IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18317/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 January 2015	**On 29 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

ENTRY CLEARANCE OFFICER – NIGERIA

Appellant

and

EMMANUEL BASHIRU
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: None (neither the sponsor nor the representative attended)

DECISION AND REASONS

1. This is an entry clearance appeal that was allowed at the First-tier. For clarity and convenience, however, I will refer to the parties as they were before the First-tier.

2. The appellant had been refused entry clearance to join his wife in the UK. By the time of the appeal hearing all aspects of the entry clearance refusal had been conceded apart from one, which was the requirement for the appellant to show that he had passed an English language test, to the Common European Framework

level A1, with an approved provider. Following a hearing at Taylor House on 18 September 2014, at which both parties were represented, the appeal was allowed on Article 8 grounds by First-tier Tribunal Judge Abebrese. Permission to appeal was granted by First-tier Tribunal Judge Lambert, on 3 December 2014.

3. On the day of the hearing before me there was no appearance for the appellant and the sponsor. An attempt was made to telephone the representatives, Obadiah Rose Solicitors, but there was no answer. The file showed that notice of hearing had been sent to the sponsor at her home address, and to the solicitors (by first class post on 10 December 2014). There was nothing on the file to indicate that these notices had not arrived. The parties were also sent standard directions in advance of the hearing.

4. Being satisfied that notices of hearing had been properly served, and also being satisfied that the grant of permission to appeal had been properly served, along with directions, I decided to proceed with the hearing in the absence of the appellant's representative, there being no explanation for this absence.

5. At the start of the hearing I indicated to Mr Avery that I had formed the view that there were clear errors of law in the judge's decision, and that it would have to be set aside. The judge had allowed the appeal on Article 8 grounds, but at paragraph 6 of the decision, had referred to the appellant as if he were in the UK, despite the fact that this was an entry clearance appeal. It was also clear that the judge had considered submissions from both sides about the admissibility of the second English language test, but instead of deciding this issue, he had for some reason proceeded directly to a consideration of Article 8.

6. In relation to a remaking of the decision in the appeal I heard submissions from Mr Avery. I raised with him the question of whether a later English language test, said to comply with the requirements, was admissible, and whether there was any reason that it could not lead to the appeal being allowed. His submissions were as follows. There was a six month gap between the decision and the later English test. As a result it could not be taken to show what the appellant's English ability had been at the date of decision. Six months was a long time, and it was not possible to extend back to the date of decision. The requirements had been set out initially. The appellant could have obtained the correct test the first time round. They should now be required to put in a further application. At the time of the decision their application was clearly deficient.

Decision and Reasons

7. In remaking the decision I have decided to allow the appeal under the Immigration Rules.

8. The decision was made on 2 September 2013. In the refusal various points were made, but in relation to the English language test it was suggested that the actual certificate, referred to in the application, had not been submitted. This appears to

have been contested, but in any event it was subsequently submitted. This first certificate related to an ESOL English language test by Edexcel, which was passed in February 2013, some months before the decision, at entry level 3. According to the Home Office guidance this equates to CEFR level B2, significantly above the A1 level required for entry clearance by a partner.

9. The review conducted by an Entry Clearance Manager on 6 December 2013 rejected this certificate on the basis that Edexcel did not feature as one of the approved providers on the relevant list.

10. The second English language certificate was an IELTS test, passed at an overall band score of 5.5. This was issued by the British Council in Abuja, Nigeria, and the certificate also refers to Cambridge English Language Assessment. It has been accepted that this meets all of the requirements, and that the provider was on the relevant list. In the guidance the 5.5 overall band score is equivalent to CEFR B2, the same level as was achieved in the Edexcel test, and well above the A1 level required.

11. This was not a points-based appeal. There was therefore no restriction on considering evidence that was not submitted with the application. In remaking the decision I can therefore consider evidence if it relates to the circumstances appertaining at the time of the decision. This is set out as Exception 1 within section 85A of the Nationality, Immigration and Asylum Act 2002.

12. There is some unresolved tension between Appendix FM-SE, which appears to introduce an element in entry clearance appeals not unlike points-based appeals, with the additional evidential restriction on considering anything not submitted with the application, and the 2002 Act; but if there is some tension it appears to me that the statutory provision at section 85A of the 2002 Act must prevail. The consequence, it seems to me, is that the second English language certificate is admissible evidence in the appeal. It further appears to me that it does relate to the circumstances at the time of the decision. The main argument to the contrary by Mr Avery rested on the idea that the appellant's English ability could have changed significantly in a six month period.

13. I have considered this point, which might be a sound one in certain cases, but on the evidence in this case it does not appear to me to hold good. The only challenge to the first test was that it was not on the relevant list, and the test is not challenged in any other way. There does not therefore appear to be any reason to reject the information contained in it, namely that the appellant achieved entry level 3 in ESOL. As I have said above, this is well above the required CEFR level. It is also the same CEFR level as the IELTS score. The available evidence therefore indicates that there was no change in the appellant's English language ability between February 2013, some months before the decision, and March 2014, a few months after the review. Even if the first certificate is disregarded entirely it is unlikely that the appellant could have progressed in six months from a level below CEFR A1 to CEFR B2.

14. For these reasons I can see no proper basis to require the appellant to submit a further application. It may well be that the restrictions on providers are entirely justified, but it appears to me that the second test is admissible evidence showing not only that the appellant's English language ability was well above that required, and that this was, on balance, also the case at the date of decision; but also that he has now complied with the detailed requirements that he should provide a certificate from an approved provider. Requiring a further application in these circumstances does not appear to me to be justified, because the second certificate is admissible evidence that meets the requirements, and is concerned with the situation at the date of decision. If the submissions on this point at the First-tier hearing had been properly addressed this may have been the outcome, but it is unfortunate that they were not, through jumping directly to a consideration of Article 8. Since this error has caused a significant delay it would not be an attractive prospect, in fairness terms, to have to require a further application, leading to yet more delay, in any event.

15. It has not been suggested that there is any need for anonymity in this appeal. I have decided, despite allowing the appeal in remaking it, not to make a fee award, on the basis that the correct certificate was not provided until after the Entry Clearance Manager's review.

Notice of Decision

The judge's decision allowing the appeal on Article 8 grounds is set aside, it having been found to contain material errors on points of law. The decision is remade as follows.

The appeal is allowed under the Immigration Rules.

Signed Date **29 January 2015**

Deputy Upper Tribunal Judge Gibb

TO THE RESPONDENT
FEE AWARD

Despite having allowed the appeal I have decided, for the reasons given above, not to make any fee award.

Signed Date **29 January 2015**

Deputy Upper Tribunal Judge Gibb