Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/35397/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 6 June 2013	**On : 11 June 2013**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

VICTOR ORIANWU MARDITHIE

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms C Simpson, instructed by Stewart & Co Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a Nigerian citizen resident in Spain, was born on 6 September 1965. He has been given permission to appeal against the determination of First-tier Tribunal Judge Bartlett dismissing his appeal against the respondent's decision to refuse entry clearance to the United Kingdom as a family visitor.

2. The appellant applied for entry clearance to the United Kingdom as a family visitor, on 23 July 2012, stating in his application form that he intended to stay in the UK for one week, to see his fiancée and his daughter. He would be staying with his fiancée, Amako Ekwo, for one week. He stated that he resided in Spain and was employed full-time as an assistant clerk in a company called Suiqas SL.

3. The respondent refused the appellant's application on the grounds that it was not accepted that he intended to leave the United Kingdom at the end of his visit and it was not accepted that he could maintain and accommodate himself without recourse to public funds or that he could meet the cost of his return trip. The respondent referred to various discrepancies in the appellant's evidence which led to doubts about his employment and about his income and financial circumstances. Reference was also made to the absence of evidence from his ex-wife confirming that she was expecting his visit.

4. In his Notice of Appeal the appellant indicated that he did not require an oral hearing of his appeal. His appeal was accordingly determined on the papers by the First-tier Tribunal and was dismissed in a determination promulgated on 28 March 2013.

5. In his determination, First-tier Judge Bartlett noted the respondent's comments, in response to the grounds of appeal, that the appellant had still not submitted any information about his daughter, such as her whereabouts, her immigration status or a letter from her mother confirming she was expecting a visit. Judge Bartlett accepted that the appellant's fiancée was able to accommodate and support him but was not satisfied that the appellant had demonstrated that he intended to leave the United Kingdom at the end of his proposed visit. The judge made the point that, had the appellant requested an oral hearing, it may have been that his concerns could have been resolved by further evidence, but in the absence of any further evidence he found that the appellant had failed to meet the burden of proof. He accordingly dismissed the appeal under the immigration rules.

6. Permission to appeal was sought on behalf of the appellant by his United Kingdom representatives, on the basis that they had, in fact, requested an oral hearing in order that witnesses could attend, and that the decision was therefore wrong in law. The application for permission enclosed a copy of a letter from Stewart & Co to the First-tier Tribunal, dated 12 February 2013, advising the Tribunal that they had been instructed in the matter, providing the sponsor's details and requesting an oral hearing of the appeal.

7. Permission was granted on 16 April 2013 on the grounds of arguable procedural unfairness with regard to the determination of the appeal.

Appeal Hearing

8. The appeal came before me on 6 June 2013. I advised Mr Bramble that, whilst there was no copy of the letter of 12 February 2013 on the court

correspondence file, the fact that the determination had been sent to Stewart & Co Solicitors suggested that their letter had been received by the Tribunal in response to the Form IA35 issued to the appellant on 17 January 2013 inviting further submissions. I was therefore satisfied that the letter had been received but not acted upon, leading to the request for an oral hearing being overlooked, which had resulted in procedural unfairness.

9. Mr Bramble accepted that the judge's decision ought therefore to be set aside and I accordingly set it aside. On the basis of the appellant's specific request that the appeal be re-made in the Upper Tribunal rather than remitted to the First-tier Tribunal, and upon Mr Bramble's agreement with that course, I proceeded to hear evidence from the sponsor, the appellant's fiancée, for the purpose of re-making the decision.

