Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02450/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 July 2014	**On 06 August 2014**
Prepared on 25 July 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

K. Z.
(ANONYMITY DIRECTION)

Appellant

And
SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Mr Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Nigeria. On 13 December 2001 he applied for entry clearance as an overseas domestic worker, which application was refused on 30 December 2011. The Appellant's appeal against that decision to the First Tier Tribunal was however allowed. Thus on 5 October 2012 he was granted entry clearance as an overseas domestic worker, until 5 April 2013.
2. On 5 April 2013 the Appellant applied for LTR as an overseas domestic worker, which application was refused on 19 October 2013, and in consequence a decision was made by reference to s47 of the 2006 Act

to remove him from the UK. The sole reason given by the Respondent for these decisions concerned the limit to a maximum of six months leave in this capacity set out in paragraph 159D(ii); the reasons for the decision do not suggest that the merits of the application, or the evidence relied upon in support of it, were considered.

3. The Appellant's appeal against those immigration decisions was heard on 17 April 2014. It was dismissed in a Determination promulgated on 6 May 2014 by First Tier Tribunal Judge Herlihy.
4. By a decision of First Tier Tribunal Judge Davidge dated 9 June 2014 the First Tier Tribunal granted the Appellant permission to appeal on the basis it was arguable the Judge had erred in failing to appreciate that the Appellant was granted entry clearance pursuant to an application made and considered under the Immigration Rules as they were prior to the changes made on 6 April 2012; even though his physical entry to the UK did not occur until November 2012.
5. The Respondent filed a Rule 24 Notice dated 19 June 2014 in which she complained that she not seen either the grounds of the application or the Determination under appeal. Neither party applied for permission to rely upon further evidence that had not been before the First Tier Tribunal. Thus the matter comes before me.

Service

6. The Appellant did not attend the hearing, and was not represented at it. I was satisfied that both he, and Mr A, his sponsor and representative, were served by first class post with notice of the hearing at the date they had given for service. That notice was not returned to the Tribunal through the dead letter system.
7. The Appellant has offered no explanation for his failure to attend the hearing, and has requested no adjournment of it. In the circumstances I am satisfied that the Appellant has been served with notice of the hearing, and I am not satisfied that there is any reason why I should not proceed to determine his appeal in his absence.

The relevant Immigration Rules

8. It is accepted by Mr Deller that the application was made on 13 December 2011, and that it was initially considered by the Respondent pursuant to the Immigration Rules as they were prior to 6 April 2012, on 30 December 2011. When the Appellant's appeal against that initial decision by the ECO was successful, it is therefore accepted that the grant of entry clearance must have been made under the Immigration Rules as they were prior to 6 April 2012, notwithstanding the

changes in the Immigration Rules that had by then occurred.

9. Accordingly Mr Deller concedes that although this point was before the Judge, he did not adequately deal with it. It is also conceded now that it is plain that the decision maker applied on 19 October 2013 the wrong Immigration Rules to the Appellant's most recent application. In turn it is conceded that the Judge erred in failing to appreciate that she had done so.

10. It is conceded therefore that the decision must be set aside and remade.

11. In order to make a lawful decision upon the application the decision maker must consider and apply paragraph 159EB of the Immigration Rules, granting a period of leave of up to 12 months at a time, but only if the requirements of paragraph 159EA continue to be met. No consideration has yet been given to whether the Appellant met at the date of the application (or currently meets) the requirements of paragraph 159EA. Nor has the Appellant or his sponsor chosen to attend the hearing of this appeal to explain what his circumstances were and are. They may of course have already left the UK, or there may be other reasons for their failure to do so. I am not however satisfied that I have the material before me to make a decision upon whether those requirements were met at any material date. Thus I simply allow the appeal to the limited extent that the Respondent's decisions of 19 October 2013 were not made in accordance with the law. Thus the Appellant's application of 5 April 2013 remains outstanding, and awaits a lawful decision upon it.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 6 May 2014 did involve the making of an error of law that requires that decision to be set aside and remade.

I remake the decision so as to allow the appeal to the limited extent that the Respondent's decisions of 19 October 2013 were not made in accordance with the law, and thus the Appellant's application remains outstanding and awaits a lawful decision upon it.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes

Dated 25 July 2014