



The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: OA/10324/2013

THE IMMIGRATION ACTS

Heard at Manchester
On November 10, 2014

Decision and Reasons Promulgated
On November 11, 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

MR AKINBOWALE OLUSEYI AKINLUA
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr McVeety (Home Office Presenting Officer)

For the Respondent: Not present or represented

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant, born September 21, 1973 is a citizen of Nigeria. He applied for entry clearance as a dependant of a points based migrant

and his application was considered under paragraph 319C HC 395. On April 8, 2013 the respondent refused this application.

3. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on April 29, 2013 and the respondent reviewed the decision on September 3, 2013. On January 9, 2014 Judge of the First Tier Tribunal Saffer (hereinafter referred to as the "FtTJ") heard his appeal and allowed it in determination promulgated on January 14, 2014.
4. The respondent lodged grounds of appeal on January 20, 2014 and on May 15 2014 Judge of the First-tier Tribunal Chochan granted permission to appeal finding it arguable the FtTJ had possibly erred by taking into account documentary evidence that post-dated the decision and as it was a points based application he had been precluded from doing so pursuant to Section 85A of the 2002 Act.
5. The matter was originally listed on August 4, 2014 but this hearing was adjourned until September 23, 2014. The sponsor, Bridget Odunayo Wale Akinlua, requested a further adjournment by letter and this was refused. The matter came before Upper Tribunal Judge Chalkley on that date and he adjourned the matter as he was not satisfied the sponsor was aware her application to adjourn had been refused. In adjourning it he noted the accounts did not appear to have sufficient funds and he felt it would be reasonable to give the sponsor an opportunity to explain the situation.
6. On November 10, 2014 the sponsor failed to attend and at 11.45am I called the case on.

SUBMISSIONS

7. Mr McVeety submitted the FtTJ had erred because there was no evidence that the bank statements considered by the FtTJ had been submitted with the application. They had been faxed to the Tribunal on April 23, 2013 which was after the application had been refused and were attached to the grounds of appeal. He submitted Section 85A of the 2002 Act prevented the FtTJ from taking into account such documents and in particular he was prevented from having regard to the bank statements contained at pages [26] and [31] of the April 23, 2013 fax. He invited me to find an error in law and to dismiss the appeal.
8. I reserved my decision.

MY FINDINGS ON ERROR IN LAW

9. The appellant submitted an application to join his spouse in the United Kingdom. Bank. Some bank statements were submitted but in order to meet the requirements of the Rules and in particular paragraph 319C(g) and Appendix E (i)(g) and (j) HC 395 the appellant had to provide evidence there were sufficient funds in an account he had access to for a period of ninety days
10. The sponsor failed to attend the original hearing and did not appear before me so I have had to consider the respondent's appeal based on Mr McVeety's submissions and what appears on the file.
11. I was not satisfied all of the bank statements presented to the FtTJ were in fact submitted with the application. I have carefully examined the file and I accept Mr McVeety's submission that at least two of the relevant statements were not before the entry clearance officer. These documents can be found at pages 26 and 31 of the fax sent on April 23, 2013. These documents show funds of £21,000 appearing in one bank account and then appearing in another account and remaining. It is these documents the appellant needed to satisfy the Rules.
12. There was no explanation from the appellant/sponsor and taking into account my own examination of the file and Mr McVeety's submissions I find the appellant did not satisfy the requirements of paragraph 319C and the FtTJ erred in allowing the appeal based on post-decision evidence.
13. Section 85A(4) of the 2002 Act clearly states the Tribunal may consider evidence adduced by the appellant only if it –
 - a. was submitted in support of, and at the time of making, the application to which the immigration decision related,
 - b. relates to the appeal in so far as it relies on grounds other than those specified in subsection (3)(c),
 - c. is adduced to prove that a document is genuine or valid, or
 - d. is adduced in connection with the Secretary of State's reliance on a discretion under immigration rules, or compliance with a requirement of immigration rules, to refuse an application on grounds not related to the acquisition of "points" under the "Points Based System".
14. The evidence submitted with the appeal notice filled in the "gaps" and consequently the FtTJ should not have had regard to it.
15. I therefore find there has been an error in law and I set aside the FtTJ's decision.

FINDINGS AND REASONS

16. In light of Section 85A of the 2002 Act I do not admit the additional evidence and I therefore find the appellant has failed to satisfy the Immigration Rules.
17. Although article 8 ECHR was raised in the grounds of appeal neither the sponsor nor the appellant advanced any article 8 ECHR arguments.
18. The failure by the sponsor to attend the hearing on two separate occasions is extremely worrying and does not support any claim that there is subsisting family life.
19. There is no evidence that the appellant would satisfy Appendix FM and/or paragraph. In the circumstances there is nothing exceptional or compelling that would make refusing entry clearance unjustifiably harsh or disproportionate.
20. The appellant has a simple solution to the current situation. He needs to provide evidence that demonstrates the Immigration Rules are met and in such circumstances his appeal is likely to be allowed.

DECISION

21. There was a material error of law. The original decision is set aside and I dismiss the appeal under both the immigration rules and article 8 ECHR
22. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated: **November 10, 2014**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award as the application did not succeed.

Signed:

Dated: **November 10, 2014**

Deputy Upper Tribunal Judge Alis