Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21015/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 21st January 2020

Decision & Reasons Promulgated
On: 28th January 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, Abuja

Appellant

and

Obianuju Chiamaka Nwakuna
(no anonymity direction made)

Respondent

For the Appellant: **Ms Jones, Senior Home Office Presenting Officer**
For the Respondent: **Dr Nwakuna (Sponsor)**

DECISION AND REASONS

1. The Respondent OCN is a national of Nigeria born in 1995. She seeks leave to enter the United Kingdom as the partner of her husband and sponsor Dr Ugonna Sampson Nwakuna.

2. Leave to enter was refused by the Entry Clearance Officer (ECO) on the 10th September 2018 and the Appellant exercised a right of appeal. The appeal was allowed by First-tier Tribunal Judge Juss on the 9th September 2019. The Entry

Clearance Officer now appeals against that decision, with permission to do so granted on the 16th December 2019 by First-tier Tribunal Grant-Hutchinson.

A Right of Appeal?

3. The first question raised in this appeal is whether the First-tier Tribunal had jurisdiction to hear the case at all.

4. Under s82(1) Nationality, Immigration and Asylum Act 2002 there are only three rights of appeal to the First-tier Tribunal:

> **Right of appeal to the Tribunal**
>
> (1) A person ("P") may appeal to the Tribunal where—
>
> (a) the Secretary of State has decided to refuse a protection claim made by P,
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
>
> (c) the Secretary of State has decided to revoke P's protection status.

5. Mrs Nwakuna had never asserted a right of appeal under s82(1) (a) or (c). The only conceivable avenue of appeal applicable to a wife seeking to join her husband was provided by s82(1)(b). In order to pursue it she would have to plead, under s84(2), that the decision was unlawful under section 6 of the Human Rights Act 1998. In this onward appeal the ECO asserts that Mrs Nwakuna had made no such assertion, and that as she was seeking to join her Tier 2 Migrant husband, this had actually been an application made under the 'Points Based System'.

6. The statutory scheme gives rise to three questions:

   i) Did Mrs Nwakuna make a human rights claim?

   ii) Was it refused?

   iii) Did she assert, in her grounds of appeal, that the decision was an unlawful interference with her human rights?

7. The answer to the first question is, in my view, yes. On the 11th July 2018 Mrs Nwakuna made an online application for entry clearance. At the top that form indicates that the type of visa she was applying for is 'settlement', and that this too was the purpose of the application. An application to settle with your spouse is, it is common ground, a human rights application. The fact that Dr Nwakuna subsequently indicated that his wife had intended to apply for a visa as a Tier 2 dependent, and had filled in that form in error, does not change the fact that the application lodged was in fact a human rights application: Sheidu (Further submissions; appealable decision) [2016] UKUT 000412 (IAC) by anaology.

8. That this is so is reflected by the ECO's decision, dated the 10th September 2018. The ECO wrote to Mrs Nwakuna a letter prefaced as follows:

> "Your human rights claim in an application for entry clearance made on the 11th July 2018 has been refused. … you can appeal this decision".

The answer to the second question is therefore uncontrovertibly yes.

9. That being the case, it is quite clear that the statutory requirements in s82(1)(b) are met. There was a right of appeal to the First-tier Tribunal.

10. It is the final question which has, it would seem, given rise to the confusion. In its decision the First-tier Tribunal records that Article 8 was not raised before it; it is this comment that the ECO has relied upon in submitting that there was never a human rights appeal here. Both the First-tier Tribunal and the ECO are wrong. Whilst the grounds of appeal do refer to the rules relating to Tier 2 dependent migrants, they also contain the clear assertion that the decision is unlawful under s6 of the Human Rights Act 1998:

> "The refusal of leave to enter is breach of my human right to private and family life"

Furthermore the First-tier Tribunal recognises that this ground was unaltered before it, noting [at §8] that Dr Nwakuna asserted a 'human right' to have his wife here with him.

11. It follows that the answer to all three of the questions posed by the statutory framework, set out at my §6 above, are in the affirmative. There was a human rights claim, that was refused, and the appellant asserted human rights as a ground of appeal under s84. The First-tier Tribunal had jurisdiction to hear the appeal. The ECO's assertion to the contrary is rejected.

Misdirection

12. This leads me to the second ground of appeal. That is that the ECO takes issue with the First-tier Tribunal's formulation that the appeal is allowed "under the Rules". I have already set out the basis upon which Mrs Nwakuna had brought her case before the First-tier Tribunal. There was no case 'under the rules' and certainly no jurisdiction to allow an appeal on that basis. Had the First-tier Tribunal been referring to, for instance, the partner provisions under Appendix FM, such a form of words might have been unfortunate, but permissible, since they could be construed to mean that Mrs Nwakuna had made out her Article 8 case *with reference to* those Rules, but it is far from clear that this is what was meant. In fact the couple accepted that they could not qualify under said rules because Dr Nwakuna is not – or rather was not at the date of the appeal – 'settled'. He could not therefore meet the requirements of Gen.1.2 of Appendix FM, and his wife was not therefore 'eligible' for settlement. This ground is therefore made out.

Reasons

13. The ECO's final ground is that the determination is devoid of reasons, and it is not possible for the ECO to understand why he has lost. It is with regret that I find this ground to be made out. The First-tier Tribunal notes that the wrong application was filled in, and that the intended application was under Tier 2. It then records Dr Nwakuna's displeasure at having to travel back to Nigeria to see his wife all the time, before setting out the bare facts in respect of the marriage and his employment in the United Kingdom. From there the decision proceeds directly to the conclusion that the appeal is allowed. I am unable to understand on what basis that conclusion was reached. This ground is made out.

Disposal

14. The decision of the First-tier Tribunal is flawed for material error of law, both grounds (ii) and (iii) having been made out.

15. In light of my finding that Mrs Nwakuna does have a right of appeal, it therefore falls to me to remake her human rights appeal. The parties before me are in agreement that the relevant date for the purpose of my assessment must be todays date.

16. My starting point is to assess whether Mrs Nwakuna meets the requirements of the Immigration Rules. Since her application was for settlement as a spouse, I look first to Appendix FM.

17. The refusal letter dated 10th September 2018 states that the application does not fall to be refused on grounds of suitability. There is no evidence before me to suggest that there are any suitability issues pertaining, and certainly Ms Jones did not suggest that there were. I am accordingly satisfied that Mrs Nwakuna meets the suitability requirements.

18. In respect of the eligibility requirements the sole reason given for refusing her a visa was that Dr Nwakuna was not settled. At today's date Dr Nwakuna is settled in the United Kingdom. He was granted indefinite leave to remain on the 13th January 2020. At the date of the decision the remaining eligibility requirements were met, specifically the ECO was satisfied that Dr Nwakuna was earning above the minimum income threshold set out in E-ECP.3.1, all relevant documents, including a letter from his NHS Trust employer, having been provided. For the avoidance of doubt Dr Nwakuna has produced before me NHS payslips covering the past six months, with accompanying Natwest Bank statements, demonstrating that he receives a monthly salary of between £3891.12 (October 2019) and £2996 (January 2020). The reason that the amount fluctuates is unclear but the total annual figure is given of £48,075. This is well in excess of the £18,600 required by the Rules. There has never been any issue

taken with the assertion that this is a genuine and subsisting relationship and I accept, on the basis of Dr Nwakuna's evidence, and the documentary evidence provided, that it is: this includes the birth certificate of his son, born in Nigeria in October of last year. Having considered all of the evidence before me I am satisfied that as of today's date Mrs Nwakuna meets all of the requirements for leave to enter as a partner set out in Appendix FM.

19. I bear in mind that this is an Article 8 appeal. I am satisfied that there is between the sponsor and Mrs Nwakuna a genuine and subsisting family life. I am satisfied that in refusing her entry there has been an interference with, or lack of respect for, that family life. The question before me is whether the decision is proportionate. The rules relating to spousal settlement are, in the context of Appendix FM, specifically approved by parliament to strike a fair balance between the rights of the individual and the rights of the state to control its own borders. Since Mrs Nwakuna meets the requirements of those rules it follows that the Secretary of State would hold it disproportionate to refuse leave. I therefore find that the decision is unlawful pursuant to s6 of the Human Rights Act 1998 and the appeal must be allowed.

Decisions

20. The determination of the First-tier Tribunal is flawed for error of law and it is set aside.

21. I remake the decision in the appeal by allowing the appeal on human rights grounds.

22. There is no direction for anonymity.

Upper Tribunal Judge Bruce
21st January 2020