Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19110/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 December 2017	**On 16 January 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

CHIDOZIE DONATUS OKOLI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Swain, Counsel, instructed by Eagles Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Nigeria, has permission to challenge the decision of Judge M Khan of the First-tier Tribunal (FtT) sent on 7 August 2017 dismissing his appeal against the decision made by the respondent on 24 June 2016 refusing him entry clearance as a partner under Appendix FM of the Immigration Rules.

2. The grounds first take issue with the judge's assessment that the appellant had failed to meet the suitability requirements of the Rules through failure to disclose material facts in relation to the application (the

"suitability" point). This assessment was said to be inadequately reasoned. The grounds further take aim at the judge's finding that the appellant had not established he was in a genuine and subsisting relationship with his spouse. This finding was also said to be inadequately reasoned.

3. I heard excellent submissions from Mr Swain and Ms Pal. Mr Swain's submissions developed a further point flagged by the FtT judge who granted permission who had written that "the decision is hard to follow at times due to a lack of proof-reading" which "of itself, could amount to an arguable material error of law". In amplifying the point Mr Swain described the decision as "shoddy". He drew particular attention to the judge's failure to properly consider the appellant's representative's letter which accompanied the entry clearance application, observing that the only reference to this was in para 25 when outlining the appellant's representative's submissions.

4. I shall address first the contention that the judge's decision is shoddily written and "hard to follow". It is true that the judge's decision contains a number of typos (e.g. "ineligibility" is rendered more than once as "illegibility") and that the grammar is sometimes lacking; but these deficiencies are not such as to obscure the reasoning or rob it of sense. Reading the determination as a whole it is sufficiently clear what the judge's reasons were for dismissing the appeal and indeed the written grounds do not complain of a lack of clarity as such; the contention is rather an inadequacy of reasons. The only paragraph Mr Swain identified as illustrating the judge's lack of clarity was para 25, but in respect of that paragraph his complaint was not about the reference in it to the appellant's representative's letter but to the judge's failure to address it when setting out his conclusions. However, as I shall specify below, this letter was not anywhere near as helpful to the appellant's case as represented.

5. As regards the first ground of appeal challenging the judge's assessment that the appellant had not met the suitability requirement, I do not consider it made out. Paragraph S-EC.2.2(b) identifies as a basis for lack of suitability, 'whether or not to the applicant's knowledge... (b) there has been a failure to disclose material facts in relation to the application.'

6. I am not persuaded that the judge erred in law in concluding that the appellant fell foul of this provision. Question 28 of the EC application form asked "Have you made an application to the Home Office to remain in the UK in the last 10 years?" The appellant's reply is recorded as "Yes". Question 29 requires three particulars to be cited: Date of Application; Type of Application; Home Office Reference Number. The only entry in this box is against Type of Application where the word "Dependency" is written. The appellant submits that his failure to give an answer as regards the date of application and the Home Office reference number was purely secondary and that the mere fact that the appellant had said that

he had made an application on the basis of dependency discharged his duty to disclose material facts. In this regard he points to the fact that the information he gave was enough to enable the respondent to make inquiries and establish that the application in question was for an EEA residence card as the partner of an EEA national and the date on which it had been made and refused. However, the provision refers to "material facts" and the facts relating to date of application and reference number were as material as the answer regarding type of application. Furthermore, the Declaration signed by the applicant declared that the information given on the form was "complete and correct to the best of my knowledge and belief". The reference to the state of his knowledge and belief is significant because the sponsor's own evidence to the judge was that she was speaking to the appellant whilst completing the form online. He "had told her that the EEA application was refused in January 2012, she also knew that the EEA application had been made in December 2011" (paragraph 20). That evidence made it very difficult to follow how she then went on to say that she did not know she had to put the date of the EEA application.

7. Mr Swain makes much of the fact that the appellant's application was accompanied by a letter from his representatives making even clearer that he had made a previous application. In point of fact this letter dated 18 March 2016, does not mention the appellant's previous application at all. If anything, therefore, this letter represented a complete failure to mention a material fact. If anything it suggests that the previous application was an earlier attempt to regularise the appellant's stay on the basis of his relationship with the sponsor: ("We understand that the applicant while in the UK instructed a firm of solicitors to regularise his stay but by the time any application was submitted he was advised to leave voluntarily and returned to Nigeria").

8. It must also be recalled that on the sponsor's own evidence the previous application is one that the appellant should have withdrawn well before the date it was eventually refused. Whilst it is correct that in the couple's evidence there was a short period during which the appellant was still in a relationship with the Dutch national, that relationship had clearly broken down by the end of 2011. At para 19 the judge stated:

> "The sponsor said she did not speak to the appellant to withdraw his EEA application as his relationship with Ms Peny had broken down. She said that she did not advise the appellant to withdraw his application as he had told her that he was returning to Nigeria voluntarily, she said she thought that was a good idea. She said that the appellant left the UK voluntarily and his EEA application was refused. She said that the appellant did not write to th7e Home Office that his relationship with Ms Peny had broken down and that she had left the UK. She said that they did not discuss as to what may have happened if his EEA application had been allowed. She said that she was not sure if it was the same solicitor who had advised the appellant to go back to Nigeria who had made his EEA application in the first place. She said that she did not know if the appellant had to withdraw his EEA

application from the Home Office, she should have advised the appellant to withdraw his application."

9. The grounds contend that when it came to an assessment that material facts had not been disclosed it was for the ECO to prove as much. Reference was made to Agho v SSHD [2015] EWCA Civ 1198. However the suitability grounds are not the same as general grounds of refusal and did not involve the ECO in alleging fraud or deception; only a failure to disclose material facts.

10. As regards the appellant's challenges to the judge's assessment that the appellant had not established he was in a genuine and subsisting relationship, I am once again, not persuaded that the judge erred in law. The burden of proof rested on the appellant. In making this assessment the judge clearly took into account a number of considerations including: the failure of the appellant to inform the Home Office of the breakdown of his relationship with a Dutch national in respect of his EEA application (para 30); the lack of time the couple had spent together since the appellant returned voluntarily to Nigeria (para 31); and the lack of evidence of ongoing communication between the couple (para 32). Mr Swain does raise a number of criticisms of the judge's treatment of the evidence relating to the couple's relationship prior to and since marriage, but these amount to mere disagreements with the judge's findings of fact. The judge clearly took into account the appellant's explanation for his failure to leave the UK (that he wished to remain in the UK with the sponsor and when that was impossible, sought to return to be with her) (see para 31). The judge gave careful consideration to the claimed contact between the couple since he returned to Nigeria, both in the form of visits by her and electronic forms of communication (paras 31-32). The conclusions reached by the judge on these matters were open to him on the evidence. In respect of the Lycamobile records, it was not incorrect of the judge to say most were short and in any event the majority of those produced (like the payslips) were post-decision. There was no evidence of texting, WhatsApp or emails (although it is fair to say the sponsor has now produced WhatsApp records said to run from January 2014 available in the event I found a material error of law).

    For the above reasons I conclude that the judge did not materially err in law and accordingly his decision to dismiss the appellant's appeal must stand.

No anonymity direction is made.

Signed: Date: 15 January 2018

H H Storey

Dr H H Storey
Judge of the Upper Tribunal