Upper Tribunal
(Immigration and Asylum Chamber)

Ajakaiye (visitor appeals – right of appeal) Nigeria [2011] UKUT 00375 (IAC)

THE IMMIGRATION ACTS

Heard at: Field House
On 21 June 2011 Determination promulgated

Before

Mr. Justice Blake, President
Senior Immigration Judge Gill

Between

Kehinde Temilade Ajakaiye

Appellant

And

Entry Clearance Officer, Abuja

Respondent

Representation:

For the Appellant: No representation but Mr. O. Awonuga, the sponsor, appeared.
For the Respondent: Mr. G. Saunders, Home Office Presenting Officer.

(1) In family visitor appeals, the question whether there is a right of appeal depends on whether the application "was made" for the purpose of visiting a relative to which the applicant is related in one of the ways described at paragraph 2 of the Immigration Appeals (Family Visitor) Regulations 2003.

(2) Ascertaining the purpose of the visit is primarily achieved by examining what the applicant said in the visit visa application form, although, as presently drafted, the forms may not provide sufficient opportunity to identify all relevant matters.

(3) In the event of ambiguity as to who is to be visited and whether they are a qualifying relative, regard may be had to extraneous evidence.

(4) Where a judge has embarked on the hearing of an appeal without objection and reaches the conclusion that the appellant was not seeking to visit a qualified person, there is a right of appeal to the Upper Tribunal. The right of appeal does not depend on the Immigration Judge's findings of fact.

(5) Although the Immigration Appeals (Family Visitor) Regulations 2003 distinguish between two classes of in-laws (see SB (family visit appeal: brother-in-law?) Pakistan [2008] UKAIT 00053), an intention to visit a nephew or niece is within its scope.

DETERMINATION AND REASONS

1. The appellant, a 26-year old Nigerian national, had appealed against the respondent's decision of 29 June 2010 to refuse her application of 22 June 2010 to visit Mr. O. Awonuga (the sponsor) in the United Kingdom for a period of two weeks under paragraph 41 of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the Immigration Rules).

2. In response to question 8.4 of her completed visa application form, the appellant said that she would be staying with the sponsor, who she described as her brother-in-law and gave his address. In response to "*Part 9 Additional information*" of the application form, the appellant said that she wished to visit her brother-in-law and "*their kids*".

3. The appellant's appeal was heard on 18 February 2011 before Immigration Judge I F Taylor who dismissed her appeal. The Immigration Judge said that he was satisfied that there was no valid appeal before him under the Immigration Rules because the relationship between the appellant and her sponsor was too distant. In response to a question from the Immigration Judge, the sponsor said in evidence that he and the appellant were "*very distant cousins*" and that they were not first cousins. The record of proceedings suggests that the sponsor was never asked whether he was related by marriage to the appellant or invited to comment on the appellant's contention that he was her brother in law.

4. In the Refusal Notice, the respondent had not taken issue with the relationship claimed between the appellant and the sponsor or whether the claimed relationship gave rise to a right of appeal. No preliminary point was taken as to right of appeal by the duty judge or the respondent in subsequent submissions.

5. The issues taken by the respondent were whether she was a genuine visitor seeking entry as a visitor for a limited period as stated by her, whether she intended to leave the United Kingdom at the end of her proposed visit, whether she would be accommodated and maintained without working or recourse to public funds and whether she would able to meet the costs of her return or onward journey, as required (respectively) under paragraph 41 (i), (ii), (vi) and (vii) of the Immigration Rules. The Immigration Judge did not make any findings on the issues taken by the respondent.

6. On 14 April 2011, Senior Immigration Judge Spencer granted the appellant's application for permission to appeal, observing that the Immigration Judge had taken a point as to whether the appellant had a right of appeal under the Immigration Rules without notice to the appellant, that the fact that the sponsor was a distant cousin of the appellant would not preclude him from being her brother-in-law and that how his answer should have been interpreted depended on how the question as to his relationship was asked and how he had understood it.

7. At the hearing, we permitted Mr. Saunders to ask the sponsor some questions about the nature of his relationship with the appellant. The sponsor told us that he gave the Immigration Judge the wrong answer when he told her that he was the distant cousin of the appellant. The reason was that he was confused and depressed when he attended the hearing. He is married to the appellant's biological sister Tola Mutiat. They were married in the United Kingdom and have two sons. The first was born on 11 July 1998 and the second on 27 June 2003. His wife did not work. The appellant would be visiting him and his family. She kept in touch with her sister by telephone. There had been a recent telephone conversation. She had now completed the studies at her college. He did not know why the appellant had said in her application form that she was visiting her brother-in-law rather than she was visiting her sister and family.

