



**Upper Tribunal
(Immigration and Asylum Chamber)
VA/01181/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at City Centre Tower,
Birmingham
On 14th January 2016**

**Decision & Reasons
Promulgated
On 12th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR EDWIN KWAW PAHA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

ENTRY CLEARANCE OFFICER - UK VISA SECTION

Respondent

Representation:

For the Appellant: Mrs L K-Afful (Solicitor)
For the Respondent: Mr I Richards (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Pacey, promulgated on 28th October 2014, following a hearing at Birmingham Sheldon Court on 22nd October 2014. In the determination, the judge dismissed the appeal of Edwin Kwaw Paha, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Ghana, who is presently resident in Denmark, and was born on 5th April 1977. He appeals against the decision of the Entry Clearance Officer, dated 12th February 2014 who rejected his application to enter the UK as a family visitor.

The Appellant's Claim

3. The Appellant's claim is that he wished to visit his wife and child and his wife, Ms Josephine Appiah, is his Sponsor. He applied on 14th January 2014. He is living in Denmark as a student. The Respondent, however, had regard to paragraph 320(7A) and (7B) of the Immigration Rules, and noted that the Appellant had been refused entry clearance on 15th April 2009 because he had used deception in his application in that he had not declared the fact that he had been refused a visa in his previous application for entry clearance on 25th February 2011.

The Judge's Findings

4. The judge considered the evidence of the sponsoring wife, Ms Appiah, who stated in her witness statement that the allegation that the Appellant had exercised deception was a mistake because it arose from his 2009 application, where there had been an onerous answer. However, in relation to the current application, the Appellant had given the correct answer, which would not be the action of someone trying to deceive. The judge considered the copy of the Appellant's 2009 application and the refusal.
5. It had not been disputed before the Tribunal that it was correct that the Appellant had been refused twice before, and yet in his 20 page application, he clearly stated in answer to question 83, that he had never been refused a visa. The Respondent therefore discharged the burden of showing that the Appellant had not been truthful (as the judge had reminded herself at the outset of her determination at paragraph 3). When the Appellant's representative argued that the copy of the 2009 application had not been provided, the judge explained that since it was his own application, he was reasonably deemed to have been aware of why the current application was refused (see paragraph 14).
6. The judge proceeded to dismiss the appeal under paragraph 320(7A) and (7B). The judge went on to give the Appellant the benefit of the doubt in that the Appellant, as the judge explained, had been truthful in saying that he had not been refused entry clearance into the UK in the last ten years (see question 28).
7. The judge went on to consider both the Article 8 arguments in relation to family life, and the Section 55 power under the BCIA 2009. In relation to Article 8, the judge explained that the visit was only intended for two weeks and there was no indefinite separation envisaged because the Appellant was only temporarily as a student in Denmark and the parties

could reunite after that, especially as there was no Article 8 right to choose to live in the country of one's choice.

8. In relation to Section 55, the judge explained that, "In terms of section 55 the son's parents chose to live in separate countries knowing that they have a child and must reasonably therefore be taken to have considered the possible effect on him of his father studying in another country" (paragraph 25). The judge went on to say also that the planned visit was only for two weeks, but that given that there had been a separation between the child and the father since 2008, a short two week visit was not going to have any particular impact in terms of the Section 55 duty of the Secretary of State to the best interest of the child.

Grounds of Application

9. In his grounds of application, the Appellant states that the judge erred with respect to a finding on the Appellant's dishonesty given that the Court of Appeal guidance in **AA (Nigeria) [2010] EWCA Civ 773** was that dishonesty had to be expressly proven by the Secretary of State in terms of an intention to positively mislead. The Appellant's dishonesty had not been ever considered because the Appellant had chosen not to appeal the 2009 decision against him.
10. On 15th December 2014, permission to appeal was granted.
11. On 23rd December 2014, a Rule 24 response was entered. This made the following points. First, the Appellant did not appeal the 2009 refusal and nor did he subsequently give any evidence as to how it was an oversight for him to not have disclosed material matters. It was simply not credible that the Appellant could not recall that he had a previous application refused.
12. Second, the Appellant was subsequently refused for past deception in 2011. The Appellant again chose not to appeal that refusal.
13. Third, it was close to perverse for the Appellant to now seek to rely upon **AA (Nigeria)** and to assert that his dishonesty had not been established.
14. Fourth, it was a choice of the parties to live apart from each other. The Sponsor lived in England and the Appellant lived as a student in Denmark. It was therefore entirely open to the judge to conclude that the family life was not sufficiently strong to warrant further consideration outside the Rules. The judge did closely look at the factual history of the Appellant and his family. They had lived in different countries for the majority of their married life.
15. Fifth, there was no indication that the Appellant and his wife could not live together in Ghana if they so wished to. The judge had indicated that after his studies the Appellant could indeed have the option of so doing. Finally, as far as Section 55 of the BCIA was concerned, this was expressly addressed by the judge with regard to the relevant facts.

The Hearing

16. At the hearing before me, Mrs K-Afful went through the Grounds of Appeal. She made the following submissions. First, the issue before the judge was whether the Appellant had used deception in his 2009 application and whether that deception was used dishonestly. The case of **AA (Nigeria) [2010] EWCA Civ 773** was clear that dishonesty had been expressly proved by the Respondent Secretary of State. Second, the judge erred by making a material factual error. Reliance was placed upon **Nixon [2014] UKUT 00368**. The judge assumed that the parties had chosen to live separately as a matter of choice. She was wrong in this because the judge failed to appreciate that the applicant had been banned from the UK since 2009 for ten years on grounds of having exercised deception and all his subsequent applications were refused on that basis. This was not separation by choice. It was an enforced separation. It was accordingly, a material factual error. Third, the judge misdirected herself in relation to Article 8 because she ought to have considered Article 8 ECHR outside the Rules given that the Immigration Rules are not a complete code and the proportionality test will be at large in a case such as the present. Fourth, the judge's reasoning in relation to the best interest of the child was contrary to established principles on child law. The cases of **LD (Zimbabwe) [2010] UKUT 278** and **Azimi-Moayed [2013] UKUT 197** was clear in this respect.
17. For his part, Mr Richards relied upon the Rule 24 response. He submitted that there was no material error. He said that the materiality of any error by the judge was simply not strong enough. If anything, the judge had gone on to dismiss the appeal both under the Immigration Rules and under human rights grounds, when, given the nature of the decision and the refusal, all that was needed was a consideration under the Immigration Rules. Nevertheless, the fact remained that in 2009 and 2011 the Appellant was refused and never chose to appeal. There was no evidence which could have persuaded the judge that this was an Appellant who had been honest. First, the judge was not satisfied that the applicant was only coming to this country for a short period. Second, she was not satisfied that her decision to refuse was relevant to Article 8 proportionality outside the Immigration Rules, given that the Appellant's interest was simply to visit for two weeks, in circumstances where he had been barred from entering the UK, and had lived separately from his wife for the majority of their married life. Finally, as far as Section 55 of the BCIA was concerned the judge expressly considered this at paragraph 25 and did so in relation to the facts that she had already found.
18. In reply, Mrs K-Afful submitted that the judge should have considered Article 8 jurisprudence outside the Immigration Rules even if she had already decided to refuse the application under the Immigration Rules.

No Error of Law

19. I am satisfied that the making of the decision by the judge does not involve the making of an error on a point of law (see Section 12(1) of TCEA

2007) such that I should set aside the decision the remake the decision. My reasons are as follows.

20. This is a case where the Appellant had been refused in 2009 and 2011. It was known to the Appellant why he had been refused. At the hearing before Judge Pacey it had been argued that a copy of the 2009 application and the refusal was not provided to the Appellant's representative. The judge dismissed this contention on the basis that it was the Appellant's own application and he would have known what he had put in it. Given the two previous refusals, which were in relation to the Appellant having exercised deception in the past, the judge concluded that, "The Respondent has therefore discharged the burden of proof" (paragraph 13). The judge was entitled to come to this conclusion on the basis of the evidence that was before her, which she had clearly highlighted fully. I agree with the Respondent's Rule 24 response that, "It is close to perverse for the Appellant to now seek to rely on **AA** and assert that his dishonesty is not established" (see paragraph 4).
21. Second, as far as Article 8 was concerned the parties were living separately from each other, and had done so for the majority of their life, and the Appellant's Article 8 right was simply in relation to a visit visa application for two weeks, which the Respondent had rejected because the Respondent did not believe this to be a genuine visit, and unless there was anything further, which needed consideration, which could not be properly considered through the application of the Immigration Rules, the judge was under no obligation to consider freestanding Article 8 jurisprudence, because the result would have been the same. It is not as if Article 8 has not been considered at all.
22. Third, in relation to the Section 55 jurisdiction for the welfare and best interest of the child, the judge plainly makes an express reference to this and considers this in the context of the facts as already found. In short, the determination of the judge is clear and comprehensive and there is simply no basis for the challenge to this decision, notwithstanding Mrs K-Afful's valiant efforts to persuade me otherwise.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

10th February 2016

