Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07043/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 April 2018	**On 4 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MRS AISSATOU ADAMA BARRY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr U Okoroh, Legal Representative.
For the Respondent: Mr C. Avery, Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellant is a citizen of Guinea who is married to a United Kingdom sponsor Mr Maroof Diallo. On 27 May 2015 she made application for entry clearance as a partner under Appendix FM of the Immigration Rules. That application was refused and she subsequently appealed. Following a hearing, and in a decision promulgated on 26 April 2017, Judge of the First-tier Tribunal Chudleigh dismissed the Appellant's appeal both under the Immigration Rules and on human rights grounds. At paragraph 23 of the decision the Judge found for the Appellant in relation to the relationship with her sponsor and that a satisfactory explanation for the absence of

an English Language Test Certificate had been provided. However, at paragraph 22 the Judge recorded that it was common ground that the Appellant failed to provide payslips covering a period of six months prior to the date of application as was required by Appendix FM – SE. In those circumstances it was demonstrably the case that at the date of the decision the Appellant had failed to comply with the requirements of the Immigration Rules and that the Entry Clearance Officer was correct to refuse entry clearance. The payslips related to the period from 11 February 2015 to 3 June 2015 which was less than six months. The Judge noted however, that the sponsor's employer had provided letters stating that the Sponsor's gross income was above the threshold of £18, 600. The Judge then correctly, pursuant to Section 82 of the Nationality, Immigration and Asylum Act 2002, recorded that an appeal could only be brought against the decision to refuse a human right claim and went on to make findings in relation to the issue of proportionality.

2. Permission to appeal was initially refused but a renewed application was granted by Upper Tribunal Judge McWilliam in a decision dated 23 January 2018. Judge McWilliam's decision states: -

> "The Appellant seeks permission to appeal against the decision of FT Judge Chudleigh to dismiss her application for entry clearance as a spouse.
>
> It is arguable that the Judge did not make a finding whether at the date of he (sic) decision the Appellant met the substantive requirements of the Rules in respect of maintenance and that this was arguably a relevant factor in the assessing of proportionality".

3. Thus, the appeal came before me today.

4. Mr Okoroh urged me to accept that the Judge had materially erred by failing to apply the evidential flexibility rules set out in paragraph D of Appendix FM – SE. In particular Paragraph D(d)(i) which provides that where a document does not contain all of the specified information and that the missing information is verifiable from the documents submitted with the application, the application may be granted exceptionally providing the decisionmaker is satisfied that the document is genuine and that the applicant meets the requirement to which the document relates. The Judge found that the Appellant provided five months' pay slips instead of six months' pay slips but the missing information was verifiable from other documents submitted with the application and in particular a bank statement showing seven months' wages being credited to the account. Further the Judge did not consider that the applicant succeeded on other grounds and that evidential flexibility should have been applied. Mr Okoroh referred me to Section 3.4 "Evidential flexibility" of the Respondent's own guidance. He submitted that it was incumbent upon the decisionmaker in a situation like this, where there was an absence of one item of specified documentation, to nonetheless grant the application on the basis that the information was verifiable from other documents submitted with the application.

5. Mr Avery submitted that there was no error in the Entry Clearance Officer's decision. He queried whether it was the Appellant's position that the Judge should have exercised a discretion not hitherto utilised by the Entry Clearance Officer. There was

no reason for the Judge to do this. The policy referred to by the Appellant's representative was in relation to how the Secretary of State should exercise discretion. There was no reason to go beyond the specified material provided as other reasons were also given for this refusal.

6. I find the Judge has not materially erred as asserted by Mr Okoroh. Contrary to the grounds of permission to appeal the Judge has made clear findings as to whether at the date of the decision the Appellant met the substantive requirements of the Immigration Rules in respect of maintenance and having done so the Judge has factored her conclusion on that into the Article 8 balancing exercise. When the Entry Clearance Officer made the decision, the Appellant was unable to meet the requirements of the Immigration Rules in relation to the specified documents. That decision also refused the application on two other bases. It was therefore not incumbent upon the Entry Clearance Officer, where he did not anticipate addressing the omission of the pay slip would lead to a grant to allow the application because it was going to be refused in any event for other reasons.

7. The Judge has not materially erred as asserted.

Decision

I uphold the decision of the First-tier Tribunal.

No anonymity direction is made.

Signed Date 1 May 2018.

Deputy Upper Tribunal Judge Appleyard