



IAC-AH-SAR-V1

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

Appeal Number: IA/29880/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4th September 2015**

**Decision & Reasons Promulgated
On 18th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**EBERECHUKWU ONYINYE OGWUEGBU
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No legal representation

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant is a female Nigerian citizen born 4th May 1979 who appeals against the decision of Judge of the First-tier Tribunal Kaler promulgated on 27th March 2015.
2. The Appellant entered the United Kingdom on 8th October 2009 with leave as a Tier 4 (General) Student valid until 12th February 2012. She was subsequently granted leave as the dependant of a points-based system migrant on 23rd January 2012, this leave was renewed on 25th February

2013 until 31st May 2014. This leave was granted on the basis that the Appellant's partner, Innocent Nwalozie Amadi, was a points-based system migrant.

3. On 6th May 2014 the Appellant applied for further leave to remain submitting form FLR(FP). She indicated in her application that she had entered the United Kingdom as a student in 2009 and that she currently had employment. She confirmed at section 7.8 that her relationship with her partner began in January 2011, and that he was currently awaiting a decision on his application for indefinite leave to remain in the United Kingdom. The Appellant indicated that she was pregnant, and that she and her partner had no plans to live outside the United Kingdom.
4. The application was refused by letter dated 17th July 2014 and the Respondent issued a Notice of Immigration Decision of the same date refusing to vary leave to remain, and deciding to remove the Appellant from the United Kingdom.
5. The Appellant appealed and requested that her appeal be decided on the papers.
6. Judge Kaler (the judge) considered the appeal on the papers as requested and dismissed the appeal on human rights grounds and under the Immigration Rules.
7. The Appellant then applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred in law in making reference to the Appellant having previously been married, but that her marriage was no longer subsisting, and that she was now in another relationship. The Appellant explained that she had never been previously married, and contended that Mr Amadi had been her only partner from 2009 and that she had been granted leave to remain as his partner from 23rd January 2012. She pointed out that she and her partner are traditionally married.
8. The Appellant also contended that the judge had not properly taken into account that her partner had an application pending as his appeal had been allowed to the extent that his application remained outstanding before the Secretary of State for a lawful decision to be made. The Appellant also pointed out that she and her partner have a son born on 9th January 2015.
9. Permission to appeal was granted by Judge of the First-tier Tribunal White who found that the judge had arguably made a significant error of fact in stating that the Appellant had been previously married.
10. Also there had been some confusion in the Respondent's recital of the Appellant's immigration history which may have tainted the judge's findings, and it was arguable that the judge should have given more adequate consideration to the best interests of the Appellant's child.

11. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary that the judge had directed herself appropriately. It was submitted that any factual error was not material and there was in fact no evidence before the judge that the Appellant had given birth.
12. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

13. The Appellant attended the hearing and indicated that she was content to proceed without legal representation.
14. Mr Melvin provided the Appellant with the rule 24 response. The Appellant was given an opportunity to consider this.
15. I explained to the Appellant the procedure that would be adopted throughout the hearing, and that the purpose of the hearing was to decide whether the First-tier Tribunal had made a mistake of law.
16. A copy of the Appellant's letter to the Tribunal dated 14th July 2015, together with a letter from the Home Office dated 7th July 2015 which informed the Appellant's partner that he been granted leave to remain, was supplied to Mr Melvin.
17. I then heard from the Appellant as to why she believed the First-tier Tribunal had erred in law. She relied upon the grounds contained within the application for permission to appeal, and the grant of permission.
18. The Appellant pointed out that the judge had made a mistake in recording that she had been previously married. She also pointed out that her partner had now been granted leave to remain. I explained that this evidence was not relevant to the error of law issue, as her partner had not been granted leave to remain when the judge made her decision.
19. The Appellant confirmed that she came to the United Kingdom as a student on 8th October 2009 and that she had a student visa until February 2012. In January 2012 she was granted a visa as a dependant of her partner, which was further extended in February 2013 until May 2014.
20. The Appellant also advised that she and her partner had a customary marriage which took place in Nigeria on 1st November 2014. Members of their family were present but they were not as they remained in the United Kingdom. The Appellant also confirmed that she and her partner have a son who was born on 9th January 2015.
21. The Appellant stated that the judge should have taken into account that her partner's application for leave to remain was still outstanding.

22. I asked the Appellant what evidence was before the judge to confirm that she had a child, and the Appellant acknowledged that the only medical evidence was a letter from her GP which was attached to the Notice of Appeal, and which stated that she was pregnant and expecting a baby on 4th January 2015.
23. I then heard submissions from Mr Melvin who relied upon the rule 24 response and his written submissions. Mr Melvin pointed out that it was accepted that the Appellant could not meet the requirements of the Immigration Rules and contended that although the judge had made a mistake of fact in recording that the Appellant had been previously married, this was not material to the application.
24. Mr Melvin pointed out that the judge had taken into account that neither the Appellant nor her partner had ever had anything other than limited leave to remain in the United Kingdom and I was asked to find that the decision of the First-tier Tribunal was sustainable and disclosed no error of law.
25. By way of response the Appellant reiterated that she had been her partner's dependant since January 2012, and he was currently in Nigeria and had not yet been able to return as he had contracted malaria and was receiving treatment. The Appellant stated that she was a support worker, and that she did voluntary work for the church and that she and her partner had never received benefits in the United Kingdom and they had paid tax and national insurance.
26. At the conclusion of submissions I indicated that I would reserve my decision.

