IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17643/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th May 2015	**On 12th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR SAMUEL OPOKU-KUFUOUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:
For the Appellant: Mr Olawanle (Solicitor)
For the Respondent: Mr Kandola (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Warren L Grant, promulgated on 18th September 2014, following a hearing at Taylor House on 11th September 2014. In the determination, the judge dismissed the appeal of Samuel Opoku-Kufuour. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Ghana, who was born on 11th July 1969. He applied for leave to enter the UK as the spouse of Mrs Lillian Akosua Attipoe, a British citizen, present and settled in the UK. The Respondent Entry Clearance Officer was not satisfied that the Appellant and the Sponsor were parties to a subsisting marriage, or that they intended to live with one another permanently as husband and wife. Nor, was the Respondent Entry Clearance Officer satisfied that the Appellant met the financial requirements, or that he met the English language requirement.

The Appellant's Claim

3. The Appellant referred to the birth of her daughter as proof that his marriage was subsisting and genuine. He referred to his BA degree awarded by the University of Ghana on 14th June 2008,

> "Along with a letter from the university dated 25th June 2012 stating that the courses were taught in the English language. The letter went on to state that the Appellant had been in taught in English since school days and that he has proven oral and written skills in English enabling him to pursue a course in his field with English..." (paragraph 8 of the judge's determination).

He referred to his sponsoring wife's earned income of £20,924.79, to her pay slips, as well as her P60, sent with the application (see paragraph 14 of the determination). These were the Sponsor's earnings as at 31st March 2013. However, after a period of maternity leave, the Sponsor went back to work on 1st October 2013 and the earnings here showed her to be in receipt of £27,000 per year as a nurse (see paragraph 14 of the determination).

The Judge's Findings

4. The judge had little difficulty in accepting most of the evidence presented before the Tribunal. In what is a careful, sympathetic, and well crafted determination, the judge held that "the marriage is not in issue and on the basis of the copious evidence (not challenged by Mr Staunton) including the birth of a daughter I find that the Appellant and the Sponsor are parties to a valid and subsisting marriage..." (paragraph 7). Secondly, the judge held that with respect to the financial requirement that, "I am unable to find from what is before me that at the date of the decision the Appellant met the funding requirement" (paragraph 14). Third, however, the difficulty lay in relation to proof of the Appellant's English language requirement evidence.

5. Although the Appellant had relied upon his BA degree from the University of Ghana on 14th June 2008, he had only subsequently had confirmation of the level of attainment in this foreign degree qualification for English, by a letter dated 18th June 2014 "from UK NARIC to the Appellant confirming that the level of English language for his degree is considered to meet the requirements of CEFR level C1." (See paragraph 11).

6. The judge heard arguments from Mr Olawanle, who also appeared in the Tribunal below, that the letter from UK NARIC reflected the situation at the date of the decision. However, as the judge reasoned, "if that letter from UK NARIC had been supplied as it should have been supplied with the application we would not be here today. If it had been supplied with the Grounds of Appeal it would surely have been taken into account ..." (see paragraph 12). Furthermore, "there was no knowing what NARIC would decide about the Appellant's degree until they actually put pen to paper. They might have ruled totally conversely about it ..." (paragraph 13).

7. Therefore, the position would not have been clear, in the way contended for by Mr Olawanle, when it first arose for a decision before the Entry Clearance Officer. It was for the Appellant to have put in the evidence. If the evidence had not been put in by the time of the decision, then it could not be relied upon. On this basis, the Appellant's appeal could not succeed. The judge did not give further consideration to Article 8 ECHR rights.

Grounds of Application

8. In the grounds of application, it is said that the judge failed to take into account Article 8 ECHR. When the matter first came for consideration of the application before the First-tier Tribunal on 24th November 2014, it was held that, "it would have been desirable for the judge to have mentioned Article 8. The grounds are correct in that it does not". However, the error was not material. On a renewal before the Upper Tribunal, UTJ Grubb held that,

> "The Appellant also raised Article 8 and the judge has not considered that at all. That is an arguable error of law. The Appellant has a wife and child in the UK and despite not meeting the English language requirement of the Rules, or apparently all the other requirements, I cannot say that the Article 8 claim would inevitably fail" (see paragraph 2).

Permission to appeal was granted.

9. On 22nd April 2015 a Rule 24 response was entered to the effect that UTJ Grubb had only granted permission on the basis of the Appellant's Article 8 claim. However, there was no material error of law in Judge Grant's decision. This was because the Appellant had not shown that he met the requirements of the Rules and Article 8 is not a means to circumvent the Rules. Should the Appellant wish to pursue a claim under Article 8 he should do so by submitting a fresh application.

Submissions

10. At the hearing before me on 28th May 2015, Mr Olawanle, appearing on behalf of the Appellant, submitted that I should make a finding of an error of law, for the failure of the judge below to consider Article 8, and to then proceed and remake the decision, because the evidence was cogent and convincing that the Appellant deserved to succeed in his appeal. This was for the following reasons.

11. First, if one looked at the skeleton argument for the judge (at page 4) there is an express reference to the refusal decision amounting to a breach of private and family life under Article 8. Second, if one looks at paragraph 3 of the First-tier Tribunal's rejection of the application for permission, there is an express recognition that, "it would have been desirable for the judge to have mentioned Article 8". Third, the Rule 24 response itself states (at paragraph 5) that, "it is not evident from the documents available when producing this response that the Appellant set out his case for an Article 8 claim in his application...".

12. However, this was plainly not the case because an email sent on 18th February 2014 (which I have seen in this Tribunal) to Mr PS (restricted) on the email on [-]@fco.gov.uk by the Appellant's sponsoring wife is to the effect that she is going to have an emergency caesarean operation and that, "a caesarean section can be daunting for most women who go through it and it is essential I have a proper support system in place..." The email is accordingly written, "just to make you aware that your office has not yet contacted my husband Samuel Opoku-Kufuour regarding his entry clearance to the UK...". She ends the email by emphasising that, "I with to reiterate that I am alone, I haven't got family members here at the moment and it is critical that my husband comes by Monday 24th February 2014 to offer me support needed". That email, submitted Mr Olawanle, was ignored by the Entry Clearance Officer, and clearly raise Article 8 concerns. A failure to consider Article 8 was a material error of law in these circumstances.

13. Mr Olawanle then submitted that, subject to my finding an error of law, I should proceed to remake the decision. He relied upon the following submissions. First, the Appellant complied with all the requirements of the Rules except the English language requirement. However, upon closer examination, it was explained that he did meet this requirement as well. This is because he was not relying upon the confirmation from the NARIC authorities, which was given on 18th June 2014 that his English language standard met with the requirements of the Immigration Rules.

14. Rather, what he was relying upon was his BA degree certificate from the University of Ghana. That document had always been before the Entry Clearance Officer, and it had always been before every other authority who had occasion to look at it. All that the NARIC document does on 18th June 2014 is to confirm that the "title of award", which is given as "bachelor of arts in social work with information studies", is one which can be given the "evaluation" of, "the level of English language for the above degree course is considered to meet the requirements of CEFR level C1".

15. This document (which appears at page 35 of the Appellant's bundle) was opposed to facto confirmation of evidence that was already before the authorities in its original form. In these circumstances it plainly was evidence that was "appertaining" to the date of the decision (see **DR (ECO: post-decision evidence) Morocco [2005] UKIAT 00038**). Second, if one looks at the case law, it is plain that this is one of those appeals that deserves to succeed. Mr Olwanle relied upon the recent case of **Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC)**. This makes it clear in the headnote that, "if Article 8 is engaged, the Tribunal may need to look at the extent to which the

claimant is said to have failed to meet the requirements of the Rule because that may inform the proportionality balancing exercise that must follow". This is confirmed at paragraph 9 of the determination.

16. Furthermore, the case of **Mostafa (Article 8 in entry clearance) [2015] UKUT 112**, confirms the principle that there are "a limited class of cases" where Article 8(1) is engaged in such a way as to make a refusal decision disproportionate. It is made clear that, "if a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8". Mr Olawanle submitted that this was one of those "limited class of cases".

17. Mr Olawanle also relied upon the case of **Mostafa (Article 8 in entry clearance) [2015] UKUT 112** for the principle that, "it is the very essence of Article 8 that it lays on fundamental values that have to be considered in all relevant cases" and which emphasises the point that in a limited class of cases "where the relationship is that of husband and wife or other close life partners" a decision to refuse entry clearance would violate Article 8 (see paragraph 24).

18. For his part, Mr Kandola submitted that permission to appeal was limited only to Article 8. The narrow issue here was whether the Appellant had complied with the Rules. He did not. Judge Grant had carefully referred to the fact that the relevant evidence about the Appellant's educational attainments was not before the ECO or the ECM. There was a six month gap during which time the relevant evidence could have been submitted. Yet it was not. Mr Kandola drew my attention to the recent case of **SS (Congo) [2015] EWCA Civ 387** which refers to the existence of relationships having been "performed under conditions of no precariousness ..." (see paragraph 37). The proper course of action, submitted Mr Kandola, was for the Appellant, who complied with every other matter under the Rules any way, to simply make a new application so that his English language evidence could be properly considered on the basis of the NARIC certificate.

19. In reply, Mr Olawanle submitted that **SS (Congo)** was not an appropriate authority for the present case because it referred to the need for compelling circumstances and exceptional circumstances to be demonstrated with regards to cases that were quite different. In this case, the Appellant had always relied upon his BA degree from Ghana. The main question was whether it would be proportionate to make his family go through the entire process again, in circumstances which are set out in the Grounds of Appeal where his wife makes it clear that she does not have the funds and has had to return back to work very quickly after the birth of her child, rather than to simply recognise the fact that the Appellant does meet with the requirements of the Rules. Proportionality was a sensible way of looking at the facts here. A BA degree certificate which had always been before the ECO cannot be the basis for requiring this particular Appellant to apply again from overseas during which time his wife is unable to have him here when she much needs him with a young child in the house. The child is presently being looked after by a childminder and it had

always been the wife's intention that her husband should play that role as her Sponsor. This was a limited class of case and would not open the flood gates.

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section12(2) of TCEA 2007). My reasons are follows.

21. It is plain that the Article 8 issue was before the judge and was not considered. It was in the skeleton argument of Mr Olawanle. It was raised before the Entry Clearance Officer in an email to Peter Scott on 18th February 2014. It was recognised by the First-tier Tribunal, which refused the initial permission to appeal application, as something that ought to have been considered. Most importantly in circumstances where the Appellant satisfied all the requirements, and the basis of the claim that he satisfied the English language requirement was his BA certificate from the University of Ghana, rather than some other document, it was important to apply the Rule in **DR (Morocco)** because the subsequent evidence from NARIC plainly was one that was "appertaining" to the date of the decision, which was focussed upon the BA certificate from the University of Ghana. The failure to consider Article 8, in what is otherwise a determination of some considerable skill and care, amounts to a material error of law.

Remaking the Decision

22. I remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons.

23. First, this is a case which properly attracts the jurisprudence set out by UTJ Southern in the recent Tribunal determination of **Adjei (visit visas – Article 8) [2015] UKUT 20261**. That confirms that once Article 8 is engaged, the Tribunal will need to look at the extent to which the claimant is said to have failed to meet the requirements of the Rule because that will inform the proportionality balancing exercise that must follow.

24. Second, in doing so, it is plain that this particular case belongs to "the limited class of cases" where a refusal of entry clearance is "liable to infringe Article 8" (see **Mostafa**) at paragraph 24). **Adjei** confirms the early jurisprudence of **Mostafa** (at paragraph 24) that, when one is dealing "with the very narrow range of claimants", which are limited to cases "where the relationship is that of husband and wife or other close life partners", the position may well be entirely different.

25. Third, if the reliance in this case was upon the BA degree certificate from the University of Ghana, and which, even at its very earliest stages was supported "along with a letter from the university dated 25th June 2012 stating that the courses were taught in the English language" (see paragraph 8 of the determination of Judge

Grant), then the confirmation of that degree certificate by UK NARIC on 18th June 2014, was a matter which called for the application of **DR (Morocco)**.

26. In those circumstances, and taking the position in its entirety, it is difficult to see why the decision to refuse is not a disproportionate one. One only has to go through the five stage approach set out by Lord Bingham in **Razgar** to see why this is so.

27. First, the decision interferes with the Appellant's right to respect for his family life.

28. Second, it has consequences of such gravity as to engage the operation of Article 8.

29. Third, the decision is not in accordance with the law if the law under **DR (Morocco)** required the taking into account of the UK NARIC evidence because it related to the BA degree certificate. But even if this is not the case, and I am prepared to allow for the possibility that it is not the case, the fourth reason is that the interference is not necessary in a democratic society because it does not infringe the protection of the rights and freedoms of others because this case belongs to a narrow category of cases which are very specific.

30. But most importantly, the fifth requirement is that the interference must be proportionate to the legitimate public end that is sought to be achieved. In this case, if the Appellant were to apply again on the basis of the UK NARIC certificate, it is beyond per adventure that he would succeed and it makes no sense whatsoever to require him to do so.

31. This is because as the handwritten Grounds of Appeal make it quite clear the Appellant has a 9 month old daughter who was born in the UK. His wife "is struggling with her baby on her own as a single parent". If a fresh application were to be made then,

> "My wife has to work for a while and it would take between six to nine months for an application to be made and considered. Moreover, the financial demands of a fresh application will be a further drain on the family's income having spent a lot in the previous application..."

On the facts of this case, none of this is justified. This appeal is allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that if falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 9th June 2015

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and therefore I make a fee award of the amount paid or payable.

Signed	Dated
Deputy Upper Tribunal Judge Juss	9th June 2015