



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/06094/2014

THE IMMIGRATION ACTS

Heard at Field House
On 13 May 2015

Decision and Reasons Promulgated
On 29 May 2015

Before

The Hon Mr Justice Edis
Upper Tribunal Judge Southern

Between

ENTRY CLEARANCE OFFICER

Appellant

and

NKWEMAKONAM JANE ANENE

Respondent

Representation:

For the Appellant: Mr Duffy. Senior Home Office Presenting Officer
For the Respondent: None

DETERMINATION AND REASONS

1. The Entry Clearance Officer ("the ECO") has been granted permission to appeal against the decision of First-tier Tribunal Judge Oliver who, by a determination promulgated on 8 January 2015, allowed Ms Anene's appeal against refusal to grant entry clearance as the spouse of a person present and settled in the United Kingdom. As was the position before the First-tier Tribunal, Ms Anene was not represented but her husband, Mr Chibuikwe Okoye, attended and spoke in support of his wife's appeal.

2. Although Ms Anene is the respondent before the Upper Tribunal, and the ECO the appellant, we shall refer to her as the claimant to avoid confusion when discussing the determination of the First-tier Tribunal.
3. Mr Okoye, who is a British citizen, was married to the claimant in Nigeria on 30 December 2013. Before he returned to the United Kingdom he assisted the claimant to assemble and submit her application for entry clearance to join him in the United Kingdom. The date of the application was 17 January 2014.
4. For that application to succeed, the claimant had to meet every requirement of the applicable immigration rule. The ECO refused the application because he concluded that two requirements of the rules had not been met. The first reason given for refusal, because of an absence of evidence of the parties having maintained contact with each other, was that the ECO did not accept that this was a genuine and subsisting relationship nor that the parties intended to live together permanently in the United Kingdom. That objection can be disposed of shortly. The judge, having heard oral evidence from the claimant's husband, has made a clear and unchallenged finding of fact that this is a genuine marriage and that the parties to it do indeed intend to live together in the United Kingdom. There is no reason at all to disturb that finding of fact which is therefore preserved. Indeed, having ourselves heard oral evidence from Mr Okoye we are in no doubt at all that the judge was correct to make that finding.
5. It is, therefore, only the second reason given by the ECO for refusing the application with which we are concerned in this appeal. In order to meet the financial eligibility requirements of the immigration rules, the claimant had to provide certain documentary evidence of her husband's income in the United Kingdom. The ECO refused the application because the documentary evidence fell short of what was demanded by the rules. In the refusal notice the ECO said this:

"Appendix FM-SE states that you need to provide wage slips and bank statements covering 6 months prior to the date of application and a letter from your sponsor's employer confirming the terms of their employment and their salary. Appendix FM-SE also states that evidence must be dated no more than 28 days before the date of the application and that personal bank statements should cover the same period as the pay slips."

Thus, the requirement was for the claimant to provide evidence of her husband's income for the period between 17 July 2013 and 17 January 2014, bank statements for that period and letters from her husband's employers, dated not more than 28 days before the date of the application (and so between 20 December 2013 and 17 January 2014) confirming the terms of his employment, including his income.

6. The claimant, who explained to us that he has worked hard to ensure that he could provide for his wife, in fact held two jobs at the relevant time. He worked as a security guard for a company called Total Security Services Ltd ("Total") and as a cleaner for Apex Recruitment Agency ("Apex").
7. The ECO accepted that the claimant had submitted her husband's payslips from Apex dated between 30 August 2013 until 13 December 2013. As the earliest of

those payslips would have related to the immediately preceding period being worked, it seems probable that, in respect of his work as a cleaner, other than the last few days, those pay slips covered the whole of the period of 6 months preceding the date of the application. In fact, the documentation before us includes also a payslip from Apex dated 10 January 2014. We assume that was not provided to the ECO because at the time it would have become available from Apex, the Mr Okoye was in Nigeria, for the purpose of his marriage to the claimant.

8. A real difficulty arose in respect of the payslips from Total. The applicant needed to rely upon this income as well as her husband's earning from Apex were not sufficient. The ECO noted that the claimant had submitted a range of pay slips from this company but the only ones that were relevant for the purpose of the application, which was concerned with the income of the claimant's husband between 17 July 2013 and 17 January 2014, were dated from 16 August 2013 to 6 December 2013. The ECO observed that:

“None of these pay slips are dated within 28 days before the date of application or cover a 6 month period prior to the date of application.”

