IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/03604/2014
OA/03780/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th August 2015	**On 20th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MISS OSASU OGIERIAKHI
MR AMOS ORIERIAKHI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Canter, Counsel, instructed by Farani Javid Taylor Solicitors LPP
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Nigeria who appealed against the refusal of entry clearance to grant them entry to the UK as the dependent children of their father and British citizen, Mr Peter Ayo Ogieriakhi. Their applications were refused under paragraph 297 of the Rules and under Article 8 ECHR the date of refusal being 3rd February 2014. Their subsequent appeal to Judges Daldry and Denson was dismissed.

2. In short, the judges gave two substantial reasons for dismissing the appeal. Firstly, the Sponsor had not shown he had exercised "sole responsibility" for the children and secondly, the accommodation was not adequate.

3. The Grounds of Appeal point to the fact that the judges failed to apply paragraph 297(d) of the Rules which significantly did not require the element of "sole responsibility" to be satisfied. This was because the Appellants' mother was deceased and the judges appeared to have overlooked that. No more need be said about that aspect because the parties agreed that this was a material error.

4. The judges also found that the accommodation was "inadequate" as stated by the Sponsor but it was said in the grounds that the judges were also wrong in their conclusion on this aspect given that the property was a two bedroom flat with a "three bed space". Given that the Sponsor lived alone at the date of decision the property would not be overcrowded. It was also said that the Sponsor did not say in his evidence that the property was "inadequate" for the three persons but merely said he wanted to improve the size of the accommodation once entry clearance was granted.

5. Permission to appeal was duly granted. The Secretary of State lodged a Rule 24 notice indicating that it was for the Appellants to show that their accommodation was adequate and the panel had given sufficient reasoning for their findings, pointing out the lack of documentary evidence to support the claims i.e. a property inspection report.

6. Before me Mr Canter for the Appellants said that the accommodation available at the date of decision, namely 42 [-] House, was adequate because it contained two bedrooms and a living room. There would therefore be a separate bedroom for each of the three persons in the property and there could not be said to be overcrowding in terms of the Housing Acts. The tenancy agreement at page 117 of the bundle confirmed the Sponsor's evidence in this regard. Whatever the Sponsor may have said about the apparent inadequacy of the accommodation the issue required to be looked at on an objective basis and on that basis the Appellants should succeed. If it was necessary to look at the new property at 82 [-] Lanes then the Sponsor's evidence was that he now had a "spare room". There was not a hint in the findings of the panel that they regarded the tenancy agreement as in any way inadequate or that they were rejecting any parts of the Sponsor's evidence. On the contrary, they were relying on what he said about the inadequacy of the accommodation to dismiss the appeal. They had been wrong to do so and for the reasons stated I was asked to set the decision aside and allow the appeal.

7. For the Home Office Ms Isherwood relied on her Rule 24 notice. There was no material error in law. The Sponsor's witness statement was silent on the issue of accommodation. The panel were entitled to take the view they

did take given that the Sponsor had accepted that the accommodation was inadequate. I was asked to uphold the panel's decision.

8. I reserved my decision.

Conclusions

9. It is agreed that the panel fell into material error in concluding that the Sponsor was bound to prove he had "sole responsibility" for the children and that error is acknowledged by the Home Office.

10. The panel found that the accommodation of 42 [-] House was inadequate (as was the new accommodation at 82 [-] Lanes).

11. Being an entry clearance case I am bound to look at matters as they stood at the date of decision – see **DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 00038**. It seems to have been put to the Sponsor in evidence that this accommodation was inadequate and he may well have agreed with that. After all, on his evidence there were only two bedrooms and assuming each child would wish to have their own bedroom that meant that the living room would have to be used as a bedroom, which many persons would think was essentially unsatisfactory. From Counsel's note produced before me it seems that the Sponsor was asked a leading question on the issue of accommodation, namely "When the application was submitted they would live at 42 [-] Road, not adequate for you and two children. Is that why you moved?"

12. To that question the Sponsor agreed that this was why he had moved. To move to a larger property with two children of a different sex would be entirely understandable. However whatever the Sponsor thought about the adequacy of the accommodation is not determinative of whether or not the accommodation was adequate in terms of the Immigration rules. The test must be an objective one and depends on the size of the accommodation - it does not depend on the description given of it by the Sponsor.

13. Before me Ms Isherwood was good enough to agree (correctly) that the fact that there was a living room in addition to the two bedrooms indicated that the accommodation was adequate under the Housing Acts. Apart from relying on the admission of the Sponsor that the property was inadequate, the panel gave no further reasons why the accommodation requirements of the Rule were not satisfied. The reason they did give was unsound and constitutes a material error in law. It is therefore necessary to set aside the decision and remake it.

14. The panel were not disputing the evidence of the Sponsor in any way. They accepted that the property at 42 [-] House had three rooms – indeed the tenancy agreement confirms that. On that basis the requirements of Rule 297 (iv) namely that the Appellants will be "*accommodated adequately*" are satisfied.

15. It is not necessary to go on and consider the new accommodation at 82 [-] Lanes. In passing it might be said that the panel fell into error by doing so and also erred in their conclusions about the adequacy of the accommodation there given that the Sponsor explained that there was a "spare room" (see paragraph 20 of the decision). However I emphasize that the obligation of the panel was to consider the adequacy of the available accommodation at the date of decision.

16. For the reasons stated it is necessary to set this decision aside and allow the appeal. There is no need for an anonymity order.

Notice of Decision

17. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

18. I set aside the decision.

19. I remake the decision in the appeal by allowing it.

20. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald