



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL

APPEAL NUMBER: HU/09362/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 29 October 2018

Decision and Reasons Promulgated
On: 14 November 2018

Before
Deputy Upper Tribunal Judge Mailer

Between
MRS PATRICIA IZIEGBE OKOSUN
ANONYMITY DIRECTION NOT MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr B Malik, counsel, instructed by Calices Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria born on 10 August 1975. She appeals with permission against the decision of the First-tier Tribunal Judge Moore dismissing her appeal against the respondent's decision dated 17 March 2016, refusing her application for indefinite leave to remain in the UK as the spouse of a person present and settled here.
2. In granting the appellant permission to appeal, Upper Tribunal Judge Martin noted that the First-tier Tribunal dismissed her appeal, finding that this was not a genuine and subsisting marriage and that the evidence of finances was inadequate. Those findings were challenged in the application for permission to appeal to the First-tier Tribunal but were refused by a First-tier Tribunal Judge.
3. The grounds before her however "unusually argue" that the Judge erred in dealing with the appeal at all as he had no jurisdiction to do so. This was an appeal under

the old regime under the transitional provisions. Accordingly, the “old section 82 applied.” As at the date of refusal, the appellant had existing leave until March 2017. There had been no decision to curtail that leave and there was therefore no appealable decision.

The decision before the First-tier Tribunal

4. Judge Moore noted as a preliminary issue at [5], that the presenting officer contended that the issue of human rights in the appeal was irrelevant since the appellant had existing 3C leave when the appeal was lodged. It was accepted that there was a valid appeal regarding leave to remain, but in relation to human rights grounds, no removal was proposed by the respondent.
5. Ms Pinder, who represented the appellant at the hearing, submitted that the Tribunal could indeed consider Article 8 rights even if the respondent did not propose to remove since she could become an overstayer.
6. Judge Moore decided to hear the appeal. There had been no curtailment of the appellant's leave and he considered the matter 'as of today'. He noted that the appellant had s. 3C leave from the time this appeal was lodged. He would consider whether the respondent's decision breached her Article 8 rights and in doing so 'will pay due regard to paragraph 287 of the Immigration Rules in particular' [5].
7. In a detailed decision, Judge Moore found the evidence relating to cohabitation to be unreliable and inconsistent. There was a lack of credible and reliable evidence demonstrating a subsisting relationship between the appellant and her husband. He was not satisfied that the evidence given at the hearing established that this is a genuine and subsisting relationship, or indeed that there has been any cohabitation [25].
8. Nor did he accept that there had been any exceptional circumstances entitling the appellant to succeed under Article 8 outside the rules.
9. Counsel who represented the appellant before the First-tier Tribunal prepared grounds in support of her application for permission to appeal. On 4 March 2018, First-tier Tribunal Judge Birrell refused that application. She noted that the Judge gave a well reasoned decision. Judge Birrell gave a detailed decision refusing permission to appeal. She found that the findings were open to the Judge and the grounds constituted no more than an attempt to re-litigate the appeal.
10. Following the refusal of the initial application for permission to appeal the appellant applied for permission to appeal to the Upper Tribunal. She to rely on a new ground of appeal, namely, the Judge erred by proceeding to hear the appeal as there was no appealable decision before the Tribunal. Upper Tribunal Judge Martin granted permission to appeal on that ground.
11. Mr Malik, who did not prepare the application to the Upper Tribunal for permission to appeal, stated that he had only recently been instructed.

