Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35844/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th December 2015	**On 19th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

JUBRIL OLUSESI KASUMU

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms P Yong, Counsel; Greenland Lawyers
For the Claimant: Ms S Sreeraman, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge McIntosh dismissing the Appellant's appeal against the Respondent's decision to refuse him further leave to remain under as a spouse of a present and settled person, and challenging removal directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge A. K. Simpson. The grounds upon which permission was granted may be summarised as follows:

(i) It is arguable that the judge erred in considering matters no relevant to the issue, particularly as it was never suggested by the Respondent that the Appellant and his British wife are not in a genuine and subsisting relationship and as they are now expecting their first child; and

(ii) It is arguable that the judge erred in assuming that the British sponsor would be granted a visa to join her husband in Nigeria given that she is not a Nigerian national.

3. I was provided with a Rule 24 response from the Respondent.

Error of Law

4. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I find that there was an error of law in the decision, such that it should be set aside. My reasons for so finding are as follows.

5. The history underlying the appeal shows that the Respondent never sought to challenge the subsistence of relationship between the Appellant and his spouse in the Refusal Letter. It is trite that the Respondent can alter the basis for her refusal of the application or take issue with further matters on appeal, having put the Appellant on notice and a fair opportunity being given to the Appellant to deal with such matters. On that note, §15 of the determination does not disclose that the Presenting Officer raised the issue of the marriage not being genuine and subsisting in her closing submissions (or earlier in cross-examination). Therefore, it is unclear why the judge embarked upon an assessment of a rule which was not in issue. Ms Sreeraman asked me to find that the judge was entitled to raise any issue of their own accord *ad hoc* pursuant to *RM (Kwok On Tong: HC395 para 320) India* [2006] UKAIT 00039. I wholly reject that submission as that is not the *ratio* of that reported determination. The most pertinent passage from the decision of Upper Tribunal Judge Ockelton states *inter alia* as follows at [10]:

> "In *Kwok On Tong* (and also in *R v IAT ex parte Hubbard* [1985] Imm AR 110) the Court had to consider what the position was if a refusal of entry clearance was based on one element of the Rules, but by the time of the hearing it became apparent that there was some other requirement of the Rules which the appellant could not meet. Both those cases decide that the notice of refusal is not equivalent to a pleading; if new elements of the Immigration Rules come into play they are to be dealt with on the appeal, and the parties must be allowed any appropriate adjournment in order to avoid the injustice of being taken by surprise…"

6. In short, new issues under the Rules may come into play, however that must be at the instigation of the parties, particularly where they are both represented. I reject the suggestion that an independent judge hearing an appeal may descend into the arena to raise an issue against one party where the other has not explicitly sought to do so. For a judge to do so, in my view this result in a party being in a position to allege there had been an appearance of or reasonable apprehension of bias (see *Alubankudi (Appearance of bias)* [2015] UKUT 542 (IAC)). Whilst neither party has gone so far as to suggest that here, I find that the judge has erred in raising an issue which was not

taken by the Respondent and finding against the Appellant on that matter, particularly where it is further unclear from the determination whether this issue was raised by the Respondent nor whether any notice of the issue was given to the Appellant by the Respondent.

7. I find that the judge's decision on the Appellant's article 8 matters outwith the Rules are infected by the view taken against the Appellant of his genuine and subsisting relationship.

8. Given my findings on this first ground, I do not propose or need to go on and consider the remainder.

9. In the light of the above findings, I set aside the decision and findings of the judge in totality.

Decision

10. The appeal to the Upper Tribunal is allowed.

11. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal, to be heard by a differently constituted bench.

Anonymity

12. The First-tier Tribunal did not make an anonymity order and I was not asked to make one and do not see reason to do so at present.

Signed Date

Deputy Upper Tribunal Judge Saini