Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/05549/2014**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly **Decision Promulgated**
On 30 March 2015 **On 21 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

OLUBUNMI CHRISTY OMOLARA OLANREWAJU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Afzal of IIAS
For the Respondent: Mr Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge De Haney promulgated on 16 December 2014 which allowed the appeal under the Immigration Rules and on human rights grounds.

Background

3. The Appellant was born on 2 May 1970 and is a national of Nigeria.

4. On 21 February 2014 the Appellant applied for entry clearance to the United Kingdom as the souse of Oluwatoyin Omosola Olanrewaju.

5. On 26 March 2014 the Secretary of State refused the Appellant's application and issued two refusal letters. The refusal letters gave a number of reasons:

(a) The evidence did not show tht the marriage was genuine and subsisting.

(b) The Appellant had not provided all of the evidence as required in Appendix FM-SE specifically 6 months of wage slips and bank statements and a letter from her employer confirming the terms of her employment and salary dated no earlier than 28 days before the date of application.

(c) There was no satisfactory evidence in relation to the accommodation.

6. There was then an ECM review on 18 September 2014 in which it was accepted that all of the required pay slips and bank statements had been provided but the employers letter provided was dated 2009 and did not meet the requirements of Appendix FM-SE.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge De Haney ("the Judge") allowed the appeal against the Respondent's decision. The Judge found :

(a) The parties were in a genuine and subsisting relationship.

(b) There was a letter in the Respondent's bundle dated 10 January 2014 from Manchester City Council which confirmed that the Appellant had been employed since 15 August 2005 as a support worker for the Adult Social Care Department.

(c) The defects in the letter fell within the flexibility policy.

(d) Further and in the alternative given the P60s, payslips and contract of employment the Respondent had the option of waiving the requirement if they believe it to be unnecessary.

(e) The letter from the employer was within the timescale of 28 days of the application.

(f) He did not find it 'palatable or in the interests of justice nor can it be in any way be fair' for the Appellant to reapply with the correct documentation as he fulfils the requirements of the Immigration Rule 'save for one de minimus detail.' He relied on Sultana & others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC).

(g) In the alternative taking into account the public interest factors as set out in paragraph 117 of the Nationality Immigration and Asylum Act 2002 refusal of entry clearance was disproportionate.

8. Grounds of appeal were lodged which argued that the Judge had allowed the appeal on the basis of a near miss which is impermissible; the employers letter did not meet the requirements of the Rules and while the Appellant had the opportunity to address the shortcomings in other evidence in relation to payslips and bank statements and did so she did not do so in relation to the employers letter; the ration in Sultana was misapplied in that the decision required the Appellant to ask for a discretion to be exercised in order to criticise the Respondent for not using it; the appeal cannot ne allowed under Article 8 on a near miss basis.

9. On 10 February 2015 First-tier Tribunal Judge Parkes gave permission to appeal stating that the application *'complies with Appendix FM and Appendix FM-SE or it does not and this application did not.'*

10. At the hearing I heard submissions from Mr Mc Vitie on behalf of the Respondent that:

(a) He relied on the grounds.

(b) The application did not meet the requirements of the Rules as it did not meet the requirements of Appendix FM-SE.

(c) The Judge should not have applied the near miss principal in the overall assessment under Article 8.

(d) The Appellant had a remedy: make a fresh application with the required documents.

11. On behalf of the Appellant Mr Afzal submitted that :

(a) The Appellant did not produce a letter from his employer with the gross annual salary but all of the income claimed is corroborated.

(b) The letter from January 2014 meets all of the requirements.

(c) There was no public interest in maintaining a refusal where it was accepted that the income was sufficient on the basis of all of the other evidence produced.

12. In reply Mr Mc Vitie on behalf of the Appellant submitted that Article 8 was not the remedy in a case where the applicant could not meet the requirements of the Rules relying on Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC).

Legal Framework

13. In relation to the date of a specified document paragraph A1 1 (l) of Appendix FM-SE provides:

> *(l) 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.*

14. In relation to salaried employment paragraph 2(b) of Appendix FM-SE provides:

> *"(b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:*
>
> *(i) the person's employment and gross annual salary;*
>
> *(ii) the length of their employment;*

(iii) the period over which they have been or were paid the level of salary relied upon in the application; and

(iv) the type of employment (permanent, fixed-term contract or agency)."

Finding on Material Error

15. Having heard those submissions I reached the conclusion that the Tribunal made errors of law that were material to the outcome in the decision.

16. This was an appeal against a refusal of entry clearance as a spouse where the refusal was originally based on three issues: the Respondent did not accept that the marriage was genuine and subsisting; the Appellant had not produced the specified information in respect of the sponsor's income and there was insufficient evidence of adequate accommodation. By the time that the matter came before the First-tier Judge it was agreed that in relation to the income the Entry Clearance Manager had been provided with salary slips and bank statements covering the required 6 month period but it was asserted that the required employer's letter had still not been provided.