12. He adopted the current grounds of appeal. He noted that the appellant entered the UK with valid leave to remain as a student on 18 December 2009. That leave was due to expire on 30 April 2012. On 3 April 2012 she applied for leave to remain as the spouse of a person settled here. That application was made under the pre-Appendix FM Provisions. That application was granted after 9 July 2012, expiring on 28 January 2015.
13. Before the expiry of that leave, she made an application for indefinite leave to remain, which was refused on 22 March 2015. She was however granted instead limited leave to remain expiring on 22 March 2017.
14. On 12 October 2015 she applied for indefinite leave to remain. That was refused by the respondent on 17 March 2016 and was the subject of the First-tier Tribunal decision in this case.
15. Mr Malik referred to the transitional provisions in the 2012 Immigration Rules. The statement of changes dated 16 August 2012 introduced various changes to the family life provisions.
16. There were however transitional provisions, one of which is set out at Part 8 – Family Members. He submitted that none of the new categories of appeal in the 2014 Act applied to the appellant's application dated 12 October 2015. Nor did the savings provisions in the 2014 Act or related orders apply either. He submitted that those immigration applicants who were covered by the transitional provision in Paragraph A280 of the 2012 Immigration Rules would continue to be subject to s.82 of the 2002 Act as it was prior to its amendment by the Immigration Act 2014.
17. Accordingly, in the appellant's case there was no "immigration decision" within the meaning of s.82(1) of the 2002 Act, as the appellant still had extant leave expiring on 22 March 2017 at the date of the respondent's refusal on 17 March 2016.
18. On behalf of the respondent, Mr Avery submitted, in reliance on the skeleton argument provided, that the appellant's submissions are founded on the provisions of the 2002 Act prior to its amendment by s.15, which had held that under s.82(1) as then in force, a right of appeal lay only against "immigration decisions" prescribed by s.82(2).
19. Decisions on applications under that regime only constituted such an immigration decision where they were refusals to vary leave as a result of which the subject had no leave (s.82(2)(d)). Under that regime, the decision under appeal would indeed on the appellant's reasoning not have been appealable. However, the decision under appeal, taken in March 2016, was plainly one subject to the amended appeals provisions produced by the 2014 Act. It constituted a refusal of an application made on 12 October 2015 and represented itself consistently in the decision letter as a refusal of a human rights claim, appealable only on the ground that the decision was unlawful under s.6 of the Human Rights Act.

20. He submitted that this is in accordance with the provisions governing the commencement of s.5 of the 2014 Act. Article 8 referred to the amendments coming into force on 6 April 2015. There was a substitution for Article 9 of a new Article 9.
21. The substituted Article 9 provided that notwithstanding the commencement of the relevant provisions, the saved provisions continued to have effect and the relevant provisions do not have effect so far as they relate to the following decisions of the secretary of state. Article 9 (1)(c) relates to a decision made on or after 6 April 2015 (so far as that is not a decision mentioned in sub paragraph (a) or (b)) to refuse an application made before 6 April 2015, where that decision is:
 - i. to refuse leave to enter;
 - ii. to refuse entry clearance;
 - iii. to refuse a certificate of entitlement under s.10 of the 2002 Act;
 - iv. to refuse to vary a person's leave to enter or remain and where the result of the decision is that the person has no leave to enter or remain, unless the decision is also a refusal of an asylum, protection or human rights claim.
22. Mr Avery submitted that there is no link between the saved provisions and the transitional provisions.
23. Furthermore, he submitted that the provisions say nothing about rights of appeal. The purpose of the transitional provisions was to enable an applicant to continue on the same immigration path as before.

Assessment

24. I accept the respondent's contention that the appellant's submissions relate to the provisions of the 2002 Act prior to its amendment by s. 15, which held that under s82(1) as then in force, a right of appeal only lay against 'immigration decisions' prescribed by s 82(2). Decisions under that regime only constituted such an immigration decision where they were refusals to vary leave as a result of which the subject had no leave (s. 82(2)(d)). Under that regime, the decision under appeal would as asserted by the appellant, not have been appealable.
25. The decision under appeal however was made on 17 March 2016, and was a decision subjected to the amended appeals provisions introduced by the 2014 Act. It constituted the refusal of an application made on 12 October 2015, and represented itself consistently in the decision letter as a refusal of a human rights claim, appealable only on the grounds that the decision was unlawful under s.6 of the Human Rights Act.
26. As noted, with effect from 6 April 2015 the relevant provisions, including the new Part 5 of the 2002 Act applied, unless the case fell into a category specified in the revised Commencement Order, which it did not.
27. The respondent, when refusing the appellant's application, noted that the appellant had a right of appeal against the decision under section 82(1) of the Nationality,

Immigration and Asylum Act 2002 as the secretary of state has decided to refuse her human rights claim.

28. There was accordingly a valid appeal against the decision to refuse the appellant's human rights claim.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

Anonymity direction not made.

Signed Deputy Upper Tribunal Judge Mailer

8 November 2018