



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03636/2016

THE IMMIGRATION ACTS

Heard at Field House
On 28 November 2017

Decision & Reasons Promulgated
On 21 December 2017

Before

UPPER TRIBUNAL JUDGE WARR

Between

MRS CHRISTIANA EKWUTOSI OHAKANU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms J Bond of Counsel instructed by Irving & Co Solicitors

For the Respondent: Miss A Holmes, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 19 December 1977. She appeals the decision of the Entry Clearance Officer on 13 January 2016 to refuse her application for an entry clearance as the spouse of the sponsor, who is a British citizen. The refusal was on the basis that the applicant did not satisfy the suitability requirements of the Immigration Rules in that it was alleged that the appellant had failed to pay charges in accordance with the NHS Regulations. In relation to Article 8 while the appellant might have a family life with her husband there was no satisfactory reason

why he could not join the appellant in Nigeria. There were no exceptional circumstances. Review was sought of the refusal and the Entry Clearance Manager on 23 August 2016 maintained the original decision but raised a new hurdle based on the record of the interview with the sponsor. It was said that further concerns were raised regarding the relationship and he was now not satisfied that the appellant had a family life with the sponsor and that in any event the couple could live together in Nigeria. There were no exceptional circumstances.

2. At the hearing before the First-tier Judge the Home Office Presenting Officer, Ms Parr, conceded that the suitability ground for refusal was no longer relied upon as satisfactory payment arrangements had been put in place in compliance with Home Office policy. Following the interview it was not accepted that the appellant had a family life with the sponsor. Reliance was placed on **Kwok On Tong [1981] Imm AR 214** - notice of refusal was not equivalent to a pleading and if new elements of the Immigration Rules came into play they were to be dealt with on the appeal. While the Entry Clearance Manager had expressed doubts as to the nature of the relationship between the appellant and the sponsor no specific aspect of the Immigration Rules had been identified. However Ms Parr stated that she did not accept that the relationship was genuine and subsisting. Reference was made to paragraph E-ECP.2.6 of the Rules.
3. The judge went on to consider the findings in a previous appeal by the appellant which had come before First-tier Judge Manuell on 18 September 2015. The judge notes that Judge Manuell had made a clear finding that he found the appellant and the sponsor to be credible which had been supported by the independent evidence of the sponsor's brother. Judge Manuell had accepted that the appellant and sponsor were in a genuine and subsisting relationship. The judge accordingly found in the light of the guidance in **Devaseelan [2002] UKIAT 00702** that he regarded the findings of fact made by Judge Manuell as a starting point but added "however I am entitled to consider new facts or any facts not considered at the previous appeal which may be capable of producing a different outcome".
4. The determination continues

"13. I have also had regard to the case of **Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 00312 (IAC)**. The head note of which states:

'The parties are bound by unappealed findings of fact in an immigration judge's decision. It is therefore not open to the respondent following a successful and unchallenged appeal by an appellant to make a further adverse decision on the same issue relying on the same evidence as before unless there is evidence of fraud or one of the exceptions identified in para 35 of the judgment of the Court of Appeal in *Secretary of State v TV [2008] EWCA 997* applies.'

14. However, I find that the principles set out in **Chomanga** do not apply in the present case. Firstly, I note that [the] appellant's appeal before FTTJ Manuell was not allowed and therefore no basis for the respondent to challenge that decision.

Second, the respondent is not relying upon the same evidence, but new evidence of the responses given by the sponsor during an interview. Thirdly, paragraph 5 of the Decision and Reasons reveals that the respondent was not represented at the hearing and the circumstances surrounding it. The circumstances before me are very different, the sponsor's evidence has been tested and reveals significant shortcomings.

15. I have also had regard to **Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 00041 (IAC)** which confirmed that following **GA ("Subsisting" marriage) Ghana* [2006] UKAIT 00046** the appellant must demonstrate that the matrimonial relationship continues at the relevant time rather than just the formality of a marriage. Whilst no particular evidence of mutual devotion is required I find that there are a number of countervailing factors generating suspicion as to the intentions of the parties.

16. Having heard the oral evidence of the sponsor, I found him to be vague and unconvincing. For example the sponsor, in his oral evidence, stated that he decided to get married to the appellant 2 days after meeting her at a friend's party, but when asked why he decided so quickly he stated that he decided to get married 1 month later. He then stated that the reason for deciding to get married was that they were from the same background. The sponsor also gave a confused and inconsistent account of the periods that he and the appellant were said to have lived together whilst the appellant was in the UK. He initially stated that after they got engaged they lived together between November 2013 to July 2013, however in his interview he stated that the appellant had returned to Nigeria during this time (Q.43, 46-47). When this contradiction was brought to his attention he then stated that he meant that he lived with the appellant upon her return from Nigeria in July 2014, but this was also in contradiction to what he stated in his interview where he stated that he and the appellant did not live together until after the wedding on 17.10.2014 (Q.43). In addition to these inconsistencies the sponsor confirmed that he did not visit the appellant after she returned to Nigeria on 7.10.2015. Whilst the sponsor stated that he communicated with the appellant every day the evidence submitted (at p.237-245) did not predate 2017. The sponsor also stated that he supported his wife by sending financial support in the sum of about £200 a month and relied upon money transfer receipts (P.246-25). However, I do not find these to be reliable documents. This is because these documents are standard pro-forma completed in manuscript with nothing to identify by whom they were completed. The information in the pro-forma suggests that the money was transferred into a bank account, however, there was no evidence that such an account existed or whether such sums were indeed credited to the said account. The credibility of these documents are further undermined by the reference numbers which are sequentially inconsistent with the dates upon which the transfers are said to have taken place.

17. FTTJ Manuell made his decision on the evidence before him as at date of that hearing, namely 11.9.2015. I must make a decision on the evidence before me as at the date of the respondent's decision, namely 13.1.2016. Clearly it is must be possible for the quality and nature of a relationship to change. At the relevant date I find that based upon the evidence before me that the relationship between the appellant and her sponsor was not subsisting nor am I satisfied that they

intend to live together permanently. Consequently I find that the appellant fails to meet the requirements of the immigration rules.”

5. The judge referred to **Secretary of State v SS (Congo) [2015] EWCA Civ 387** and concluded his determination as follows:

“20. Given my finding above I do not accept that family life exists between appellant and her sponsor. I am therefore not satisfied that the impact of the decision is sufficient to engage the potential operation of Article 8. This is because whilst any decision to remove a person from the United Kingdom will almost invariably engage the potential operation of Article 8, the instant decision does no more than to preserve the *status quo*. However, if I am held to be wrong in this view, I am satisfied that that having regard to the appellant’s inability to meet the eligibility requirement of the rules and bearing in mind the public interest requirements of Section 117B and guidance in **SS Congo** I conclude that the decision in this case is in accordance with the law and is necessary and proportionate in a democratic society in order to maintain the economic well being of the country through the consistent application of immigration controls. In reaching this conclusion, I have had regard to the absence of any evidence that the appellant or her sponsor would face any significant difficulties in furthering their family life, such that it is, with her sponsor in Nigeria or in making a further application for entry clearance to the United Kingdom.”

6. Grounds of appeal were settled (not by Ms Bond). It was stated that the notes of interview had only been produced at the hearing before the First-tier Judge and neither the appellant nor the sponsor had been provided with the notes before the hearing. The wrong standard of proof had been applied and reliance had been placed on suspicion by the First-tier Judge in paragraph 15 of his determination. Judge Manuell had made a positive finding in respect of the relationship having heard oral evidence from the parties. The judge had found that the parties were plainly truthful witnesses and their evidence had been supported by independent evidence in particular medical evidence confirming their respective medical histories. The sponsor’s brother had taken the trouble to make a long journey to court to support the appeal and the evidence was accepted in full. Judge Manuell commented that the appellant’s visits to the United Kingdom had all been entirely lawful pursuant to her multiple entry visas. On advice she had sought to extend her stay beyond her original intended return date and Judge Manuell was satisfied that she had had good reasons for doing so and that she intended to return to seek entry clearance from Nigeria as a spouse and there was no reason to suppose that the application would not be granted promptly.
7. The appellant did indeed return to Nigeria to make the application which is the subject of this appeal.
8. It was argued that the First-tier Judge had erred in considering the guidance in **Devaseelan** and the facts relied on were not materially different from those before First-tier Judge Manuell. The judge had erred in finding the sponsor “unconvincing” which indicated that he had applied an incorrect standard of proof in assessing the

sponsor's evidence which had already been accepted as entirely credible. Reference had been made to it being "possible" for the quality and nature of a relationship to change but the issue should have been determined on the balance of probabilities not an assessment of what might be possible.

9. The judge had misdirected himself in distinguishing **Chomanga** as it had been held in **Mubu [2012] UKUT 00398 (IAC)** that the **Devaseelan** guidelines were to be applied to a determination of a factual issue regardless of whether the decision had been appealed or whether or not the appeal had been allowed. It was irrelevant whether or not the respondent had been represented in the previous proceedings.
10. The sponsor had been diagnosed as suffering with Type 1 Diabetes. The evidence had been before the judge. Such a condition could lead to periods of confusion.
11. A response was filed on 3 October 2017 in which it was argued that the First-tier Judge had been entitled to depart from the findings made by Judge Manuell. Adequate reasons had been given for the findings.
12. Counsel relied on the grounds. She pointed out that the appellant had intended to return to Nigeria but had had an operation and she had also looked after her husband who suffered from diabetes. The NHS charges had been paid. The vague answers given by the sponsor should have been seen in the light of the fact that diabetes caused confusion. The standard of proof had been set too high. Suspicion was not enough.
13. In answer to a question from Miss Holmes Counsel pointed out that all the evidence regarding diabetes had been before Judge Manuell.
14. Miss Holmes expressed concerns that the medical evidence had not been mentioned by the First-tier Judge and it had been clearly relevant to the alleged vagueness of the sponsor's replies.
15. While the representatives were in agreement that the determination was flawed Ms Bond did not accept that the decision should be reversed. She referred to the delay. There was discussion about the various options for dealing with the appeal.
16. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the conclusions of the First-tier Judge if they were materially flawed in law.
17. The hearing would not have been a straightforward one for the then representative as one issue – the NHS charges – was dropped and evidence relating to the second issue was only served at the proceedings.
18. It is not necessary to decide whether the judge misdirected himself in approaching the **Devaseelan** guidelines though at least two of his reasons for distinguishing

Chomanga appear doubtful in the light of the grounds of appeal which I have referred to above. The second reason – the new evidence – relates as I have said to material only served at the hearing. Miss Holmes properly accepts and indeed raised the issue of the medical evidence not having been taken into account when the findings in relation to the sponsor’s evidence being “vague and unconvincing” were reached. I agree with the representatives that the decision is flawed in law.

19. I note that further evidence was submitted under cover of a letter dated 9 November 2017 covering some 91 pages. The degree of fact-finding required in this case is considerable. While I am sympathetic to the point raised by Counsel about delay it does appear to me that a fresh hearing is required before a different First-tier Judge.
20. The appeal is allowed to the extent that it is remitted to be heard afresh by a different First-tier Judge.

Anonymity Order

The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT **FEE AWARD**

The First-tier Judge made no fee award and I make none.

Signed

Date: 20 December 2017

G Warr, Judge of the Upper Tribunal