



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/00397/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 21 January 2015

Decision & Reasons Promulgated
On 4 February 2015

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

LAWRENCE AYENI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFO

Respondent

Representation:

For the Appellant: Miss Smith, instructed by Adonai Beulah, Solicitors
For the Respondent: Miss Johnstone, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant Lawrence Ayeni was born on 10 June 1965 and is a male citizen of Nigeria. On 18 November 2013, the respondent the Entry Clearance Officer Shefo refused the appellant entry clearance to the United Kingdom as a partner of a person present and settled here. The appellant appealed to the First-tier Tribunal (Judge M Davies) which, in a determination promulgated on 8 September 2014, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.
2. There are a number of grounds of appeal which are not expressed with any cogency in the documents submitted by the appellant's solicitor. I was, however, assisted at

the hearing by Miss Smith of Counsel and I shall deal with the grounds in the order in which she raised them before me.

3. First, it is common ground that the initial refusal by the ECO incorrectly cited paragraph 320 of HC 395 as a ground of refusal. The judge had before him a determination of Judge Lambert dated 21 May 2013. In that determination, one reads that the appellant had made two applications for leave to remain in the United Kingdom (in 2008 and 2010 respectively) which Judge Lambert described as “dishonest as well as frivolous and vexatious.” Judge Lambert found that the appellant had absconded whilst in the United Kingdom and further that it would not be unreasonable to expect the appellant’s wife and her children to join the appellant in Nigeria to continue their family life there. Judge Davies acknowledged that:

“those findings ... support the respondent’s contention that the appellant’s behaviour calls into question his character and conduct and as such it makes it undesirable to grant entry clearance. The appellant made two dishonest applications for entry clearance (*sic*) whilst in the United Kingdom and absconded as found by Immigration Judge Lambert is clear evidence in my view that the respondent’s decision was in accordance with the Immigration Rules.”

Paragraph 320 of the Immigration Rules cannot be used in the case of a marriage application such as this. At the hearing before him, Judge Davies allowed the Presenting Officer to raise paragraph 320(19) as an alternative (i.e. the correct) Immigration Rule under which the appellant’s previous conduct might be addressed. The grounds of appeal to the Upper Tribunal object to that course of action. Miss Smith, before me, did not seek to press that point and I can see nothing in the determination or the record of proceedings to indicate that the appellant’s representative objected before the First-tier Tribunal. In any event, the appellant does not dispute the findings of Judge Lambert regarding his previous immigration history and I can identify no error in law in Judge Davies’s determination at [21] where he found that that history might be invoked by the ECO in the present application to deny the appellant entry clearance.

4. The judge moved on to consider whether Article 8 ECHR was engaged. At [24] he wrote “the respondent’s decision does not engage the appellant’s Article 8 rights as it has no effect upon the status quo that exists.” The grounds of appeal take issue with that statement with good reason. Whilst it is arguable that the appellant has been left in the same position following the ECO’s decision as he was before he made his application and that his family life has, therefore, not suffered any interference as a result of the immigration decision, it is arguable that the judge’s comment ignores the duty on decision makers to promote, as well as avoid interfering with, Article 8 rights, including those of individuals living abroad. I find that the judge did err by stating that he would not consider Article 8 at all simply because he had before him an out of country entry clearance application.
5. However, the position is further complicated by the fact that, notwithstanding the judge’s statement at [24], he went on [26] to direct himself to the familiar guidance set out in *Razgar* [2004] UKHL 27. Quite why he did so having earlier found that Article 8 was not engaged is not clear. I assume that he did so for reasons of completeness. Having said that, his Article 8 analysis at [26(6)] is brief:

In this appeal there are no exceptional circumstances that engage the Article 8 rights of the appellant, his spouse or her dependant. Even if that were the case no evidence has been produced to show that that would lead to unjustifiable hardship.

6. Earlier, at [25] the judge had considered the Article 8 and Article 3 rights of the appellant's stepchild who suffers from sickle cell anaemia. I can identify no errors of law in that part of the judge's analysis. The question remains whether the judge significantly erred in law in his treatment of Article 8 ECHR to the point that his determination should be set aside. I am satisfied the judge has had adequate regard to all the relevant circumstances in this case. He has dealt [as I have noted above] with the health issues of the stepchild, with the appellant's immigration history and the nature of his relationship with the child's mother. It was open to the judge, as regards the child's illness, to find that no evidence has been produced to show that the condition could not be treated in Nigeria. Brief though it is, the judge's conclusion that refusal of entry clearance would not lead to unjustifiable hardship was plainly open to him. The appellant was properly excluded from entering the United Kingdom because he could not comply with the Immigration Rules and I would agree with the judge that there was nothing unusual or exceptional arising from the facts of this case which might justify the grant of entry clearance outside the Immigration Rules. I find therefore that, although the judge has made somewhat contradictory findings regarding the engagement of Article 8, he reached a valid conclusion on the evidence. Indeed, it is a conclusion which I would have repeated had I set aside the determination and remade the decision on the basis of the same evidence. In consequence, I decline to set aside the determination and this appeal is dismissed.

NOTICE OF DECISION

7. This appeal is dismissed.

No anonymity direction is made.

Signed

Date 22 January 2015

Upper Tribunal Judge Clive Lane

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 22 January 2015

Upper Tribunal Judge Clive Lane