



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: VA/03079/2015

THE IMMIGRATION ACTS

Heard at Field House
3rd of January 2018

Decision & Reasons Promulgated
29th of January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS OMOLARA THERESA OKUNSANYA
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - LAGOS

Respondent

Representation:

For the Appellant: Ms O Mosaku, Solicitor
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 7th of July 1947. She appealed against a decision of the Respondent dated 2nd of December 2015 to refuse her application for entry clearance as a visitor pursuant to paragraph 320 (7A) of the Immigration Rules. The Appellant's appeal was allowed by Judge of the First-tier Tribunal Oliver sitting at Taylor House on 21st of February 2017. The Respondent appealed against that decision and for the reasons which I have set out in more detail below I have set that decision aside and re-made the decision in this case. I therefore refer to the parties as they were known at first instance for the sake of convenience.
2. Paragraph 320 (7A) provides that an application for entry clearance is to be refused where false representations have been made or false documents have been submitted whether or not material to the application or to the applicant's

knowledge. The burden of establishing this rests upon the Respondent and the standard of proof is the usual civil standard of probabilities.

3. The Judge set out the background to the case at [1] of the determination. The Appellant had first been granted a single visit visa to come to the United Kingdom in December 1990. She subsequently enjoyed multi-visit visas making full use of them visiting her children and grandchildren in the United Kingdom on many occasions. On 3rd of July 2013 she was stopped at the airport when seeking to leave Nigeria for a further visit to the United Kingdom. Her daughter had just given birth and her own birthday was due four days later. The immigration officer noted that a previous stamp on her passport purporting to show her re-entry into Nigeria on 27th of April 2012 was a stamp which was not in circulation until 1st of August 2012.
4. The Appellant's existing 5-year multi-visit visa which had been issued to her on 12th of May 2011 was cancelled. The Respondent's case was that the Appellant had been twice requested to attend the Respondent's office at the High Commission with her passport but had failed to do so. By the time the Appellant did attend over two years had expired. On 2nd of December 2015 the Respondent found that false representations had been made with the Appellant's application for a further visa, in order to misrepresent the Appellant's travel history. The Respondent refused the application under paragraph 320 (7A).

The Appellant's Case

5. The Appellant argued that she had travelled in and out of Nigeria twice before on the same visa. She denied overstaying in the United Kingdom, her visit having been from 30th of March 2012 until 27th of April 2012 (the date on the stamp). She had been visiting the United Kingdom for over 20 years, was always law-abiding and had never overstayed. When she returned home to Nigeria on 3rd of October 2013 she sent a sworn affidavit to the Respondent but received no response. She wrote again on 3rd of November 2015 and subsequently attended at the High Commission with her daughter and with her passport. The decision of the Respondent impinged on her right to family and private life. She was a widow living alone in Nigeria while all her children and grandchildren were settled in the United Kingdom. She depended on her children for emotional support. She had been forced to spend two Christmases and birthdays on her own in Nigeria. Her grandchildren could not understand why they had been unable to see their grandmother.

The Decision at First Instance

6. At [10] the Judge gave his reasons for allowing the appeal. After noting that the party alleging deception bears the burden of proving that, the Judge commented that a mere assertion that deception had been practised was no substitute for evidence. Evidence should take the form at the least of a witness statement from a person in knowledge of the facts concerning the date of use of each of the stamps, if indeed there were different stamps, with copy exhibits. In the absence of such evidence the Respondent's reasons for refusal fell very far from valid evidence, let alone proof of the assertions made which had had far-reaching consequences for the family life of not only Appellant but also her family in the United Kingdom.

7. The Judge considered the Appellant's unblemished immigration history and impressive achievements in character. He could think of no reason why she would knowingly be involved in deception. Because of the lack of evidence, he had no reason to doubt not only that the stamp was genuine but that the Appellant had also travelled on the day in question. She had suffered a considerable hurt from the assertion made by the Respondent which had had serious interference with a strong family life she enjoyed with her children and grandchildren. The decision was disproportionate and the appeal was allowed on human rights grounds.

The Onward Appeal

8. The Respondent appealed against this decision arguing firstly that the Judge had wrongly refused the Presenting Officer's request for an adjournment of the hearing. This was a reference to [4] of the determination in which the Judge stated that at the outset of the hearing he had asked if there was any further evidence to support the allegation that the questioned stamp in the Appellant's passport was not in genuine use at the date showed. After some argument the Presenting Officer had sought an adjournment (to investigate the existence of further evidence) which was opposed. The Judge noted that the Appellant had sought reasons for the cancellation of the visa as early as the day on which she had been stopped (3rd of July 2013). At the date of the refusal decision well over 3 years later no further evidence or explanation had been supplied to her. He decided that the case should proceed.
9. The Respondent's complaint in the onward grounds of appeal was that there was no evidence of any letter from the Appellant written to the Respondent and the Judge should not have made an adverse finding against the Respondent for not having replied to a letter that had not been received. In any event the Respondent had twice requested that the Appellant attend the office with her passport but she had failed to do so for some two years without any explanation [this was referred to in the Judge's determination]. The failure to attend the entry clearance post to assist with the Respondent's enquiries was inconsistent with the Judge's comments that the Appellant's visits to the United Kingdom meant a great deal to the Appellant. Given the serious nature of the allegation of deception the Presenting Officer's request was a reasonable one and the Judge had acted unfairly in refusing it.
10. The 2nd ground of appeal was that the Judge had failed to make a reasoned finding that there was family life for the purposes of Article 8 between the Appellant and Sponsor. The Sponsor was the Appellant's son who had attended the hearing at first instance. He had confirmed he had been resident in the United Kingdom since 1996 and was one of the Appellant's 4 children living in the United Kingdom. The Sponsor had had a son born in August 2016 and as a result of the refusal to grant entry clearance the Appellant had been unable to come to visit the child.
11. The grounds complained that it was established case law that family life would not normally exist between parents and adult children. If family life did not exist then generally Article 8 would not be engaged. An application to come to the United Kingdom as a visitor was a temporary visit of limited duration. There needed to be further elements of dependency involving more than normal emotional ties. None

of the criteria to establish more than emotional ties were met in the present case. There was no finding of a financial or emotional dependency. There were no reasons preventing the Sponsor from visiting the Appellant either in Nigeria or elsewhere. The refusal did not cause any interference to family visits. The proportionality assessment was inadequately reasoned.

12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Osborne on 8th of November 2017 who granted permission to appeal. He summarised the grounds of onward appeal and wrote: "in an otherwise careful and focussed decision and reasons it is nonetheless arguable that the Judge, whilst having described the Appellant's family life with her children and grandchildren as "strong" failed to set out precisely the qualities that led to that description of the Appellant as a senior adult. There is no explanation from the Judge as to how the Appellant's family life falls within the principles set out in Kugathas and Ghisling. To that extent it is arguable that the Judge materially erred. This arguable material error of law having been identified, all the issues raised in the grounds are arguable."
13. The Appellant responded to the grant of permission to appeal pursuant to rule 24 by letter dated 8th of December 2017. Taking issue with the complaint about the refusal of the adjournment, the letter stated that the Respondent had only requested an adjournment after it was clear that evidence had not been provided by the Respondent at the hearing in relation to the allegation of deception against the Appellant. There had been various opportunities for the relevant evidence to have been presented. The Judge had taken full account of all the relevant evidence provided to support the appeal which met the requirements of Kugathas and Ghisling. There was oral evidence relating to the Appellant's family ties in the United Kingdom. The Appellant had four children all of whom were in the United Kingdom and were settled. These children now had children of their own. The Appellant was a widow with no family ties or support in Nigeria. There was evidence of regular contact between her children and her grandchildren. She relied on them for emotional support.
14. At paragraph 5 of the letter however, the solicitors stated that as the Judge had not explained how the Appellant's family life fell within the principles of Kugathas and Ghisling she invited the Tribunal to determine the appeal with a fresh oral hearing.

The Hearing Before Me

15. On behalf of the Respondent the Presenting Officer relied on the grounds of onward appeal. There was evidence of the Respondent contacting the Appellant asking for further information which she never replied to. In reply, the Appellant's solicitor submitted that the Appellant had been stopped on a particular occasion, her passport had been examined and returned to her. She had asked why she had been stopped in 2013. She was only told that the Respondent would communicate with her. The Appellant had waited for a period of time but had not received anything from the Respondent by way of explanation. She therefore prepared an affidavit to support her case. The Respondent received the Appellant's request. The Appellant had not received the Respondent's letter (dated 5th of November 2013 asking her to

bring her passport to the High Commission). There had been problems with her mailbox.

16. The Judge at first instance had pointed out that there were various opportunities for the Respondent to provide the evidence to the Appellant to confirm the Respondent's assertion that the stamp in the passport was false. When the Respondent requested an adjournment, the Judge could not see how the case would be in any better shape at the end of a period of adjournment than it was at that time. The Respondent had not made out his case at the hearing. There was no procedural irregularity or unfairness in the Judge proceeding with the hearing.
17. In her witness statement the Appellant had said that she had been asked why she had an irregular stamp in her passport and had been informed that the stamp dated 27th of April 2012 was not in circulation at that date. The Appellant said she had been confused about this question thinking that the Respondent would be in a better position to answer than she was. On entry or leaving Nigeria she was at the mercy of immigration officials placing the relevant stamp in her passport and had no way of checking whether that stamp was right or wrong. She could only check the date. Although the Appellant had received an answer from the respondent to her query the supporting evidence had not been provided to her. The Judge had considered the seriousness of the issue of the stamp.
18. In response, the Presenting Officer stated that the Judge should not have made a finding against the Respondent. He should have adjourned to enable clarification of a core issue. In conclusion for the Appellant it was submitted that the Appellant had given evidence on how often she travelled to and from the United Kingdom. She had a multiple entry visa and had had a business. It was important for her to come and go. The Appellant had had close contact with her family over a period of 20 years which would indicate a closeness which went beyond normal emotional ties. She was a widow. She relied on her relationship with her children. The facts of the case were not in dispute it was to do with the evidence. Both parties were content for me to make a decision on the case: either to uphold the determination finding no material error of law or if there was a material error of law to remake the decision in this case.

Findings

19. The Appellant was encountered at Lagos airport on 3rd of July 2013 seeking to travel to London. According to the Entry Clearance Manager's review an airline liaison officer working at the airport inspected the Appellant's passport and found a Nigerian re-entry stamp dated 27th of April 2012 (stamp number 36) which was of a format that the officer knew was not in official usage on that date. The stamp was therefore identified as a false endorsement in the passport and with the authority of a visa manager the visit visa which had been issued to the Appellant on 12th of May 2011 was cancelled. The passport itself was returned to the Appellant with a request that she attend the British High Commission to speak with the visa officer. The Respondent complains that a period of two years went by and the Appellant did not go to the High Commission with her passport for this matter to be further investigated. The Appellant argues that she demanded an explanation of why her

visit visa had been cancelled. The Respondent referred to letters written to the Appellant asking her to come to the High Commission which received no reply.

20. The Judge had before him a document verification report (DVR) dated 2nd of December 2015 prepared by S. Patel, an entry clearance officer who had been working in Lagos since September 2013. He or she was currently working in the visa section of the British Deputy High Commission in Lagos and was a member of the document verification team. Whilst in Lagos it was part of the officer's duties to examine travel and supporting documents submitted in connection with entry clearance applications. The verification report under the section comments stated: "as a result of an examination on the above document, it is concluded that the above entry stamp dated 27th of April 2012 has been improperly or fraudulently obtained to purport to show that the holder returned to Nigeria earlier than the actual date of return and had therefore remained in the United Kingdom longer than indicated".
21. The Judge's concern was that the document verification report by itself was insufficient to establish the Respondent's assertion that the Appellant had a false stamp in her passport. He said he would have expected a witness statement and copies of the relevant stamps. In my view the Judge materially erred in these conclusions. The DVR was in effect a witness statement by the entry clearance officer. Whilst it is correct that the copy of the relevant stamp was not annexed to the DVR, it has to be pointed out that the Appellant had retained her passport with the stamp in question. The Appellant produced a bundle of documents running to some 70 pages for the purpose of her appeal. At page 67 of her bundle there was a photocopy of the cancelled visa marked "revoked". At the top of page 67 but very faintly was a stamp which appeared to be 27th of April 2012, the stamp in question. The stamp is unclear and it is not perhaps surprising that that the Judge did not refer to it in his determination.
22. The issue is whether the Judge's rejection of the evidence in the form of the DVR was open to him in all the circumstances. As I have indicated the DVR was in effect a witness statement and the Judge does not fully quote the evidence at [3] of the determination. The maker of the DVR gave their professional qualifications and experience and explained that the stamp was not in circulation until 1st of August 2012 hence a stamp placed in the passport dated April 2012 was fraudulently obtained. Whilst this information is brief, it is difficult to see what further information the Respondent could reasonably have been expected to give.
23. The Judge proceeded on the assumption that there was no valid evidence before him to show that the stamp was fraudulent. In proceeding in this way, the Judge materially erred in law. There was sufficient evidence before him to explain to the Appellant why her visa had been cancelled. There was no evidence from the Appellant beyond her assertion that the stamp was valid. There was no independent expert evidence for example. The maker of the DVR was clearly an experienced officer and his (or her) evidence needed to be treated with some care as it was unanswered. Regrettably, this was not done in this case.

