Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/36364/2013
IA/36376/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3rd September 2014	**On 10th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR OMOTAYO OLUSOLA OKEDARA
MRS MABEL OKEDARA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee , Counsel, instructed by Rashid & Rashid
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are citizens of Nigeria. The first named Appellant (hereafter referred to as the Appellant) sought leave to remain here as a Tier 4 Migrant with the second Appellant further leave to remain as his

dependant. Their appeal came before the First-tier Tribunal Judge M J Bennett who allowed the appeal "on the sole ground that the decisions were not in accordance with the law".

2. Grounds of application were lodged stating that the judge had erred in two ways. Firstly, he had made a material misdirection of law in that the Secretary of State had been entitled to refuse the application with reference to paragraph 322 (9) of the Rules as the Appellants had failed to provide a completed application form. The judge had considered whether the Secretary of State ought to have exercised her discretion but could "see no extenuating circumstances " and such a finding was inconsistent with a finding that the decision was not in accordance with the law.

3. The second ground was that the judge had found that paragraph 322(9) should not be applied in this case essentially on the basis of an allegation of poor conduct by the Appellant's former solicitors. In that regard reference was made to **BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311** in that there has to be evidence that those allegations were put to the former representatives and that had not been done.

4. Permission to appeal was granted on the basis of the grounds. There was no Rule 24 notice lodged and thus the matter came before me on the above date.

5. For the Secretary of State, Mr Wilding indicated that there was a requirement for the Appellant to complete an application form. That had not been supplied and therefore the case had to fail. In response to submissions from Mr Lee, it was said that there was nothing to say that the Secretary of State's decision was unlawful. It was not unlawful at the time he made it. While the Secretary of State would always entertain a fresh application the dispute the Appellant had was really with those solicitors who had dealt with the case on his behalf.

6. Mr Lee submitted that the ratio of **BT** was not relevant in this case because there was nothing to put to the solicitors. The solicitors had misled the Appellant. The requirement under 322(9) was a discretionary one and it was perfectly open to the judge to take into account all the evidence supplied and conclude that the discretion should have been exercised differently. It was clear from all the correspondence that the solicitors had fallen into serious error in so advising the Appellant. Given that, the judge had not erred in law in concluding that the decision of the Secretary of State was unlawful.

7. I reserved my decision.

Conclusions

8. The case of **BT (Nepal)** is something of a red herring in this case in that this involved an appeal where there were allegations against a firm of

solicitors who had been given no opportunity at all to reply to them. That is not the position in this case. Indeed the opposite is true as the solicitors involved in this case, Dean Manson, were perfectly aware of the position as they advised the Secretary of State that they did not understand the contents of her letter namely that they were requesting the Appellant to forward new forms which they regarded as unnecessary. Accordingly the position of the solicitors was very clear. No doubt they considered that they were acting in the best interests of their client.

9. The judge set out the terms of paragraph 322(9) noting that this was a ground on which leave to remain should normally be refused where there was a failure by an applicant "*to produce within a reasonable time information, documents or other evidence required by the Secretary of State to establish his claim to remain under these Rules".*

10. The judge went on to note that it was very unfortunate that no application forms had been submitted and concluded that the Respondent was entitled to ask them to do so as the Secretary of State was doing no more than asking the Appellant to comply with paragraph 34(E) of the Immigration Rules.

11. Accordingly on the findings of the judge the Secretary of State was entitled to ask the Appellant to complete fresh application forms which the Appellant, through solicitors, pointedly refused to do. Given that finding it followed inexorably that the Secretary of State was entitled to refuse the application under paragraph 322(9).

12. What the judge did was to note the Appellant's evidence who said that if he had known that it was necessary to do so he would certainly have filled in a fresh application form. It was on that basis that the judge went on to find that 322(9) should not have been applied in this instance and the decision was therefore not in accordance with the law.

13. I agree with what was said by Mr Wilding. The Secretary of State cannot be said to have acted unlawfully when an applicant refuses to comply with a part of the Immigration Rules. The judge appears to have conflated the willingness of the Appellant to comply with the rules with the application of the rules themselves and hold that this willingness was enough to conclude that the decision of the Secretary of State was unlawful. No doubt the judge was trying to do justice to the Appellant who found himself in an unfortunate situation because of the advice given to him by his solicitors.

14. However it seems to me that whatever the good intentions of the Appellant that matter is distinct from whether or not the Secretary of State was acting unlawfully in refusing the application. As the judge put it, the appeals were allowed on the sole ground that the decisions were not in accordance with the law. In my view, for the reasons put forward above, that was a clear error of law. The Secretary of State had not acted unlawfully and indeed it is very hard to see how a different decision could

have been made in the absence of an application form. It follows that this decision must be set aside and a fresh decision made dismissing the appeal.

Decision

15. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

16. I set aside the decision.

17. I remake the decision in the appeal by dismissing it.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald