Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/20999/2016
HU/21649/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 14 November 2018	**On 27 December 2018**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

VICTORIA NIKE OLADIPUPO
GBENGA OLU TAIWO
(No anonymity orders made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Singer of Counsel
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Nigeria born in 1985 and 1974. The second appellant is the first appellant's dependent partner. They appealed against a decision of the respondent made on 18 August 2016 to refuse their applications made on 17 March 2016 for leave to remain on family and private life grounds. Following a hearing at Birmingham on 25 August

2017 Judge of the First-tier Tribunal Boylan-Kemp MBE dismissed their appeals.

2. The first appellant's claimed immigration history is that she had leave as a domestic worker from 13 February 2007 until 26 February 2013. On 6 February 2013 she applied for indefinite leave to remain with the assistance of her then employer. Her employer assisted the first appellant in completing the form and was to pay the fee. However, the application was rejected on 26 February 2013 because the cheque sent with the application was returned as unpaid by the employer's bank.

3. However, her claim is that she did not receive the refusal letter in respect of the application made on 6 February 2013 until January 2014. It was only after she chased up the decision that she discovered that the application had been rejected. Her position is that had she received the refusal letter then she would have been able to submit a fresh application which would have succeeded, meaning she would not have become an overstayer and she would not have had to provide an English language certificate.

4. They also rely on their family and private life. They married in 2014 and have a child born in 2015 who is a citizen of Nigeria but has established his life here.

5. The respondent did not accept that the refusal letter dated 26 February 2013 was not sent in response to the application made on 6 February 2013. There was no indication it had been returned as undelivered.

6. As for family life their child was born when neither appellant had any lawful right to remain in the UK therefore they had no realistic expectation of being allowed to stay. There was no reason why they could not return to Nigeria as a family unit.

7. They appealed.

First tier hearing

8. At paragraph [14] of her decision the judge accepted that the family enjoy family life here and, at [15], have established a private life. At [16] she accepted that removal would create an interference with their private life which engages Article 8 but she concluded that such interference would be a proportionate interference.

9. The judge dealt with the issue of the refusal letter dated 26 February 2013 at [21 ff]. She noted that the respondent provided a copy of two letters dated 3 January 2014 to the appellant stating that a letter was sent to her by recorded delivery with a 13 letter/digit reference on 26 February 2013. At [23] she found that in the absence of any evidence to the contrary such as a returned letter or notification from the Post Office that the letter was

undeliverable, service had been shown. She did not accept that a handwritten log of phone calls which the first appellant claimed to have made to the Home Office documenting her attempts to find out what was happening with her application was a contemporaneous note of such.

10. Having found that the refusal decision of February 2013 had been communicated to the appellants they had as a result become overstayers [24] and thus little weight should be given to their private life. She then concluded that there was no good reason why they could not return to Nigeria as a family unit.

Error of law hearing

11. The appellants sought permission to appeal which was granted on 8 October 2018. The grounds complain that the judge erred in her approach to the application for ILR in February 2013, in particular as to whether a refusal was received later that month.

12. The grant states:-

> *"4 … The service issue was a factual matter, but it may be arguable that the Judge did not make reasoned or evidence based findings on the appellants' evidence of non receipt; and did not complete the required process of balancing such findings against the recorded delivery slip."*

13. At the hearing before me Ms Everett, for the respondent, agreed with Mr Singer that the judge had materially erred in her consideration of this matter such that the decision had to be set aside.

14. The reason was that the judge failed to have regard to a document, which was before her, of the respondent headed "GCID – Case Record Sheet." It includes what appears to be an intra-department email (the writer's name is redacted) dated 20 December 2013. It indicates a lack of evidence to support the claim by the respondent that the refusal decision of February 2013 was despatched.

15. It states:

> *"I hope you can help applicant called CCC regarding progress of her SET O application submitted 25-02-13, notes on CID suggest application was rejected as cheque was rejected and there is an RD AU 217828220 GB on CID notes to suggest documents were returned but no evidence on HO track and trace or royal mail track and trace that package was despatched, can this be looked into and myself or applicant advised whether package was despatched."*

16. Ms Everett indicated that having searched the file she could find nothing more on this issue.

17. As well as the CID notes indicating that the first appellant, in December 2013, made enquiry with the respondent as to the status of her application, there was also a letter (referred to at [22] of her decision) produced on the day of the hearing by the respondent's representative dated 3 January 2014 to the first appellant which states "*Following your recent enquiry concerning your application for Leave to Remain in the United Kingdom on 6 February 2013*" and which enclosed a copy of the refusal. Such could be taken to support her claim that having heard nothing from the respondent she contacted them about the status of her application for ILR. Moreover, having received this letter in January 2014 the first appellant shortly afterwards made a further application for ILR which might suggest that had she been aware of the refusal at an earlier stage she would have sought to regularise her stay soon thereafter.

18. I agreed with parties that the judge in reaching her finding that the February 2013 decision had been sent by the respondent and received by the appellants, failed to have regard to relevant evidence and she thereby failed to give adequate reasons.

19. Such error was material because it affected the factual matrix against which the judge went on to assess the question of proportionality.

20. By consent the decision was set aside to be remade. It was indicated that as over a year had passed since the First-tier hearing, oral evidence would wish to be given.

21. The decision of the First-tier Tribunal is set aside. The nature of the case is such that it is appropriate under section 12 of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement paragraph 7.2 to remit to the First-tier Tribunal for an entirely fresh hearing. No findings stand. The member(s) of the First-tier Tribunal to consider the case are not to include Judge Boylan-Kemp MBE.

22. No anonymity order made.

Signed: Date: 18 December 2018

Upper Tribunal Judge Conway