Once again we have before us other payslips from Total relevant to the period under consideration and, again, it is not now possible for us to say at what stage these were made available by the claimant. The ECO recorded also that the bank statements submitted did not cover the 6 month period proceeding the date of the application. Finally, the claimant had not provided letters from each of her husband's employers in a format meeting the requirements of Appendix FM-SE. The claimant did provide a letter from one of the employers, Apex, but that was dated 23 August 2013 and so not within 28 days before the date of the application as was required.

9. It is clear from paragraph 2 of the judge's determination that he was aware of the reasons why this application had been refused. He said:

“... it was argued that the appellant had not met the financial requirements under appendix FM. Not only did the sponsor's combined earnings not reach the required figure but the evidence he submitted did not satisfy the documentary requirements of appendix FM-SE. The payslips from Apex Recruitment were not dated within 28 days of the date of application and did not cover a six-month period prior to that date. A letter had been provided from only one of his employers and was dated more than 28 days before the date of application.”

Explaining why, despite that, he allowed the appeal, the judge said that in evidence Mr Okoye:

“... gave his own calculation of his earnings, putting them at £19,460 per annum”

although the claimant's husband was speaking also of his current earning from his new employment with the NHS which led the judge to conclude, at paragraph 10 of his determination:

“He has now provided documentation over a longer period than required to show that he meets the financial requirements.”

10. The ECO has been granted permission to appeal because the judge arguably erred in allowing the appeal on the basis of evidence that did not satisfy the requirements of the immigration rules and, in particular, not engaging with the requirements of Appendix FM-SE.

The legal framework

11. The immigration rules to be met by persons seeking leave to enter as the partner of a person present and settled in the United Kingdom are found in Appendix FM of the immigration rules. Navigation through those provisions is a challenging task even for experienced professional legal advisors. We do not consider it would be helpful to reproduce in this determination all of the relevant sections of the applicable rules. It is sufficient for us to record that the ECO was correct in his summary of what was required of the claimant. It is important to recognise also that the requirements are mandatory. The definition provision of GEN 1.2 having made clear that for the purposes of Appendix FM “partner” includes a spouse of the claimant, rule EC-P.1.1 provides that

‘Section EC-P: Entry clearance as a partner

EC-P.1.1. The requirements to be met for entry clearance as a partner are that-

- (a) the applicant must be outside the UK;
- (b) the applicant must have made a valid application for entry clearance as a partner;
- (c) ...
- (d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.’

Those provisions include financial requirements. Rule E-ECP.3.1 requires that an applicant in the position of this claimant must provide Specified Evidence that her husband, who sponsors her application, has a “specified gross annual income of at least £18,600”.

12. Appendix FM-SE sets out what is accepted to be Specified Evidence for the purposes of Appendix SE. This is where the requirement is found that, in order to establish the income requirement has been met, the claimant must provide payslips covering a period of 6 months prior to the date of the application, a letter from the employer who issued those payslips confirming basic details of the nature and duration of the employment and bank statements covering the same period as the pay slips showing that that income has been paid into the bank account of the person employed. Appendix FE-SE also contains the requirement relating to the age of the documentary evidence:

“Where this Appendix requires the Applicant to provide specified evidence relating to a period which ends with the date of application, that evidence, or the most recently dated part of it, must be dated no earlier than 28 days before the date of application.”

13. The refusal to grant entry clearance was an immigration decision falling within section 82(2)(b) of the Nationality, Immigration and Asylum Act 2002. Section

85A(2) provides that, in relation to an appeal against such an immigration decision, the Tribunal may consider only the circumstances appertaining at the date of the decision. Although section 85(4) provides that the Tribunal may consider 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 the decision, that is expressed to be subject to the effect of section 85A.

