Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06419/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 February 2018	**On 20 March 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

ENTRY CLEARANCE OFFICER – CAMEROON

Appellant

and

MR EMMANUEL NYUGAP TAMNGWA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr S Ell, Counsel

DECISION AND REASONS

1. The respondent (hereafter the claimant), a citizen of Cameroon, applied for a visit entry clearance for approximately 23 days to see his wife and son. He stated that he wished to care for his wife whilst she underwent treatment for cancer. The appellant (hereafter the Entry Clearance Officer or ECO) decided on 15 May 2017 that the claimant did not meet the requirements of paragraphs V4.2-V4.10 of the Immigration Rules because he was not satisfied he intended to leave on completion of his visit; and because he was not satisfied the claimant's financial circumstances were as set

out by him. The ECO also concluded that the claimant's application did not constitute a human rights claim.

2. On appeal the First-tier Tribunal Judge (Judge Henderson) allowed the claimant's appeal. Despite finding that the claimant's wife would have available treatment for her cancer in Cameroon (paragraph 21) and that it was "unlikely that he [the claimant] would be able to provide very much real substantive support to the sponsor during such a short period" (23 days) (paragraph 25), the judge said he accepted that given the sponsor's current medical condition and stage of her treatment "it would be extremely difficult and possibly risky for her to travel to Cameroon" (paragraph 26). The judge then addressed the ECO's reasons for refusal and concluded:

> 27. The respondent had refused the appellant's visa on the basis that his was not a genuine intention to visit and referred to paragraphs 4.2-4.10 of Appendix V – these relate to eligibility and are not in relation to any lack of suitability or previous breaches of Immigration laws (which are contained in paragraphs 3.1-3.16). On the basis of the evidence produced, I do not understand why the appellant did not meet the provisions of paragraphs 4.2-4.10. There was some reference in the RFRL to insufficient information regarding his financial position but no evidence was referred to.
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> 28. The main issue seemed to be that the respondent did not accept that the appellant would leave the UK at the end of his visit. In **NG (Iran) v SSHD 2008 EWCA Civ 312 and LU 15.5.08** the IJ thought that **AA and Others (Sector Based Work) Bangladesh 2006 UKAIT 00026** precluded him, on a visit visa appeal, from giving weight to the fact that the Iranian applicant had previously sought to settle here. The Court of Appeal said the IJ's reliance on **AA** was misconceived and the Tribunal on reconsideration was entitled to weigh that previous application in the balance and find that, when taken together with other evidence, there was a strong possibility that the applicant still intended to settle. However, I have not seen any evidence from the respondent as to why it was believed that this was the case. He had left the UK voluntarily and the evidence about his job in Cameroon was not challenged.
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> 29. I have considered carefully the evidence on both sides relating to the question of proportionality and I find that, on balance, the respondent's decision is not a proportionate one. Given the sponsor's poor state of health, even though it may not be impossible for her to travel to Cameroon to visit her husband, it would be risky and difficult for her to do so, especially with a young child. The appellant wishes to make a short visit so that he can be with the sponsor and see his child for the first time. I accept that he is unlikely to provide any substantive care with regard to her medical treatment over this period, but I find that refusing him the right to see his wife and child in these circumstances would be a disproportionate interference with his right to family life.

Notice of Decision

30. the appeal is allowed: the respondent's decision is in breach of section 6 of the Human Rights Act 1998.

3. The ECO's four main grounds of appeal were as follows. It was contended that the judge had legally erred by:

(i) considering he had jurisdiction to deal with the appeal, when in fact the claimant had not made a human rights claim;

(ii) in assuming, contrary to **Mostafa [2015] UKUT 00112 (IAC)**, that Article 8 was engaged by a bare refusal to permit a short visit to the UK;

(iii) in failing to take into account the claimant's previous actions undermining immigration control which should have been considered as part of the proportionality assessment; and

(iv) in making contradictory findings on the issue of whether the sponsor could return to Cameroon and be treated there, especially given that the sponsor's visa was due to expire in December 2017 and [she] so could be expected to return to Cameroon soon.

4. The ECO's first ground is hopeless; wisely, Ms Isherwood did not seek to maintain it. Manifestly the claimant made a human rights claim both in form and substance. He identified the human right he alleged to have been breached as Article 8 and specified that he relied on his right to respect for his family life relationship with his wife and son. It did not merely rely on a formulaic mention of human rights. **Ahsan** [2017] EWCA Civ 2009 applied.

5. As regards the ECO's second ground, whilst the fact that the visit was short-term was a relevant point to be considered in the Article 8 proportionality assessment, it is hard to see that the judge overlooked this, since he did indeed comment on it at paragraph 25. **Mostafa** does not support this ground since the Upper Tribunal itself in this case identified the relationship between a husband and wife as one that falls within the scope of Article 8(1) in the entry clearance context.

6. Jumping to ground (iv), this too lacks force. The judge's findings on whether the sponsor could return there were not contradictory. It is clear from paragraph 26 that the judge's finding was that for the sponsor to return to Cameroon given her "current medical condition and stage of her treatment" would be extremely difficult and possibly risky. That did not gainsay the other fact found, namely that, if she were back there, she would have available treatment.

7. Nevertheless ground (iii) is of a different order. It properly identifies a serious flaw in the judge's approach to the assessment of proportionality. The crux of any proportionality assessment is a balancing exercise, including weighing the

appellant's interests against the public or community interest in maintenance of effective immigration control and economic well-being. In this context one obvious factor requiring to be weighed on the public interest side of the scales was the fact that the claimant had breached immigration laws when he was in the UK. He had worked in breach of his conditions and had become an overstayer. Another factor is that he had married his wife at a time (in 2014) when his immigration status was precarious. Further, his wife did not hold settled status and her leave was due to expire in December 2017.

8. The nearest the judge comes to addressing such factors is in paragraph 27. The judge's reasoning therein appears to be that they could not have been relevant because the ECO had not sought to refuse entry clearance for lack of suitability or previous breaches of immigration laws (which are contained within paragraphs 3.1-3.16). But that reasoning at best establishes that the ECO was prepared to hinge the claimant's ability to meet the Immigration Rules solely on intention to depart and maintenance.

9. Given that the judge had rejected the ECO's view that the claimant had not made a human rights claim, the judge was only entitled to allow the appeal under Article 8 if satisfied that the decision amounted to a disproportionate interference with (disrespect for) the claimant's right to respect for family life. Not weighing in the Article 8 balance the aforementioned public interest factors was a clear failure to take into account relevant matters and a clearly material error of law.

10. Compounding this error was the fact that on the judge's own findings the right to family life involved in the entry clearance application was clearly seen as extremely contingent, being for a very short-term visit (23 days) and not one during which the claimant would be able to provide very much real substantive support (paragraph 25).

11. I would also observe that in paragraph 27 the judge appears to reverse the burden of proof in relation to the maintenance requirement. The ECO had also refused the application on the grounds that the claimant had not satisfactorily verified his financial circumstances. At paragraph 27 the judge brushed this aside on the footing that "[t]here was some reference in the RFRL to insufficient information regarding his financial information but no evidence was referred to". First of all, it was not incumbent on the ECO to refer to evidence, since what was relied on was lack of evidence on the part of the claimant. Second, in any event the ECO did refer to evidence, e.g. the claimant's copy of his UBA statement.

12. For the above reasons I conclude that the judge's decision must be set aside for material error of law.

13. I now turn to consider re-making the decision.

14. I consider that I am in a position to re-make the decision without further ado. The decision under challenge is an entry clearance decision made in May 2017 and both

parties have had an opportunity to present further evidence, but chose to rely on the state of the evidence as it was before the judge.

15. As already stated, it is clear that the claimant made a human rights claim and that his appeal is a human rights appeal.

16. I consider first whether the claimant met the requirements of the Immigration Rules at V4.2-4.10 of Appendix V. He clearly did not. If on no other ground he clearly failed to show (as required by V4.2(e)) that he had sufficient funds to cover all reasonable costs in relation to his visit without working or accessing public funds. But in my judgment the claimant also failed to show that he had a genuine intention to visit as required by V.4.2.(a)(c). There are two main reasons leading me to this conclusion. First, the claimant said his purpose was to care for his wife whilst she was undergoing treatment for cancer, but the letter from the doctor that he produced to support this claim stated that his wife needed her husband as a full-time carer. This medical opinion pointed to the wife needing a considerably longer visit than 23 days.

17. Second, the claimant had previously failed to comply with immigration law, working in breach of conditions and overstaying. It is true that he had eventually left voluntarily, but it would have been obvious to him that if the immigration authorities had had to enforce his removal, he would very likely have face debarment from being able to apply for entry clearance again. At best his voluntary departure mitigated the seriousness of his immigration offending; it did not negate it.

18. Having concluded that the claimant did not meet the requirements of the Immigration Rules, I turn to consider whether he was nevertheless entitled to succeed on Article 8 grounds outside the Rules.

19. I have no difficulty accepting that the claimant has a family life relationship with his wife and son and so comes within the scope of Article 8(1). I am also prepared to accept that the ECO refusal amounted to an interference with his right to respect for family life. However I do not consider such interference was disproportionate. It is true that, it was clearly a family visit underpinned by genuinely compassionate circumstances comprised by the wife's medical condition and ongoing treatment for cancer. However, what I have said earlier when analysing the decision of the FtT remains relevant here: the right to family life at stake in the context of a visit claimed to be for 23 days is one having a more contingent basis than a longer-term stay. In **Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511** Sales LJ said at [30]:

> "In my view, the shortness of the proposed visit in the present case is a yet further indication that the refusal of leave to enter did not involve any want of respect for anyone's family life for the purposes of Article 8. A three week visit would not involve a significant contribution to 'family life' in the sense in which that term is used in Article 8. Of course, it would often be nice for family members to meet up and visit in this way. But a short visit of this kind will not

establish a relationship between any of the individuals concerned of support going beyond normal emotional ties, even if there were a positive obligation under Article 8 (which there is not) to allow a person to enter the UK to try to develop a 'family life' which does not currently exist."

This passage was cited with approval by Singh, LJ in **SSHD v Onuorah [2017] EWCA Civ 1757** at [35]. Further, also relevant was the claimant's immigration history. The marriage with the claimant's spouse took place at a time when both parties must have known his immigration status was precarious and that is a relevant factor in the context of family life as well as private life: see **Rajendran UKUT (IAC)**. Further, the claimant had breached immigration law on his last stay in the UK and had become an overstayer. In addition, his wife's own leave to remain was limited and due to expire in just over six months' time (in December 2017). The lack of satisfactory evidence relating to his financial circumstances meant that he could not be treated as someone able to maintain and accommodate himself in the UK without recourse to public funds.

20. In my judgement the public interest factors weighing against the claimant far outweighed the strength of his family life interest in being granted entry clearance. Notwithstanding the compassionate purpose of his visit, it cannot be said that there were compelling circumstances warranting a grant of entry clearance on Article 8 grounds.

21. For the above reasons:

The decision of the FtT Judge is set aside for material error of law.

The decision I re-make is to dismiss the claimant's appeal against the decision refusing him entry clearance as a visitor. His Article 8 claim fails.

No anonymity direction is made.

Signed: Date: 16 March 2018

H H Storey

Dr H H Storey
Judge of the Upper Tribunal