IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49014/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 30th March 2016	**On 14th April 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR OLUWAGBEMIGA ANTHONY IDOWU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr M Diwnycz (Senior Home Office Presenting Officer)
For the Respondent: Mr O Ogunbiyi (Counsel)

DECISION AND REASONS

1. I shall refer to the Appellant before the Upper Tribunal as the Secretary of State. I shall refer to the Respondent before the Upper Tribunal as the Claimant. This is the Secretary of State's appeal to the Upper Tribunal, brought with permission, against a decision of the First-tier Tribunal (Judge Martins herein after "the judge") allowing the Claimant's appeal against a

decision of 14th November 2014 refusing to vary his leave to enter the UK and deciding to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. By way of brief background, the Claimant who was born on 29th June 1988 is a national of Nigeria. He entered the UK on 26th September 2007 as a student and subsequently extended that leave. Eventually, he submitted an application for leave to remain on the grounds of marriage to a UK national and it was that application, and its refusal, which led to the above decision and the subsequent appeal to the judge. It is also right to point out that the adjudication process has been somewhat convoluted with there having been a previous appeal to the First-tier Tribunal which I shall say something about, albeit briefly, below.

3. The Claimant was represented before the judge but the Secretary of State was not. The judge, when considering the Article 8 arguments, noted that the application which had led to the decision under appeal, had been made on 22nd December 2011 which was prior to significant changes which had been made to the Immigration Rules on 9th July 2012. Of course, there have subsequently been certain further changes. The judge considered that, given that the application had been made prior to the changes to the Immigration Rules, she had to base her decision upon the Immigration Rules as they stood in December 2011 and that this meant, in consequence, that when she came to consider Article 8 she had to undertake what is sometimes referred to as a "freewheeling" Article 8 assessment which would be unencumbered by the content of what might be described as the Article 8 related Immigration Rules. On that basis, she allowed the Claimant's appeal, having concluded that the Article was engaged and that, although any interference with Article 8 rights would be lawful and in pursuance of a legitimate aim, the interference would not be proportionate. In this context, she accepted that the Claimant had a genuine and subsisting marriage with his British citizen wife who had lived all her life in the UK, that he had been lawfully resident in the UK at all material times and that the interference with his family life would be disproportionate even if it simply meant his having to return to return to Nigeria in order to apply for and obtain entry clearance.

4. The Secretary of State obtained permission to appeal on the basis that following the judgment in **Singh [2015] EWCA Civ 74**, the Secretary of State was entitled to take into account the provisions of the Immigration Rules as they stood at the time the relevant decision was made. Permission was also granted on the basis that, in any event, the judge had failed to consider the public interest requirements identified under Section 117B of the [Nationality, Immigration and Asylum Act 2002].

5. In light of the grant of permission there was a hearing before the Upper Tribunal (before me) with the intention that the question of whether or not the judge had erred in law would be addressed. However, Mr Diwnycz indicated that he did not seek to pursue any of the arguments in the grounds lodged on behalf of the Secretary of State. He also pointed out

that the Secretary of State had, in the earlier appeal against the same decision, conceded that the Claimant's application ought to be considered on the basis of the law as it stood in December 2011. Mr Diwnycz said that the Secretary of State would stand by that concession/undertaking.

6. Mr Diwnycz is known to me and is a very experienced Home Office Presenting Officer. He is indeed a Senior Home Office Presenting Officer. He was, of course, representing the Secretary of State before me. He told me that he did not wish to pursue the grounds and, it seems to me, in those circumstances, if the Secretary of State is offering no argument and is, in effect, not seeking to rely upon the grounds, then there is no basis upon which I can or should set aside the decision of the judge. Accordingly, I conclude that the judge did not err in law and that the decision shall stand.

Notice of Decision

The decision did not involve an error of law and shall stand.

Anonymity

I make no anonymity direction.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I do not disturb the fee award made by the First-tier Tribunal.

Signed Date

Upper Tribunal Judge Hemingway