14. In consequence, while it was open to the judge to consider evidence arising after the date of the decision, he could do so only to the extent that it illuminated the position as at the date of the decision.
15. Drawing all of this together, it is readily apparent that the determination of the judge discloses legal error.
16. First, it is not possible to discern from the determination on what evidential basis the judge came to the conclusion that the applicant had met the financial requirements of the rules. His determination simply does not identify any evidence upon which it was open to him to conclude that the requirements of the rules had been satisfied.
17. Secondly, the judge failed to apply the requirement of primary legislation that in an appeal of this type he was concerned only with the circumstances appertaining at the date of the decision. The issue to be resolved was whether at the date of the decision the claimant had met those requirements. In order to succeed she had to establish an historic fact, that she had provided the Specified Evidence demanded. That could be achieved only by pointing to pay slips, bank statements and employers' letters that pre-dated the application by no more than 28 days, save that such requirement applied to the pay slips only in respect of the most recent.
18. It can be seen from the determination that the judge relied upon the "calculation of his earnings" provided by the claimant's husband in oral evidence. But that calculation was unsupported by the specified evidence demanded by Appendix FM-SE and in proceeding upon that basis the judge impermissibly disregarded mandatory requirements that had to be met of the application for entry clearance was to succeed.
19. The judge made no attempt to engage with the mandatory requirement that the claimant provide the Specified Evidence required in the form of letters from both of the employers, each of which had to be dated not earlier than 28 days before the date of the application.
20. For these reasons we are satisfied that the judge made an error of law such that his determination must be set aside.
21. Having informed Mr Okoye that we would remake the decision in respect of the claimant's appeal we invited him to say whether or not he believed he was in a position to produce, now, pay slips for the 6 month period proceeding the date of the application and letters from both employers dated not more than 28 days before the date of the application. We were unable to secure from him a clear response and so allowed him time to assemble whatever documentation he

wished us to consider when remaking the decision. He returned later on the day of the hearing and submitted some further pay slips and asked us to look at them although these appeared to be mainly the original documents of which copies were already before us.

22. We have examined with the utmost care all of the documentary material before us. It has to be said that the documentation is in a state of complete disarray and it is not possible to be sure as to what was before the ECO and before the judge. However, doing the best we can, we have assembled this evidence in the form it should have been presented in the first place. When this is done, it can be seen, at least, that the circumstances appertaining at the date of the decision were that the claimant was in fact able to produce documentary evidence to establish that her husband's total gross income was in excess of £18,600.
23. As we have said, the claimant's husband, at the date of the decision had two jobs. Annexed to this determination is a schedule we have prepared of the income earned from each as demonstrated by the pay slips produced for the period of 6 months immediately preceding the date of the application. The fortnightly pay slips during this period in respect of his work for Apex amounts to £3,802.50 for the 6 month period between 17 July 2013 and 17 January 2014 and the pay slips for Total £5,721.90. Therefore his gross earned income was £9,524.40. As that is for a period of 6 months that is indicative of an annual gross income equivalent to £19,048.80.
24. That is reinforced by an examination of the receipts into his two bank accounts during the same 6 month period between 17 July 2013 and 17 January 2014. The total of payments into his Santander account was £5,974.12 and into his Halifax account £4,722.42. Taken together that is the equivalent of receipts over a period of a year, if replicated throughout at the same rate of receipts, of £21,393.08.
25. However, that serves also to illustrate why the rules demand more than simply the production of pay slips. Plainly, some of the receipts into the accounts do not represent earned income because they do not tally with the amount of the pay slips. It is, no doubt, for that reason that Appendix FM-SE demands a range of Specified Evidence to establish financial eligibility and not simply the production of pay slips. The problem for the claimant is that she has not provided letters from the two employers and the one she did provide did not comply with the requirements of Appendix FM-SE because it was not dated within 28 days of the application.
26. Therefore, despite providing wage slips that appear to demonstrate the required level of gross income, the applicant has failed to meet the requirements of the immigration rules because she has not provided letters from both of her husband's employers, dated not more than 28 days before the date of the application, confirming the matters required by the rules.
27. By any view, the claimant came very close to meeting the requirements of the rules. But the appeal cannot be allowed on a "near miss" basis. That much is clear from the stark provision of Section D-ECP of Appendix FM: if an applicant

meets the requirements set out entry clearance will be granted; where an applicant does not meet those requirements, the application will be refused. Any doubt about that has been dispelled by the recent decision of the Court of Appeal in *SSHD v SS (Congo) and others* [2015] EWCA Civ 387. Richards LJ observed at the beginning of his judgment that the appeals had been listed together to enable the court to give consideration to the proper approach to be adopted to the new immigration rules relating to applications for leave to enter by persons who are family members of persons already present in the United Kingdom. He said:

“... Appendix FM constituted an attempt by the Secretary of State to reflect more precisely than before the relevant balance to be struck between the public interest and individual interests for the purposes of Article 8 of the European Convention on Human Rights..”

And that:

“In combination with Appendix FM (which sets out the substantive criteria according to which the Secretary of State will grant LTE or LTR, as the case may be, under the Rules), another section of the new rules, contained in Appendix FM-SE (Family members – specified evidence) to the Immigration Rules sets out evidential requirements to be satisfied if a claim for LTE or LTR under the Rules is made. The effect of Appendix FM-SE is also in issue on these appeals.”

