Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21030/2012

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 13 November 2013	**On: 13 December 2013**

Before

Upper Tribunal Judge O'Connor
Deputy Upper Tribunal Judge Chana

Between

MR OLAHIYI HENRY AGOYI
(NO ANONYMITY DIRECTION IS MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER-ABUJA

Respondent

Representation:

For the Appellant: Sponsor in person
For the Respondent: Ms H Horsley, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondent is a citizen of Nigeria born on 14 March 1974. However, for the sake of convenience we shall refer to the latter as the "appellant" and to the Secretary of the State as the "respondent", which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant's appeal to the First-tier Tribunal was against the decision of the respondent to refuse his application dated 2 May 2012 to enter the United

Kingdom as the spouse of a British national pursuant to paragraph 281 of the Immigration Rules HC 395 (as amended).

3. Judge of the First-tier Tribunal Oakley allowed his appeal. First-tier Tribunal Judge Grant Hutchinson in a decision dated 26 September 2013 granted the respondent permission to appeal to the Upper Tribunal, it being found to be arguable that the First-tier Tribunal judge had erred in his findings and conclusions on the issue of maintenance.

4. Thus the appeal came before us.

Error of Law

5. The ECO refused the appellant's application in reliance on paragraphs 281(i)(a), (iv) and (v) of the Immigration Rules.

6. The First-tier Tribunal allowed the appellant's appeal, concluding in relation to the maintenance requirement that: .

> "[13] The Sponsor's income for the tax year 2011/12 was at £7311 and appropriate details were provided to the Respondent in respect of the tax assessment which provided those figures…
>
> [14] The Appellant has been offered employment by Mr Glen Lambert, a personal friend of the Sponsor, and there will be training provided to the Appellant but the sponsor was unable to clarify the amount that the Appellant would be paid…
>
> [17] Finally, I turn to the issue of finance and note firstly that no account has been taken whatsoever by the Respondent at the time of the Decision of the savings of the Sponsor but in addition at the time of the review took place details had been provided of additional income receive by the Sponsor which, coupled with the Sponsor's savings together with the offer of employment of the Appellant, would certainly satisfy the requirements of a couple under the Department of Work and Pensions figures."

7. At the hearing before the Upper Tribunal the sponsor was advised that the appeal would involve two steps, the first being to determine whether there is an error of law in the determination of Judge Oakley and the second, if we find there was an error, to hear evidence from the sponsor to enable us to remake the decision.

8. The sponsor submitted that Judge Oakley's decision was a good one; however when asked whether she could point to any paragraph in the determination where the judge had considered evidence of the rent or council tax payable or she accepted that she could not.

9. Having considered the determination as a whole we find Judge Oakley's consideration of the maintenance issue involved the making of an error on a point of law. The judge failed to consider whether the monies put forward by the

sponsor as savings were in fact savings; these claimed savings being in the sponsor's current account the balance of which fluctuated on a day to day basis and which was clearly being used to meet the sponsor's living expenses. The judge further failed to observe that the evidence relating to these savings was dated three months prior to the date of the Entry Clearance Officer's decision, and that there had been large sums of money deposited into the account the provenance of which was not known.

10. Most significantly, the judge failed to make an assessment as to the amount of rent and council tax payable by the sponsor, monies which should have formed an integral part of any calculation of adequacy of maintenance. As to the five line letter of offer of employment to the appellant by the sponsor's friend, the judge said nothing of the fact that this was on un-headed paper, that the offer was absent material details such as, the likely duration of the employment and how much the appellant would be paid and most importantly that on the face of the document relied upon by the appellant the offer post-dated the ECO's decision by approximately 3 months.

11. Having considered the determination as a whole we conclude that the judge erred in law in his evaluation of the maintenance issue and we therefore set aside the decision and remake it for ourselves.

Re-making of decision

12. It was agreed by the parties that the only issue in the appeal, in relation to the Immigration Rules, is whether the appellant can satisfy the maintenance requirement in paragraph 281. The respondent does not now take issue with any of the other requirements of this rule. The appellant has to demonstrate that he will be maintained in the United Kingdom from his own resources or that of his sponsor without recourse to further public funds.

13. The respondent did not challenge the appellant's evidence before the First-tier Tribunal that the sponsor's two daughters, aged 17 and 18 at the relevant time, were no longer living with the sponsor, are not her responsibility and that therefore the financial requirement that the appellant has to satisfy is not for a couple with two children. As a consequence, at the hearing it was agreed that the relevant income support level for our considerations was £106 per week, that being the level for a couple. The sponsor further accepted that the rent for her proportion of the accommodation was £72.00 a week and that she pays £20.10 per week for council tax. In order to meet the requirement of the Immigration Rule she, therefore, has to demonstrate income, or other available funds, in excess of £198.10 per week [£106+£72+£20.10].