8. Mr. Saunders did not take issue with the evidence we heard, nor did he dispute the proposition that the Immigration Judge made an error of law, in that, the appellant had not had a fair opportunity to deal with the issue whether there was a right of appeal by reason of the family nature of the intended visit, and the Immigration Judge had not from the record of proceedings adequately explored with the sponsor whether he was related by marriage and why the appellant had stated that he was her brother in law.

9. We are satisfied for both reasons that the Immigration Judge's decision did involve an error on a point of law. If he was going to explore the question of the relationship for the purpose of considering his jurisdiction and the credibility of the claimed purpose of visit it was incumbent on him to do so fairly. The point had not been taken by the respondent and so neither sponsor nor appellant would have had notice of it or come prepared to address it. From the evidence we heard from the sponsor we have little doubt that if the matters had been put to him for comment he would have

indicated that he was married to the appellant's sister and if necessary the marriage certificate could have been produced. From the record of proceedings we consider there to have been a reasonable possibility that the sponsor thought he was being asked about a relationship by blood rather than by marriage. We conclude that the error was material both as to jurisdiction and the merits of the appeal. We accordingly set aside the decision and remake it. Following the hearing we invited further submissions from the respondent and if any submissions were made by the appellant in reply as to the merits of the visa application and the points on which the respondent has based his refusal.

Right of appeal

10. Section 88A(1) of the Nationality, Immigration and Asylum Act 2002, as amended (the 2002 Act), provides for the right of appeal in entry clearance cases. This states:

> "88A. Entry Clearance
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> (1) A person may not appeal under section 82(1) against refusal of an application for entry clearance unless the application was made for the purposes of –
> (a) visiting a person of a class or description prescribed by regulations for the purpose of this subsection, or
> (b) [not relevant]"

11. The Regulations referred to in section 88A(2) are the Immigration Appeals (Family Visitor) Regulations 2003 (the 2003 Regulations), which provide as follows:

> "2. (1) For the purposes of section 90(1) of the Nationality, Immigration and Asylum Act 2002, a 'member of the applicant's family' is any of the following persons-
>
> (a) the applicant's spouse, father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother, sister, uncle, aunt, nephew, niece or first cousin;
>
> (b) the father, mother, brother or sister of the applicant's spouse;
>
> (c) the spouse of the applicant's son or daughter;
>
> (d) the applicant's stepfather, stepmother, stepson, stepdaughter, stepbrother or stepsister; or
>
> (e) a person with whom the applicant has lived as a member of an unmarried couple for at least two of the three years before the day on which his application for entry clearance was made.
>
> (2) In these Regulations, 'first cousin' means, in relation to a person, the son or daughter of his uncle or aunt."

Paragraph 2(1) of the 2003 Regulations refers to section 90(1) of the 2002 Act but section 88A of the 2002 Act was substituted for ss. 88A, 90 and 91 of the 2002 Act by section 4 of the Immigration, Asylum and Nationality Act 2006 from 1 April 2008. In other words, the reference to section 90(1) in paragraph 2(1) of the 2003 Regulations should now be read as a reference to section 88A.

12. 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.

13. Whether there is a right of appeal is a preliminary decision for determination by the duty judge at a screening stage: see rule 9 (1A) (b) Asylum and Immigration Tribunal (Procedure) Rules 2005. There the First tier Tribunal is directed to look at the notice of appeal to see whether:

> "the notice of appeal concerns the refusal of an application for entry clearance which was not made for a purpose falling within s.88A(1)(a) or (b) of the 2002 Act".

An Immigration Judge has to have jurisdiction in order to entertain an appeal and receive evidence in the case. If the notice of appeal has been accepted and no objection is taken by the respondent, there is no need for the Immigration Judge to embark on an inquiry into his or her own jurisdiction. Indeed having embarked on the appeal without objection, it may be that an Immigration Judge should not do so (see the judgment of Sedley LJ in Pengeyo & Ors [2010] EWCA Civ 1275, a decision made in the context of section 92 of the 2002 Act). If however a preliminary point is taken and enquired into by the judge, it appears to us that the starting point is the application form and supporting material. The problem arises if the application form is entirely neutral on the question, and the notice of

appeal has not advanced the position. If the Immigration Judge is entitled to embark on an inquiry into jurisdiction at the stage of the substantive hearing at all, he or she must do so fairly and give the person lodging the notice of appeal the opportunity to make representations. At that stage it may be possible to receive information as what the application was for, by extraneous further evidence that a judge can take into account.

14. One reason why a problem of this kind arises is because the family visitor application forms that are currently in use are unsatisfactory, in our view, for the following reasons

(a) Question 8.4 of this form reads:

> "8.4 Please name the relative you will stay with and provide exact details of your relationship with them … "

Question 8.4 is inadequate, because it is possible to visit person A, who comes within the 2003 Regulations, but stay with person B, who does not. For example, it is possible for an applicant to wish to visit his or her sister but due to problems with accommodation, intend to stay with a family friend or indeed a hotel. Thus, if such an applicant were to state, in response to question 8.4, that he or she intended to stay with person B, he or she has answered the question but not provided the information which establishes whether there was a right of appeal.

(b) If an individual wishes to visit his or her brother-in-law, it may be thought by a lay person that a description of the individual to be visited as "*brother-in-law*" is sufficiently precise. However, this is not the case because the Regulations distinguish between two classes of in laws. SB (family visit appeal: brother-in-law?) Pakistan [2008] UKAIT 00053 establishes that there is a right of appeal if the applicant intends to visit his or her spouse's sibling, but not if the applicant intends to visit his or her sibling's spouse.

(c) Question 9 on the form asks for supplementary information but not a precise description of the relationship between applicant and the person intended to be visited. In some cultures, the terms "*uncle*", "*aunt*" and "*cousin*" may be used to describe individuals who may or may not fall within paragraph 2 of the 2003 Regulations. Precision is desirable so that the First-tier Tribunal does not embark on appeals that if the facts were clear at the outset it had no jurisdiction to do so, and appellants are not misled into wasting time and money on such proceedings.

15. Whilst the content of a visa application form is a matter for the respondent, it is in the interests of all parties for it be clear from the outset whether an individual has a right of appeal. In our view, the family visitor application forms that are currently in use fail to achieve this purpose and the questions should therefore be sufficiently precise to extract the relevant information. In our view, the forms should require

applicants to state which relative(s) they are intending *to visit* (and not merely stay with) and to provide precise details of their relationship with those relative(s), *with some examples*, so that applicants understand that it will not be enough to state that they intend to visit a brother-in-law or a sister-in-law or a cousin or uncle or aunt, but that it is necessary for them to identify the individuals (if any) through whom they are related to the relatives they intend to visit and to explain how they and the person they intend to visit are each related to those individuals.

16. For the time being, where there is ambiguity on the face of the application form taken together with documents submitted at the time of application, it may be necessary to make enquiries at the hearing in order to establish whether there was a right of appeal. However, the focus of the enquiry must be to cast light on the application itself. This is consistent with the decision in SB (Pakistan).

17. We turn now to the application form in the instant case. In answer to question 8.4, the appellant mentioned the sponsor's name and said that he was her brother-in-law. This is not necessarily a relationship which falls within paragraph 2 of the 2003 Regulations.

18. However, in answer to question 9, *"Additional Information",* the appellant said:

> "I wish to visit my brother-in-law and their kids ……"

19. Whether the brother-in-law is the sibling of an applicant's spouse or the spouse of the applicant's sibling, the offspring of such a relationship would be a nephew or niece, and if visiting them was a declared purpose of the visit there would be a right of appeal against any refusal. In this case, therefore, the application form and supporting material was not ambiguous and there was no basis for objection to the jurisdiction as a preliminary issue, especially given that the respondent had not taken the jurisdiction point, nor had the duty judge. On this basis the judge should not have concluded there was no jurisdiction to hear the appeal.

20. If there had been ambiguity as to the purpose of the application then we would have considered the extraneous evidence given to us by the sponsor. We accept his evidence that his wife is the appellant's sister and that the visit was to see the family unit consisting of him, his wife and their children. If there had been no nephews and nieces that the appellant was coming to visit, no doubt about the address that the appellant was seeking to stay at and therefore visit, and the evidence was that at that address there was to be found both the sponsor and the spouse of the sponsor who is the relevant relative for the purpose of the regulations, we consider it would have been permissible in the present state of the application form, for an Immigration Judge to have received this information and to have concluded that the purpose of the visit included visiting the relative living at the address (in this case, the appellant's sister). We have concluded that, having become concerned about the jurisdiction issue, if the judge had enquired fairly into the relationship by

marriage and the accuracy of what the appellant had stated in the application form he would have obtained these answers. His evidence before the Immigration Judge, when asked whether he was related to the appellant, or how he was related to the appellant, that he was a distant cousin, is not necessarily inconsistent with his evidence to us, as he may well have thought that he was being asked whether he had a blood relationship with the appellant. It was therefore necessary for the Immigration Judge to have put to the sponsor the fact that the appellant had described him as her brother-in-law. If the Immigration Judge had done so, we have no doubt that the sponsor would have told him in evidence what he told us. The procedural irregularity led to an inadequate evidential inquiry. We are satisfied that on this basis there is jurisdiction and the genuine purpose of the visit was to see the family.

21. We now consider the merits of the substantive appeal under paragraph 41 of the Immigration Rules.

22. By a Notice dated 26 June 2011, we informed the parties that we had concluded that the appellant had a right of appeal and, further, that we had taken the preliminary view that the evidence demonstrated that she satisfied the requirements of paragraph 41 that were put in issue by the respondent. Accordingly, we informed the parties that we were minded to allow the appellant's under the Immigration Rules, for the reasons given in the notice. We gave the respondent 28 days within which to object to the proposal to allow the appellant’s appeal, and serve written submissions on the evidence. We gave the appellant a further 28 days to serve written submissions in reply, in the event the respondent served any submissions.

23. On 14 July 2011, the Upper Tribunal received a letter from the UK Border Agency stating that it accepted that there was a right of appeal, that it accepted our findings as to the merits of the appeal, and that it did not propose to make any further representations.

24. We are satisfied, on the balance of probabilities, that the circumstances appertaining as at the date of the decision were such that the appellant satisfied the requirements of paragraph 41 that were placed in issue by the respondent (see paragraph 5 above). Our reasons (which were set out in the Notice dated 29 June 2011) are as follows:

    (a) In the application form, the appellant said that her brother-in-law would pay for her expenses such as accommodation and food (question 5.17) and that her uncle in Nigeria would fund her trip to the United Kingdom. Given that the appellant said in her application form that her brother-in-law was employed and that there was a letter from the appellant's sponsor confirming his employment and that he would accommodate the appellant, there appears to be no basis for saying that he was unwilling or unable to provide her with accommodation and food during her short visitor of two weeks.

(b) There is no reason to doubt that the appellant was intending to visit the address as she declared in the form. At this address lives her sponsor, the husband of her sister Tola and their two children born in 1998 and 2003.

(c) In the Refusal Notice, the respondent stated that the appellant had not provided evidence that her uncle had the necessary authority to use the funds of Shisamdy Nigeria Limited, of which he is the managing director, for personal use. In response the appellant submitted minutes of a meeting on 16 June 2010, during which it was resolved that the company would finance in full the managing director's trip abroad that summer or, if he was unable to embark on such a trip, a trip abroad by any of his dependants. The minutes record that the appellant's uncle informed the members present that his niece, the appellant, would travel abroad in his place, as he was unable to travel abroad for personal reasons. In the review by the Entry Clearance Manager (ECM), the ECM said that the "*abstract of the minutes*" of the meeting submitted does not confirm that the appellant's sponsor had the permission to use company funds for personal use. However, the ECM did not explain why the copy of the minutes supplied (they were not merely extracts) did not provide adequate evidence that the appellant's trip was to be financed by the company and the company had given its approval to such a course. We further conclude that the question as to who is going to pay for an air ticket is a rather subordinate one to the question whether the applicant will be able to maintain and accommodate herself during the visit without employment or recourse to public funds.

(d) The appellant attached to the Notice of appeal copies of her personal bank statements and personal bank statements of her uncle. She said in the grounds of appeal that the deposits from her uncle were noted with asterisks in her personal bank statements. We note that the bank statements in the respondent's bundle are poor copies, in that, part of many of the entries on the left side of each page are off-page. However, there were letters from Lead City University which confirmed that the appellant was a student at the institution. The respondent does not appear to take issue with this evidence. The letter dated 17 June 2010 states that the appellant is expected to return to the university to complete her studies there. There appear to be no reasons to take issue with this evidence, which is relevant in deciding whether the appellant intends to leave the United Kingdom at the end of her proposed visit.

Decision

25. The decision of the Immigration Judge involved the making of an error on a point of law such that it falls to be set aside. We have remade the decision. Our decision is that the appellant's appeal against the decision of the Entry Clearance Officer is allowed.

Signed

Senior Immigration Judge Gill
Judge of the Upper Tribunal