At paragraph 51 he made clear that:

“... compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.”

Explaining that:

“This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts...

Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls...

Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare *Stec v United Kingdom*, cited at para. [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that.

'Near miss' cases

...Contrary to the argument of the respondents, that fact that an applicant may be able to say that their case is a 'near miss' in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of LTE outside the Rules. A good deal more than this would need to be shown to make out such a case. The respondents' argument fails to recognise the value to be attached to having a clear statement of the standards applicable to everyone and fails to give proper weight to the judgment of the Secretary of State, as expressed in the Rules, regarding what is needed to meet the public interest which is in issue. The 'near miss' argument of the respondents cannot be sustained in the light of these considerations and the authority of *Miah v Secretary of State for the Home Department* [2012] EWCA Civ 261, especially at [21]-[26]."

28. We have little doubt that the claimant and her husband will feel upset and disappointed at the outcome of this appeal. It appears to be the case that Mr Okoye had not appreciated when he travelled to Nigeria the full extent of the documentation he needed to provide in support of his wife's application for entry clearance and so was unable to provide all that was required. But he has demonstrated, at least on the face of the payslips, that his income was sufficient. That is no answer to a failure to comply with the Specified Evidence requirements, for the reasons provided by Richards LJ in *SS (Congo)*. There was nothing to prevent the claimant waiting until after her husband had returned to the United Kingdom so that he could secure the missing documents to enable her to submit a complete application compliant with the requirements Appendix FM-SE.
29. There is, of course, nothing at all to prevent the claimant submitting a fresh application and there is no reason at all to suppose that would not be successful. By this determination we uphold the finding of fact of Judge Oliver that this is a genuine and subsisting marriage and we have made clear that, by any view, Mr Okoye is a diligent individual with an established record of employment who will be able to provide maintenance and accommodation for his wife should she be granted leave to join him. That is the proper course when an initial application falls short of what is required. This also was made clear by Richards LJ at paragraph 57 of *SS (Congo)*:
- "The Secretary of State remains entitled to enforce the Rules in the usual way, to say that the Rules have not been satisfied and that the applicant should apply again when the circumstances have indeed changed. This reflects a fair balance between the interests of the individual and the public interest. The Secretary of State is not required to take a speculative risk as to whether the requirements in the Rules will in fact be satisfied in the future when deciding what to do. Generally, it is fair that the applicant should wait until the circumstances have changed and the requirements in the Rules are satisfied and then apply, rather than attempting to jump the queue by asking for preferential treatment outside the Rules in advance."
30. There was no issue before the First-tier Tribunal of whether there should have been consideration outside the rules of rights protected by article 8 of the ECHR and no such argument was before us. And nor could there be. There is no prospect of such an argument succeeding in the circumstances of this appeal, as is made unambiguously clear, again, by the Court of Appeal in *SS (Congo)*.

31. For all of these reasons, it is clear that we must substitute a fresh appeal to dismiss the appeal under the immigration rules.

Summary of decision:

32. The Judge of the First-tier Tribunal made an error of law and the determination is set aside
33. We substitute a fresh decision to dismiss the appeal against refusal to grant entry clearance.

Signed

A handwritten signature in black ink, appearing to read 'P. Ball', with a stylized flourish at the end.

Upper Tribunal Judge Southern

Date: 14 May 2015

Schedule of Payslips – Apex Recruitment Agency Ltd	
Date of Pay Slip	Gross Income
30.08.2013	422.50
13.09.2013	422.50
27.09.2013	422.50
11.10.2013	422.50
1.11.2013	422.50
15.11.2013	422.50
29.11.2013	422.50
13.12.2013	422.50
10.01.2014	422.50
Total gross income for 6 month period	£3,802.50

Schedule of Pay Slips – Total Security Services Ltd	
Dates covered by pay slip	Gross Income for period
27.07.2013 – 10.08.2013	529.22
11.08.2013 – 07.09.2013	1,047.46
08.09.2013 – 05.10.2013	863.12
06.10.2013 – 02.11.2013	957.88
03.11.2013 – 30.11.2013	1,363.14
01.12.2013 – 22.12. 2012	961.08
Total gross income for 6 month period	£5,721.90

Total gross income calculation	
Gross Income – Apex – 6 months	3,802.50
Gross Income – Total – 6 Months	5,802.50
Total gross income – 6 months	£9,606.90
Pro –rata income projected for 12 months	£19,213.80