IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13903/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 February 2016	**On 8 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

OMOYEMI SALIU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. C Record, Counsel
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought the Appellant against the decision of Judge of the First-tier Tribunal Brown dated 14 August 2015 following a hearing at Taylor House on 21 July 2015. The Appellant is a national of Nigeria who applied for entry clearance under Section EC-P: Entry clearance as a partner in Appendix FM of the Immigration Rules and relying on Article 8 of the European Convention on Human Rights, seeking to

join her husband, the sponsor, Mr Isa Awolaja, a British national of Nigerian origin. Mr Awolaja is a man in his early seventies and has been in recent employment.

2. In a decision dated 2 October 2014 Respondent refused entry clearance for a number of reasons. It was noted that the Appellant had previously entered the United Kingdom on 7 October 2005 with entry clearance as a visitor, and had overstayed, remaining until removed on 27 June 2011. The Respondent referred to a number of other factors which were deemed to be adverse, and invoked the provision of paragraph 320(11) of the Immigration Rules, refusing entry clearance on the basis that the Appellant had significantly contrived to frustrate the intentions of the Immigration Rules and there were aggravating circumstances.

3. I do not need to set out the particulars of those alleged aggravating circumstances, because on appeal the Appellant and her husband, the Sponsor, were successful in persuading the judge that this was not an appropriate case in which the provision of paragraph 320(11) should have been invoked.

4. However there had been other reasons relied upon by the Respondent for refusing the application; principally that the financial requirements of Appendix FM were not satisfied. It was noted that the Sponsor had an income of £9,520.99. The Respondent identified that part of that income was made up of pension credits which the Respondent asserted were not entitled to be treated as income for the purposes of Appendix FM or Appendix FM-SE. There was therefore a further shortfall in the Sponsor's income.

5. Whilst the Sponsor had savings, these did not add up to two-and-a-half times the difference between the Sponsor's income and the relevant £18,600 threshold in order for the Appellant to satisfy the financial eligibility requirements of Appendix FM.

6. It was thus decided by the Respondent that the requirements of Appendix FM were not met by the Appellant and that there were not sufficient reasons outside of the Rules for entry clearance to be granted. I should also add that the Respondent also asserted that in relation to an English test that the Appellant had sat, the Respondent could not find evidence of that on line at the time that the application was being considered.

7. On appeal to the judge the Sponsor appeared and gave evidence. As mentioned above, the Appellant and Sponsor were successful in persuading the judge that this was not a case where paragraph 320(11) should have been invoked. However the judge went on to consider whether the requirements of the Immigration Rules were satisfied at the date of the decision.

8. Ms Record, who appeared before the judge on behalf of the Appellant (and who also appears before me) accepted before the judge that the financial eligibility requirements were not met at the date of decision and that the Rule was not satisfied. The appeal was pursued on Article 8 grounds.

9. The findings made by the judge commencing at paragraph 22 were that there was a family life as between the Sponsor and the Appellant. That in my view does not appear to have been disputed by the judge. It was noted as follows:

> "25. The Appellant relies upon family life with her husband. I note that from time to time family life has taken place between the Appellant and Sponsor in Nigeria when the Sponsor has visited. It would seem that the Appellant and sponsor have adapted in some way to family life that for the majority of the time is conducted from a distance. I accept that in this case the Appellant and Sponsor wish to be physically close within the UK although on the face of it there is no real reason why married life cannot continue in Nigeria. I accept that the continued exclusion of the Appellant from the UK will be an interference with her family life. I find that such removal will be in accordance the UK government's stated aim of maintaining immigration control into the UK. The issue is whether it is a proportionate exercise of any discretion to continue to exclude her from the UK.
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> 26. I have some sympathy with the Appellant and the Sponsor. It is highly unlikely that between them the Appellant and sponsor will be able to find sufficient funds and income to satisfy the financial criteria under the Rules. I note that in the case of **MG (Serbia and Montenegro) [2005] UKAIT 00113** it was stated that sympathy for an individual did not enhance a person's rights under Article 8."

10. The judge also directed himself in law by reference to **SS (Congo) and Others [2015] EWCA Civ 387** reminding himself that a near miss was not a relevant consideration tipping the balance in favour of a refusal of entry clearance being disproportionate. The judge also directed himself in law as to the requirements of Part 5A of the Nationality, Immigration and Asylum Act 2002 and set out the provisions of Section 117B at his paragraph 28. He concludes his deliberations as follows:

> "29. In general terms effective immigration control is in the public interest and that is why there are Rules to which all potential immigrants have to comply. In the Appellant's case the financial criteria were not met as at the date of the decision. They could not be met at the date of hearing. The financial requirements cannot be treated lightly. I observe also that the sponsor is advancing in years. His health may fail at any time leading to as loss in income and a need to claim state benefits. There is no guarantee that the Appellant could find meaningful work.
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> 30. I make the observation also that in terms of family relationships the Appellant has children in Nigeria and the sponsor has children in the UK. I observe that there is apparently no bar to the sponsor living in Nigeria, the country where he was born and brought up. He has lived for long

periods in Nigeria with his wife. He accepts that his right to remain in the UK was initially derived from his children from a former marriage. There is however a bar to the Appellant living in the UK and that bar is created by the Rules which form part of the UK government's immigration policy. The relationship between the Appellant and the sponsor was formed when the Appellant had no right to remain in the UK. She had overstayed after coming on a visit. Whilst that conduct in itself is insufficient in my view in her case to invoke the provisions of paragraph 320(11) of the Rules the fact that the relationship between the Appellant and sponsor developed when the Appellant had no valid leave is something that I must also consider as weighing in the balance against her.

31. Taking all matters into consideration I find that in this case there is nothing that is exceptional, extraordinary, or compelling that would merit considerations of the Appellant's case outside of the Rules. In this case the Rules adequately deal with the circumstances put forward by the Appellant and sponsor. The appeal also fails on human rights grounds."

11. The Appellant sought permission to appeal against that decision in grounds of appeal dated 8 July 2015 prepared by Ms. Record. At paragraph 6 of the grounds the Appellant avers as follows:

"6. The Appellant applies for permission to appeal to the Upper Tribunal on the following grounds:

(1) The IJ did not take into account factors as regards financial circumstances – under Article 8 which supports the Appellant's case and are relevant to proportionality.

(2) The IJ failed to take into account the genuine nature of the marriage and the distress of removal that the relationship continuing - in other words (given the age of the sponsor) the case of Beoku-Betts applies and the removal of the Appellant significantly affected both the Appellant and the sponsor.

(3) The IJ failed to take into account the prima facie mistake that removing the Appellant in the first place is a significant factor as regards public interest."

12. I do not overlook the remainder of Ms. Record's grounds as developed at paragraphs 7 to 12, but it suffices to observe that those additional paragraphs seek to amplify the core grounds set out in her paragraph 6.

13. Permission to appeal was granted on 30 December 2015 by Judge P J M Hollingworth, essentially indicating that those grounds of appeal were arguable.

14. I have heard oral argument from Ms. Record today. She sought to rely upon her grounds of appeal, and responded to queries that I raised in the course of my considering the case. I did not require Mr Nath to address me.

15. Firstly, I sought clarification from Ms. Record about what was meant by an assertion at paragraph 9 of her grounds of appeal. It seemed to me that it was being asserted that although the sponsor did not have sufficient income to meet the financial eligibility criteria at the date of decision, that he did meet the financial eligibility criteria at the date of hearing.

16. Ms. Record now clarifies that that is not the assertion that she makes. Even if it were the case that the sponsor at the date of hearing had sufficient income such that the Appellant met the income threshold, the judge would not have been entitled to take that change of circumstances into account on the basis of the authority of **AS (Somalia) v Entry Clearance Officer [2009] UKHL 32** which provides that in an entry clearance appeal the assessment of Article 8 proportionality is to take place in relation to the circumstances as they appertained at the date of decision and not at the date of hearing.

17. That matter then having been made clear, I did not, with respect, fully follow the remainder of her ground of appeal as regards financial circumstances. In response to the assertion that the judge failed to take into account factors as regards financial circumstances, I reject that proposition. The judge referred at his paragraphs 8 to 12 to the issues raised by the Entry Clearance Officer in the decision of 2 October 2014, in which it is clear that the financial circumstances of Appellant and sponsor are of concern and they do not meet the financial threshold of the relevant Rule.

18. At paragraph 29 of the decision the judge returns to that issue in his findings as I have quoted above. It is recorded that the Appellant did not meet the financial eligibility criteria for leave to remain under the Rules, and gave weight to that fact, as he was entitled to do.

19. Ms. Record draws my attention to Section 117B(3) of Part 5A of the 2002 Act. That provides:

> "It is in the public interest and in particular in the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are financially independent because such persons (a) are not a burden on taxpayers, and (b) are better able to integrate into society."

