Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/11674/2014
& OA/11676/2014

THE IMMIGRATION ACTS

Heard at FIELD HOUSE
On: 8 October 2015

Decision & Reasons Promulgated
On: 13 November 2015

Before

Mr C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
ENTRY CLEARANCE OFFICER - LAGOS

Appellant

and

HANNAH KEHINDE AWONIYI
ELIZABETH TAIWO AWONIYI

Respondent

Representation:
For the Appellant: The Entry Clearance Officer, Mr Jarvis, Senior Presenting Officer
For the Respondent: By their father, Dr Olubunmi Alaba Awoniyi

DECISION AND REASONS

1. The question in these appeals is whether First-tier Tribunal Judge Row was correct in law in allowing the appeals under the Immigration Rules against the Entry Clearance Officer's decisions dated 10 September 2014 refusing the respondents' applications for entry clearance as returning residents to the United Kingdom under paragraph 18 of the Immigration Rules.

2. The judge accepted that the respondents (the claimants) could not succeed as returning residents because they had never previously had indefinite leave to enter or remain in the United Kingdom when they last left. This is uncontroversial; it was not suggested in the applications or argued before the judge that the claimants had been previously in the United Kingdom other than on a temporary basis.

3. Having reached this conclusion, the judge asked whether the claimants could nevertheless succeed under paragraph 297 which provides for indefinite leave to enter the United Kingdom *inter alia* as the child of a parent, present and settled or being admitted for settlement here. He concluded that the claimants met the paragraph 297 provisions and on this basis allowed the appeal, indicating that in such circumstances it was unnecessary for him to consider the matter under Article 8.

4. After hearing argument from Mr Jarvis and representations made by Dr Awoniyi, we gave our decision at the hearing that the judge had been incorrect to allow the appeal. But in all the circumstances of the case, we decided not to set aside the decision so exercising our discretion under s 12(2) (a) of the Tribunals, Courts and Enforcement Act 2007.

5. The background to the appeals is as follows. The twin claimants are nationals of Nigeria where they were born in May 1997. Their father is a British citizen and lives in Wolverhampton. He is employed as a psychiatrist by Dudley & Walsall Partnership NHS Trust. In August 2014 at the time the applications for Entry Clearance were made he was earning net of tax £5,300 per month and he lived alone in a three-bedroomed house.

6. The claimants' mother was killed in an aeroplane crash in 2000. It was decided that they would be raised by their father's mother in Nigeria, but she passed away in June 2014. They visited their father in the United Kingdom on occasions in 2001 and 2004, the longest period being between 20 November 2004 and 9 July 2005. The death of their paternal grandmother led to the applications and these appeals.

7. The applications were made on-line with "Returning Resident" being selected as the purpose and type of application being made and so attracted a fee for each of US$494. The correct immigration history was given and as well, reference was made to the death of the claimants' paternal grandmother in June 2014, the frequency of their father's visits to Nigeria 3-4 times a year and the claimants' desire to live with him on a permanent basis.

8. A feature of the process was that the claimants were also required to complete in manuscript forms described as Appendix 1 (BAF4A July 2012) Family Settlement & Family Reunion. In addition, their father was required to complete sponsorship undertakings in respect of both children and he was also required to fill out a further document described as "Settlement/Returning Resident/EEA Family Permit Categories List". We observed at the hearing that it was not clear why this was needed as a returning resident would need only to demonstrate (i) that he had indefinite leave when he last left, (ii) that he had not been away for more than two

years, (iii) had not received assistance from public funds towards the costs of leaving and (iv) was seeking admission for the purpose of settlement.

9. Mr Jarvis explained that these documents were required to be completed in order for the Entry Clearance Officer to consider any Article 8 aspect. He readily accepted that but for the fee the claimants met all the requirements of paragraph 297. But it was not open to the Entry Clearance Officer to rectify matters by calling for a top-up of the fee paid; the system did not permit this.

10. Despite this purpose, the immigration decisions for both claimants make no reference at all to the supplementary material and focus solely on the inability of the failure to meet the requirements at paragraph 18(i) and (ii):

> '18. person seeking to enter the United Kingdom as a returning resident may be admitted for settlement provided the immigration officer is satisfied that the person concerned:
>
> (i) had indefinite leave to enter or remain in the United Kingdom when he last left; and
>
> (ii) has not been away from the United Kingdom for more than two years; and
>
> …'

11. We note that the Entry Clearance Manager in his appeal review explained that he had considered the decision to refuse entry clearance with due regard for human rights legislation and in particular Article 8. He considered the decisions were correct in law and in proportion to the maintenance of affected immigration control. There was no evident analysis of the supplementary material.

12. It is not disputed that the Entry Clearance Officer was entitled to refuse the applications made under the rules; the claimants had asked to enter as returning residents not for settlement as dependants under paragraph 297.

13. Paragraph 30 provides:

> 'An application for an entry clearance is not made until any fee required to be paid under the Consular Fees Act 1980 (including any regulations or orders made under that Act) has been paid.'

14. The judge was required to decide if the decisions were in accordance with the law including immigration rules (s86 of the 2002 Act in force at the date of the decisions in these appeals). As no valid application had been made under paragraph 297, the judged erred in allowing the appeals under the Immigration Rules as plainly the decisions were in accordance with the relevant rule.

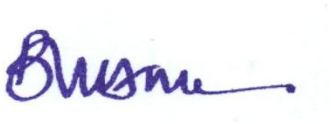
15. The judge explained that he had taken into account *SZ (Applicable immigration rules)* [2007] UKAIT 37, a case in which it was held that the FtT had erred by not considering paragraph 297 even though it had not been raised. The grounds of appeal in the cases before us make it clear that the claimants' father wanted them to live with him on a permanent basis and that he could afford to do so as indicated by

the documents produced. As was made clear in *SZ* (at [11]) however that the tribunal is not the primary decision maker; the focus of enquiry must always be on the basis upon which the application was made. If an appellant asserts a different basis that is properly a matter for a fresh application. It is correct that at [16] the Upper Tribunal in *SZ* considered that there would occasionally be situations for the tribunal to consider and apply another rule but in the cases before us the applications had been unambiguously made for returning residents and did not meet the requirements of the rules. There was nothing to inhibit the making of fresh applications to rectify matters.

16. Mr Jarvis was commendably candid in accepting that paragraph 297 would have been met but for the fee. There is no explanation why, having regard to the purpose behind the supplementary material, the Entry Clearance Officer did not consider the human rights impact of the applications and, significantly, he gave no consideration to the claimants' best interests. As we have observed, there was no detailed analysis by the Entry Clearance Manager despite the matters raised in the grounds of appeal.

17. There is no suggestion that there was any deception by the claimants or their father and it is plain that the applications were made in error. We have no doubt that had Dr Awoniyi taken advice, valid, successful applications would have been made. These cases concern minors at the relevant time and any factual consideration is fixed by s85 of the 2002 Act. Taking all these factors into account we consider that exceptionally and on the particular undisputed facts of these cases, the decision of the First-tier Tribunal although erroneous does not require to be set aside. Accordingly the appeal by Entry Clearance Officer is dismissed with the consequence that the decision of the First-tier Tribunal stands.

Signed Date 12 November 2015



Upper Tribunal Judge Dawson