10. The sponsor, Ms Ekwo, said that she became engaged to the appellant on 15 February 2011 and they intended to get married this Christmas. His daughter was six years old. She had not met her but had spoken to her by telephone when the appellant had spoken to her. He had a close relationship with his daughter and she missed him a lot. Her mother would not allow her to go to visit her father in Spain because of her age but her father had told her that he would visit her when he got a visa for the United Kingdom. The appellant divorced his wife, the mother of his daughter, last year. When put to her that the appellant appeared to have stated in his grounds of appeal before the First-tier Tribunal that his ex-wife was not the mother of his daughter, Ms Ekwo agreed that it was not clear. She suggested that what he had meant to say was that it was she who had invited him to the United Kingdom and not his ex-wife. She last saw the appellant yesterday in the Netherlands. His brother lived there and so she would go to see him whenever he was there as it was closer than Spain. He paid regular maintenance to his daughter. He paid around £300 a month which he sent to her and she would then go to the bank and put the money into his ex-wife's account. She produced a bundle of Nat West receipts as evidence. She would give the bank the account number and sort number of his ex-wife's account, with the appellant's name as the reference.

11. When cross-examined by Mr Bramble, the sponsor said that the appellant would send the money to her, sometimes by Western Union, but she did not have any evidence of that. When asked why the appellant had not given her a letter from his ex-wife to produce to the Tribunal as confirmation of his visit to their daughter, Ms Ekwo said that it was she who was inviting him to the United Kingdom and not his daughter, although he intended to visit his daughter. He intended to call his ex-wife once he got his visa and arrange the visit. Ms Ekwo said that she was aware that the appellant had worked for Suiqas SL but she did not know where he had worked prior to that. When asked if his contract with the company had been extended after January 2013 she said that she knew only that he had had some temporary and permanent contracts and had been working in Spain for many years. He was working for a different company now. The deposits in his Santander account in Spain were from his account in Nigeria. He had money in an account in Nigeria which he had inherited and he

had referred to that in his visa application form. Ms Ekwo confirmed that the appellant would be staying with her in the United Kingdom.

12. The sponsor gave further details about the appellant's payments to his ex-wife, when re-examined, and said that he had been making them every month since about 2011. She was sure that his ex-wife and daughter were still in the United Kingdom.

13. In response to my further enquiry, Ms Ekwo said that the appellant's ex-wife was aware that he was intending to visit. She did not know why he did not send the money directly to his ex-wife instead of through her but she believed that it was to do with international charges and having receipts. She was aware that he had visited the United Kingdom previously but did not know the length of his visits. She was not sure why he had been refused entry clearance previously. He suspected that it was because his ex-wife had invited him but had had no job at the time. He had lived in Spain for twelve years and loved it there and wanted to visit for just a few days. He had not applied for Spanish citizenship as he had the same rights as a Spanish citizen. I asked if she knew why he had a national insurance number for the United Kingdom and she replied that he had told her that it was because his ex-wife had told him he needed it to show that he was married and could support her, but he had never worked here.

14. Mr Bramble, in his submissions, said that the focus in this appeal was upon the appellant's daughter, as his relationship with Ms Ekwo did not fall within the amended family visitor categories. There was still insufficient evidence about his daughter. Mr Bramble admitted that it was difficult for him to pursue the ECO's concerns about the appellant's employment as there was no document verification report. The evidence of his tax payments indicated that he was employed at the relevant time but did not explain how he had the funds from employment to make the deposits into his Santander account, albeit that there was evidence of funds in his Nigerian account. In the absence of adequate evidence about his daughter, the appellant was unable to meet the requirements of the rules and the appeal had to be dismissed.

15. Ms Simpson submitted that there was sufficient evidence that the appellant had a daughter in the United Kingdom, that he had a court order granting him contact with her and that his daughter was unable to visit him in Spain. The sponsor had given evidence of money transferred for her support. There was nothing in the immigration rules requiring there to be written confirmation of consent by a parent for the other parent to see their child. The appeal ought therefore to succeed on that basis. Alternatively, the appellant's relationship with his fiancée was one that fell within the family visitor regulations, as they had a civil partnership. The appellant had no intention of remaining in the United Kingdom. He was entitled to Spanish residence and intended to return to Nigeria to set up a business there. He was employed at the time of the decision to refuse entry clearance. The deposits in his account had been explained.

Consideration and findings

16. The Immigration Appeals (Family Visitor) Regulations 2012 came into force on 9 July 2012 and are thus applicable in the appellant's case. Paragraph 2(2) sets out the family relationships relevant to section 88A(1)(a) of the Nationality, Immigration and Asylum Act 2002, as giving rise to a right of appeal against the refusal of entry clearance. A fiancée is not included in the list of relationships.

17. Ms Simpson submitted that civil partners were included, and that the sponsor could be regarded as a civil partner given the length of her relationship with the appellant. However, it is clear that that is not the case and that Ms Simpson was in fact thinking of a common law partnership, which did not fall within the list of relationships. A "civil partner" is defined in the interpretation section at paragraph 6 of the Immigration Rules, as "a civil partnership which exists under or by virtue of the Civil Partnership Act 2004 (and any reference to a civil partner is to be read accordingly)". There is no civil partnership in the terms indicated between the appellant and the sponsor. As such, the appellant is unable to appeal against the refusal of entry clearance on the basis of his intended visit to the sponsor and the appeal arises only with respect to his intended visit to his daughter.

18. The question then arises as to the validity of the appeal with regard to the appellant's application to visit his daughter, in particular given the concerns about the lack of evidence in that regard. That was a matter considered by the Upper Tribunal in Ajakaiye (visitor appeals - right of appeal) Nigeria [2011] UKUT 375, where it was stated at paragraph 12 that:

> "The right of appeal under section 88A turns on whether "the application was made" for the purpose of visiting a person who is related to the applicant in one of the ways described at paragraph 2 of the 2003 Regulations. The reference to "the application was made" suggests that the answer to whether a refusal of the application gives rise to a right of appeal is governed by the purpose of the application. The most obvious place to find out what the purpose of the application was is the applicant's completed application form and such other documents as may have been submitted at the time in order to decide whether the applicant had applied in order to visit such a relative. If examination of this material reveals that this was the stated purpose of the visit then the individual has a right of appeal and that right of appeal is not lost, whatever evidence is subsequently served and even if that evidence detracts from and undermines the application itself. If subsequent evidence reveals that an individual's intention as stated in the application itself is unreliable, or it is found to be unreliable, that may (depending on the circumstances and the other evidence in the case) justify reaching adverse conclusions on the requirements under paragraph 41 of the Immigration Rules but it would not justify a conclusion that the individual did not have a right of appeal. Equally if there is an error of law in an assessment of what the purpose of the application made was, the Upper Tribunal will have jurisdiction to investigate the matter."

19. In the light of such findings, and in the absence of any submissions to the contrary, it seems to me that there is a valid appeal. Any concerns as to the

relationship and the nature of the appellant's visit in that regard are relevant to his intentions and thus his ability to meet the requirements of paragraph 41 of the immigration rules, rather than the validity of the appeal.

20. As Mr Bramble acknowledged, the appellant has provided evidence of his employment with Suiqas SL together with his registration for payment of taxes in Spain and, in the absence of any evidence to support the allegations made by the ECO, the respondent's concerns carry little weight. On that basis, and in the light of evidence of funds available in his Nigerian bank account, it seems to me that he has adequately addressed the concerns as to his financial circumstances. When taken together with Ms Ekwo's oral evidence and the documentary evidence relating to her property and income from employment, I am satisfied that he has met the burden of demonstrating an ability to meet the costs of his trip and that he would be adequately accommodated and maintained in the United Kingdom for the short period of his proposed visit.

21. However, the main concern in this appeal is the appellant's intentions arising from the lack of adequate evidence about his daughter. Whilst he has stated that, aside from visiting his fiancée, the purpose of his visit was to see his daughter, he has still failed to show that that was genuinely his intention. Despite his application having been refused partly on the basis of an absence of evidence of his daughter and his intention and ability to visit her, there is still no satisfactory evidence in that regard. I did not consider that Ms Ekwo's evidence alone was sufficient to address such concerns. She had never met his daughter and was only relying on what the appellant had told her about his daughter's presence in the United Kingdom and his intentions as regards visiting her. Although she produced receipts for payments made by herself to his ex-wife, she was unable to provide any confirmation that the money came from the appellant and was being used for the support of his child. Her evidence about the payments was particularly vague, perhaps because of her own lack of knowledge about them, and she was unable to provide any reasonable or credible explanation as to why the appellant should send the funds to her for onward transfer to his ex-wife, rather than simply sending the money directly to his ex-wife.

