IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18064/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 December 2014	**On 18 December 2014**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

ENTRY CLEARANCE OFFICER – ABUJA

Appellant

and

MS MFON GRACE USORO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Duffy
For the Respondent: Mr D G Onyeadiri (Sponsor)

DETERMINATION AND REASONS

1. For ease of reference purposes the parties are hereafter referred to as they were in the First-tier Tribunal so that Ms Usoro is the appellant and the Entry Clearance Officer the respondent.

2. The appellant is a citizen of Nigeria who was born on 22 May 1975. She was refused entry clearance as a partner under Appendix FM of the Immigration Rules. In essence the Entry Clearance Officer was not satisfied that the appellant's relationship with the sponsor is genuine and

subsisting or that they intend to live permanently together. Additionally the ECO was not satisfied as to the adequacy of accommodation without recourse to public funds and further the appellant did not meet the English language requirements of the Immigration Rules E-ECP.4.1.

3. The appellant appealed that decision to the First-tier Tribunal. The judge found that the appellant met all the requirements of the Immigration Rules and allowed the appeal. There is no challenge to the judge's findings in respect of the relationship between the appellant and sponsor or the adequacy of accommodation. However, the respondent takes issue with the finding by the judge that the appellant met the English language requirements of the Rules.

4. The date of application by the appellant was 2 August 2013. The date of refusal was 24 September 2013. At paragraph 20 of the decision the judge records that the appellant submitted in support of the appeal an IELTS certificate dated 12 October 2013 i.e. post decision. The judge found that the test results clearly revealed that the appellant has no difficulty in comprehending and adequately communicating in English. The judge in addition found that he accepted the sponsor's oral evidence that the only reason why the appellant did not initially undertake the test before her application was submitted was because she had been misled by someone at the British embassy in Abuja. It had been indicated to her that if applicants have a degree or HND studied in English they do not need to take the English language test. He noted that the appellant indicated in her application form that she has an HND in accountancy and has submitted a copy of that certificate which plainly indicates study in English. Having received the refusal notice the appellant undertook the test in order to address that issue and she had passed it.

5. The judge then went on to find that by virtue of Section 85(4) of the Nationality, Immigration and Asylum Act 2002 and as "plainly confirmed by the Tribunal in **DR Morocco [2005] UKAIT 00038**" he was entitled to take into account post decision evidence provided it shed light on the state of affairs as at the date of application/decision. He took into account the certificate that was provided post decision and as a result he was left in no doubt that the appellant's English language ability/skills are and were, as at date of decision, more than adequate to meet the requirements of the Immigration Rules and considerably exceed the level A1 of the Common European Framework of Reference, as required under the Rules. The judge thereafter allowed the appeal under the Immigration Rules.

6. It is plain enough that the judge had sympathy for the appellant and sponsor and he allowed the appeal. However, he should not have done so under the Rules. Summarising the English language requirements set out in E-ECP.4.1 in Appendix FM if the appellant was to succeed she had to be a national of a majority English speaking country as listed (Nigeria is not in that list); alternatively she needed to have passed an English language test in speaking and listening at a minimum of level A1 of the Common

European Framework of Reference for Languages with a provider approved by the Secretary of State or have an academic qualification recognised by UK NARIC to be equivalent to the standard of a bachelors or masters degree or PhD in the UK which was taught in English; in the further alternative the appellant had to show that she was exempt from the English language requirement (it is not contended that this appellant is so exempted).

7. Although the appellant has an academic qualification as noted by the judge this is an HND in accountancy. An HND is not the equivalent to the standard of a bachelors or masters degree. The only way therefore that the appellant could meet the English language requirement in the Rules was by providing a certificate from a recognised provider but she clearly did not take the test or provide a certificate until after the date of decision.

8. Section 85(4) of the NIA 2002 as referred to in paragraph 21 of the determination is applicable where the Tribunal is considering evidence about any matter which it thinks relevant to the substance of the decision including evidence which concerns a matter arising after the date of decision. However by 85(5) sub-Section (4) that section is subject to the exceptions in 85A. At 85A(2) in relation to an appeal against refusal of entry clearance (as in this case) the Tribunal may consider only the circumstances appertaining at the date of the decision. The judge therefore clearly erred in allowing this appeal under the Immigration Rules. It is unfortunate for the appellant that although it appears that her English language ability and skills are and were as at the date of decision more than adequate to meet the requirements of the Immigration Rules as a fact she did not meet those requirements, and this is for the reasons set out above.

9. I have taken note of the fact that the judge accepted the sponsor's oral evidence that the only reason why the appellant did not initially undertake the test before her application was made was because she had been misled by someone at the British embassy in Abuja. This is a serious allegation to make. The sponsor himself did not appear to have been there at the relevant time and presumably therefore he has relied on what he has been told by the appellant. The judge should have required very cogent evidence to be put before him prior to making such a finding. Such very cogent evidence is entirely lacking. Although the judge believed the sponsor he was not entitled to come to the finding that he did considering the complete lack of supporting evidence.

10. The judge therefore erred in finding as he did and he should not have allowed the appeal under the Immigration Rules. I therefore set aside that decision through material error of law although the findings made by the First-tier judge in relation to the genuineness of the marriage and accommodation stand as there is no challenge to those findings.

11. The judge giving permission to appeal the decision of the First-tier Judge suggested that the appellant might wish to seek to introduce an Article 8

ECHR appeal at this stage. As I explained to the sponsor this was not a matter that I would allow. It was in essence an entirely new issue and given that the facts as found by the judge and which are not challenged show that the marriage is a genuine one and that all other requirements of the Immigration Rules now appear to be covered and satisfied a further application for entry clearance should meet with success. That is the proper course to take. The sponsor pointed out that this would involve the appellant and himself in great expense because they would have to pay a further fee but that is the unfortunate consequence of not meeting the requirements of the rules in the first place. Nevertheless that is the route that should now be taken rather than to seek to pursue an Article 8 claim.

Decision

12. Having set aside the decision of the First-tier Tribunal Judge and for the reasons set out above I dismiss the appeal under the Immigration Rules.

13. Anonymity was not requested. In the circumstances of this appeal I do not find that anonymity is required and therefore I do not make such a direction.

Signed Date **18 December 2014**

Upper Tribunal Judge Pinkerton