17. Before the First tier judge the Judge found in the Appellant's favour in respect of the nature of the relationship and the accommodation and that part of the decision has not been challenged.

18. In relation to the Employers letter the Judge found among the Respondent's papers that there was a letter from the sponsors Employer Manchester City Council dated 10 January 2014 that had been overlooked. The Judge found that the letter only because did not contain details of the Sponsor's gross salary and therefore did not meet the requirements of the Rules. I am satisfied however that the Judge had failed to engage with *all* of the requirements of Appendix FM-SE in relation to the employers letter because :

- the letter was not dated within 28 days of the application which was 21 February 2014;
- it did not state the gross salary;
- it did not state the period over which they have been or were paid the level of salary relied upon in the application ;
- It did not state the type of employment (permanent, fixed-term contract or agency).

19. I note that the Judge suggests that the defects in the letter were 'de minimus' . I find that failing to meet the evidential requirements in four material particulars cannot be described as de minimus. The Judge referred to Sultana as supporting his view but I do not find that Sultana provides support given that I do not find that the defects in the employers letter are minor and there was also no contact by the Appellant or a legal representative explaining why the requisite evidence could not be provided and the headnote confirms that :

"Where applicants wish to invoke any discretion of this kind, they should do so when making the relevant application, highlighting the specific provision of the Rules invoked and the grounds upon which the exercise of discretion is requested."

20. I am satisfied that there was an error in the way that the Judge assessed the case under the Rules and that he should not have allowed it under the Rules.

21. The Judge then went on to consider the case under Article 8 and there was no challenge that he was entitled to do so given that Appendix FM is not a complete code. In a very brief assessment the Judge found that given he was satisfied that the sponsor did earn the required level of income and therefore but for a 'minor omission' met the requirements of the Rules it was disproportionate to refuse entry clearance. I am satisfied that in making this finding the Judge was in error in that he was applying a near miss argument that in essence the weight to be given to non-compliance with the Rules diminishes where the applicant is "nearly" or "almost" compliant. I am satisfied that in applying this near miss argument he was applying an argument which the court disapproved of in Miah, Bibi and Salman v Secretary of State for the Home Department [2012] EWCA Civ 261 finding that the existence of a "near-miss" principle would be a steep slope away from predictable rules, the efficacy and utility of which would be undermined. Accordingly there was no "near-miss" principle applicable to the Immigration Rules. The Secretary of State must assess the strength of an Article 8 claim, but the requirements of immigration control were not weakened by the degree of non-compliance with the Immigration Rules (paras 13 – 26).

22. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside and remade.

Remaking the decision

23. I am satisfied that the Appellant that in his application for entry clearance as a spouse under Appendix FM cannot succeed under the Immigration Rules as he failed to provide the specified evidence in the form of an employers letter dated within 28 days of the application containing confirmation of his wife's gross salary, how long she had been paid at that level and the nature of her employment as required by Appendix FM-SE.The Rules are detailed and prescriptive and there is no near miss principle to save a defective application unless the error comes within the limited terms of the provisions of Appendix FM-SE D which this case did not as the application was refused on a number of other grounds.

24. In considering the appeal under Article 8 of the Convention I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

25. I accept that the Appellant and wife have a family life which must be respected.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

26. Article 8 does not impose on the state any general obligation to respect the choice of residence of a married couple and there was no argument placed before me as to why the Appellant and his wife cannot enjoy family life together in Nigeria albeit I recognise that the sponsor is a British citizen.

27. However if I am wrong about this and I accept that the decision would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

28. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate his conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

29. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy their private and family life.

*I**f so, is such interference proportionate to the legitimate public end sought to be achieved?***

30. In making the assessment I have also taken into account that my starting point is that the Appellant does not meet the requirements of the Rules as I have found that the defects in the employers letter were not *de minimus*. I take into account the public interest factors in s 117 of the Nationality Immigration and Asylum Act 2002 as amended. I am satisfied that there is a route for the Appellant to enter the United Kingdom as a spouse but the system deliberately and reasonably puts the responsibility on the applicant to submit the correct documents. The sponsor has never submitted a letter from his wife's employer which contains the mandatorily required information and this is a requirement of the Rules and there is no reason why the Appellant could not provide it. I am satisfied that the decision to refuse is proportionate as the Appellant has the clear option to submit an application in accordance with the requirements of the Rules.

CONCLUSION

31. **I therefore found that errors of law have been established that were material to the outcome of the decision and that the Judge's determination should be set aside**

DECISION

32. **I remake the appeal.**

33. **The appeal is dismissed under the Immigration Rules.**

34. **This appeal is also dismissed on human rights grounds (Article 8)**

Signed Date 20 April 2015

Deputy Upper Tribunal Judge Birrell