22. Ms Ekwo was, furthermore, unable to provide any explanation as to why the appellant had not produced a letter from his ex-wife consenting to him visiting his daughter, other than to say that it was she and not his ex-wife who was inviting him to the United Kingdom and sponsoring the visit. However it seems to me that this total lack of any evidence of communication from his ex-wife and his daughter, albeit that she is only six years of age, is a matter of some significance and concern. That is particularly so, given the presence of various discrepancies and anomalies in the evidence. One such anomaly, which I pointed out to Ms Simpson, was that the second ground of appeal before the First-tier Tribunal appeared to suggest that the appellant was stating that his daughter was not the child of his ex-wife. Whilst it may be, as the sponsor suggested, that that was simply a matter of bad grammar and that the appellant was referring to the person who had sent the letter of invitation, that was not the only discrepancy. I note that the appellant, at question 128 of his

visa application form, dated 23 July 2012, stated that he had not seen his daughter for the past two years, yet in his statement he said at paragraph 8 that he last saw her on 26 May 2011 when she visited him with her mother. Ms Ekwo made no mention of such a visit and her evidence suggested that the only way the appellant could see his daughter was if he visited her since she was too young for her mother to send her to Spain to see him.

23. Ms Simpson relied on the appellant's ex-wife's tenancy agreement and the court order as evidence of his daughter's presence in the United Kingdom. However, whilst the address given by the appellant for his daughter in his visa application form is the same as that in the tenancy agreement submitted in the appeal bundle, that tenancy agreement was entered into in September 2009. There is no evidence to show that the appellant's ex-wife remained living at that address at the time of the entry clearance application, nor that his daughter lived there at that time. The court order is from a Nigerian court and, whilst it refers to his daughter as living in the United Kingdom, there is no proper explanation why an order was sought in Nigeria rather than in the United Kingdom, if she was living here. It also seems to me of some relevance, albeit perhaps somewhat peripheral, that the appellant has failed to explain why he has not applied for Spanish citizenship as a means of enabling him to visit the United Kingdom, and thus visiting his daughter, particularly following several previous unsuccessful attempts to obtain entry clearance to the United Kingdom as a Nigerian citizen.

24. In the circumstances, given the lack of any satisfactory evidence of the appellant's relationship with his daughter and her continued residence in the United Kingdom, I am unable to conclude that he has genuinely demonstrated that the intended purpose of his trip, other than to see his fiancée, was to visit his child. This in turn casts doubts on his overall intentions in regard to his proposed trip. Accordingly, on the evidence before me, I cannot accept, on a balance of probabilities, that he is a genuine family visitor who intended only a short visit to the United Kingdom before returning to Spain. I find that he has failed to show an ability to meet the requirements of the relevant immigration rule, namely paragraph 41 of HC 395. That does not, of course, prevent him from making a fresh application to visit his daughter in the future, but supported by full and satisfactory evidence.

25. Article 8 of the ECHR has not been raised and there clearly would be no merit in a claim on such a basis. The appellant has, for the reasons given above, failed to show that he has a family life with his daughter. Even if his relationship with Ms Ekwa could be considered as family life, their relationship has been maintained on the basis of visits by her travelling to meet with him and the refusal of entry clearance does not prevent that from continuing. There has been no application by the appellant for him to remain in the United Kingdom with Ms Ekwo on any more permanent basis and indeed she confirmed that that was not his current intention. As such, Article 8 is not even engaged.

DECISION

26. The making of the decision of the First-tier Tribunal involved an error on a point of law. The decision of the First-tier Tribunal is therefore set aside. I re-make the decision by dismissing the appeal on all grounds.

Signed

Date

Upper Tribunal Judge Kebede