Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/00225/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11th March 2015

Decision & Reasons Promulgated
On 24th March 2015

Before

UPPER TRIBUNAL JUDGE REEDS

Between

ENTRY CLEARANCE OFFICER – LAGOS

Appellant

and

HENRIETTA IHEAKONYEN EHIABOR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms E Savage, Senior Home Office Presenting Officer
For the Respondent: The Sponsor in person, Mr Richard Otuorimo

DECISION AND DIRECTIONS

1. This is an appeal brought by the Entry Clearance Officer who has permission to appeal the decision of the First-tier Tribunal (Judge Verity) who allowed the appeal of the Respondent against the decision of the Entry Clearance Officer made on

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17th December 2013, refusing her entry clearance to the United Kingdom for the purpose of a family visit.

2. Whilst the Entry Clearance Officer brings the application for permission, I intend to refer to the parties as they were before the First-tier Tribunal.

3. The background can be briefly stated. The Appellant made an application for a family visit to stay with her sister and her brother-in-law on 6th December 2013. She had travelled to the United Kingdom on two previous occasions in September 2009 and December 2010 for the purposes of a family visit and had returned to Nigeria at the conclusion of those visits. In respect of the visit made in September 2009, the application was originally refused by the Entry Clearance Officer but was reversed on appeal before the First-tier Tribunal in a determination promulgated on 8th June 2009 (Immigration Judge Mylne QC).

4. The Entry Clearance Officer considered the basis upon which the application had been made and the material that had been produced in support of that application. In a decision dated 17th December 2013 the Entry Clearance Officer set out the position from the documents, noting that the Appellant had stated that she was a "new graduate with no income". The Entry Clearance Officer considered the application on the basis upon which it was made and observed that he must be satisfied of her current circumstances in order to be satisfied of her intentions in the UK and that it was the Appellant's responsibility to provide evidence of those circumstances. The Entry Clearance Officer took into account and acknowledged that she had recently completed a year of National Service from November 2012 until November 2013 but she had provided no other details of her circumstances in Nigeria, including the course that she stated she had recently completed at university and in support of her application she had chosen to submit no financial documentation at all. The Entry Clearance Officer went on to state, "I am unable to assess your application in the full knowledge of your circumstances." He went on to state:-

> "Furthermore, you have failed to demonstrate sufficiently strong ties to Nigeria to satisfy me that you intend to leave the UK but rather you have good economic reasons for not doing so. Given your doubtful financial circumstances, I am not satisfied on the balance of probabilities that you will abide by the employment conditions of visitor entry clearance. I have also considered that you have no previous UK travel history. Furthermore, I also note that you have no dependants in Nigeria."

Thus the Entry Clearance Officer was not satisfied that she was a genuine visitor seeking entry for the period or for the purpose as stated and refused the application under paragraph 41(i), (ii), (vi) and (vii).

5. It is also plain from that decision that the Entry Clearance Officer set out that the Appellant's right to appeal that decision was limited to the grounds identified at Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002. That Section

provides "the decision is unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with the Appellant's Convention rights".

6. The Appellant issued Grounds of Appeal in which it was asserted that the reasons given for refusal of the application were wrong in law and unsustainable, that contrary to the body of the decision, the Appellant had visited the UK previously on two occasions being sponsored by the same family relatives and importantly that the decision constituted a breach of her family life contrary to the provisions of Article 8 of the ECHR. There was also a ground on the basis that the decision was "irrational and **Wednesbury** unreasonable". Thus it is plain from the Grounds of Appeal to the First-tier Tribunal that the Appellant, notwithstanding a disagreement with the reasons given for refusing the application under the Immigration Rules, was also relying on what was the only Ground of Appeal, namely that under Article 8 of the ECHR.

7. I have referred to the decision made by the Entry Clearance Officer which clearly set out the rights of appeal and it is further right to observe that the decision before the Entry Clearance Manager reflected the same position and in the appeal review which took place on 1st April 2014 it was plainly set out that "there is no full right of appeal against this decision. In this respect I remind the Tribunal that they have no jurisdiction on this appeal." In this context the Entry Clearance Manager was referring to the grounds raised in relation to the Immigration Rules. The review went on to state that whilst it was noted as part of the Grounds of Appeal that he had claimed the decision breached Article 8, that the Entry Clearance Manager did not find that that had been satisfied.

