Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20703/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 July 2014	**On 10 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS ELIZABETH HODUPE AKINSEYE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - LAGOS

Respondent

Representation:

For the Appellant: Mr D Adbayo Solicitor, David & Vine Solicitors
For the Respondent: Mr E Tufan, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against a decision by an Entry Clearance Officer to refuse her entry clearance as the spouse of a person present and settled here on the grounds, inter alia, that she had

previously contrived in a significant way to frustrate the intention of the Immigration Rules, and therefore her application fell for refusal under paragraph 320(11). The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal, having regard to the issue in controversy.

2. The appellant is a national of Nigeria, whose date of birth is 9 November 1941. In June 2012 she applied for entry clearance as the spouse of Mr Rufus Akinsey under paragraph 281 of the Immigration Rules. In the covering letter written on her behalf by her then legal representative, she said that she had married her sponsor in the London Borough of Lambeth on 23 January 1971. They had been married for over 41 years, and they now had two adult children who were both British citizens. The sponsor had ILR which was issued to him on 3 March 1999. The applicant and the sponsor had lived together in the UK after marriage until 1979 when they both moved to Lagos. In 1989 the sponsor returned to the UK for a better life for himself and his family. The applicant came to visit the sponsor in the UK between the years 1990 and 1991. She made further attempts to visit the UK once again, but was denied entry. In the meantime, the sponsor had a pending asylum application.

3. In 2002 the applicant became so desperate to come and see the sponsor, her children and grandchildren, that she travelled to the UK with a false passport. She remained in the UK from 2002 to 2007 whilst various applications for leave to remain were pending. In 2007 she was removed to Nigeria after all her appeal rights were exhausted.

4. The reason why the applicant had not applied for entry clearance as a spouse in the past five years was because she and the sponsor could not agree on where to spend the rest of their lives together, whether in Nigeria or in the UK. Since 2007 the sponsor had been travelling at least twice a year to Nigeria to visit the applicant. He spent two to three months on each occasion he travelled. The sponsor stayed in Lagos with the applicant in their family home. The applicant had now decided to live in the UK with the sponsor as this was his wish, and furthermore her children and grandchildren resided in the UK.

5. On 13 September 2012 an Entry Clearance Officer in Lagos gave his reasons for refusing the appellant's application. He refused it under paragraph 320(7A), 320(11) and paragraph 281 of the Immigration Rules. Her fingerprints had been checked against records held in the United Kingdom. A positive match confirmed that she had previously used the following names in the UK: Mary Johnson, Ajibode Elizabeth Madupe and Elizabeth Madupe Williams. But the appellant had not declared these names at section 1.3 on her Visa Application Form.

6. UK records show that she entered the United Kingdom and sought to remain as Mary Johnson, a national of Sierra Leone, on 31 March 2002. Her application to remain was refused on 28 August 2005 but she

remained in the UK until 24 January 2007. During her time in the UK she also used multiple identities as detailed above. The Entry Clearance Officer was satisfied the above conduct was consistent with that described in Entry Clearance Guidance Chapter 26.18 as having contrived in a significant way to frustrate the intentions of the Immigration Rules. It was therefore appropriate to refuse her application under paragraph 320(11).

7. The Entry Clearance Officer was also not satisfied that the marriage between her and the sponsor was genuine and subsisting. She submitted no evidence of telephone bills, correspondence, cards or visits since February 2010.

8. He had also considered the application under Article 8. There was nothing to prevent her sponsor from relocating to Nigeria to enjoy family life or continuing to visit her there. While he accepted the decision constituted limited interference with Article 8, he reminded himself this was a qualified right, and he was satisfied the decision was justified and proportionate in the interests of maintaining an effective immigration control.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. The appellant's appeal came before Judge Traynor sitting in the First-tier Tribunal at Hatton Cross on 14 February 2014. Mr Adbayo appeared on behalf of the appellant, and Mr Graham, Counsel, appeared on behalf of the respondent. The appellant's husband, her son Tony Atkins and her daughter Olayemi Olubunmi adopted their witness statements as their evidence-in-chief. They were not cross-examined. The judge also took into account an unsigned witness statement from the appellant dated 13 February 2014.

10. The judge's findings are set out at paragraph 35 onwards. The judge accepted the appellant's explanation that she honestly believed that her circumstances were known to the respondent, including her full identity. Having had the opportunity to consider all the evidence, he found the respondent had not discharged the burden of proof necessary to justify refusal of the application under the terms of paragraph 320(7A). Given the appellant's explanation, and the fact that her VAF clearly referred to the fact that she had been removed from the United Kingdom and in all other respects was a correct and accurate summary of her immigration history, he found that the failure to complete section 1.3 was not a dishonest act but a genuine omission.

11. However, the judge found that the respondent had reasonably exercised discretion to refuse the application under the terms of paragraph 320(11). He had carefully considered the IDIs with reference to such refusals in conjunction with the decision of **PS (paragraph 320(11) discretion; care needed) India [2010] UKUT 440 (IAC)**. What was made clear by those instructions and by **PS** was that the respondent should determine whether or not there were aggravating circumstances involving a person's immigration history which should warrant a subsequent refusal of

applications for entry clearance. In this respect, it was noted that the use of an assumed identity or multiple identities for deceptive reasons was a factor that should be taken into account. Equally, the switching of nationality was another factor which was considered as aggravating. The respondent's decision notice highlighted the fact that the appellant had used different identities in her dealings with UK immigration officials.

12. The judge found that apart from her maiden and married names, the appellant did use at least three identities in her dealings with UK immigration officials. In addition to her own name, she used and relied on a different name in a false passport which enabled her to enter the United Kingdom. Her subsequent claim for asylum was in the name of Mary Johnson and she also falsely claimed that she was a citizen of Sierra Leone. The judge was therefore satisfied that there was reliable evidence to support the claim that she had used multiple identities with a view to deceiving immigration officials at that time. He was obliged to conclude that her willingness to use a false passport in another name and subsequently claim asylum in yet another name and nationality which was not her own was serious and aggravating conduct which fell within the criteria set out in RFL 7.3 of the IDI relating to refusals under paragraph 320(11).

13. At paragraph 40, he noted the IDI required the decision maker to give consideration to issues of relevant family life in the UK at the time of the alleged conduct and, in the case of children, to consider the level of responsibility for the breach.

14. At paragraph 41, the judge found that the appellant had not enjoyed direct family life in the United Kingdom for a number of years. The time when she did enjoy family life here was when her children were much younger. Her children were now mature adults. She entered the United Kingdom in 2001 and she did so in the full knowledge that her lawful attempts to enter had been lawfully refused and that her children were already adults by then and been pursuing their own lives without her.

15. While he accepted that the appellant's husband and children were then in the United Kingdom, the fact remained that her husband had left Nigeria almost ten years previously and remained in the United Kingdom unlawfully until such time as he was granted leave to remain. It had never been explained why it was that the appellant's children came to the United Kingdom separately or why the appellant did not make an application for entry clearance at that time to join her husband as his spouse. From her own account it appeared that her attempts to enter the UK after her husband and children came here was upon the basis of visiting the United Kingdom, rather than for settlement. She had adduced no evidence to suggest that she had ever applied for a settlement visa. He found it had been entirely inappropriate to conclude that simply because the appellant had been lawfully refused entry clearance she was entitled to engage in illegal and deceptive conduct and not bear the consequences of her conduct. There was nothing to suggest that she alerted the respondent to

her true identity until after her appeal rights were exhausted. Given the sustained deception, he found that this was a particularly aggravating feature which the respondent was entitled to take into account in concluding that the appellant's conduct justified refusal of her application under paragraph 320(11). In the circumstances, he found that the respondent had properly taken account of the relevant guidance in the IDI and that discretion had been exercised both reasonably and proportionately in refusing the appellant's application.

16. With regard to sub-paragraph (iii) of paragraph 281, the judge was satisfied there was evidence of the appellant's husband regularly visiting Nigeria, and spending months at a time there with the appellant. So the judge found that the appellant had discharged the burden of proving that they had a subsisting relationship which they would intend to pursue together as husband and wife. The judge also found that the other requirements of paragraph 281 put in issue by the Entry Clearance Officer were met. Nonetheless, the judge held that the appeal under the Rules should be dismissed.

17. The judge considered an alternative claim under Article 8 ECHR at paragraphs 45 to 48. He noted that even though the appellant was removed from the United Kingdom in 2007, her husband chose to remain in this country. He also noted the children at that time were aged 36 and 30 years respectively. He was satisfied no reasons would have compelled the appellant's husband to have remained here for the benefit of the children who were very mature adults. It had therefore been a matter of choice that he remained in the United Kingdom and had visited the appellant in Nigeria. That choice had been made against the sure and certain knowledge that his wife was not entitled to return to this country until she could establish a lawful right to do so. Essentially, he found that by refusing the application, the respondent's decision simply maintained the status quo. He agreed with Counsel for the respondent that the decision would not effectively interfere with that family life because it would continue as before. He therefore held that the decision did not engage the appellant's Article 8 rights. But if he was wrong about that, he nonetheless found that the respondent's decision had been made in accordance with the law and was necessary in a democratic society. He also found the decision was one which was entirely proportionate to the legitimate aim pursued, and could not amount to a breach of the appellant's Article 8 rights in any event.

The Application for Permission to Appeal

18. The appellant applied for permission to appeal to the Upper Tribunal, arguing that the judge had erred in law in paragraph 46 of his determination. The judge had placed undue weight on the fact the couple had lived apart for a significant period. Ground 2 was that the judge should have found there was a disproportionate interference with family life for the following reasons:

(a) the appellant had met most of the requirements of the Immigration Rules;

(b) the appellant had been removed from the UK and had stayed away for over five years which was a requirement of the Immigration Rules relating to persons removed from the UK;

(c) the Immigration Rules did not envisage a life ban from re-entry for persons in the appellant's category;

(d) the appellant's spouse was settled in the UK and had adequate accommodation and maintenance for his wife.

The Grant of Permission

19. On 16 May 2014 First-tier Tribunal Judge Levin granted permission to appeal for the following reasons:

> "The grounds take issue solely with the judge's findings under Article 8. Given the judge's findings that the appellant met all of the requirements of the Rules for entry clearance as a spouse and his finding that the respondent was not justified to refuse the application under paragraph 320(7A) it is arguable that the judge's findings that the refusal was justified under paragraph 320(11) which is a discretionary ground and that the decision did not constitute a disproportionate breach of Article 8 were both irrational. Both the grounds in the determination disclose arguable errors of law."

The Rule 24 Response

20. On 9 June 2014 Lorna Kenny settled a Rule 24 response on behalf of the Entry Clearance Officer. The Judge of the First-tier Tribunal had directed himself appropriately. The respondent considered that Judge Traynor's determination gave thorough reasoning and explanation for his findings on paragraph 320(11) and Article 8, and the conclusion he reached was justified. The grounds of appeal amounted to a disagreement with the judge's findings.

The Hearing in the Upper Tribunal

21. At the hearing before me, Mr Adbayo said he had nothing to add to the observations of Judge Levin and the grounds of appeal, with one exception. Although the judge had directed himself in paragraph 40 that the IDIs required the decision maker to give consideration of relevant family life in the UK at the time of the alleged conduct, the judge had not actually given such consideration.

22. Mr Tufan adopted the stance taken by his colleague in the Rule 24 response. With regard to the observations made by Judge Levin, he submitted that a very high test had to be surmounted in order to find that a finding or conclusion was irrational. There was nothing perverse or

irrational in the judge's reasoning or conclusion. He had considered Article 8 in some detail as part of a detailed and comprehensive determination.

Discussion

23. Paragraph 320(7B) provides an alternative ground on which entry clearance or leave to enter the United Kingdom is to be refused. This is where the applicant has previously breached the UK's immigration laws by;

    (a) overstaying,

    (b) breaching condition attached to his leave,

    (c) being an illegal entrant,

    (d) using deception in an application for entry clearance, leave to enter or remain...unless the applicant:

    (i) overstayed for 90 days or less and left the UK voluntarily, not at the expense directly or indirectly of the Secretary of State;

    (ii) used deception in an application for entry clearance more than ten years ago,

    (iii) left the UK voluntarily, not at the expense directly or indirectly of the Secretary of State more than twelve months ago,

    (iv) left the UK voluntarily, at the expense directly or indirectly of the Secretary of State more than two years ago; and the date the person left the UK was no more than six months after the date on which the person was given notice of the removal decision, or no more than six months after the date on which the person no longer had a pending appeal; whichever is the later;

    (v) left the UK voluntarily, at the expense directly or indirectly of the Secretary of State, more than five years ago; or

    (vi) was removed or deported from the UK more than ten years ago.

    Where more than one breach of the UK's immigration laws has occurred, only the breach which leads to the longest period of absence in the UK will be relevant under this paragraph.

24. The Entry Clearance Office did not invoke paragraph 320(7B) as a justification for refusing the appellant's application. But its relevance for present purposes is that it shows that a period of exclusion of ten years is envisaged under the Rules where the Secretary of State has had to remove the applicant. The five year period of exclusion referred to in the grounds of appeal applies where the applicant has left the UK voluntarily, not where the applicant has had to be removed.

25. As was noted in the course of oral argument, the exemption for spouses contained in paragraph 320(7C) is deleted in Phelan Eighth Edition, which incorporates all changes in the Rules up to including those published on 5 September 2012.

26. Arguably, the presence or absence of paragraph 320(7C) has no bearing against the exercise of discretion under paragraph 320(11). But if it does have a bearing, its deletion only serves to reinforce the propriety of the approach taken by Judge Traynor. The fact that the appellant met the requirements of paragraph 281 of the Immigration Rules was not a trump card in the exercise of discretion under paragraph 320(11).

27. The requirement under RFL 7.3 is as follows:

> "All cases must be considered on their merits, the activities considered in the round to see whether they meet the threshold under paragraph 320(11), taking into account family life in the UK and, in the case of children, the level of responsibility for the breach.
>
> Where an applicant falls to be refused under 320(7A) or 320(7B) the ECO must also consider whether it is also appropriate to refuse the applicant under paragraph 320(11)."

28. At paragraph 40, the judge was wrong to direct himself that the focus of the family life consideration was relevant family life in the UK "at the time of the alleged conduct". Under the IDI, consideration of family life is not confined to family life which was enjoyed at the time of the alleged immigration offending. But the judge does not in fact confine himself to considering family life in the period 2002 to 2007. The judge rightly focuses on the family life which the appellant was enjoying with the sponsor at the date of the refusal decision, but also takes into account other phases in the appellant's life, including the phase in her life before the sponsor was granted ILR, and the phase of her life when she was present in the United Kingdom illegally from 2002 to 2007.

29. There is nothing perverse or irrational in the judge's conclusion that the respondent's discretion under paragraph 320(11) had been exercised both reasonably and proportionately. If the appellant had accrued a ten year period of exclusion following removal, there would be a strong argument that the discretion had been unreasonably exercised.

30. It is not suggested by Judge Traynor that the appellant is subject to a life ban. In any event his jurisdiction was confined to considering whether a discretion under paragraph 320(11) should have been exercised differently *at the date of decision*, at which time the appellant was a long way short of serving a ten year period of exclusion.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

Signed Date

Deputy Upper Tribunal Judge Monson