



IAC-AH-VP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: VA/16737/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 4th September 2015**

**Decision & Reasons Promulgated
On 14th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICE - LAGOS

Appellant

and

**KOLAWOLE OMOGBOLAHAN TAJUDEEN
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: No Representation

DECISION AND REASONS

1. The Entry Clearance Officer (ECO) appeals against the decision of First-tier Tribunal Judge Clayton promulgated on 12th March 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the Claimant.
3. The Claimant is a citizen of Nigeria born on 16th October 1980 who on 21st June 2013 applied for entry clearance to the United Kingdom as a visitor. The Claimant indicated that he wished to attend his cousin's graduation ceremony and would stay in the United Kingdom for a period of seven

days. The Claimant produced a letter from his cousin Ajaiade Adebola Omowola dated 20th June 2013 indicating that she graduated from the University of East Anglia in December 2012, and that she intended to travel to the United Kingdom for her graduation ceremony which was to take place on 17th July 2013.

4. The application was refused on 8th July 2013. The ECO contended that the Claimant had submitted a passport containing a false Nigerian immigration stamp dated 2nd May 2013. The application was therefore refused with reference to paragraph 320(7A) of the Immigration Rules. Because a false document had been submitted, the ECO was not satisfied that the Claimant intended to visit the United Kingdom for the period or purpose stated, and was not satisfied that he would leave the United Kingdom at the end of the visit, and therefore also refused the application with reference to paragraph 41(i) and (ii) of the Immigration Rules. The ECO contended in the refusal decision, that the Appellant had only a limited right of appeal, and that his appeal was limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) which relates to a breach of human rights.
5. The Claimant instructed solicitors who entered an appeal on his behalf contending that the decision to refuse entry clearance was incompatible with the Claimant's rights under the 1950 European Convention on Human Rights (the 1950 Convention), was not in accordance with the law, and not in accordance with the Immigration Rules.
6. The appeal was heard on 2nd March 2015. The ECO was not represented, and the Claimant, although not present, was represented by Counsel.
7. Judge Clayton noted that the burden of proof in relation to paragraph 320(7A) rested upon the ECO, and found that the burden had not been discharged and the ECO had failed to produce any evidence to prove that a false document had been submitted. The appeal was allowed for that reason.
8. This decision prompted an application for permission to appeal to the Upper Tribunal to be made on behalf of the ECO. It was contended that the judge had failed to take into account that the Claimant had only a limited right of appeal. The judge had allowed the appeal under the Immigration Rules, and had therefore exceeded his jurisdiction which amounted to a material error of law.
9. Permission to appeal was granted by Judge of the First-tier Tribunal Grimmitt who found that following the introduction of section 52 of the Crime and Courts Act 2013, appeals against refusal of entry clearance as a visitor could only be made on human rights or race relation grounds, and it was therefore arguable that the Claimant did not have a full right of appeal.

10. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.
11. The hearing took place on 4th September 2015. There was no attendance on behalf of the Claimant. I was satisfied that proper notice of the hearing had been given both to the Claimant in Nigeria, and his solicitors in the United Kingdom. There was no explanation for the non-attendance, and no application for an adjournment. I took into account rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and was satisfied, taking into account that the decision to refuse entry clearance had been made as long ago as 21st June 2013, that it was in the interests of justice to proceed with the hearing.
12. I heard submissions from Mr Melvin who relied upon the grounds contained within the application for permission to appeal and submitted that the First-tier Tribunal had clearly erred in law by not considering that the Claimant only had a limited right of appeal, and that the decision should be set aside, re-made and dismissed.
13. I indicated that I was satisfied that the First-tier Tribunal had materially erred in considering the appeal, and set aside the decision, indicating that I would issue a written decision, giving my reasons for setting aside the First-tier Tribunal decision, and re-making the decision.
14. In my view the First-tier Tribunal materially erred in law by not appreciating that the Claimant only had a limited right of appeal. The judge granting permission erred by referring to section 52 of the Crime and Courts Act 2013, as that only applied to applications made on or after 25th June 2013, and this application for entry clearance was made on 21st June 2013.
15. However it is correct that the Claimant had only a limited right of appeal. He was not seeking to visit a family member in the United Kingdom as defined by The Immigration Appeals (Family Visitor) Regulations 2012. The application was made on the basis that the Claimant was a general visitor, and therefore his right of appeal was limited to grounds alleging either racial discrimination or a breach of human rights.
16. The appeal that was entered was valid, because reference was made in the grounds to a breach of human rights although no explanation was offered as to how the decision to refuse entry clearance breached the Claimant's human rights.
17. The First-tier Tribunal should firstly have considered whether Article 8 of the 1950 Convention was engaged, and if it was not, should not have gone on to consider the appeal under the Immigration Rules. The correct approach has been clarified by the Upper Tribunal in Mostafa [2015] UKUT 00112 (IAC), Adjei [2015] UKUT 0261 (IAC), Abbasi [2015] UKUT 00463 (IAC), and Kaur [2015] UKUT 00487 (IAC).

18. There is no reference in the First-tier Tribunal decision to consideration of human rights, and no consideration as to whether Article 8 was engaged. The judge has considered the appeal under the Immigration Rules and for that reason materially erred in law.
19. I re-make the decision by dismissing the Claimant's appeal. The Claimant has not explained how Article 8 is engaged, either on private or family life grounds. The evidence indicates that the Claimant was not seeking to visit a family member in the United Kingdom, but wished to accompany his cousin to her graduation ceremony. In my view a wish to attend a relative's graduation ceremony in the United Kingdom does not engage Article 8 of the 1950 Convention.
20. There was no reference in the Grounds of Appeal to racial discrimination. As I find that Article 8 is not engaged, it is not necessary for me to go on and make findings as to whether the decision to refuse entry clearance interferes with the Claimant's right to respect to private and/or family life, whether the decision is in accordance with the law, and whether the decision is necessary and proportionate.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside.

The decision is re-made and the Claimant's appeal is dismissed.

Anonymity

There has been no application for anonymity and I see no need to make an anonymity order.

Signed

Date 4th September 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The Claimant's appeal is dismissed. There is no fee award.

Signed

Date 4th September 2015

Deputy Upper Tribunal Judge M A Hall