



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/16543/2017
HU/16545/2017

THE IMMIGRATION ACTS

Heard at Field House
On 20 March 2019

Decision & Reasons Promulgated
On 15 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS M O Y – 1st Appellant
AM – 2nd Appellant
(Anonymity order not made)

Appellants

and

ENTRY CLEARANCE OFFICER – (UKVS SHEFFIELD)

Respondent

Representation:

For the Appellants: Mr G Maurantonis of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are both citizens of Nigeria. The first Appellant who I shall refer to as the Appellant is the mother of the 2nd Appellant AM. The Appellant was born on 20

March 1972 and AM was born on 17 October 2012. They both appeal against a decision of Judge of the First-tier Tribunal Rhys-Davies sitting at Hatton Cross on 14 November 2017 in which he dismissed their appeals against decisions of the Respondent dated 2 November 2017. Those decisions were to refuse the Appellants applications for entry clearance under Appendix FM of the Immigration Rules and outside those rules under Article 8, (right to respect for private and family life). The Appellant wished to join her husband Mr [HO] ("the sponsor"), a British citizen present and settled in the United Kingdom. AM wished to travel with her mother as her dependent. At first instance it was agreed that AM's appeal would stand or fall in line with the Appellant's appeal.

The Appellants' Case

2. The Appellant's case was set out by the Judge at [14] to [32] of the determination. In summary, the Appellant had travelled to the United Kingdom in 2011 where she had a relationship with a man that lasted until her return to Nigeria on 2 April 2012. She became pregnant by this relationship and her marriage to her husband broke down. She returned to the United Kingdom in September 2012 and AM was born here in October of that year. In 2013 the Appellant met the sponsor and they began a relationship. The Appellant overstayed her visit visa by a few days and was advised to return voluntarily to Nigeria. She had lost her passport so needed to obtain a travel document and she used the same surname as AM. The Appellant left the United Kingdom on 14 April 2013 after being questioned by immigration officers about the identity on her travel document.
3. She changed her name from her married name to the surname [Y]. She kept in contact with the sponsor who travelled to Nigeria in April 2015 and the parties married. She then applied for entry clearance as the sponsor's spouse in April 2016 which was refused in June 2016 because there were outstanding NHS charges incurred when the Appellant gave birth to AM. The Appellant and the sponsor remained in daily contact since then and there was a further visit to Nigeria by the sponsor in May 2018. The sponsor paid the outstanding NHS charges. The Appellant supported herself from her own business after returning to Nigeria. She currently lives in Lagos in a home owned by her family where they have a maid. The Appellant's parents had not come to her wedding due to insufficient time.

The Decision at First Instance

4. The Judge began his findings and conclusions at [50]. He rejected the Respondent's argument that the Appellant's passport submitted in 2016 was not genuine. This meant that paragraph 320 (3) of the Immigration Rules (which imposes a mandatory refusal where a document establishing identity has not been produced) was not substantiated. He held that for the Respondent to succeed under paragraph 320 (11), which is a discretionary refusal, with a four-stage process, the Respondent had to show both that the Appellant had overstayed and had contrived in a significant way to frustrate the intentions of the Immigration Rules.

5. The Judge attached weight to the fact that the Appellant had not overstayed, as she had claimed, by a matter of days but rather of months. She arrived in September 2012 but did not leave until April 2013 when she should have left in February of that year. This was two months or 33% longer than her visit visa permitted. The explanation given by the Appellant for not abiding by the requirements of her visit visa lacked material detail. The sponsor could add nothing useful to that. The Appellant was in an emotional state after the birth of AM but that did not explain the failure to leave the United Kingdom. The Respondent had thus proved the 2nd stage.
6. The 3rd stage was to determine whether there were aggravating circumstances. Although the Judge did not consider that the Appellant's recourse to NHS treatment would amount to an aggravating feature, he did consider that the Appellant's use of a false name on the emergency travel document she was using when leaving the country would amount to such. It was inherently unlikely that the Nigerian High Commission staff would have suggested the use of a false identity. The use of a false name for innocent purposes was unnecessarily complicated and made no sense. AM's birth certificate would bear the Appellant's name as AM's mother. There would be no need for the Appellant to worry about having a travel document in her own name with a different family name to that of AM. The Appellant's travel document also bore a different date of birth but the Appellant's explanation that this was an error was rejected by the Judge.
7. The Respondent had properly applied the exercise of discretion under paragraph 320(11) and the Judge directed himself that it was not open to him to review that exercise of discretion, relying on the case of Ukus [2012] UKUT 307. The burden of proof was on the Appellant to show that the relationship between her and the sponsor was genuine and was subsisting. For the reasons given by the Judge at [73] to [79] he did not find that to be the case. The time the couple had spent in each other's company had been very short and it was reasonable to expect to see some documentary evidence of contact throughout the period they had been apart. There was no explanation why they had spent so little time together since the Appellant had left the United Kingdom. The explanation as to why the Appellant's parents had not attended the wedding, given by the sponsor, lacked credibility.
8. The Judge found that the Appellant could not succeed under Article 8 outside the rules because the relationship was not genuine and subsisting. However even if it was any interference with family life was proportionate because it could continue as it was at present. There was no evidence about the sponsor's relationship with his own children in the United Kingdom in so far as those relationships needed to be considered if deciding whether the sponsor might go to Nigeria to be with the Appellant. The sponsor could travel to Nigeria, it was not a country of which he had no knowledge at all. He might want or need to find employment, but he would not be handicapped on the job market. The appeal was dismissed.

