



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

Appeal Number: HU/01797/2015

THE IMMIGRATION ACTS

Heard at Field House

On 8th September 2017

**Decision & Reasons
Promulgated**

On 20th September 2017

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**ITOHAN VIVIAN OSADOLOR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr S Nwaekwu, Moorehouse Solicitors

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 15th August 1983. She appeals against the decision of First-tier Tribunal Judge Cameron, promulgated on 3rd February 2017, dismissing her appeal against the refusal of entry clearance.
2. Permission to appeal was sought on the grounds that the judge failed to properly apply Section 85(5) of the 2002 Act and failed to properly assess Article 8. The material issues in the appeal were whether the documents submitted to the First-tier Tribunal for consideration in line with Section

85(5), which were not available to the Respondent at the time he made the decision which the Appellant appealed against, meet the requirements for the issue of entry clearance visa sought by the Appellant and whether proper consideration has been given to the Appellant's Article 8 rights in light of her peculiar circumstances. It was also submitted that the Tribunal failed to properly consider the evidential flexibility policy set out in paragraph D of Appendix FM-SE.

3. Permission was granted by First-tier Tribunal Easterman on 17th July 2017 on the grounds that the judge appeared to apply both the old and current version of Section 85(5) and therefore it was arguable that the judge erred in law.
4. In the Rule 24 response, the Respondent stated: "Notwithstanding the phraseology of paragraph 8 of the determination, the PO at paragraph 17 accepted that the new provisions applied which the judge did apply, please see paragraph 45. Also, the judge is entitled to give weight to the fact that not all the required evidence was submitted with the application form, paragraph 40. It is submitted that because this is a human rights appeal the judge is entitled to find that despite the Appellant and Sponsor being in a genuine and subsisting marriage the appeal remains dismissed under Article 8. In doing so the judge followed the approach approved by case law and assessing the evidence reached findings which are open to be made."

Submissions

5. Mr Nwaekwu relied on Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) and submitted that the judge erred in law in failing to assess the Appellant's application under Appendix FM on the information which was available at the date of hearing. The judge failed to make a clear finding that the Appellant satisfied Appendix FM at the date of hearing and then failed to properly carry out a proportionality assessment on the basis that the Appellant now satisfied the Immigration Rules. Had the judge considered that the Appellant could satisfy the Rules as at the date of hearing then he would have found that the refusal of entry clearance was disproportionate.
6. Mr Nwaekwu relied on paragraphs 20 and 21 of Mostafa which state:
 - "20. We must now ask ourselves if refusing the Claimant entry clearance by refusing to give him entry clearance for the specific and limited purpose sought interferes disproportionately with the private and family lives of the Claimant and his wife.
 21. In these circumstances the Entry Clearance Officer must justify the interference and satisfy us that the interference is proportionate. Subject to two sets of considerations we can see no justification for stopping a husband joining his wife when a

Tribunal is satisfied that their circumstances satisfy the requirements of the Rules. The first relates to their candour. For example, if they had contributed to the application being refused by presenting inaccurate information or by omitting something material or committing some comparable misdemeanour. We can accept that it might be appropriate to refuse someone entry clearance whose application suffered from deficiencies such as these because good administration requires applicants to engage with the system and, further, we consider that there are duties of candour and cooperation on all applicants. There are no such failings here. The second set of considerations relates to the impact of refusal on the relationships that have to be promoted. Refusal of entry clearance will not always interfere disproportionately with such a relationship.”

7. Mr Nwaekwu submitted that the judge had failed to conduct a proper proportionality assessment and had failed to make a finding on whether the Appellant could satisfy the Rules at the date of hearing. The case of Mostafa applied to all entry clearance cases, not just visit visas and in fact family life held more weight in settlement cases. The judge’s decision should be reversed.

8. Mr Tufan submitted that Mostafa was not applicable because it was decided before the 2014 amendment came into force. Mr Tufan referred me to Appendix FM-SE paragraph D which states:

“(a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State (‘the decision-maker’) will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies.

(b) If the applicant:

(i) Has submitted:

(aa) a sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);

(bb) a document in the wrong format (for example, if a letter is not on letter headed paper as specified); or

(cc) a document that is a copy and not an original document; or

(dd) a document which does not contain all of the specified information; or

- (ii) Has not submitted a specified document, the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.
- (c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.
- (d) If the applicant has submitted:
 - (i) A document in the wrong format; or
 - (ii) A document that is a copy and not an original document, or
 - (iii) A document that does not contain all of the specified information, but the missing information is verifiable from:
 - (1) other documents submitted with the application,
 - (2) the website of the organisation which issued the document, or
 - (3) the website of the appropriate regulatory body, the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates. The decision-maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in paragraph (b).
- (e) Where the decision-maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or request alternative or additional information or document(s) be submitted by the applicant.
- (f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request."

9. Mr Tufan relied on SS (Congo) [2015] EWCA Civ 387:

“37. On the other hand, if someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a right to come here an extreme example would be the case of a so-called ‘mail-order bride’, the relationship will have been formed under conditions of known precariousness which will make the analogy with the Strasbourg case law reviewed in Nagre a close one (see also Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471 at paragraph 68). In that sort of case, it will be appropriate to apply a similar test of exceptional circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant leave to enter outside the Rules.”

“51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.”

“89. The FTT also erred in saying that it would not be proportionate to expect FA to make a further application. Since FA's application failed to comply with the Immigration Rules and no compelling circumstances were identified why those Rules should not be applied in her case in the usual way, there was nothing disproportionate in applying the Rules in accordance with their terms, with the effect that FA's application failed and she would have to make a new one. The Entry Clearance Officer (and the FTT) was not required to waive the operation of the Rules as some sort of goodwill gesture because of the way in which the FA's previous application had been dealt with.”

10. Mr Tufan submitted that, following Agyarko [2017] UKSC 11, where family life is precarious, there must be unjustifiably harsh consequences to establish a breach of Article 8. There were none in this case because it was open to the Appellant to make a fresh application. There was no material error of law in the judge's decision.

11. Mr Nwaekwu submitted that the judge failed to make findings under Appendix FM. Had the judge done so he would have come to a different conclusion in relation to proportionality. The judge had failed to make findings on each of the five steps set out in Razgar [2004] UKHL 17. The proportionality assessment was lacking in substance and was defective. This was material because the judge could have come to a different decision had he asked himself the correct question set out in Razgar.

Discussion and Conclusion

12. Entry clearance was refused on 29th June 2015 for the following reasons: The Appellant could not satisfy the suitability requirements because she failed to submit a valid tuberculosis certificate with her application. She could not satisfy the eligibility requirements because there was insufficient evidence to show that she was in a genuine and subsisting relationship. She could not satisfy the financial requirements because the bank statement provided for the Sponsor's salary did not cover the same period as the payslips. The bank statements did not evidence the Sponsor's earnings for the relevant period. The Appellant had failed to provide documents specified in Appendix FM-SE of the Immigration Rules. There were no exceptional circumstances to justify a grant of leave outside the Immigration Rules.
13. The judge took into account the documents submitted at the hearing and concluded that the Appellant was in a genuine and subsisting relationship. He found that there was family life and interference. His failure to set out the five steps in Razgar was not material because he had, in paragraphs 50 to 55, applied Razgar. The argument put forward by Mr Nwaekwu is that the judge failed to make a finding that the Appellant satisfied the Immigration Rules at the date of hearing and to add that into the balancing exercise when assessing proportionality.
14. At paragraph 40 the judge stated: "The appellant did not provide the specified documents in relation to the sponsor's income and did not provide the TB certificate and cannot therefore meet the requirements of the rules."
15. The judge found at paragraph 54: "I have found that the appellant did not meet the requirements (sic) the rules. I am not satisfied that the appellant has shown that there are compelling circumstances which would tip the balance in the appellants favour and there is nothing to indicate that it would be unreasonable to expect the appellant to reapply now that the sponsor stated he does meet the requirements of the rules and for the sponsor to provide the specified documents required. I take into account SS (Congo) in particular at paragraph 89 when coming to this finding."
16. And at paragraph 55: "When taking into account all the factors in favour of the appellant balancing these against the respondents (sic) legitimate aim of the maintenance of immigration control and taking into account the factors set out above I come to the conclusion that the balance falls in favour of the respondent and the decision to refuse entry clearance is proportionate to the respondents (sic) legitimate aim."
17. It is quite clear from paragraphs 40 and 54 that the judge does not accept that the Appellant met the Immigration Rules at the date of hearing. The judge took into account the Sponsor's claim that he now has all the

required evidence, but it was not in the Appellant's bundle which was before the judge. There was no tuberculosis certificate; the bank statements were incomplete and the Sponsor's earnings did not meet the required threshold.

18. The judge's finding that the Appellant failed to meet the requirements of the Immigration Rules was open to him on the evidence before him. The judge took this into account in assessing proportionality. There was no error of law in that assessment.
19. The judge accepted that there was a genuine and subsisting relationship between the Appellant and Sponsor and that therefore family life was established and Article 8 was engaged. Both the Appellant and Sponsor were aware at the time they formed the relationship and when they married that there was no right for the Appellant to come to the UK. The Appellant would have to make an application under the Immigration Rules.
20. The Appellant failed to submit specified documents with her application. The evidential flexibility policy did not apply in this case for the reasons given at paragraph 39 of the judge's decision. The Appellant could not satisfy Appendix FM-SE because she had failed to submit specified documents with her application.
21. The judge also considered where there were any compelling circumstances justifying a grant of leave outside the Rules and concluded that there were none. His decision was consistent with paragraph 21 of Mostafa. The Appellant had failed to submit specified material with her application. Good administration required the Appellant to engage with the system. The judge's finding that it was proportionate to refuse entry clearance was open to him on the evidence before him.
22. At the time the application was made and at the date of hearing the Appellant had failed to provide specified documents with her application. That defect could not be remedied by later submission of the documents. The judge considered whether there were any compelling circumstances which would prevent the Appellant from making a further application and concluded that there were none. That is a course which is still open to the Appellant.
23. The Appellant's application for entry clearance did not comply with the Immigration Rules in that she failed to submit specified evidence and there were no compelling circumstances why the Rules should not be applied in her case. There was nothing disproportionate in applying the Immigration Rules and the judge's assessment of proportionality was not lacking in substance or form.
24. Accordingly, I find that there was no error of law in the decision of 3rd February 2017 and I dismiss the Appellant's appeal.

Notice of Decision

Appeal dismissed.

No anonymity direction is made.

J Frances

Signed

Date: 18th September 2017

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

Since I have dismissed the Appellant's appeal I make no fee award.

J Frances

Signed

Date: 18th September 2017

Upper Tribunal Judge Frances