



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09634/2017

THE IMMIGRATION ACTS

Heard at North Shields
On 4 January 2019

Decision & Reasons Promulgated
On 15 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

IRETIOLUWA OLUWASEUN ADEGBUYI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria who made her most recent application for entry clearance to the UK as a visitor on 15 February 2017. That application was refused on 10 March 2017.
2. The Appellant's appeal against that refusal on Article 8 grounds came before the First-tier Tribunal on the papers, when it was allowed by First-tier Tribunal Judge Higgins in a decision promulgated on 3 April 2018.

3. The Respondent sought to challenge that decision, and his application for permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Hollingworth on all grounds on 13 October 2018. Neither party has applied under Rule 15(2A) for further evidence to be admitted in the remaking of the decision. Thus the matter comes before me.

Error of law?

4. The ECO was not satisfied that the Appellant met the requirements of the Immigration Rules; V4.2(a) and (e).
5. As to V4.2(e); the Appellant had denied having any income or savings, and claimed that she and her child (a dual Nigerian/British citizen) were wholly dependent upon her sponsor husband, a British citizen. Whilst he had demonstrated that he had an income, he had not demonstrated that he had any savings, or that the margin between his income and his outgoings was sufficient to cover the cost of the proposed visit. In her VAF she had stated an expectation that he would pay £800 towards the costs of the trip [Q81]. Whether or not that was to include her own travel costs that she had estimated at £561, and those of her son (which she had not specified – but who she had stated was to travel with her), the evidence offered in support of the application, and the appeal, failed to demonstrate that the sponsor could afford either. The only evidence offered in support of the appeal failed to demonstrate the sponsor had any savings at the date of decision. The only bank statement placed in evidence was for an account held by the sponsor with Santander Bank, for the period 16 May to 14 June 2017 [p29-30]. Although this recorded an agreed overdraft facility of £1800, it also showed an overdrawn balance as at the beginning and at the end of the statement period of -£1588.49 and -£1771.48 respectively. Thus the only evidence offered showed that the sponsor was only just living within his income, and did not establish that he could afford the proposed expenditure of even one, let alone two air tickets.
6. The Judge did not engage with this evidence, let alone analyse it, and noted simply that the sponsor had an overdraft facility. In my judgement that was a material error of law, that rendered unsafe his bald statement that he was satisfied the relevant requirements of the Immigration Rules were met [27]. As set out above, the Appellant had failed to provide evidence to show that V4.2(e) was satisfied, and the evidence she had provided indicated that it was not.
7. The findings in relation to V4.2(e) ought also to have informed the Judge's approach to the issue raised by the Respondent as to whether the Appellant was a genuine visitor to the UK, who genuinely intended to return to Nigeria after a two week holiday. This claim was, at best, unlikely to be true given the financial cost of the proposed two week visit, the sponsor's apparent inability to afford it, and the imbalance between the expenditure that would be involved in it and the limited evidence of his financial circumstances.
8. The Respondent's grounds also challenge the Judge's approach to the issue of whether or not Article 8 was engaged by the decision under appeal, and argues that the refusal of a visitor's visa can never engage Article 8. As such, the grounds are misconceived. The grounds appear to confuse the question of whether the refusal engaged Article 8, with the secondary question of whether the interference was

proportionate. The grounds do however also challenge the Judge's approach to the question of proportionality in addition.

9. It was not suggested at any point that the marriage between the Appellant and sponsor had failed, and the Judge was in my judgement correct to approach the appeal on the basis that the refusal prevented the Appellant from visiting her husband in the UK, although it had no effect upon his ability to visit her in Nigeria. As such the Judge's decision that the refusal did pass the low threshold of engagement to Article 8 in relation to the "family life" enjoyed between the couple and their child, was consistent with Mostafa [2015] UKUT 112.
10. Where the Judge erred in my judgement was in his approach to the issue of proportionality. This was the Appellant's fourth refusal of entry clearance as a visitor. Previous refusals having been made on 18 December 2012, 9 August 2013, and 20 February 2015. The couple had wed on 22 August 2013. They had done so in the knowledge that unless the Appellant met the requirements of the Immigration Rules for entry as a visitor, or, for settlement, they would only be able to live together in Nigeria. There was no suggestion the sponsor was unable to visit Nigeria in safety. There was no suggestion that the couple's child was moving to the UK to settle – indeed it was stated firmly that he was not. Thus the refusal of entry clearance for the purpose of a two week visit, did not affect the status quo. Nor did it affect the ability of the sponsor to visit the Appellant and his child in Nigeria. (The bald assertion that the sponsor enjoyed no annual leave from his employment was not something to which the Tribunal could afford any significant weight.)
11. The Judge should have weighed in the proportionality balancing exercise the fact that the Appellant did not meet the requirements of the Immigration Rules; V4.2(e). If he had done so, then he would have been bound to find (as I do) that the refusal of entry clearance was a proportionate response. Accordingly I remake the decision on the appeal so as to dismiss it.

Decision

12. The Decision of the First Tier Tribunal which was promulgated on 3 April 2018 did involve the making of an error of law that requires the decision to be set aside and remade.
13. The appeal is dismissed

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The Appellant has not sought anonymity, and is not granted anonymity. There is no obvious reason to grant anonymity.

Signed
Deputy Upper Tribunal Judge J M Holmes

Date 4 January 2019