8. The appeal came before the First-tier Tribunal (Judge Verity) on 6th November 2014. Before her, the Sponsor appeared to present the appeal on behalf of his sister-in-law. The Entry Clearance Officer was represented by a Presenting Officer. The decision records the history and sets out the evidence given by the Sponsor at paragraph 5 and at paragraph 6 it was noted that the Appellant's sister had attended court but did not give evidence as it was indicated that there was nothing contentious in the statement and that her evidence was accepted. The judge went on to hear the submissions made from each of the parties and it is plain from reading those submissions that the points raised on behalf of the Entry Clearance Officer went to the issues under the Immigration Rules and similarly those submissions made on behalf of the Appellant made reference to the Immigration Rules and the issue of whether or not she was a genuine visitor. The judge reserved her determination and at paragraph 9 set out the findings of fact. At that paragraph the judge reached the conclusion that the decision reached by the Entry Clearance Officer did not fully consider the Appellant's case. The judge found that the Entry Clearance Officer by stating that there had been no previous UK travel history that this was not the case and made reference to the earlier decision of the Immigration Judge dated 7th June 2009 which allowed an appeal and that she had visited the UK on two occasions and had returned to Nigeria. The judge went on to consider new documentary evidence that had not been placed before the Entry Clearance Officer concerning her circumstances, namely that the Appellant had been offered a job as an executive

trainee on 17th December 2013 (the date of the decision), such appointment being confirmed as permanent on 21st July 2004.

9. The judge at paragraph 9 made reference to her salary and recognised that whilst they were not facts which would have been before the Entry Clearance Officer that if they had been submitted it was possible that the Entry Clearance Manager would have reached other conclusions but as the information had not been provided, that was the reason for the Tribunal hearing. The judge therefore concluded at paragraph 9 the following:-

> "Taking these factors into account I am satisfied that the Appellant has demonstrated that she has strong ties to Nigeria and that she has sound economic reasons for returning to her home country. I therefore allow the appeal.

In the notice of decision the judge reflected that sentence "The appeal is allowed".

10. An application was made on behalf of the Entry Clearance Officer for permission to appeal that decision. The Grounds of Appeal state that on 25th June 2013 Section 52 of the Crime and Courts Act 2013 amended Section 88A of the Nationality, Immigration and Asylum Act 2002 as inserted by the 2006 Act (entry clearance) to remove the right of appeal for persons visiting specified family members. The grounds went on to state that, however, they were still able to bring an appeal on the residual grounds in Section 84(1)(b) and (c) of the 2002 Act, namely on human rights and race relations grounds. The grounds went on to state that the statutory jurisdiction could not be conferred by waiver or agreement or the failure of the parties relying on the decision of **Virk and Others v SSHD [2013] EWCA Civ 652** at paragraph 23 and that the judge, by allowing the appeal under the Immigration Rules, had gone beyond the jurisdiction and therefore had erred in law such that the decision should be set aside. It is also made plain in the grounds at paragraph 6 that the judge failed to make any findings in relation to what was the only Ground of Appeal in relation to Article 8.

11. A Judge of the First-tier Tribunal (Judge Pooler) granted permission to the Entry Clearance Officer stating:-

> "The point appears not to have been taken in the hearing; but nevertheless the Appellant had a right of appeal under statute only on limited grounds, essentially human rights. The judge, who appears to have allowed the appeal because she was satisfied that the Appellant had strong ties to Nigeria and had sound economic reasons for returning, arguably failed to consider only those grounds and to make relevant findings."

12. The Appellant by way of reply produced a document entitled "Respondent's response to the Appellant's grounds for permission to appeal under Rule 24", that document being provided prior to the hearing and also in a bundle of documents served on the Tribunal on 10th March 2015. In that document, it is said by way of reply that the judge did not allow the appeal under the Immigration Rules but allowed the appeal "based on the available facts". It further states at paragraph 3

that it had been raised in the Grounds of Appeal that the decision constituted an interference with the Appellant's right to family life relying on Article 8 of the ECHR and further at paragraph 4 submitted that the judge was right to have allowed the appeal because the decision of the Entry Clearance Officer was irrational and **Wednesbury** unreasonable thus the Rule 24 response made it plain that the decision of the First-tier Tribunal was a correct one.

13. Thus the appeal came before the Upper Tribunal, Ms Savage appeared on behalf of the Entry Clearance Officer and the Sponsor, Mr Otuorimo, appeared on behalf of the Appellant, as he did before the First-tier Tribunal. As the Sponsor was acting in person, I endeavoured to explain to him the procedure that would be adopted and ensured that he had all relevant documentation and gave him the opportunity to ask any questions during the course of the hearing.

14. Ms Savage relied upon her grounds and in addition provided to the Tribunal a case that had been reported very recently that of **Mostafa (Article 8 and entry clearance) [2015] UKUT 00112 (IAC)** and also a copy of **Virk and Others v SSHD [2013] EWCA Civ 652** that had been referred to in the permission grounds.

15. She submitted that contrary to the Rule 24 response, the judge plainly allowed the appeal by reference to the Immigration Rules. She directed the Tribunal's attention to the last sentence of paragraph 9 where the judge used exact terms of paragraph 41 of the Rules. Thus it was stated that she had allowed the appeal under the Immigration Rules but that the legal position was set out in the permission grounds and that Section 52 of the Crime and Courts Act 2013 amended Section 88A of the Nationality, Immigration and Asylum Act 2002 so that there was no right of appeal except on grounds of unlawful discrimination or on Article 8 human rights grounds. Thus it was not open to the judge to allow the appeal under the Immigration Rules or on the basis as suggested by the Rule 24 response as not being in accordance with the law. This was a case where the application was made on 6th December 2013 and thus the restrictions applied. She submitted that whilst the issue of jurisdiction does not appear to have been raised by any of the parties, the decision of **Virk** applied at paragraph 23. In those circumstances she submitted the decision to allow the appeal could not stand and should be set aside.

16. She made some submissions concerning the Article 8 grounds and that the relationship relied upon was not one that could acquire the protection of Article 8 on the basis that the Appellant and the Sponsors were adult siblings and that there was no evidence of dependency. She made reference to the most recent decision of **Mostafa** and sought to distinguish that case from the present facts of the appeal noting that the relationship here was one of adult siblings, and that at paragraph 24 of the decision it did not appear to fall within those relationships where Article 8(1) could be engaged. In this appeal also, applying paragraph 21 of **Mostafa**, there were deficiencies in the actual application and the evidence relied upon by the First-tier Tribunal relating to her employment had not been placed before the ECO. In the alternative she submitted that the decision was justified and proportionate.

17. The Sponsor, Mr Otuorimo, relied upon his skeleton argument which I have set out earlier. In that skeleton argument or Rule 24 response, he submitted that the judge had not allowed the appeal under the Immigration Rules but allowed it on the factual basis that she had heard and that the Entry Clearance Officer applying the Immigration Rules had failed in his duty to consider properly the history that she had travelled to the UK on two previous occasions and the evidence that she had ties to Nigeria. He also referred to the case of **Mostafa** at paragraph 24 noting that if a person's circumstances do satisfy the Immigration Rules and that 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. He went on to state that there were no financial issues in the application and that this was a visit intended as a family visit for her to visit her family members in the UK at Christmas. He referred to the decision of the First-tier Tribunal in 2009 that she was a genuine visitor and that in this case there was a right to family life. He told me that his wife had entered the UK in 2014 and there had been return visits to Nigeria in 2011 and in 2014. He identified certain parts of statements that related to Article 8.

18. At the conclusion of the submissions of the parties I indicated to them that having considered with care the written documentation and the oral submissions that I had heard, that I was satisfied that the decision of the First-tier Tribunal demonstrated a material error of law and that the decision could not stand and must be set aside. Whilst I gave short reasons for reaching that conclusion, I indicated to the parties that I would set out my reasons in writing which is what I now go on to do.

19. It is entirely plain from the written documentation before me that the decision of the Entry Clearance Officer clearly stated that the appeal was limited to the grounds identified at Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002. As set out in the grounds for permission that was as a result of Section 52 of the Crime and Courts Act 2013 which came into effect from 25th June 2013 which amended Section 88A of the 2002 Act so that there is no right of appeal against refusal of entry clearance in family visitor cases except on grounds of race relations and human rights grounds. It is further plain that the issue of jurisdiction was raised in the Entry Clearance Manager's review made on 1st April 2014. The Grounds of Appeal, whilst disagreeing with the decision of the Entry Clearance Officer in substance and therefore the Immigration Rules themselves, also made it clear that the appeal was advanced on the basis of human rights under Article 8 of the ECHR. The decision of the First-tier Tribunal does not raise or deal with the issue of jurisdiction at all despite those matters that I have set out in the preceding paragraphs. Thus it was not a case in which jurisdiction had not been raised but it is clear that the issue was not considered by the parties or the judge during the appeal.

20. Whilst the Sponsor asserts that the judge did not allow the appeal under the Immigration Rules, that can be the only sensible inference from a careful reading of the determination as a whole. The decision of the First-tier Tribunal at paragraph 9 made reference to the relevant circumstances under paragraph 41 dealing with previous travel to Nigeria, her ties to Nigeria in terms of employment and, as Ms Savage observed, at paragraph 9 used the words that strongly indicated that she was

allowing the appeal under the Immigration Rules noting as follows, "Taking these factors into account I am satisfied that the Appellant had demonstrated that she has strong ties to Nigeria and that she has sound economic reasons for returning to her home country. I therefore allow the appeal." Thus I am satisfied that the judge did not allow the appeal on human rights grounds but appeared to allow it under the Immigration Rules. Had the decision been one that was made on human rights grounds, then the decision would have to have grappled with the test in **Razgar** and set out findings of fact as to how Article 8(1) was engaged and make factual findings consistent with a human rights claim of this type. As Ground 6 of the permission grounds by the Entry Clearance Officer make plain, the judge failed to make any findings on Article 8. Consequently I am satisfied that the First-tier Tribunal had no basis in law for allowing the appeal under the Immigration Rules and no power to consider an appeal on those grounds. As set out in **Virk and Others v SSHD [2013]** at paragraph 23, the First-tier Tribunal is a creation of statute whose jurisdiction in the case is limited by the terms of Section 8 of the 2002 Act and that the parties cannot agree to the Tribunal exercising a jurisdiction that had not been given to it by Parliament.

21. Whilst the Rule 24 response makes reference to it being open to the judge to allow the appeal on the basis that it was "**Wednesday** unreasonable" or irrational, that also fails as an argument as there is no Ground of Appeal that the decision is "not in accordance with the law" or "not in accordance with the Immigration Rules". Thus I set aside the decision.

22. It follows therefore from my decision that the only power in law that the judge should have considered was that relating to Article 8 of the ECHR and whether the decision was incompatible with the Appellant's rights under Article 8. As the permission grounds make clear at paragraph 6, the judge failed to deal with that issue and no findings were made in relation to that even though it is plain in my judgment it was raised in the Grounds of Appeal. As a result of that, I reach the conclusion that that was an issue that remained outstanding and thus the decision would either have to be remade by this Tribunal or remitted to the First-tier Tribunal to consider.

23. The Sponsor has conducted the appeal without the benefit of legal representation and I accept that it may not have been plain to him that in the event of setting aside the decision that the Tribunal would go on to remake the decision itself. The Appellant's sister was not present at court and as the First-tier Tribunal had made no findings of fact upon the nature of their relationship or any factual findings relevant in deciding whether Article 8 was even engaged that it is incumbent on a Tribunal to hear that evidence and make findings of fact as necessary. The sponsor submitted that the appeal should be remitted to the First-tier Tribunal for those findings to be made after hearing the evidence on these issues. Whilst the decision of **Mostafa** in its obiter remarks at paragraph 24 makes reference to the kinds of relationships that attract the protection of Article 8(1), the fact remains that there were no findings made by the First-tier Tribunal concerning this issue and it seems to me that in the interests of justice and on the basis that this was the ground that was identified by the Appellant as one that required consideration that the Appellant should be given

the opportunity to provide that evidence upon which she would seek to rely and for those findings of fact to be made.

24. In those circumstances, having found an error of law and set aside the decision but finding that I am unable to remake the decision at the hearing, I have reached the conclusion that the case should be remitted to the First-tier Tribunal as the sponsor requested. The findings of fact made at paragraph 9 shall be preserved.

25. Therefore the decision of the First-tier Tribunal is set aside, and the case is to be remitted to the First-tier Tribunal at Taylor House for a hearing on a date to be fixed in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the practice statement of 10th February 2010 (as amended).

Directions

26. Not later than seven days before the forthcoming hearing the parties shall serve on the Tribunal and each other any documentary evidence upon which it is intended to rely at the hearing before the First-tier Tribunal.

Notice of Decision

27. The decision of the First-tier Tribunal involved the making of an error on a point of law therefore the decision is set side. The findings of fact made at paragraph 9 shall be preserved. The case is to be remitted to the First-tier Tribunal at Taylor House for a hearing on a date to be fixed as soon as reasonably possible in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the practice statement of 10th February 2010 (as amended).

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Reeds