Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA386072013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th May 2016	**On 26th May 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

AYOMIDE FANIYAN SAMUEL (FIRST APPELLANT)
OLAYINKA FANIYAN (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Al-Rashid, instructed by David A Grand
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The first Appellant is a citizen of Nigeria born on 21st September 2000. The second Appellant is his mother a Nigerian national born on 22nd August 1979. Both Appellants arrived in the UK on 19th July 2005. They did not have leave to enter and remained without leave.

2. The Appellants made applications for leave to remain on Article 8 grounds under Appendix FM and paragraph 276ADE of the Immigration Rules. Their applications were refused.

3. There was no Reasons for Refusal Letter in respect of the first Appellant. The Notice of Decision to the first Appellant is dated 24th April 2013 and states:

> "You applied for leave to remain in the UK as a dependant of Olayinka Faniyan but your application has been refused.
>
> The requirements of the Rules for this category include that:
>
> E-LTRC.1.6 One of the applicant's parents must be in the UK and have leave to enter or remain or indefinite leave to remain or is at the same time being granted leave to remain or indefinite leave to remain under this Appendix.
>
> In view of the fact that your parent Olayinka Faniyan has been refused leave to remain in the UK your application has been refused in line with his application. The Secretary of State is not satisfied that you are able to meet the requirements of Appendix FM as stated above."

4. The second Appellant was refused leave to remain on the basis that she too could not satisfy Appendix FM because her partner, Samuel Sunday Faniyan, was not a British citizen and was not settled in the UK. She could not satisfy Appendix FM under the partner route and her son could not satisfy Appendix FM under the child route. The Respondent also issued notices of removal under Section 10 dated 13th August 2013.

5. The Appellants appealed to the First-tier Tribunal. Unfortunately, there has been some confusion as to whether the second Appellant had in fact submitted notice of appeal and indeed the decision of First-tier Tribunal Judge Devittie refers only to the first Appellant Ayomide Faniyan Samuel with one appeal number. There has been no allocation by the Tribunal of a file in respect of the second Appellant and she does not have an appeal number.

6. However, it is quite clear that two notices of appeal were submitted in the bundle of evidence which was supplied by the Appellants' representative on 4th April 2016 in response to directions I gave on 29th February 2016. It would appear from reading those documents that notices of appeal were submitted to the Tribunal, but there is a response from the Tribunal stating that the notice in respect of Ayomide Samuel Faniyan was not received and therefore this was resubmitted at a later date.

7. It is clear from this evidence that a 26-page fax was sent through on 15th August 2013 with a covering letter of the same date with reference to Miss

Olayinka Faniyan and dependent child. The grounds of appeal refer to Faniyan Samuel Ayomide and Miss Olayinka Faniyan and are dated 15th August 2013.

8. The application to the Home Office is made in respect of both Appellants. There is a notice of appeal dated 15th August 2013 signed by the second Appellant Olayinka Faniyan and the decision of 9th August 2013 and removal decision of 13th August 2015. There is also the removal decision in respect of the first Appellant dated 13th August 2013.

9. It would appear that the Tribunal Service wrote to the second Appellant, Olayinka Faniyan, and stated that there was no appeal form submitted in respect of her son, Ayomide Samuel Faniyan. That is why his appeal notice was sent again. For some reason, unknown to any of the parties present, it would appear that only the appeal form for Ayomide Samuel Faniyan was allocated an appeal number.

10. Therefore, looking at that evidence as a whole, I find that there is an appeal in respect of the second Appellant and due to an administrative error she has not been allocated an appeal number. It was agreed by the parties that the appeal before me relates to both Appellants. Due to no fault of her own, the second Appellant's appeal was not in fact registered by the Tribunal Service.

11. On that basis, when I come to consider the decision of First-tier Tribunal Judge Devittie, it was conceded by Mr Tufan, that his failure to consider the second Appellant amounted to an error of law and the matter should be re-decided. Mr Tufan also conceded that in respect of the first Appellant, Ayomide Samuel Faniyan, the judge had erred in law at paragraph 4 because he had failed to consider Regulation 7 of the Immigration (EEA) Regulations 2006.

