



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/12248/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 6th January 2016**

**Decision & Reasons Promulgated
On 22nd January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

ENTRY CLEARANCE OFFICER

Appellant

and

**BLESSING BOMA GREEN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Kotas, Home Office Presenting Officer

For the Respondent: Mr Stanley Dagogo Green, the Sponsor

DECISION AND REASONS

1. Although this is an appeal by the Entry Clearance Officer I refer to the parties as they were before the First-tier Tribunal.
2. The Appellant, a citizen of Nigeria, appealed to the First-tier Tribunal against a decision made by the Entry Clearance Officer on 23rd August 2014 to refuse her entry clearance to join her spouse in the United Kingdom. First-tier Tribunal Judge Wylie dismissed the appeal under the Immigration Rules but allowed the appeal under

Article 8 of the European Convention on Human Rights. The Entry Clearance Officer appeals with permission to this Tribunal.

3. The background to this appeal is that the Appellant and the Sponsor have been in a relationship since 2002. They met in Nigeria. The Sponsor is a British citizen who lives and works in the UK. He has been resident in the UK for over 30 years. When he met the Appellant he was married to another woman with whom he had two daughters. She and the Sponsor continued their relationship while the Appellant remained in Nigeria. The couple have three children born in 2004, 2006 and 2008 all of whom are British citizens and all of whom reside in Nigeria with the Appellant. The Appellant and the Sponsor married on 19th August 2011. The Appellant applied for entry clearance to join the Sponsor in the UK and the Entry Clearance Officer refused the application on the basis that he was not satisfied that various requirements of Appendix FM had been met. At the hearing in the First-tier Tribunal the judge accepted that there is adequate accommodation, that the Appellant satisfies the English language requirement, and that the Sponsor and the Appellant have a genuine and subsisting relationship and that they intend to live together permanently in the UK. The judge also accepted that the Sponsor has an income from employment of more than £18,600 per year. However the judge considered the specified evidence produced with the application and at the hearing and concluded that all of the specified evidence required by Appendix FM-SE had not been produced and therefore the Appellant could not succeed under the Immigration Rules.
4. The judge proceeded to consider the appeal under Article 8 of the European Court of Human Rights. The judge accepted that the Appellant had family life with the Sponsor and their three children and that the decision would interfere with that family life. The judge went on to consider proportionality and considered the nature of the relationship between the Appellant, the Sponsor and the three children. The judge had regard to the decision in **SSHD v SS (Congo) [2015] EWCA Civ 387** and noted that there should be compelling circumstances to justify leave to enter should the Rules in Appendix FM-SE not be complied with. The judge concluded that there are such compelling circumstances in this case. The judge noted that there is substantial evidence that the Sponsor meets the income requirement and has been working for the same employer for seventeen years, has lived in the UK for over 30 years, has adult children living and working in the UK, the three children are British citizens and they are entitled to live and be educated in the UK. The judge noted that the Sponsor would have to give up his longstanding pensionable employment to move to Nigeria for family life to be enjoyed there and noted that a fresh application with up-to-date payslips and bank statements, with a further letter from his employer, would meet the requirements of the specified evidence and that the application would be allowed. The judge concluded that it would be disproportionate in this case to refuse the application for leave to enter.
5. In the Grounds of Appeal the Entry Clearance Officer submitted that the compelling circumstances quoted by the First-tier Tribunal Judge in this case are not compelling at all. The Entry Clearance Officer did not disagree with most of the judge's findings

but did disagree with the suggestion that the Entry Clearance Officer had said that the Sponsor should move to Nigeria to continue family life because where he chooses to live as a British citizen is a matter for him.

6. The grounds contend that in his proportionality assessment the judge ignored the fact that the Sponsor's relationship with the Appellant began in 2002 and that all three children they had together were born in Nigeria at a time when the Sponsor was married to someone else and that these were lifestyle choices made by the Sponsor and the Appellant. It is contended that the position taken by the First-tier Tribunal Judge that the best interests of the children would be served by being with both parents ignores those lifestyle choices already made by the Sponsor and cannot therefore be considered as compelling circumstances as identified in **SS (Congo)**. It is contended that the remedy for the Appellant and the Sponsor is properly put by the First-tier Tribunal Judge at paragraph 37 in that the Appellant can submit a new application as Article 8 cannot be used to circumvent the Immigration Rules. It is contended that the entry clearance refusal in this case merely maintains the status quo and cannot properly be described as disproportionate.
7. At the hearing before me Mr Kotas relied in particular on paragraphs 87 and 57 of **SS (Congo)**. He submitted that it is proportionate to expect the Appellant to make a fresh application.
8. Mr Green submitted that all relevant documents were in fact submitted to the Entry Clearance Officer but that the documents were lost in transit. He said he did not know why this issue had not been raised before the First-tier Tribunal Judge but accepted that he had been represented by Counsel in the First-tier Tribunal. He submitted that he did have the missing payslip from April 2014 and had bank statements covering the relevant period. He submitted that the children's situation is compelling as his children were meant to start school in September and they cannot start school in the UK without his wife's presence here.
9. In response Mr Kotas accepted what the Sponsor had said. He accepted that the missing documents in terms of Appendix FM-SE are the April 2014 wage slip and bank statements covering the relevant period. Mr Green produced those documents. Mr Kotas viewed the documents and was satisfied that these documents do in fact show that the Appellant met the requirements of Appendix FM-SE as at the date of the decision.

Error of Law

10. There appears to have been a difficulty in terms of the evidence presented to the First-tier Tribunal. The Appellant's bundle before the First-tier Tribunal contains evidence of the Sponsor's payslips and bank statements in relation to October 2014 to April 2015. The relevant period for determination in relation to the requirements of the Appendix FM-SE was the period prior to the application which was in the middle of May 2014.

11. I have considered the judgment of the Court of Appeal in **SS (Congo)**. I note that in paragraph 87 the court said in relation to one of the Appellants in that case:

“The fact that he would lose his job in the United Kingdom and hence would prefer to establish family life here does not constitute compelling circumstances to require the grant of LTE outside the Rules: as the authorities made clear, Article 8 does not create a right for married couples to choose to live in a contracting state.”

I also note paragraph 57 where Lord Justice Richards said:

“In certain of the appeals before us, the Respondent said that improvements in the position of their Sponsors were on the horizon, so that there appeared to be a reasonable prospect that within a period of weeks or months they would in fact be able to satisfy the requirements of the Rules. They maintain that the Secretary of State should have taken this into account when deciding whether to grant LTE outside the Rules. In our judgment, however, this affords very weak support for a grant of LTE outside the Rules. The Secretary of State remains entitled to enforce the Rules in the usual way, to say that the Rules have not been satisfied and that the applicant should apply again when the circumstances have indeed changed. This reflects a fair balance between the interests of the individual and the public interest. The Secretary of State is not required to take a speculative risk as to whether the requirements of the Rules will in fact be satisfied in the future when deciding what to do. Generally, it is fair that the applicant should wait until the circumstances have changed and that the requirements in the Rules are satisfied and then apply, rather than attempting to jump the queue by asking for preferential treatment outside the Rules in advance”.

12. Whilst I note that the judge did take account of the decision in **SS (Congo)** I do not accept that the judge has given sufficient reasons for accepting that there are compelling circumstances in this case, given the lifestyle choices made by the Appellant and the Sponsor which led to the fact that the Appellant has not lived in the UK throughout their relationship and that the children were born and have been brought up in Nigeria. In my view, in considering the public interest in his proportionality assessment, the judge also failed to take into account properly the fact that a fresh application could be made and may be successful. The fact that a fresh application could be made is in this case a factor to be given significant weight in terms of proportionality in that if the Appellant made a fresh application which is likely to be granted it is not disproportionate to expect that she should do so. If the Rules could be met then Article 8 should not be used as a means by which the Rules can be bypassed.
13. For these reasons I consider that the judge has made an error of law in allowing the appeal on human rights grounds. I therefore set the decision of the First-tier Tribunal aside.

Re-making the decision

14. In terms of re-making this decision Mr Kotas accepted, on viewing the documents held by Mr Green, that the April 2014 payslip has now been produced and that the bank statements for the relevant period of six months prior to the date of the application have now been produced and these documents demonstrate that the

Appellant met the requirements of the Rules at the time of the application. Mr Kotas accepted that these documents could be considered at this stage despite it not being clear whether they were submitted with the application. Although Mr Green states that these documents were produced with the application he has not produced any evidence to substantiate his claim that documents were produced and were lost in the post.

15. I note that the findings made by the First-tier Tribunal Judge were not challenged. In light of Mr Kotas's concession that the documents produced meet the requirements of Appendix FM, I am satisfied that the Appellant has demonstrated that she met the requirements of the Immigration Rules at the relevant time. I therefore allow the appeal under the Immigration Rules.

Notice of Decision

16. The decision of the First-tier Tribunal Judge contained a material error of law and I set it aside. I re-make the decision by allowing the appeal under the Immigration Rules.

No anonymity direction is made.

Signed

Date: 21 January 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because it has not been established that the relevant evidence was submitted with the application.

Signed

Date: 21 January 2016

Deputy Upper Tribunal Judge Grimes