24. It follows from the preceding paragraph that I do not need to determine whether the Judge's refusal to adjourn the hearing was a material error of law since I find that the Judge had sufficient evidence before him to deal with the case and there was no purpose in adjourning the hearing as there was nothing further of particular relevance that needed to be supplied.
25. Since I find a material error of law I set the decision of the First-tier Judge aside and proceed to remake the decision. I first deal with the issue of the visa stamp. The Appellant's complaint was that she had asked for evidence to explain why her visa had been cancelled but this had not been given to her. There are two problems for the Appellant with this claim. The first is that she was asked by the Respondent to go to the entry clearance post with her passport to clear the matter up. She did not respond to those requests and a 2-year period went by with her ignoring the request. The Appellant's explanation to me was that she had had difficulties with her mailbox and therefore did not receive the Respondent's letters. I do not consider that that is a good explanation for the Appellant's failure to respond to the entry clearance officer's request for a meeting. It was not raised in her witness statement and is inconsistent with her explanation that she was waiting for an explanation from the Respondent. She could and should have been more proactive in contacting the Respondent if she was as concerned as she claimed. The inference must be that the Appellant did not take up the Respondent's invitation to a meeting because she knew that the passport stamp was false and there would have been a little point in clarifying the matter further.
26. The 2nd difficulty is that the Appellant was given a full explanation of what the problem was with her visa at the very least in the Respondent's letter to her dated 2nd of December 2015. She had a wrong stamp placed in the passport which had an impossible date on it. This is clear and understandable.
27. The Respondent's case was that there was no evidence that the Appellant had travelled on 27th of April 2012 the inference being that the Appellant must have travelled at a later date and had the stamp backdated to show that she had complied with the terms of her visa. Unfortunately for the Appellant by the time the visa stamp was backdated the type of stamp had been changed by the authorities. The Appellant was given an adequate explanation but she was not prepared to accept the explanation she was given. The Respondent's decision to cancel the Appellant's multiple entry visa was justified under paragraph 320 (7A) of the Rules since the stamp was false.
28. The Appellant's only appeal against refusal of entry clearance as a visitor is outside the Immigration Rules under Article 8. In assessing Article 8 the appeal has to be looked at through the prism of the rules. The Appellant states she has a family life with her children and grandchildren in this country and that there is an emotional dependency upon them. No adequate reasons appear to have been given to the Judge at first instance why her children could not visit her in Nigeria. The Appellant herself referred to attending the High Commission with her daughter (see [5] above) who must therefore have travelled out to see the Appellant.

29. This was an application by an adult to visit other adults (and their children). In the Court of Appeal decision of **Kopoi [2017] EWCA Civ 1511** approving earlier case law it was stated: "Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties... there is not an absolute requirement of dependency in an economic sense for 'family life' to exist, but it is necessary for there to be real, committed or effective support between family members in order to show that 'family life' exists ([17]); neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, sufficient ([19])."
30. The Judge was impressed by what he described as the Appellant's unblemished immigration history. That was based on his finding that there was not an unlawful stamp in the Appellant's passport which as I have indicated above was a wrong conclusion. Even if the Judge was right that the Appellant had an unblemished history, it is difficult to see how that would have carried significant weight in the balancing act. Given that the Appellant could not succeed under the rules because she fell foul of paragraph 320 (7A), there is even less weight to be attached to the Appellant's immigration history. It is difficult to see that family life was engaged in this appeal as the basis of emotional dependency was not made out. The relationship between the Appellant and her adult children did not go beyond normal emotional ties.
31. Even if I am wrong on that and family life was engaged, the interference caused by cancelling the Appellant's visit visa was pursuant to the legitimate aim of immigration control because a fraudulent stamp had been placed in the Appellant's passport. That interference (assuming that it could be made out that there was interference) was proportionate to the legitimate aim pursued because of the seriousness of the false stamp. The result of the decision was to confirm the status quo whereby the Appellant continued to live in Nigeria and could be visited by her children if they so wished. As I have indicated there appears to be little evidence that they did wish to visit her. The only explanation given by the Appellant's son as to why he did not visit her in Nigeria was that it was not possible to have all the family go to see her at once. I do not find this an adequate reason. The Appellant's daughter visited the Appellant and there is no good reason why the Appellant could not have visits from her children one at a time if necessary. Family life can reasonably be expected to continue in such a way. I find that the Appellant cannot succeed under Article 8 outside the Immigration Rules and her appeal against the cancellation of her entry visa is dismissed.
32. I make no anonymity order as there is no public policy reason for so doing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision in this case by dismissing the Appellant's appeal against the Respondent's decision.

Appellant's appeal dismissed

Signed this 22nd of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have set the decision of the First-tier Tribunal aside and therefore set aside the fee award. As I have dismissed the Appellant's appeal I make no fee award.

Signed this 22nd of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge