IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: VA/27600/2012
VA/27590/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28th November 2014	**On 16th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ADEWALE MUTIU LAWAL (FIRST APPELLANT)
BOBOLA BARNABAR AKINSEYE (SECOND APPELLANT)
(NO ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - ABUJA

Respondent

Representation:
For the Appellants: No Representation
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellants appeal against a determination of Judge of the First-tier Tribunal Malone promulgated on 25th April 2014.

2. The Appellants are Nigerian citizens born 1st September 1983 and 9th May 2000 respectively who applied for entry clearance as family visitors.

3. The Appellants applied for entry clearance for one week to enable them to visit Olumuyiwa Ogenewu (the Sponsor) a British citizen. The Sponsor indicated that he would be paying the cost of the visit, and would be providing accommodation.

4. The applications were made in January 2011 and initially refused on 31st January 2011. Those refusals were appealed, which resulted in the appeals being dismissed by Judge Rimington of the First-tier Tribunal, in a determination promulgated on 23rd August 2011.

5. The Appellants were granted permission to appeal against that decision which resulted in Deputy Judge of the Upper Tribunal Philips allowing the appeals by way of a determination promulgated on 13th March 2012. The appeal of the second Appellant was only allowed insofar as the Respondent's decision was not in accordance with the law.

6. Following the Upper Tribunal hearing further up-to-date evidence was required by the Respondent from the Appellants and there then followed a further refusal dated 28th May 2012. In relation to the first Appellant, the refusal was based upon paragraph 41(i) and (ii) of the Immigration Rules, the Respondent not being satisfied that the first Appellant was a genuine visitor or that he intended to leave the United Kingdom at the conclusion of the visit.

7. The Respondent acknowledged that the Upper Tribunal had allowed the appeal, but contended that the first Appellant was required to submit up-to-date evidence of his employment and finances, and evidence of his relationship to the second Appellant who the first Appellant had claimed was his nephew.

8. The first Appellant submitted six pay slips from Cargowise Logistic as evidence of his employment, but the Respondent noted these appeared identical and appeared to have been produced at the same time and the company stamp on each pay slip had been spelt wrongly.

9. A representative of the Respondent attempted to contact the company on 28th May 2012 on the telephone number printed on the pay slips but the telephone number did not work.

10. It was noted that the first Appellant had submitted no further evidence of his employment such as an income tax clearance certificate or personal bank statement. The Respondent was not satisfied that the first Appellant was employed as claimed or that he had sufficient social or financial ties to Nigeria.

11. Regarding the relationship to the second Appellant, it was noted that two photographs had been taken in a studio of the Appellants together but there was no further evidence of the claimed relationship.

12. A representative of the Respondent attempted to contact the Sponsor in the United Kingdom on 28th May 2012 using the telephone number provided with the application but the line was dead. It was noted that the Sponsor was on the electoral register for a different address in the United Kingdom associated with numerous other visa applications.

13. The refusal notice for the second Appellant referred to paragraph 46A of the Immigration Rules which sets out the requirements for leave to enter as a child visitor. It was not accepted that the second Appellant was related as claimed to the first Appellant or that he was genuinely seeking entry as a visitor for a limited period nor that he intended to leave the United Kingdom at the end of the visit. The same point was made about the Sponsor in the United Kingdom being on the electoral register for a different address, and the Respondent was not satisfied that it had been demonstrated that suitable arrangements had been made for the second Appellant's travel to, and reception and care in the United Kingdom, taking into account the second Appellant is a minor.

14. The appeals were subsequently heard by Judge Malone on 15th April 2014. There was no attendance on behalf of the Appellants and the judge dismissed both appeals under the Immigration Rules.

15. The Appellants applied for permission to appeal to the Upper Tribunal. Full details of the application for permission, together with the grant of permission are set out in my written decision promulgated on 17th October 2014, following a hearing on 10th October 2014. At that hearing I found that the judge had erred in law in that evidence relied upon by the Appellants had not been taken into account, and full reasons for this finding are set out in my written decision. That hearing was adjourned at the request of Mr Parkinson who had not received the Appellants' bundle which was on the Tribunal file.

Re-Making the Decision

16. The appeals were listed for hearing on 28th November 2014. There was no attendance on behalf of the Appellants. They are not legally represented but I was satisfied that proper notice of the hearing had been given to them in Nigeria, and to the Sponsor in the United Kingdom. I observed that there was on the Tribunal file an email from a solicitor who had previously represented the Appellants, dated 11th April 2014, which was sent to the First-tier Tribunal and which indicated that he was no longer instructed, and that the Appellants wished their present oral appeals to be determined on the papers. This email was sent to the First-tier Tribunal in advance of

the hearing on 15th April 2014, unfortunately it was not placed before the judge until after the hearing had taken had taken place.

17. I considered Rule 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and as I was satisfied that proper notification of the hearing had been given, I decided to proceed with the hearing as I believed this to be in the interests of justice, taking into account that there was no application for an adjournment, and that the applications for entry clearance had been made as long ago as January 2011.

Submissions

18. Mr Parkinson submitted that the appeals should be dismissed. I was asked to note the lack of attendance by the Sponsor and to find that this was relevant. Mr Parkinson submitted that there was no evidence of a relationship between the second Appellant and the Sponsor, or the first Appellant, and no birth certificate had been produced although the issue of relationship had been raised in the refusal.

19. In relation to the first Appellant Mr Parkinson submitted there was no explanation as to why the pay slips issued by the employer had the name of the company misspelt nor was there any explanation for the employer's telephone not working. Mr Parkinson asked that I note that there was no appearance by the Sponsor to explain why he was prepared to fund the visit by both Appellants at considerable expense, for a period of one week.

20. I was asked to dismiss both appeals.

21. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

22. In considering these appeals I have taken into account the Respondent's bundle of documents, which is not indexed or paginated, but which is attached to an Entry Clearance Manager review dated 7th August 2013. That review lists documents submitted with the application, but those documents are not contained within the Respondent's bundle that was submitted to the Tribunal. I have also taken into account a bundle submitted on behalf of the Appellants comprising 74 pages. It would appear that this is the bundle that was submitted in relation to the first appeal before the First-tier Tribunal which resulted in a determination promulgated on 23rd August 2011.

23. I have also taken into account a letter from the Sponsor dated 1st March 2014 addressed to the First-tier Tribunal at Taylor House, and a copy of the first Appellant's Electronic Tax Clearance certificate, and a letter from the first Appellant's employer Cargowise Logistic Nigeria Limited dated 1st October 2012 addressed to Visa Section, British Deputy High Commission, Lagos.

Finally I have taken into account the witness statement from the Sponsor dated 6th October 2014.

24. The burden of proof is on the Appellants and the standard a balance of probability. As these are appeals from refusal of entry clearance, I must consider the circumstances appertaining at the date of refusal of entry clearance, that being 28th May 2012.

25. The issues to be decided are whether the Appellants intend genuine visits, and whether they intend to return to Nigeria, and whether suitable arrangements have been made for the second Appellant's travel to, and reception and care in the United Kingdom.

26. I have to take into account that there has been a previous determination prepared by Deputy Upper Tribunal Judge Philips promulgated on 13th March 2012. I have therefore considered the principles set out in Devaseelan Sri Lanka* [2002] UKIAT 00702 and have taken into account guidelines set out therein at paragraphs 37 to 42. In brief summary the first determination should always be the starting point and facts happening since the first determination can always be taken into account. The first determination stands as an assessment of the claim that was made at that time, and generally a second judge should not revisit findings of fact made by the first judge on the basis of evidence that was available to the Appellant at the time of the first hearing.

27. Judge Philips was dealing with the concern of the Respondent that the first Appellant did not have sufficiently strong family, social or economic ties to show that he intended to return to Nigeria. The following findings were made in paragraph 17 of the determination;

> "17. In my finding the first Appellant has addressed and dealt with the Respondent's concerns. He has provided a detailed written statement explaining that he has secure employment held since 3rd March 2008 with the same employer. He has provided evidence of this employment by way of an employer's letter, a company ID card and six months' pay slips. The Appellant says that he is engaged to be married and this is corroborated by a letter from his fiancée. He explains that he is paid in cash and does not have a bank account so is unable to show evidence of savings. There is in my finding no reason why any of this evidence should be called into doubt and these matters taken together are sufficient to show on the balance of probabilities that the Appellant intends to return to Nigeria at the end of his visit."

28. The Devaseelan principles apply to the first Appellant, but no findings were made in relation to the second Appellant, as in his case Judge Phillips found that the Respondent's decision was not in accordance with the law, because no written reasons had been provided, and therefore the second Appellant's case remained outstanding before the Respondent for a lawful decision to

be made. In relation to the first Appellant there is therefore a clear finding that the Upper Tribunal was satisfied that he had given an accurate account of his circumstances in Nigeria. There was no application made to appeal the decision of the Upper Tribunal.

29. Following that decision entry clearance was not granted, but the Respondent required further up-to-date information and evidence of employment was provided in the form of six pay slips. I have not been provided with copies of those pay slips, which were clearly sent to the Respondent.

30. I have however seen a letter addressed to the British Deputy High Commission in Lagos, dated 1st October 2012, from the first Appellant's employer.

31. This letter confirms the employment of the first Appellant, and explains that pay slips submitted by him for the months between November 2011 and March 2012 are genuine and are not identical and were not produced at the same time. The letter explains that the company's rubber stamp was re-designed in January 2011 and contained a minor error in the spelling of the company name which was not rectified.

32. There was more than one telephone number on the pay slips and the letter confirms that all save one were working and are still working, and that the company received a telephone call some time in April 2012 from the Respondent to inform the first Appellant to submit his passport. It is also confirmed that the first Appellant is paid in cash and does not have a bank account.

33. The letter written by Cargowise is on company headed notepaper with the company address printed upon the letter, and telephone numbers. It was therefore open to the Respondent to make any further enquiry thought appropriate. I accept that the burden of proof is on the Appellant, but in my view that letter explains the points raised in the refusal, and if there were any further doubts, the Respondent could have contacted the employer. This letter was received by the First-tier Tribunal in April 2014.

34. The first Appellant, in answering the point raised in the refusal about his relationship to the second Appellant, confirmed that he never claimed that the second Appellant was his nephew. I accept this. The relationship is mentioned in the application forms and in a number of documents. The first Appellant is the first cousin of the Sponsor. The second Appellant is said to be the nephew of the Sponsor, not the nephew of the first Appellant.

35. Dealing with the point made in the refusal about the Sponsor being on the electoral register in the UK for a different address associated with numerous other visa applications, I can find no evidence that has been submitted by

the Respondent to prove this assertion, which is denied by the Sponsor in his letter and witness statement.

36. Therefore, following the findings made by the Upper Tribunal in the first Appellant's case, and placing weight upon the letter dated 1st October 2012 from his employer, I am satisfied that the first Appellant has provided an accurate reflection of his circumstances in Nigeria. I accept that he was employed as claimed and I therefore conclude that he has discharged the burden of proof, and the requirements of paragraph 41(i) and (ii) are satisfied. His appeal is therefore allowed.

37. Turning to the second Appellant who is a minor, and who was 11 years of age at the date of refusal, I am not satisfied that it has been demonstrated that suitable arrangements have been made for his travel to, and reception and care in the United Kingdom. I accept that there is contained within the Appellants' bundle a letter said to emanate from his parents. However this is not an affidavit or any form of official document, and is dated January 2011, considerably before the refusal of entry clearance. The signatures upon the letter have not been witnessed. I accept that the Sponsor in his witness statement has said adequate measures are in place to assure the safety and wellbeing of the second Appellant but without giving any details of those measures. I note that the Sponsor has never attended a Tribunal hearing.

38. The First-tier Tribunal determination promulgated on 23rd August 2011 which was subsequently set aside, recorded that the Sponsor did not attend the hearing as he had stated he could not get time off work. The Sponsor did not attend before Judge Philips at the Upper Tribunal hearing, and did not attend before Judge Malone, and in his witness statement dated 6th October 2014, the Sponsor indicated that he could not attend the Upper Tribunal hearing which took place on 10th October 2014 because he did not have any annual leave left and his request for time off work was not granted by his employer.

39. The Sponsor has therefore had the opportunity to attend five Tribunal hearings but has not done so, and therefore there has been no opportunity to question him and hear his evidence about measures that would be in place in relation to the second Appellant's reception and care. Great care must be taken when making decisions in relation to minors travelling without parents, and having carefully considered all the evidence supplied in this case, I am not satisfied that the burden of proof has been discharged in relation to paragraph 46A. I therefore dismiss the second Appellant's appeal on that basis.

40. This is not a case where Article 8 of the 1950 European Convention on Human Rights was raised and I therefore do not go on to consider Article 8.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal of the first Appellant is allowed under the Immigration Rules.

The appeal of the second Appellant is dismissed under the Immigration Rules.

Anonymity

No anonymity direction was made in the First-tier Tribunal. There has been no request for anonymity, and the Upper Tribunal makes no anonymity order.

Signed Date 5th December 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

It is not appropriate to make a fee award. There was insufficient evidence initially presented before the decision maker. The first Appellant's appeal has been allowed because of evidence subsequently submitted that was not before the initial decision maker. The second Appellant's appeal has been dismissed and therefore there can be no fee award.

Signed Date 5th December 2014

Deputy Upper Tribunal Judge M A Hall