



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13188/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2nd November 2017

Decision & Reasons Promulgated
On 14th November 2017

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MRS OLOLADE KEMISOLA OLAOFE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum of Counsel, instructed by Garth Coates Solicitors

For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of Nigeria, seeks to appeal against a decision of the respondent of 4th April 2016 refusing her application for entry clearance in the United Kingdom as a partner under Appendix FM of the Immigration Rules. An application for entry clearance as a spouse had been made on 11th January 2016.
2. Refusal was made essentially on the basis that the Entry Clearance Officer did not accept that the relationship with the sponsor was a genuine and subsisting one or that there was an intention to live together permanently in the United Kingdom.

Furthermore it was suggested that there was a lack of evidence to show that there would be adequate maintenance for the appellant and her partner without recourse to public funds.

3. The appeal came to be heard by First-tier Tribunal Judge Walker on 17th July 2017. It was noted that the sponsor had significant learning disabilities and that was a matter very much borne in mind by the Judge in the course of the determination.
4. The Judge found that indeed the relationship was subsisting and that there was an intention to live together permanently in the United Kingdom.
5. In terms of maintenance it was also noted that the sponsor was exempt from meeting the requirements of paragraph E-ECP.3.1 as he was in receipt of disability living allowance. The sponsor had an income source of £116.32 per week consisting of his earnings, DLA and a savings element. The income support equivalent calculation was £114.85 per week.
6. It was noted at paragraph 29 of the determination that the accommodation was being provided by the uncle and that that would be at no charge to the sponsor or appellant. The Judge accepted that evidence.
7. However, the Judge noted that the uncle's rent was paid for or contributed to by housing benefit and that he also received pension credits to supplement his state pension. Thus the household was supported by public funds received by the uncle. The Judge noted that the extent of that support was not known and there was a possibility that if the appellant moved into the property this would alter the situation so far as public funds were concerned. The Judge found that there would be a possibility that there would be further and additional recourse to public funds and on that narrow basis upheld the refusal in respect of the Immigration Rules.
8. The Judge went on also to dismiss matters so far as Article 8 is concerned.
9. Appeal was made against that decision on the basis that the comments made by the Judge as to the possibility of further and additional recourse to public funds were unduly speculative and indeed unfair.
10. The clear evidence was that the sponsor satisfied the maintenance requirements. This was not a case where the sponsor was receiving housing benefit, in which case clearly an extra person in the household may affect that calculation. Rather it was a third party, namely the sponsor's uncle, who received that housing allowance. There is nothing to indicate that he received it otherwise than for himself.
11. Reliance is placed upon the wording of paragraph 6A of the Immigration Rules, which reads as follows:

“For the purpose of these Rules, a person (P) is not to be regarded as having (or potentially having) recourse to public funds merely because P is (or will be) reliant in whole or in part on public funds provided to P’s sponsor unless, as a result of P’s presence in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the sponsor’s joint entitlement to benefits under the Regulations referred to in paragraph 6B).”

12. It is submitted that the focus was clearly on public funds provided to the sponsor and in this case no such funds were provided.
13. Reliance is also placed upon paragraph 6C of the Immigration Rules, which provides:

“A person (P) making an application from outside the United Kingdom will be regarded as having recourse to public funds where P relies upon the future entitlement to any public funds that would be payable to P or to P’s sponsor as a result of P’s presence in the United Kingdom (including those benefits to which P or the sponsor would be entitled as a result of P’s presence in the United Kingdom under the Regulations referred to in to paragraph 6B).”
14. That also would seem to indicate that it is the person or sponsor’s entitlement to public funds, funds payable to the person or his/her sponsor. The sponsor in the present case is not entitled to or is being paid any public funds for his housing.
15. Permission to appeal to the Upper Tribunal was granted and the matter comes before me to determine the issue.
16. Mr Bramble’s response to the passages in 6A and 6C of the Rules was that as the third party was supporting the sponsor the third party should also be regarded as a sponsor for the purpose of the Rules. He was, however, unable to point to any aspect of the Immigration Rules which supported that contention.
17. The sponsor in this present case has no entitlement to housing benefit nor indeed is there any indication that he has sought to claim it. The sponsorship undertaking, which is to be found at page 58, highlights that it is for the uncle to be responsible for the maintenance of the sponsor without recourse to public funds. There is nothing to indicate that the sponsor’s presence in the uncle’s household at present contributes in any way to an increased benefit to the uncle. In those circumstances, it is unlikely that the appellant’s presence would further increase that matter. It seems to me and I so find that it is speculation and no more on the part of the Judge. A clear statement of the uncle, which is to be found at page 85 of the bundle, is that the sponsor, his nephew, has been living with him in the address since 2007 and that if the appellant lived at the residence, the uncle would pay all utility bills and costs associated with her presence.

18. I find therefore that the approach taken by the Judge to the issue of maintenance was unduly speculative in the face of what was clear evidence that the maintenance requirement was satisfied, such as to amount to an error of law.
19. Accordingly I set aside the decision of the First-tier Tribunal Judge.
20. What is apparent from the findings of the Judge is that, contrary to the assertion in the Entry Clearance Officer's refusal, the marriage is subsisting and satisfies the ingredients of the Immigration Rules. Similarly, I find, upon the basis of fact as accepted by the Judge including the evidence of the uncle, which was found to be credible, that the financial requirements are also satisfied so as to meet the Rules.
21. If indeed the Rules are met then it is unnecessary further to consider Article 8 but, in any event, it would clearly be disproportionate to deny entry clearance to someone who in effect meets the Rules.
22. My attention was drawn to the decision in **Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC)**, determined in September 2015, which recognises that there is no power to remit to the Secretary of State.
23. In the light of such findings of fact it is clear that the decision of the Entry Clearance Officer was made upon an incorrect understanding of the reality, of the genuineness of the relationship and of the ability of the sponsor to satisfy the maintenance requirements. In those circumstances, the decision was unlawful.
24. This appeal is allowed to the extent that a lawful decision remains to be made by the Entry Clearance Officer in the light of the findings of fact that have been made by the Tribunal.

Notice of Decision

The appeal is allowed to the extent that a lawful decision is outstanding to be made.

No anonymity direction is made.

Signed

Date 13 November 2017



Upper Tribunal Judge King TD