grounds. Application for permission to appeal was directed to the First-tier Tribunal and that application was initially refused on 16th July 2015 on the basis that there was no evidence the judge had taken account of post-hearing evidence not available to her or the parties at the time of the hearing as asserted. Application was renewed to the Upper Tribunal and granted on 7th September 2015 by Upper Tribunal Judge Grubb. He noted he had some difficulty in understanding the background to the appeal noting some confusion in the background of the Sponsor and further that the Entry Clearance Manager's decision may never have been served on the Appellant and noted there was only a limited right of appeal on Article 8 grounds and noted that the parties should serve evidence as to whether the ECM's decision was served on the Appellant or was or was not available at the hearing and on that basis permission was granted.

3. The matter comes before me in accordance with directions firstly to decide whether an error of law had been made by the First-tier Tribunal in this case.

Submissions on behalf of the Appellant

4. Mr Osifeso on behalf of the Appellant renewed the matters raised in the Grounds of Appeal namely that documents relied upon by the judge including the ECM review were not available at the hearing and the Sponsor did not know about the ECM's decision to revoke her entry clearance until the judge's decision was promulgated and neither did the Appellant. In summary it was submitted that the judge had made a decision based on documents that she received post the hearing or were not available to her or the parties at the date of the hearing and therefore there had been no opportunity for that evidence to be tested.

Submissions on behalf of the Respondent

5. Ms Isherwood accepted that there were no hearing notes from the Presenting Officer available and that having asked the relevant Presenting Officer he had no memory of the case and could not assist therefore in terms of documentation available. It was submitted however that a Home Office bundle had been available and there was an Entry Clearance Manager review within the court bundle and within the documents at the time of hearing.
6. At the conclusion of these submissions I reserved my decision on the error of law which I now provide with my decision.

Decision and Reasons

7. The Appellant in this case had sought entry clearance as a dependent partner on a Tier 2 points-based system migrant to the UK for three years. To that extent the outcome of his case was dependent upon the position of his partner.
8. The circumstances relating to his partner seem a little confused but appear to be as follows. On 21st November 2013 the Appellant's partner namely his wife Mrs Babatunde had been issued with a Tier 2 Minister of Religion visa. She had attempted to come to the UK on 25th January 2014 but had been denied boarding by Arik Airlines on the basis that the person holding the passport looked considerably younger than the 30 years of age which was recorded on the passport and indeed had taken the view that she looked about 15 years of age. She had then been interviewed by telephone by the Home Office based in Lagos and was asked to attend the UK Embassy in Lagos for an interview. It appears however that she did not attend that interview but the next day travelled to the UK using a different airline and on arrival in the UK was allowed to proceed because no alert had yet reached the UK border control. On 27th January her case had been referred to the UK for reconsideration of the original visa application with the authorities in the UK not aware that she had already travelled to and entered the UK. On 31st January 2014 an email was received in the UK from the officer in Lagos who had made telephone contact with the person holding the Sponsor's passport and the information would seem to suggest that the person that Lagos spoke to said that she had not applied for a UK visa was unaware of the request to attend an interview and did not have the middle name Rebecca which had been the middle name provided by the Sponsor. As a result of that information, seemingly still unaware that the Sponsor had entered the UK her visa was revoked and on that basis the application of the Appellant was refused.
9. It was said in the Entry Clearance Manager review letter of 4th November 2014 that three attempts had been made to contact the Sponsor in the UK to be interviewed but that there had been no successful communication with her. The Entry Clearance Manager acknowledged that the Sponsor had valid entry as her visa had been activated when she arrived in the UK but they were pursuing enforcement action against the Sponsor and in those circumstances found it was not appropriate to issue the Appellant with entry clearance as a Tier 2 partner.
10. The submissions raised on behalf of the Appellant were essentially that the Entry Clearance Manager's decision as it related to the Sponsor was not served on the Appellant nor was it available at the hearing before the First-tier Tribunal and accordingly no opportunity had been provided for the Appellant at that appeal hearing to deal with the matters that were raised either as they directly or indirectly affected himself or those matters raised in respect of the circumstances regarding his wife who was now in the UK on a valid visa.
11. It is specifically averred in the grounds for reconsideration of the application which was granted by the Upper Tribunal that the Immigration Judge relied upon matters or information that became available after the hearing namely the contents of the ECM letter.

12. It is clear from the decision promulgated on 24th April 2015 that the judge had the Entry Clearance Manager letter as at paragraphs 5 to 12 that letter was referred to extensively.
13. In response to questions that I raised it was confirmed by Ms Isherwood that she did not have any notes from the Presenting Officer who had been in attendance at the First-tier Tribunal hearing on 13th February 2015. While she had fairly and properly made enquiries of that Presenting Officer he could not recall the case.
14. I note that at the hearing the Appellant and the Respondent were both represented. The Appellant's representative was Mr Osifeso who appeared before me. I further note that at the hearing before the First-tier Tribunal Judge evidence was heard both from the Appellant's Sponsor and Reverend Stephen Oluwasola who stated that he was the employer of the Sponsor. I further note at paragraph 17 that Mr Osifeso had provided a skeleton argument to the judge in which it was submitted that the refusal decision was unfair as the Appellant's spouse had a legitimate expectation she would be served with the relevant decision revoking her leave to enter the UK and that the Respondent had failed to comply with the common law duty to act fairly in that decision making process. The judge at paragraph 18 had then specifically stated "the Appellant was notified in the Entry Clearance Manager's review decision dated 4th November 2014 of the reasons for upholding the refusal decisions."
15. I have also noted that in the Appellant's documents that were before the First-tier Tribunal Judge there was a witness statement from the Reverend Oluwasola who gave evidence. He provided evidence concerning an earlier decision relating to the Appellant's Sponsor. It is clear from the documents that she had made an earlier application in similar manner to come to the UK which had been refused on the basis of income or employment but that decision had been overruled by the Entry Clearance Manager. An entry clearance has been issued on 22nd November 2013. That appears to be agreed chronology. However he also provided evidence as to the circumstances surrounding the denial of the Sponsor being allowed on the plane on 25th January 2014 and the fact that she then boarded another flight the next day. He also made reference to what may have been one of the telephone calls between Lagos and the UK where enquiries were made as to whether the Sponsor was in the UK or not.
16. The handwritten Record of Proceedings made by the judge in the First-tier Tribunal are difficult to read but note that the Presenting Officer relied on the refusal letter and on the basis that revocation of the Sponsor's visa had been served. In submissions on behalf of the Appellant it is recorded that it was submitted the Sponsor had not had the opportunity to challenge the revocation.
17. It was said that the judge did not have a Home Office bundle before her at the hearing. Firstly there is no indication that the judge had no bundle from the Home Office. If that were the case and given the presence of a Home Office Presenting Officer at the hearing I would have expected some reference to that matter even if it was that the bundle was served at the

time of the hearing. Secondly, the judge clearly had before him the Entry Clearance Manager refusal letter as the judge quoted extensively from that letter and that letter forms part of the documents on the file before myself. Thirdly the witness statement of the Reverend Oluwasola appears to deal at least in part with matters that are referenced within that review letter. Finally the skeleton argument submitted on behalf of the Appellant was on the basis that the expectation was the Appellant's spouse would be served with the relevant decision revoking her leave to enter the UK and that had not been done. That skeleton argument therefore discloses the knowledge and presumably within the knowledge of the Appellant and his spouse that there were some difficulties concerning the spouses own entry.

18. It may well be that the difficulty in this case is a question of semantics and interpretation. I am satisfied on balance that the First-tier Tribunal Judge had before him the Entry Clearance Manager's review letter of 4th November 2014 which set out the chronology and concerns and action taken with regard to the Appellant's wife which formed the basis of the refusal of the Appellant's own entry clearance. I accept Mr Osifeso's submission both before myself and before the First-tier Tribunal Judge that it does not appear that he or the judge had a decision revoking the Appellant's leave to remain in the UK. The chronology would indicate that the Home Office had attempted to revoke her entry into the UK because of concerns as mentioned above. However their actions were too late because the Appellant had already arrived in the UK and essentially therefore had a valid entry clearance. That is accepted by the Entry Clearance Manager in their review letter of 4th November 2014. It is also clear that at the date of writing that review letter the Home Office had not finalised or made a decision in terms of action against the Sponsor because the final paragraph of that refusal letter states that they are pursuing enforcement against the Sponsor. There does not appear to be on file or before any of the parties any outcome or decision relating to action that may have been taken by the Home Office against the Sponsor postdating that letter of 4th November 2014. That is consistent with paragraph 17 of the judge's decision in which she noted that Mr Osifeso on behalf of the Appellant indicated that he had not seen any relevant decision revoking his wife's leave to enter or remain in the UK. The judge in the decision did not make reference to any final decision having been taken with regard to the Appellant's wife. That, is because I suspect, no such document was available either to the judge or either party and indeed even at this stage it is not known what if any enforcement action has been taken against the Appellant's Sponsor or whether the Home Office have concluded that her leave to remain should be curtailed and removal instigated or alternatively having made enquiries they are satisfied as to her position in the UK.
19. Whilst no criticism can be raised against the First-tier Tribunal Judge and whilst I am satisfied that the judge had available the Entry Clearance Manager review letter of 4th November 2014 in the interests of justice and procedural fairness it seems to me appropriate that the Tribunal and both parties have clear knowledge of the Sponsor's current position, what action if any has been taken by the Home Office in respect of the Sponsor

and what, if any final decision has been made by the Home Office in respect of the Sponsor. If it be the case that the Home Office have or are seeking to curtail her leave to remain and enforce removal then there clearly would be no basis for the Appellant's application for entry clearance as her partner. On the other hand if having investigated this matter more fully and with greater time the Home Office have concluded that initial suspicions have been allayed and have not sought to enforce or curtail her leave to remain in the UK then that would on the face of it remove the major concern raised against the Appellant's application for entry clearance as her partner. It seems to be necessary for a clear answer to be known to the Tribunal and both parties on the position of the Sponsor wife prior to an Appellate judgment upon the Appellant's application for entry clearance. That uncertainty, whilst no fault of the First-tier Tribunal Judge does raise a material error of law in that neither the Tribunal or either party is able to properly adjudicate upon the Appellant's position without clear knowledge of the status of his wife in the UK. It is for that reason alone I find the material error of law was made and direct that the matter be returned to the First-tier Tribunal as the proper forum for a fact-finding exercise upon all evidence and information available.

Notice of Decision

I find the reasons provided above that an error of law was made by the judge in this case and direct that the decision be remade in the First-tier Tribunal.

Directions

- (1) The parties in this case are to submit to the Tribunal bundles consisting of all the documentary and witness evidence they seek to rely upon. In particular the Respondent is directed to serve documentary and witness evidence concerning the status position and any action taken with regard to the Sponsor's wife.
- (2) The parties need not serve documents and witness evidence already provided but should in any event provide a properly paginated bundle for the Tribunal.
- (3) No interpreter will be booked for the forthcoming hearing unless there is a specific written request made not later than seven days after these directions are sent.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable

Signed

Date

Deputy Upper Tribunal Judge Lever