IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/22142/2014
IA/22148/2014
IA/22153/2014

THE IMMIGRATION ACTS

Heard at Bradford

On 29 September 2014

Decision & Reasons Promulgated
On 6 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR FOLORUNSHO MICHAEL OMOLOJU (1)
MRS ANNA TOLA OMOLOJU (2)
MISS JEMIMA AMADOSIBINA OMOLOJU (3)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Jamil a Solicitor
For the Respondent: Mr M Diwncyz a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

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Introduction

1. The appellants are Nigerian. The first appellant ("Michael") was born on 19 February 1956. His wife ("Anna") was born on 19 August 1957 and his daughter ("Jemima") was born on 11 July 2000.

2. The present appeal is by the appellants against the respondent's decision to refuse to vary leave to remain and to make removal directions. The Judge of the First-tier Tribunal Hands ("the Immigration Judge") dismissed their appeals and refused to vary their leave to remain as highly skilled migrants and, in the case of Anna and Jemima, dependants thereof, because he found that Michael's appeal had to be treated as abandoned under Section 104(4) of the Nationality, Immigration and Asylum Act 2002 ("2002 Act") because he had left the UK. Consequently, the Immigration Judge held that the appeals by his dependants could not succeed either.

3. Immigration Judge Brunnen considered that there were arguable errors of law in the Immigration Judge's decision. Accordingly, he gave permission to appeal on 6 August 2014.

4. The respondent submitted a Rule 24 response dated 22 August 2014 which asserts that the Immigration Judge had been correct to treat the appeal as abandoned without consideration of the merits.

5. Directions were given on 29 August 2014 stating that the Upper Tribunal would not consider evidence which was not before the First-tier Tribunal unless the Upper Tribunal had specifically decided to admit that evidence.

Background

6. This is set out extensively in the determination of the First-tier Tribunal. In summary, Michael first entered the UK as a highly skilled migrant on 17 April 2008 with entry clearance until 12 February 2010. He then applied to remain as a Gateway highly skilled worker and received leave on 17 March 2010 valid until 17 April 2013. Michael's most recent application was considered by the respondent and refused on 2 May 2014. Michael gave notice of appeal against that refusal on 19 May 2014 and the appeal came before the Immigration Judge on 21 July 2014.

7. The Immigration Judge decided to treat the appeal as abandoned by virtue of the fact that the appellant had left the UK on 30 April 2013.

The Hearing

8. At the hearing I heard oral representations by both parties. It was pointed out that Michael had been away from the UK for more than 180 days but

the matter before the Tribunal was whether he had abandoned his appeal. Section 104(4) of the 2002 Act provides that:

> "An appeal under Section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant leaves the United Kingdom".

It was pointed out that the issue therefore was whether the appellant was "in the United Kingdom" at the time he applied for leave to remain. Although the appellant was in the UK at the date of his application (according to the application form dated 28 March 2013) he had left the UK on 30 April 2013. Therefore, at the date of the notice of appeal that was filed (19 May 2014) the appellant had not been in the UK for over a year. Therefore, this was not an "in-country" type appeal to which Section 104(4) was intended to apply. The appellant was out of country but his family remained in the UK. At the time he left the UK he did so with valid leave but, unfortunately, that leave subsequently expired and he could not return. He made an application for entry clearance as a visitor to attend the hearing but that had not been successful. The appellant submitted that the Tribunal should have gone on and considered the appeal on its merits rather than summarily disposing of it as an abandoned appeal.

9. Mr Diwncyz pointed out that the form the appellant had completed in order to lodge his appeal with the First-tier Tribunal (form IAFT-1) gave an address in the UK. However, he accepted that the appellant would not have been in the UK in order to bring an appeal, although he did have an English address. Mr Diwncyz raised this point as he considered it may be arguable that the fact that the appellant had an English address would bring him within the category of an "in-country" appellant.

10. I consider that the decision of the Immigration Judge to treat the appeal as abandoned appeared to be contrary to Section 104(4) of the 2002 Act. In fact it seems that the appellant was in the UK when he applied for leave to remain but not in the UK when he brought his appeal.

11. Having decided that there was a material error of law in the Immigration Judge's treatment of section 104 I went on to hear submissions on the merits.

12. The appellant referred me to his skeleton argument contained in the bundle dated 15 July 2014 prepared for the First-tier Tribunal hearing. Paragraph 2 of that document (at page 19 of the bundle) states that the respondent's decision had erroneously been made under paragraph 135G of the Immigration Rules when it should have been made under paragraph 245CD(c) of those Rules. Secondly, as the appellant had paid taxes in the UK during the period of his employment abroad and this would count towards the "unbroken period" of residence in the UK required by paragraph 135G of the Immigration Rules. Additionally, the respondent's published policy should have applied to the appellant's application and

this meant that her decision to refuse was erroneous. Relying on paragraph 245CD a continuous period of four years' continuous lawful residence in the UK sufficed since the appellant had applied under the Highly Skilled Migrant Programme between 3 April 2006 and 7 November 2006 and received an approval letter to that effect. He had come to the UK on the basis of that letter and his most recent period of leave had been as a Tier 1 (General) Migrant. Accordingly, he qualified under paragraph 245CD (d). The skeleton argument then went on to deal with the human rights aspect and the rights of a child, i.e. Jemima. The appellants did not accept that they had to bring themselves within paragraph 276ADE of the Immigration Rules in order to fulfil the requirements of Article 8 of the ECHR. The respondent's decision was incompatible with the "spirit" of that Convention.

13. The respondent submitted by way of response that the 180 days for each twelve month period was specified in the Rules. I was referred to the case of **BD (Work permit – "continuous period") Nigeria [2010] UKUT 418 (IAC)**. That case allowed the Tribunal to construe matters reasonably and decide whether or not the absences were for the purposes of work. The Secretary of State had taken a reasonable approach.

