



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

Appeal Number: OA/20309/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 19th February 2015**

**Decision & Reasons Promulgated
On 17th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MS OLAYEMI OLAWUNMI OMOTOSO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Babarande, Counsel

For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 26th November 1979. The Appellant applied for entry clearance as a partner under Appendix FM of the Immigration Rules and her application was considered under paragraph EC-P.1 of Appendix FM of the Immigration Rules. Her application was refused by the Entry Clearance Officer on 18th September 2013.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Bird sitting at Taylor House on 20th October 2014. In a determination promulgated on 20th October 2014 the appeal was allowed under the Immigration Rules.
3. On 27th October 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 29th December 2014 Designated First-tier Tribunal Judge Macdonald granted permission to appeal. Judge Macdonald noted that the grounds of application stated that the judge should not have been satisfied that the terms of Appendix FM-SE had been met. In particular it was contended that there were wage slips missing and the English language requirement was not met. Judge Macdonald considered that it was arguable that the judge had erred in law in favour of the Appellant in terms of the Rules given that there were a number of payslips missing and that it was arguable that the Appellant did not satisfy the test in respect of the English language requirement. No Rule 24 response appears to have been filed or served by the Appellant's solicitors. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal. This is an appeal by the Secretary of State. For the purpose of continuity throughout the legal proceedings the Secretary of State is referred to herein as the Respondent and Ms Omotoso as the Appellant. The Appellant appears by her instructed Counsel Mr Babarande. Mr Babarande is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Ms Pal.

The History of the Matter

4. The history of this matter is not in dispute. It was accepted that the Appellant had initially made an application to join her husband for settlement in March 2012 and that that application had been considered by an Entry Clearance Officer under paragraph 281 of HC 395 (being the Immigration Rules that were then in operation). That application had been refused and a further application was submitted on 28th September 2012 under the new and current Immigration Rules. That application was refused on the basis that the Appellant had failed to show her Sponsor met the financial requirements under Appendix FM and that it was decided that she had failed to provide evidence that she met the English language requirement. As a result a third application was submitted by the Appellant on 31st May 2013. It was that application that was allowed on appeal by Judge Bird.

Submissions/Discussion

5. Ms Pal indicates that the Secretary of State relied on the Grounds of Appeal and that the First-tier Judge has recorded the financial requirements and notes the need to provide the specified evidence in support of any assertion that the Sponsor meets the annual income threshold of £18,600. The specific issue in contention is the requirement for wage slips to be provided covering six months. He points out that the First-tier Tribunal Judge has noted that some wage slips are missing but considers that their absence is mitigated by bank statements which show that the payments have been going into the Sponsor's account for the dates that are not

covered by the payslips. She submits therefore that the Rule has not been met by the Appellant and that the determination as a result displays a material error of law.

6. So far as the English language certificate is concerned it is not disputed that the Appellant has a degree which is recognised and that she was taught in English but it is contended that the educational qualification is post decision and the correct approach would be for the Appellant to make a fresh application setting out her English language test results. She acknowledges that this requirement would have been met had the test results been before the Entry Clearance Officer. She asked me to set aside the decision of the First-tier Tribunal and to remake the decision refusing the Appellant's original application.
7. Mr Babarande points out that the Entry Clearance Manager was in receipt of the English test results and has noted that the Appellant has passed the English language test requirements. Whilst acknowledging that it is best to undertake the test in order to comply with the Rules and that the Appellant did not have the relevant certificate, at the time of the hearing it was clear that the Appellant obviously met the English language requirement. She now has a degree and has passed English language with a high score of 6.5. He submits that the Entry Clearance Officer was consequently wrong in refusing the Appellant on this particular ground.
8. So far as the financial position is concerned firstly he refers me to the missing payslips that are now produced but points out that the payslips are just evidential of the financial circumstances and that it was appropriate to apply evidential flexibility which was the approach adopted by the judge. He takes me to the P60s that have been provided by the Sponsor and the bank statements and that they showed quite clearly that the financial requirements were met. He indicates that there is no material error of law and he asked me to dismiss the Secretary of State's appeal.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it

necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. The challenge by the Secretary of State was that the judge has materially erred in law in failing to conclude that the Appellant met the requirements of the Immigration Rules both by way of the financial gross annual income of the Sponsor and by failing to have the appropriate English language test certificate. These issues have been fully addressed at paragraphs 16 to 21 of the First-tier Tribunal Judge's determination. At paragraph 16 the judge has acknowledged the financial requirement and has examined the documentary evidence produced which has consisted of P60s, wage slips, a letter from the Sponsor's employer who issued the wage slips and personal bank statements corresponding to the period of the wage slips. He has acknowledged that there were four missing payslips respectively for the weeks 1st, 8th, 15th and 22nd February 2013. However despite this, applying evidential flexibility, he has shown that he is satisfied that documentary evidence particularly from the P60s and bank statements has been provided to show that the Sponsor meets the requirements necessary for the Appellant's appeal as to his income over the relevant six month period. In addition to that the missing wage slips are made available to me today.
12. I am satisfied that whilst there may have been an error of law it is not material. There is clear evidence that the Appellant through her Sponsor met the financial requirements and the judge has not erred in law in his approach. He has given careful consideration to the documents produced evidencing them at paragraphs 17 and 18 and on the balance of probabilities has made findings which he was entitled to that the Appellant met the financial requirements.
13. At paragraphs 20 and 21 the judge has considered the refusal in relation to the English language requirements as required under paragraph E-ECP.4.2 namely that the Appellant has to show that she has the required English language certificate. He has noted that the Appellant was able to provide evidence of her qualification from a university in Nigeria and that subsequently she has sat and passed the relevant English language test. The judge found that the evidence from the university which was before the Entry Clearance Officer on a balance of probabilities showed that the Appellant had a BA degree and should therefore have been exempt from the requirement to produce an English language certificate. When taken together the subsequent test certificate and the document from the university showed to him that the Appellant met the English language requirement under Appendix FM. This is a finding that I am satisfied the judge was entitled to make and did not disclose any material error of law. In order to succeed the Secretary of State would have to show that there has been a material error of law. The judge was perfectly entitled to make the findings of fact that he did and the fact remains that this is an Appellant whose Sponsor meets the financial requirements and an Appellant who satisfies the English

language requirements. To suggest that the Appellant should go away and make a fresh application is an unnecessary and over burdensome approach. Any error of law is not material and the outcome on any analysis would be that this Appellant meets the requirements of the Immigration Rules. In such circumstances I find that the decision of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and the appeal is dismissed and the decision of the First-tier Tribunal is maintained.

No anonymity direction is made.

Signed

Date **19th February 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date **19th February 2015**

Deputy Upper Tribunal Judge D N Harris