12. The judge stated that:

> "The Free Movement of Persons Directive 2004/38/E states in paragraph 15 of the preamble that family members who have a retained right of residence do so exclusively on a personal basis. This means that they cannot sponsor for another family member. For example, if a non-EEA national with a retained right of residence gets married to another non-EEA national her new husband will not have any rights under the Regulations. Her new husband would only be able to enter or remain in the UK if he qualifies under the Immigration Rules. In my view the Appellant's son, the child of a non-EEA national who has retained rights of residence, is in the same position as his mother."

13. However Regulation 7 of the Immigration (EEA) Regulations 2006 states that:

> "7. - (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as family members of another person –
>
> (a) his spouse or his civil partner;
>
> (b) direct descendants of his, his spouse or his civil partner who are under 21 or dependants of his, his spouse or his civil partner….etc.

14. The first Appellant's father, Samuel Sunday Faniyan had an EEA residence card of a family member valid until May 2017. Therefore, it would appear that it is possible that the first Appellant could succeed under Regulation 7(1)(b), if his father was exercising treaty rights.

15. The Respondent accepted in the refusal letter of 9th August 2013 that the first Appellant's father was Samuel Sunday Faniyan and he was the partner of the second Appellant Olayinka Faniyan, and that there were genuine and subsisting relationships as parents and child. First-tier Tribunal Judge Devittie therefore erred in law in failing to consider the situation.

16. Accordingly, it having been agreed that the judge erred in law in respect of both Appellants, I set aside the decision of the First-tier Tribunal dated 1st May 2015, in its entirety, and I remake it as follows.

17. Having considered all the documentation before me there has been much confusion in the progress of this appeal. First-tier Tribunal Judge Molloy attempted to cure the confusion by issuing extensive directions going to four pages on 26th August 2014. He was particularly concerned that there was no evidence on the file from the Respondent, there was no Rule 13 bundle including an application form and supporting documents, and that there was no Reasons for Refusal Letter in respect of the first Appellant, Ayomide Samuel Faniyan. He directed that this was concerning given that the Respondent was under a duty to demonstrate that she had given attention to the statutory duty contained in Section 55 of the Borders, Citizenship and Immigration Act 2009.

18. Judge Molloy also sought to clarify the position of whether there had been a notice of appeal and the basis of the application, and the immigration status of the Appellant's father giving rise to any rights of residence under the Immigration (EEA) Regulations 2006.

19. It is unfortunate that the Respondent failed to comply with those directions and indeed that the Appellant only complied with those directions after the further directions issued by me on 26th February 2016.

20. However, it has been possible during the appeal to clarify the situation and ascertain the nature of the documents. There is no issue in relation to the notice of appeal and the basis upon which the application was made. The immigration status of Samuel Sunday Faniyan is that he has a derived

right of residence which was granted in May 2012 and valid until 23rd May 2017. It would appear that he was granted rights of residence as a family member of an EEA national namely as a spouse from 2003 until 2013. However, his marriage ended in divorce in 2011 and he thereafter obtained a retained right of residence.

21. The result of the discussions in court and the consideration of the documents submitted is that, to date, there is no Reasons for Refusal Letter in respect of the first Appellant, Ayomide Samuel Faniyan. The decision notice refers only to Appendix FM. The letter of 9th August 2013 which deals with his mother's application does consider the decision under the child route in respect of Appendix FM, but fails to deal with paragraph 276ADE of the Immigration Rules or to deal, in any detail, with the best interests of the child. This letter states that:

> "We have carefully considered your application however whilst we acknowledge that you have a genuine and subsisting parental relationship with a child who you claim has lived in the UK continuously for seven years immediately preceding the date of application your application falls for refusal under the eligibility requirements of the Immigration Rules which are mandatory and which apply to all applicants regardless of whether EX.1 exemption criteria is met. As you have failed to meet those eligibility requirements you cannot benefit from the criteria set out in EX.1.
>
> We have taken into consideration that your child is aged 12 and it is claimed he has resided in the United Kingdom since 2005. In this case it is considered that he would be able to adapt to life in Nigeria where you have lived previously and is familiar with the language.
>
> Moreover you would be returning as a family unit and you will be able to support your child who is also a citizen of Nigeria to enjoy their full rights as a citizen, including the right to education. It is noted that his parents have spent the majority of their lives in Nigeria and would be able to assist the child in adjusting to life there.
>
> Therefore it is considered reasonable for you and your child to return to Nigeria as a family unit and continue to enjoy your family life overseas. Whilst this may involve initial disruption to your life it is considered that it is proportionate in order to meet the legitimate aims of the state.
>
> Appendix FM sets out the criteria to be applied in assessing whether to grant leave to a family member on the basis of their family life with a child in the UK. The criteria reflect the duty in Section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, as interpreted in recent case law in particular ZH (Tanzania)."

There then follows a consideration of paragraph 276ADE in respect of the second Appellant.

22. Accordingly, it was agreed by all parties, and I make such a finding, that the decision to refuse leave and to remove the first Appellant was not in accordance with the law. The Secretary of State failed to consider paragraph 276ADE in respect of the first Appellant who had been resident in the UK for over seven years and had failed to consider whether, in the particular circumstances of his case, it was reasonable for him to leave to UK. There was no assessment of his best interests in accordance with the duty under Section 55 and the paragraphs that I have recited from the refusal letter of 9th August 2013 in respect of the second Appellant do not properly address his best interests. Therefore, there has not been a lawful decision in respect of the first Appellant and I allow his appeal insofar as the Respondent's decisions, to refuse leave and remove him, were not in accordance with the law.

23. It was also agreed that the decision of his best interests and whether it would be reasonable for him to return under paragraph 276ADE would, of course, affect a decision in respect of the second Appellant because, if it can be shown that the first Appellant is a qualifying child, then that would indeed affect whether it would be proportionate to remove his mother.

24. There was also little consideration of the Appellant's father, and his relationship with the first Appellant, in the refusal letter, although it was accepted that his relationship with the second Appellant was a genuine one.

25. Accordingly, the decision in respect of the second Appellant was not in accordance with the law. The refusal failed to properly assess the situation in relation to the first Appellant and there was no proper consideration his best interests or whether it would be reasonable for him to return to Nigeria with his mother. This would impact on the second Appellant's ability to remain on Article 8 grounds, particularly with reference to Section 117B of the Immigration, Nationality and Asylum Act 2002.

26. It is worth noting that the first Appellant has at no time made an application for a residence card under the Immigration (EEA) Regulations 2006, although it may be that he had a right of residence on arrival in the UK under Regulation 7, subject to his father and his spouse having exercised treaty rights at that time. It is of course open to the first Appellant to make an application and submit the relevant evidence to support it. If the first Appellant has a right of residence, then of course it would affect the Respondent's consideration under the Immigration Rules and whether it was reasonable for him to return to Nigeria.

27. Accordingly, I allow the Appellants' appeals insofar as the decision of 24th April 2013 and the removal decision of 13th August 2013 in respect of the first Appellant was not in accordance with the law and the decision of 9th August 2013 and the removal decision of 13th August 2013 in respect of the second Appellant was not in accordance with the law for the reasons given above. The applications therefore remain outstanding and it is for the Secretary of State to re-decide the applications on the evidence before her.

28. I allow the Appellants' appeals to the limited extent that the Respondent's decisions to refuse leave and remove them were not in accordance with the law.

Notice of decision

Appeals allowed in so far as the Respondent's decisions were not in accordance with the law.

No anonymity direction is made.

J Frances

Signed Date: 25th May 2016.

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal, I have decided to make a fee award of any fee which has been paid.

J Frances

Signed Date: 25th May 2016

Upper Tribunal Judge Frances