14. At the end of the hearing I reserved my decision on the merits which I will now consider.

Discussion

15. Grounds of appeal before the First-tier Tribunal were wide-ranging. They included:

    (1) the assertion that the appellant was absent from the UK for the purposes of work, remained domiciled in the UK and therefore for the purposes of calculating the continuous period of residence of "not more than 180 days" in the five consecutive twelve calendar monthly periods, those periods of absence could be ignored;

    (2) the respondent is alleged to have ignored her own published policy guidance relating to applications for settlement under paragraph 245CD;

    (3) the fact the correct period of continuous residence for the purposes of calculating the first appellant's qualification under the rules should be four years and not five years;

    (4) the purpose and period of absences was relevant;

    (5) the application of **BD** allowed the respondent a discretion which should be exercised in the first appellant's favour;

    (6) alternatively, human rights were engaged.

16. A number of these grounds were not pursued when I returned to consider the substantive merits of the appeal. In particular, I understand it no longer to be maintained that the first appellant qualifies for leave to remain after a four year period. It was accepted that the five year period was the correct one.

17. This is an application under paragraph 134-135 of the Immigration Rules for indefinite leave to remain as a highly skilled migrant. It is not a claim under part 6A of the Immigration Rules, which includes requirements for indefinite leave to remain by points-based migrants. Thus, I do not fully understand the assertion in the appellant's skeleton argument that Michael's application should be considered under paragraph 245CD(c). It seems that the only reason why Michael wishes to bring his application within that is because of the shorter continuous period of residence required (which is conceded anyway) and because of the disregard of periods abroad of a certain character in that part of the Immigration Rules. I will treat this application, therefore, as did the respondent, as an application which must satisfy the requirements of paragraph 134-135 of the Immigration Rules.

18. The case of **BD** (included in the appellant's bundle at 133) suggested that where an application under 134 is being considered the respondent should apply a flexible approach to any periods of absence so as to take account of the strength of a person's ties to the UK, the reasons for his absences and all the circumstances of the case. The respondent is expected to exercise her discretion "sensibly" in the light of these factors.

19. Notwithstanding the requirement of flexibility in this guidance from the Upper Tribunal, Macdonald's Immigration Law comments (at paragraph 5.14) that the normal "benchmark" is a period of absence of three months in any twelve month period will be ignored but longer periods of absence will not be. However, it appears necessary to look at the extent of the applicant's connections to the UK over this five year period and ask whether Michael intended to make his home in the UK during that period.

20. According to his witness statement Michael states that he has had a series of employers (beginning in December 2008) who have required him to work overseas. As far as I can see he cannot point to any periods during the five years since he came to the UK when he was actually required to work on a regular basis in the UK. The payment of taxes and national insurance contributions in the UK is only one factor to be looked at. The appellant's domicile for tax purposes is another factor but is not necessarily decisive. Inevitably, during the period referred to, the appellant's wife and child have settled in the UK. Anna, has worked in the health sector and his daughter Jemima has been at school here. These facts are also relevant.

21. Correspondence from Michael's employers suggest that he was required to work "from time to time" in Nigeria, for example, in the year 2009 he was required to work between 31 March and 14 May, 3 June and 18 July, 1 and 3 August, 11 August to 9 October, 14 October to 2 November, 17 November to 2 January 2010 (see page 69). In fact, his total period of absence during the period 24 November 2008 to 3 January 2010 was no less than 291 days. This can hardly accurately be described as "from time to time".

22. These periods of absence mean that Michael's residence in the UK cannot be described as a "continuous" in any meaningful way. I consider that his absences were so significant as to render his residence in the UK secondary to his residence in Nigeria.

23. The respondent left it to the Tribunal to decide whether the Secretary of State had actually "reasonably and sensibly" within the terms of **BD**. I have found this a difficult question to decide for it involves a matter of judgment in the light of all relevant circumstances. Having taken into account those circumstances, however, I am satisfied that the respondent correctly concluded that the appellant did not qualify for leave to remain on the basis of his period of continuous residence within the UK.

24. Human rights are also raised in the grounds of appeal before the First-tier Tribunal and since I am now considering the merits it is necessary to consider whether there was any error in the approach adopted by the First-tier Tribunal in relation to that claim. The appellant asserts the respondent has failed in her statutory duty to consider the best interests of Jemima as she is required to do under Section 55 of the Borders, Citizenship and Immigration Act 2009. That Act gives statutory effect to the UK's international obligations as a result of the UK signing up to the United Nations Convention on the Rights of the Child. It is claimed that the respondent's decision offends human rights law in that the respondent must act compatibly with Section 6 of the Human Rights Act 1998. That Act incorporates the European Convention on Human Rights (ECHR) into UK law. Article 8 requires the respondent to respect the appellant's right to a private or family life. The respondent's decision is said to be disproportionate. However, the decision was made in accordance with the Immigration Rules. The appellants are required to do no more than they must have envisaged that they would always have to do (i.e. return to Nigeria when their leave expired). I cannot see that decision in any way offends their human rights. Thus, Mr Jamil's decision not to press that point before me was a well considered and realistic view for him to have taken. Accordingly, I find that the respondent's decision to refuse further leave to remain did not offend either the rights of a child or international human rights law generally.

My Decision

25. The Upper Tribunal finds a material error of law in the decision of the First-tier Tribunal in treating the appeal by the appellant as abandoned I set aside that decision and will re-make the decision.

26. Having considered all the evidence, the appeal against the respondent's decision to refuse to vary leave to remain will be dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hanbury **6 November 2014**

TO THE RESPONDENT
FEE AWARD

I have dismissed the appellant's appeal against the respondent's decision and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Hanbury **6 November 2014**