My Conclusions and Reasons

27. I find that the judge erred in paragraphs 4 and 6 of her decision by describing the Appellant as having previously been married. This was factually incorrect. I believe the error was caused by a misreading of section 7.17 of the application form. The Appellant in that section indicated that her partner had previously been married but that his marriage was no longer subsisting. She indicated that she had not previously been married.
28. I find that the judge also erred in paragraph 6 in recording that the Appellant had not stated how long she had been in her present relationship. The Appellant had in fact indicated this at 7.8 of her application form, indicating that her relationship with her partner began in January 2011. The judge found that the relationship could not have been in existence any longer than four years, whereas according to the Appellant, the relationship had been in force just over four years at the date that the judge considered the appeal.

29. The judge correctly recorded that the Appellant's immigration history was that she entered the UK on 8th October 2009 as a Tier 4 Student, with leave until February 2012, and then recorded that she was granted leave as a dependent spouse on 23rd January 2012 until 31st May 2014. That is not absolutely correct, as the leave granted on 23rd January 2012 was as the partner of a points-based system migrant although the dates are correct.
30. I have to decide whether these mistakes amount to an error of law which is material. In my view they do not for the following reasons.
31. It is not disputed that the requirements of E-LTRP.1.2 could not be satisfied and therefore the application for leave to remain could not succeed with reference to Appendix FM of the Immigration Rules in relation to family life.
32. It was not suggested that the appeal should succeed with reference to paragraph 276ADE(1) in relation to private life. The Appellant had not been in the UK for twenty years, and had not suggested that there would be very significant obstacles to her integration back into Nigeria. The burden of proof and the burden of providing evidence in a case such as this rests on the Appellant.
33. Therefore, the judge did not err in finding that the appeal could not succeed with reference to Appendix FM or paragraph 276ADE(1).
34. The judge went on to consider Article 8 outside the rules taking into account the guidance given in Razgar [2004] UKHL 27. The judge recognised, and accepted that the Appellant had established family life with her partner, describing it of short duration. I do not find this to be a material error. The relationship had been in force for just over four years. There was no evidence before the judge that the parties were married, and in fact they do not have a marriage that is recognised in the UK. The Appellant stated that a customary marriage was undertaken in Nigeria in November 2014 but there was no evidence of that before the judge.
35. The judge granting permission to appeal found it arguable that Judge Kaler should have given more adequate consideration to the best interests of the child. One must consider what evidence was before the judge in relation to the child. There was in fact no evidence that the child had been born. The Appellant has confirmed that the only information in relation to the child was a letter from Dr Ahmed submitted with the Notice of Appeal which indicated that the Appellant was pregnant and due to give birth in January 2015.
36. The Appellant requested that her appeal be decided on the papers. That was her choice, and it is therefore her responsibility to ensure that any evidence to support her appeal is submitted to the Tribunal. In my view, the Appellant did not submit adequate or comprehensive evidence. In view of the scarcity of information before the judge in relation to the child,

I find no error of law in the judge recording simply, that the best interests of an infant child lie in being with his parents.

37. The judge was aware, and recorded that the Appellant's partner had applied to remain in the United Kingdom on the basis of long residence and his application had been refused. The judge also recorded that the partner had appealed that decision and that his appeal had been allowed to a limited extent. In my view, the judge was therefore aware that the decision remained outstanding before the Respondent.
38. In considering Article 8 outside the rules, the judge correctly took into account the considerations contained in section 117B of the Nationality, Immigration and Asylum Act 2002. Having found that family life existed, the judge went on to consider proportionality.
39. The judge did not err in paragraph 12 in attaching significant weight to the wish of the Secretary of State to maintain immigration control. Section 117B(1) of the 2002 Act confirms that the maintenance of effective immigration controls is in the public interest.
40. The judge took into account that the Appellant is highly qualified, and that she and her partner are both Nigerian citizens.
41. The judge was entitled to conclude, that the Appellant had not demonstrated any adequate reason, why her appeal should be allowed outside the Immigration Rules. The starting point of the judge was clearly to place weight upon the fact that the Immigration Rules could not be satisfied.
42. The judge went on to consider whether there were any factors which would justify allowing the appeal outside the Immigration Rules and found none.
43. It is clear that the Appellant's partner has now been granted two years' leave to remain, but this grant took place in July 2015, and therefore is not relevant to my consideration as to whether the judge erred in law in considering the appeal in March 2015 as at that time the partner had not been granted leave to remain.
44. In my view, the factual mistakes by the judge are not material, and the judge did not materially err in law in dismissing this appeal under the Immigration Rules or on human rights grounds. It is of course open to the Appellant to make a further application to the Secretary of State now that her partner has been granted further leave to remain.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside. I do not set aside the decision and the appeal is dismissed.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity, and the Upper Tribunal makes no anonymity order.

Signed

Date 10th September 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The decision of the First-tier Tribunal stands and therefore so does the decision not to make a fee award.

Signed

Date 10th September 2015

Deputy Upper Tribunal Judge M A Hall