By operation of Section 117A that is a relevant consideration which the judge was obliged to take into account.

20. I find that he did exactly that. He took into account the fact that the Appellant would not meet the financial requirements of the Immigration Rules. Ms. Record seeks to argue that even though the financial requirements under the Rules are not met, this

couple would have sufficient income in the United Kingdom to be financially independent, and the judge erred in failing to make a finding in that regard.

21. I do not think that that is a finding which the judge was obliged to make, having already ruled that the financial eligibility requirements of the Immigration Rules were not satisfied, indeed, were not satisfied by a significant margin. I make no observation as to whether in another case, receipt of an income falling a little way short of £18,600 would or should result in a person being treated as being financially independent, notwithstanding that the financial eligibility requirements are not met; that is not the situation which arose in the present case.

22. However even if the Appellant were financially independent as Ms. Record argues, this does not provide her with an entitlement to leave to remain. I refer to **AM (S.117B) [2015] UKUT 260 (IAC)** 17 April 2015 in which the Vice President held that an Appellant can obtain no positive right to a grant of leave to remain under either section 117B(2) or (3), whatever the degree of his fluency in English or the strength of his financial resources.

23. I find that the judge was aware of the Appellant's financial situation; he made findings of fact in relation to it which are sustainable and took the Appellant's non-satisfaction of the financial eligibility criteria of Appendix FM into account in his ultimate proportionality balancing exercise. I cannot for my part see any material error of law in the judge's assessment of the Appellant's financial circumstances.

24. The second of the Appellant's grounds is that the judge failed to take into account the genuine nature of the marriage and the distress of the removal. (Given that the present appeal is against a refusal of entry clearance, I take it that the references to removal in this ground refer to the Appellant's earlier removal from the UK on 27 June 2011).

25. In my assessment the judge made findings that there was a genuine relationship eg at [25], where the judge described how that relationship had been conducted in the past, and accepted that continued refusal of entry clearance would amount to an interference with the family life as between the Appellant and sponsor. I cannot see that the judge erred in failing to make findings as to the nature of the relationship including its genuineness.

26. Ms Record also avers at paragraph 10 of the grounds that the judge erred in failing to make reference to the fact that the Secretary of State had, prior to the Appellant's departure, issued a certificate of approval for marriage ('COA'). However, it is clear that the judge was aware that such a certificate had been issued, on 15 March 2011, prior to the Appellant's arrest as an overstayer on 14 May 2011, which prevented the marriage from taking place. These matters are set out in the judge's decision at [3].

27. In any event, the criteria for issuing COA in the now defunct scheme related only to the immigration status of the parties to the marriage, and upon the payment of a fee.

The genuineness of the proposed marriage was simply not an issue to which the Secretary of State had regard when granting or refusing such a certificate. Indeed, following the House of Lords' judgment in **R (on the application of Baiai) v SSHD [2009] 1 A.C. 287**, the Secretary of State was obliged in most cases to issue such a certificate and the issuing of a COA to the Appellant by the Secretary of State was therefore not a matter which shed light one way or the other as to the alleged genuineness of the Appellant's marriage. There is in my view no failure by the judge to take into account the genuine nature of the marriage.

28. The third ground is that the judge failed to take into account 'the prima facie mistake in removing the Appellant in the first place'. I am not able to discern any properly articulated error of law within this ground. The position adopted by the Secretary of State in May 2011 after interviewing the Appellant and Sponsor at the registry office, was to form the view that the Appellant's knowledge of the sponsor was not commensurate with that expected of a genuine couple seeking to marry – see Respondent's decision of 2 October 2014, and also the judge's decision at [3]. The Secretary of State's decision to remove the Appellant in 2011 no doubt relied in part on that assessment.

29. However, even though the present judge was prepared, some four years later, based on evidence that was presented to him, to accept that the Appellant was in a genuine relationship with the Sponsor, that does not establish that any 'mistake' was made by the Secretary of State in 2011 (against which there was at that time no judicial challenge of any sort), still yet any 'mistake' which the present judge was in some way obliged to acknowledge as a factor relevant to the proportionality balancing exercise, if indeed that is the Appellant's argument. There is no error of law disclosed in ground three.

Notice of Decision

30. I find that the making of the decision by the First tier Judge did not involve the making of any material error of law.

I do not set aside the First tier decision; I uphold it.

I dismiss the Appellant's appeal.

Signed Date: 1.3.16