



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/16554/2016

THE IMMIGRATION ACTS

Heard at Glasgow  
On 16 August 2018

Decision & Reasons Promulgated  
On 28 August 2018

Before

Mr C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE MACLEMAN

Between

ANDREW BRUNO OCHEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellants: Mr D McGlashan, of McGlashan MacKay, Solicitors  
For the respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REMITTAL

1. The appellant is a citizen of Uganda, born on 13 August 1987. He and his wife married in Uganda on 29 November 2013. His wife has a child from a previous relationship, born on 26 March 2011. The first child of the marriage was born on 7 June 2014. Wife and both children are UK citizens.
2. By an application dated 17 March 2016 (with a covering letter from his solicitors and supporting documents) the applicant sought to remain in the UK, based on family life with his wife and the two children. The respondent refused that application by a decision dated 24 June 2016.
3. A second child of the marriage was born on 17 February 2017, and is also a UK citizen.

4. FtT Judge Lea heard the appellant's appeal on 27 June 2017 and dismissed it by a decision promulgated on 12 July 2017. Permission to appeal to the UT was granted on 10 May 2018.
5. The appellant disclosed in his application previous refusals of visas. Mr Govan was able to check the respondent's records and confirm that the visa issued in 2014 was expressly for purposes of visiting his wife, he returned within its period of validity, and the visa issued in 2015 was also for that purpose. The application leading to these proceedings was made before it expired.
6. Mr Govan argued that the FtT's decision disclosed no error of law, based on the case as it had been put to the FtT, and that the grounds of appeal were no more than disagreement with the outcome.
7. There was some force in that argument. The evidence was skimpy, and the case argued was vague. There was little evidence of any objection or obstacle to the oldest child moving to Uganda, or of how any of the children's interests might be affected by any of the possible outcomes (although we suspect the case will come down to the proportionality of family life being severed through removal of the appellant).
8. We considered whether there might be error through failure to refer to the respondent's guidance or policies, which are separate from the immigration rules. The respondent's decision does not appear to have taken those into account, although there may well have been a relevant policy at the time. However, the appellant did not refer to or found upon any guidance or policy in the FtT. Judges are bound to know and apply the law and the rules, but they are not expected to apply further materials of that nature when not referred to by parties, particularly as such materials are ever-changing and it may be difficult to locate the relevant version. We do not find error in that respect.
9. We do find, however, that the judge erred at paragraphs 19, 24 and 26 by taking it as the crux of the case that it would be proportionate for the appellant to return to Uganda and apply as a spouse, being the procedure required by the rules. It had been made clear that any such application could not meet the minimum income requirements in the rules. While we appreciate that any such application would have to be decided both under and outwith the rules, this was not a "*Chikwamba*" situation. The immigration history is relevant to whether an applicant should have to comply with the formality of application from abroad. In this case the immigration history was creditable. We do not consider there was reason to require the appellant to apply again from abroad. The FtT was (or should have been) as well if not better placed than an ECO to decide the case on its overall merits on the longer-term consequences of removal and non-return of the appellant. We find the error sufficiently material to require the decision to be set aside.
10. If the case fell to be decided on the evidence as it was before the FtT, the appellant might again have been in difficulty; but significant time has gone by, family life (we were told) has continued to develop, and a further decision needs to be based on updated (and, it is to be hoped, fuller) evidence.

11. If parties consider that any guidance or policy is relevant, they are under a duty to refer to it, and explain how it applies.
12. The decision of the FtT is **set aside**. It stands only as a record of what was said at the hearing. The nature of this case is such that it is appropriate under section 12 of the 2002 Act and Practice Statement 7.2 to remit to the FtT for an entirely fresh hearing. The member(s) of the FtT chosen to consider the case are not to include Judge Lea.
13. No anonymity direction has been requested or made.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

17 August 2018  
Upper Tribunal Judge Macleman