14. The sponsor also accepted in evidence that her accounts for the financial year to 2012 show her profit to have been £6131. This equates to earnings of £117.90 per week i.e. £80.20 per week short of the required sum.

15. In order to make up for this deficit the sponsor asserts that (i) her income has subsequently increased (ii) she has savings which she can use (iii) the appellant has savings which can also be used and (iv) the appellant has an offer of employment, which he will take upon arrival. We now turn to consider each of these in turn

16. In relation to the former, the sponsor states that her turnover has been £6438 in the last six months. As this is an out of country appeal, it is trite law that we can only consider evidence that appertained to the date of decision under appeal i.e. the 2 May 2012. Evidence of the sponsor's current income, which in any event is not documented before us and was accepted to be only an estimate, is not relevant to our assessment of whether the appellant met the requirement of the Immigration Rules nearly 18 months ago.

17. As to the sponsor's savings, these in reality were not savings at all. The sponsor provided her current account statements to demonstrate that she has savings £1315 as of 25 February 2012. The level of funds in the bank account fluctuates on a daily basis and the sponsor accepted that her income is deposited into this account and that she uses it for her living expenses. She accepted that money lying in that account could not be considered to be savings. In any event, the latest statement made available to the Tribunal was for a period ending approximately 3 months prior to the date of decision and thus is of little assistance in relation to what the position was at the relevant date. Additionally the appellant was unable to explain the origins of two cash deposits of £800 and £180 made into her account prior to the application.

18. The appellant provided a copy of a bank statement bearing his name from GTB Bank dated, the end date of which was 12 March 2012. There were several large deposits made into this account. On 12 February 2012 a deposit of 70,000 naira was made and three weeks later a deposit of 655,000 naira were made into the account. At the hearing, when asked where the funds have come from, the sponsor stated that she did not know. She also said that she does not have more up to date statements for the appellant. Her evidence is that the appellant is unemployed and that he owns some land in Nigeria. Given the statement dates from two months prior to the date of decision and shows large unexplained deposits which are not consistent with the transaction history as whole, we do not accept that it has been demonstrated to the balance of probabilities that the monies in that account as of the end date of the statement were (i) monies available to he appellant to use to maintain himself in the United Kingdom and (ii) monies which were also in the account as of the date of the Entry Clearance Officer's decision

19. We therefore find that the funds in the bank accounts of the appellant and his sponsor are not monies genuinely available to them to use to maintain the appellant in the United Kingdom.

20. The appellant claims that he owns land in Nigeria. Although he has provided some evidence that he owns land, there is no evidence of historical income and certainly no evidence that this historical income will be maintained if he leaves Nigeria.

21. We finally turn to the proposed employment. The appellant provided a letter dated 25 August 2012 from Mr Glenn Paul Lambert stating that he confirms that when the appellant returns to the United Kingdom he has offered him a "permanent position as a driver's mate within my company". This letter post-dates the entry clearance application, and there is no reliable evidence that such offer of employment was available to the appellant at that date. We therefore disregard it for this reason. In any event, the letter does not indicate the salary offered, the proposed length of the appointment or for how long the position will be kept open for the appellant..

22. Although the letter states that it is a permanent position, it does not indicate whether it is full time work or part time work. Questioned at the hearing, the sponsor had very little information about this job. She was completely unaware as to what a "driver's mate" does. She further confirmed that she has no other documents such as a business card to corroborate the existence of the business. There is also no credible evidence before us that the appellant has the requisite skills to do the job of a driver's mate in this country. The sponsor's evidence is that the appellant is unemployed in Nigeria. We also observe that the claimed proposed employer did not attend the hearing to give evidence in support of the appellant's appeal. No credible explanation has been given as to why an employer in this country would give an open ended offer of employment to someone who is seeking entry clearance, which he may or may not be granted. Looking at the extremely limited evidence before us on this issue as a whole we do not accept that it has been demonstrated to the balance of probabilities that the employment was genuinely available to the appellant at the time of the ECO's decision.

23. For the reasons given above we find that the appellant does not on a balance of probabilities satisfy the requirements of paragraph 281 of the Immigration Rules as he has failed to demonstrate that he will be maintained in the United Kingdom without recourse to public funds. The appellant's appeal therefore must fail to the extent that he relies on the Immigration Rules.

Article 8

24. Applying the five stage test set out at paragraph 17 of **R v Secretary of State for the Home Department, ex parte Razgar [2004] UKHL 27** we are satisfied that the answers to the first four stages of the test are all affirmative. We find that the appellant has a family life, that the appellant's exclusion from the United Kingdom would clearly be an interference with this family life, that the interference would have consequences of such gravity as potentially to engage Article 8, but that this interference would be in accordance with the law in pursuit of the legitimate aim of immigration control. The essential question in this case concerns the test of proportionality at the fifth stage of the **Razgar** test.

25. The next question that we have to decide is whether the refusal of leave to the appellant, 'in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8' (**Huang v Secretary of State for the Home Department [2007] UKHL 11 ("Huang"), para. 20**). In considering this question, we have taken into account all factors that weigh in favour of the refusal of leave, including the desirability of applying a workable, predictable, consistent and fair system of immigration control (**Huang, para. 16**). Against this, we have taken into account the effect that refusal of leave would have on the enjoyment of the appellant's family life in the appellant's case, bearing in mind the core value that Article 8 of the Human Rights Convention seeks to protect and the fact that '[t]heir family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially' (**Huang, para. 18**).

26. We have considered the effect of our decision on the sponsor, in the light of the decision in **Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39**, in which it was held that the effect on other family members with a right to respect for their family life with the appellant must also be taken into account in an appeal to the AIT on human rights grounds. In light of this decision, we have to consider the family life of all those who share their family life with the appellant.

27. The duty imposed by Article 8 does not extend to a general obligation on the part of the United Kingdom to respect the choice by the appellant and his sponsor of the United Kingdom as the country of their matrimonial residence, and to accept the appellant for settlement in this country, at least unless it is established that it would be unreasonable to expect them establishing family life in Nigeria or elsewhere, or that there are special reasons why that could not be expected of them. Article 8 imposes a positive obligation upon the state to respect the family life of the appellants: it does not guarantee a right to family life in the United Kingdom. The first question we ask ourselves is whether it is reasonable to expect the sponsor to leave the United Kingdom and live in Nigeria (See **EB Kosovo [2008] UKHL 41**). We conclude that it is.

28. We take into account that the sponsor is a British citizen as are her children. Following **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4**, we are required to afford the interests of the children a primary though not paramount consideration, which we have done. The sponsor was previously married but is now divorced. Her two children from the previous marriage were aged 17 and 18 at the relevant date. Whilst we have no doubt there are still emotional bonds between the sponsor and her children, we have accepted the sponsor's evidence that they now live with their father and that she has no responsibility for them. The effect on the children's interests would, on the limited evidence available to us, be only marginal and the sponsor is free to travel to

Nigeria to be with the appellant if that is her wish. Although not ideal, the sponsor's children can continue family life with their mother by way of visits and other forms of communication.

29. As to the sponsor herself, she is a British Citizen and has lived her whole life here. This, though, is not impediment of itself to her living in Nigeria (See **Ogundimu [2013] UKUT 00060**). We have taken into account she has a business here, and that if she were to leave the country that business would cease. This would, though, have little impact other than on the sponsor. She does not employ any other persons and it is not suggested her customers could not make alternative arrangements. The only reason that the sponsor gave at the hearing for why she cannot relocate to Nigeria to be with the appellant is the lack of creature comforts in Nigeria and that there is a better quality of life for her in the United Kingdom. She said electricity can be interrupted as can the water supply and that it is not easy to live in Nigeria. Whilst we accept that the standard of life is higher in this country, the appellant's sponsor must have known that when she married a Nigerian national, he would have to satisfy the immigration laws of this country. Looking at the sponsor's circumstances as a whole we find it is entirely reasonable to expect her to move to Nigeria and continue her life with her husband there.

30. As we have indicated above, the appellant does not qualify under the Immigration Rules and this is a weighty factor when determining the issue of proportionality. In coming to our conclusion we have taken full account of the fact that the appellant has an impeccable immigration history, that he and the sponsor lived together in the United Kingdom for six months from September 2011 until March 2012 and that he returned voluntarily to Nigeria to make his entry clearance application. Nevertheless, looking at all the evidence as a whole we find that the decision of the entry clearance officer was proportionate to the legitimate aim of maintaining immigration control.

DECISION

For the reasons given above, the determination of the First-tier Tribunal is set aside.

We remake the decision on appeal dismissing Mr Agoyi's appeal on all grounds.

Signed by

Mrs S Chana

A Deputy Judge of the Upper Tribunal

4th day of December 2013