The Onward Appeal

9. The Appellant appealed against this decision in grounds settled by counsel who had appeared at first instance. The first ground took objection to the finding that the Appellant had contrived to significantly frustrate the Immigration Rules. That finding was said to be based on errors of fact and law. The Appellant had only overstayed by one month not two. She should have left the United Kingdom by 14 March 2013 not, as the Judge found, by 14 February. This was material because the Judge had attached significant weight to the period of overstaying. A period of up to 28 days should be overlooked when calculating lawful residence. Since the overstaying was less serious than the Judge believed it to be, it followed that the true facts might demonstrate that she had not contrived in a significant way to frustrate the intention of the Rules.
10. The Appellant was not in the United Kingdom illegally when she met the sponsor. According to the jurisprudence, some pragmatism in interpreting paragraph 320(11) was desirable because if the aggravating circumstances were not truly aggravating there was a serious risk that those in the position of someone like the Appellant would continue to remain in the United Kingdom unlawfully.
11. Ground 2 complained that there were no explicit credibility findings against the sponsor and there was a flawed assessment of the relationship which was genuine and subsisting. If the Judge were to reject the sponsor's account of the relationship, he would have had to have made adverse credibility finding. The Judge had required corroboration of the Appellant's evidence and had found the Appellant's evidence not credible, but he had not said that he found the sponsor lacking in credibility or that the sponsor's evidence should be approached with caution as he had with the Appellant's evidence. The Judge could not find this relationship to be not genuine and subsisting without grappling with the central contradiction which was that the sponsor had attended court to attest to the fact that he was in a genuine relationship with the Appellant.
12. The Appellant lived in the sponsor's house in Nigeria not, as the Judge had said, in the Appellant's house and he was paying money to the Appellant. The Appellant's motive did not account for the sponsor's motive nor did it undermine it. Just because an immigration benefit might result for one party did not mean the marriage was a sham.
13. Ground 3 argued that the authority of Ukus relied upon by the Judge did not mandate the outcome that the Judge was unable to review the legitimate exercise of the Respondent's discretion under paragraph 320 (11). The case predated the 2014 changes to the 2002 Act and the Appellant could no longer appeal on the basis that the Respondent should have exercised his discretion differently. Nevertheless, there was a right of appeal arising against the entry clearance refusal and it was always open to a Judge in a human rights appeal to find that the Respondent's exercise of discretion breached Article 8. Since the Appellant could otherwise succeed under

the rules that amounted to a strong reason to allow an Article 8 appeal. Where an application failed due to the exercise of discretion under 320 (11) it would be open to a Judge to remake the decision in the Appellant's favour. At the very least it was a factor to which considerable weight should be attached in the proportionality assessment.

14. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Hollingworth on 29 January 2019. In granting permission to appeal he found it arguable that the Judge had misinterpreted the chronology in calculating the length of overstay which was arguably one month not two months. The degree of aggravation ascribed by the Judge may have been affected. Arguably the Judge had not set out a sufficient analysis to conclude that the sponsor's credibility was undermined. This had affected the Judge's conclusion on the nature of the relationship between the Appellant and the sponsor. The Judge had not referred to the matters put forward to explain why the Appellant had not left the United Kingdom in accordance with her visit visa. That arguably affected the reopening of the exercise of discretion.
15. The Judge had found that the sponsor's answers about why the Appellant's parents had not attended the wedding lacked credibility. It was arguable that this was an insufficient analysis of how the sponsor came to know why they had not attended given that sponsor may or may not have been told by the Appellant or by some other source. Arguably the Judge's conclusions about the credibility of the sponsor were not based on the sponsor's evidence and were insufficiently analysed. The finding that the relationship was not a genuine and subsisting marriage may have been affected as had the Article 8 exercise.

The Hearing Before Me

16. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not, the decision at first instance would stand.
17. For the Appellant counsel relied on the three grounds of appeal. The first ground was that it was erroneous for the Judge to rely on overstaying. The Appellant had a two-year visit visa under which she was only entitled to stay for a maximum of 6 months at a time. What had happened in this case was she had overstayed the 6 months visa requirement by 30 days. Since 28 days was to be disregarded that meant only 2 days was an overstay. This miscalculation of the Judge had infected everything else and was a material error of law.
18. The key question under paragraph 320 (11) was whether the Appellant had contrived significantly to frustrate the Immigration Rules. The Appellant had explained in her witness statement why she had overstayed, she had good reasons to do so. It was

wrong for the Judge to say that the Appellant had met the sponsor when she was here illegally. That was due to the Judge's miscalculation. In the Upper Tribunal decision of **PS India [2010] UKUT** it was made clear that the purpose of paragraph 320 (11) was to give an incentive to individuals to return voluntarily to make an application for entry clearance from their country of origin rather than persist in remaining in the United Kingdom without leave.

19. The Appellant had left the United Kingdom voluntarily. She had not appealed the previous refusal because she had decided to apply again. The question was whether there were aggravating circumstances. The Respondent claimed that the Appellant refused to sign documents in relation to payment for treatment but there was no evidence of that before the Judge. The Judge was wrong in law to say that the Appellant's use of the NHS facilities, by giving birth, was an aggravating factor when the entire amount due to the NHS was paid by the sponsor before the current application was made.
20. The other aggravating factor was said to be the Appellant's change of surname on the passport she used to leave the United Kingdom and return to Nigeria. The Appellant had been advised by the Nigerian High Commission to change her surname to that of her child as that would make it easier for her to take the child back to Nigeria. It was apparent from the Respondent's own CPIN that Nigeria was a country where fake documents were normally and socially acceptable, but that argument had cut both ways. The High Commission would think there was nothing fraudulent about advising the Appellant to change her name. She had no financial advantage in leaving the United Kingdom under that identity.
21. In relation to ground 2 there was no full attack on the sponsor's credibility when he was the only one who could give live evidence at the hearing. I queried whether it might be a situation where the sponsor thought he was in a genuine and subsisting relationship with the Appellant, but the Appellant did not think that. Counsel accepted that it was for the Appellant to show that she was in a genuine and subsisting relationship. There were a number of errors, for example the Judge thought the Appellant lived in her own property, but she did not, she lived in the sponsor's property in Nigeria. The sponsor had paid her NHS debt. Relying on the case of **Goudey [2012] UKUT 00041**, counsel submitted that whilst there might be some gaps in the communications between the parties there were 103 pages of evidence of communications and he asked rhetorically what more might be needed. The sponsor had sought further evidence from the telephone companies, but they could not provide that.
22. As to ground 3, this was an appeal against a decision under section 84 of the 2002 Act and matters at the date of the hearing were to be taken into account. Although the issue of discretion was a matter for the Respondent alone as this was an Article 8 case the application of the discretion should have been factored into the proportionality exercise. There was nothing at all in the determination about the

duty under section 55 of the 2009 Act to consider the best interests of the 2nd Appellant who was a child.

23. In reply, the Respondent argued there was no material error of law. This was an entry clearance application. As the Judge had found that it was not a genuine and subsisting relationship, Article 8 could not be engaged. There was no authority produced for the argument that the first 28 days of an overstay would be disregarded. Irrespective of whether the overstay was one or 2 months, the Appellant was an overstayer. Ground 1 was merely an argument about the weight placed on the evidence. The Judge was entitled to make the findings that he did and there were matters that the sponsor could not assist with. There was no merit in either the 2nd or the 3rd grounds in the light of the Judge's findings.
24. I queried with the advocates the statement in the grounds of onward appeal that the Judge had not made any explicit adverse credibility findings against the sponsor, see paragraph 11 above. At [75] of the determination the Judge had said in terms "I further find that the sponsor's answers about why the first Appellant's parents did not attend the wedding lack credibility". Counsel stated that what was highlighted at [75] was a lack of credibility about the evidence about the wedding but accepted that this might not be his strongest point. He argued that at [75] the Judge had speculated about what the sponsor did not say rather than what he had said. There was a domino effect resulting in dismissal of the appeal, once the Judge had made a finding that this was not a genuine relationship.

Findings

25. This is a reasons-based challenge to the determination. The structure of the Judge's determination is that there is a four-stage process under the Rules. (i) Did the Appellant contrive to frustrate the Rules? (ii) Did she overstay? (iii) Were there aggravating circumstances? (iv) Did the Respondent exercise his discretion correctly or at all?
26. The Appellant argues that the Judge, having incorrectly calculated the period of the Appellant's overstay, has disregarded the fact that a period of overstay is permitted under the Rules. The Appellant was in possession of a two-year visitor's visa but this only permitted her to stay in the United Kingdom for periods of up to six months after which she was required to return to Nigeria before being able to return and enjoy another period of up to six months. In this case the Judge found that the Appellant came back to the United Kingdom on 14 September 2012 and the 2nd Appellant was born just over one month later on 17 October 2012. The Appellant was encountered by immigration officers attempting to leave the United Kingdom on 14 April 2013 that is just over seven months later. There is therefore an error at [56] of the determination where the Judge states that the Appellant overstayed by two months or 33% longer than her visit visa permitted. In fact, the overstay was half of that.

27. However, the reference to a disregard of a period of overstaying of up to 28 days relates to paragraph 320(7B) of the Immigration Rules. This is a mandatory provision and entry clearance must be refused where the applicant has previously breached immigration laws by overstaying. For the purposes of calculating the period of overstaying under that paragraph, overstaying of up to 28 days will be disregarded. There is no similar provision for paragraph 320 (11). This is not surprising since subparagraph (7B) relates to a mandatory condition and therefore a period of 28 days grace is built into the Rules. Paragraph 320 (11) by contrast is a discretionary provision which means that for example the length of time spent overstaying could be a factor to be taken into account by the Respondent when exercising his discretion. Thus, although the Judge's calculation was incorrect the principle which he applied was not. There was no 28-day period applicable to this sub-paragraph.
28. The overstay of over one month was a substantial one and not one that could be overlooked by an application of the *de minimis* principle. The idea of encouraging voluntary returns, suggested in **PS India** did not therefore apply. Would the Judge have still considered that an overstay of one month was a significant breach such that it demonstrated that the Appellant had contrived in a significant way to frustrate the intentions of the Immigration Rules? It is not necessary to speculate on this point, as the answer can be found at [58] where the Judge carefully considered the Appellant's explanations for the overstaying and found none of them to be adequate. It is clear therefore that the Judge considered that the overstaying meant that the 2nd stage, contriving to frustrate the rules, was met.
29. The grant of permission to appeal is incorrect when it states that arguably the Judge did not adequately consider the Appellant's explanation for the overstay. The Appellant knew the terms of her visa, she did not say when she had lost her passport and she did not say when the father of the 2nd Appellant cut off all contact with her. It was open to the Judge to say that what was in effect a lack of explanations, failed adequately to deal with why the Appellant did not leave the United Kingdom in accordance with her visit visa.
30. The 3rd stage concerned whether the Respondent had proved the existence of aggravating circumstances. The Judge found two aggravating features. The first was the receipt of NHS treatment which the Appellant was not entitled to and the second concerned the use of a false name on the Appellant's emergency travel document which she was using to exit the United Kingdom. It is worth bearing in mind that the Appellant's pregnancy was considerably advanced when she arrived in the United Kingdom on 14 September 2012. She was at that stage, eight months pregnant. The Judge does not speculate on whether the Appellant had any medical clearance indicating she was fit to fly but it is difficult to see how the Appellant could have been unaware that she was highly likely to need the services of the National Health Service very shortly after her arrival in the United Kingdom.
31. The Judge recorded the submission that the Appellant had not travelled to the United Kingdom to give birth to the 2nd Appellant and the Appellant's denial that

she had refused to sign forms whilst in hospital but in any event that was not the basis on which the Judge had found the recourse to NHS treatment to be an aggravating feature. It was that the Appellant had recourse to NHS's treatment while she was not so entitled. That the amount of the NHS charges was subsequently paid was noted by the Judge but evidently not found to be a sufficient explanation. It is not just a question of the financial cost, important as that is. It is also that someone who is not entitled to NHS treatment but nevertheless receives it, is using resources at that time which potentially prevents another person who is entitled to use the NHS from doing so.

32. The 2nd aggravating circumstance related to the use of a false identity. At [62] the Judge noted that the use of multiple identities could be an aggravating circumstance although I accept that the sentence "it is not argued that the use of multiple identities can also be an aggravating circumstance" is somewhat infelicitous. The Appellant's ground of appeal in relation to this point is to argue that fake documents are socially acceptable in Nigeria and the Nigerian High Commission in London would not have considered there was anything unusual about the Appellant using a fake document. An allegation of this sort would need to be substantiated by evidence, for example that corruption was commonplace in the Nigerian High Commission in this country. No such evidence was placed before the Judge and no such evidence was placed before me. The Judge was entitled to conclude as he did at [64] that the claim that the High Commission staff would suggest the use of a false identity was inherently unlikely.
33. The 4th stage related to the exercise of discretion by the Respondent. The Judge relied on a pre-2014 Act case but the argument essentially turns on whether the Judge should have factored into his Article 8 proportionality exercise that the Respondent could or should have exercised discretion in the Appellant's favour. It is difficult to see what merit this submission has in the light of the Judge's other conclusions. The Judge found that there was not a genuine and subsisting marriage between the Appellant and the sponsor and there was no reason why the Respondent should have exercised discretion in the Appellant's favour. At [71] the Judge stated in terms that the Respondent had properly applied paragraph 320 (11) and the consequent discretion. Given that the Judge did not accept that the marriage between the Appellant and the sponsor was genuine, it was difficult to see where the proportionality exercise would arise in this case. There was no interference with family life because there was no family life.
34. The Judge had the evidence of the sponsor but for cogent reasons did not accept that evidence indicated the genuineness of the marriage. The grounds are misconceived when they say that the Judge made no adverse credibility findings against the sponsor and I can only conclude that the drafter of the grounds, who appeared at first instance before the Judge but not before me, had not carefully read [75] of the determination, see for example paragraph 7 above. The Judge was concerned about the lack of involvement in the wedding by either the sponsor's family or the Appellant's which had not been satisfactorily explained and which cast further doubt

on the claimed genuineness of the relationship. That was a matter for the Judge, he had the benefit of hearing the sponsor give evidence and was thus best placed to form a judgement of the credibility or otherwise of the sponsor and the claim that the marriage was genuine.

35. The Judge did not require the production of particular evidence of mutual devotion before being able to find this was a genuine marriage (a requirement which **Goudey** mandates against). It was not just the absence of communications but also the absence of a credible reason why they had spent such little time together. Again, time spent together would not of itself be a requirement, but a genuine relationship would be expected to have a reasonable explanation for absence, but there was none here. The Judge also considered the matter on an “even if” basis. Even if the relationship was genuine the Respondent’s decision merely confirmed the status quo, it did not impose a new interference.
36. The grounds of onward appeal are premised on the basis that the Appellant could succeed under the rules but that was clearly not the case. The Judge had demonstrated that the Appellant’s application for entry clearance fell to be refused under the discretionary provisions of paragraph 320 (11). Since both the Appellant and 2nd Appellant were outside the United Kingdom it is difficult to see how section 55 of the 2009 Act would be relevant and the grounds do not suggest that it was. The duty under section 55 appears to have been raised for the first time in submissions to me, it was not raised at first instance. It was not a Robinson obvious point and there was no material error of law in the Judge in not dealing with it. The Judge considered whether the appeal should be allowed outside the Rules but for the cogent reasons he gave he found it could not be allowed. Overall the grounds of onward appeal and the submissions made to me are no more than a disagreement with the result, they do not indicate any material error of law on the Judge’s part. I dismiss the Appellant’s onward appeal against the Respondent’s decision.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant’s appeal

Appellant’s appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 8 April 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 8 April 2019

.....
Judge Woodcraft
Deputy Upper Tribunal Judge