Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/02408/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 July 2017	**On 17 August 2017**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

IDAYAT TUNRAYO OKE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - LAGOS

Respondent

Representation:

For the Appellant: The sponsor, Mr Bashir Adebowale Oke
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed to the First-tier Tribunal against a decision of the Entry Clearance Officer of 1 April 2015 refusing entry clearance as a visitor. She had intended to visit her partner on the visit. The judge heard evidence from her partner, Mr Oke and found him to be a credible and consistent witness and accepted his evidence in its totality. She bore in mind relevant Tribunal authorities such Mostafa [2015] UKUT 00112 (IAC), Adjei [2015] UKUT 261 (IAC) and Kaur [2015] UKUT 00487 (IAC). She accepted that there was family life between the appellant and the sponsor. She had heard from the sponsor that they were engaged and were to travel together from Nigeria where the appellant lives with their son. The son was going to remain in Nigeria when his parents travel to the

United Kingdom. The sponsor had clarified that the appellant and their child had not moved to the United Kingdom as he wanted his son to be brought up in Nigeria learning the culture until he was at least 10 years old. The appellant was simply coming to visit and see where he stayed in the United Kingdom.

2. The judge went on to consider in accordance with the guidance in the case law authorities whether the appellant could have met the requirements of the Rules. She concluded that the appellant had demonstrated that she intended a genuine visit at the end of which she would return to Nigeria. She weighed this factor into the balancing act in relation to the matter of proportionality given that it was a human rights appeal and stated that she was required to consider whether there was a strong claim that compelling circumstances might exist to justify the grant of leave to enter outside the Rules. She found, based on the evidence, that the refusal of the visit visa would not be a disproportionate breach given that the family life would continue in the same way as it has always continued and that was by way of the sponsor's visits to Nigeria since 2008 when they first met. The judge noted also that the appellant was further entitled to reapply for a visit visa or indeed as a partner under Appendix FM if she so wished.

3. The appellant appealed this decision and permission was granted by a First-tier Judge, who observed that the judge appeared to have erred in the reference to "compelling circumstances". She went on to note that it was not clear whether information about the sponsor's annual leave entitlement was before the judge. That evidence highlighted that where family life could only be continued through visits the ability of both spouses to visit each other could add significantly to the time they were able to spend together and it was arguable that that point should have been taken into account with regard to proportionality.

4. In his submissions Mr Oke said that he worked in the United Kingdom and could not go in and out of Nigeria because of his job. He had requested the appellant to visit him to resolve this problem. It was difficult for him to get time off. He had had a stroke last year and palliative care. He worked as a staff nurse and this was demanding work. He produced all the evidence to the judge and she had accepted it all. He argued that the decision in Mostafa was not relevant and he hoped that the case would be reconsidered.

5. In his submissions Mr Jarvis argued that the judge's approach was in accordance with the relevant case law. He found there to be family life and then went on to deal with the issue of proportionality. The findings were capable of arising from the authorities. It was for the judge to consider in a non-removal case the consequences of a decision to refuse. The error was not a material one, if there was an error. He accepted that there was not a lot of description of what the sponsor said about his work and it was unclear whether he had said that at the time, but the judge had

considered the background at paragraph 18. The fact that the appellant met the requirements of the Rules was different from the compelling circumstances requirements was not applicable in line with SS (Congo) and Agyarko, but there was no right of appeal so positive findings with regard to meeting the requirements of the Rules was only part of the proportionality picture. If the wrong test had been employed it was not material as it was a lesser test. The matter was not compelling though the judge would not have found for the appellant on the basis of a lower test.

6. By way of reply Mr Oke said that the case law was not relevant to how the judgment was made and he asked the Tribunal to reconsider the case.

7. I reserved my decision.

8. I see the force of the point made by the judge who granted permission that the "compelling circumstances" criterion can be seen from the decision in Kaur to relate to persons who do not meet the requirements of the Rules although it may be the case that Article 8 is engaged.

9. However, I see no materiality to that error. The judge clearly guided herself correctly on the law and took into account of the relevant evidence and circumstances in concluding that the claim could not succeed under Article 8 outside the Rules. As she noted, family life would continue in the same way that it has always continued by way of the sponsor's visits to Nigeria since 2008 when they first met. In light of the judge's positive conclusions on the appellant's satisfaction of the requirements of the Rules, it may well also be, as she noted, that a further application for a visit visa could be made. It has not been shown that the judge failed to take into account any evidence that was before her with regard to the family circumstances. As a consequence I agree with Mr Jarvis that any error about the test employed lacks materiality since it was properly open to the judge on the evidence before her to conclude that the refusal was not disproportionate bearing in mind that the family life would continue in the same way that it always had continued. Accordingly I find no material error of law in her judgment and her decision dismissing the appeal under Article 8 is refused.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date 16 August 2017

Upper Tribunal Judge Allen