UPPER TRIBUNAL
**(IMMIGRATION AND ASYLUM CHAMBER)** **APPEAL NUMBER: OA/18773/2013**

**THE IMMIGRATION ACTS**

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| **Heard at: Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On: 19 November 2014** | **On: 12 December 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**ENTRY CLEARANCE OFFICER, LAGOS**

**Appellant**

**and**

**MISS OMOTAYO KUBURAT IDRIS**
**NO ANONYMITY DIRECTION MADE**

**Respondent**

**Representation**
**For the Appellant:** **Mr P Nath, Senior Home Office Presenting Officer**
**For the Respondent:** **Mr G Davison, counsel (instructed by MA Consultants)**

**DECISION AND REASONS**

1. For the sake of convenience I shall refer to the appellant as "the entry clearance officer" and to the respondent as "the claimant."

2. The claimant is a national of Nigeria, born on 23 December 1980. Her appeal against the decision of the entry clearance officer dated 11 September 2013 to refuse to grant her entry clearance as the spouse of her sponsor, a person settled in the UK, was allowed by First-tier Tribunal Judge Cohen in a determination promulgated on 22 August 2014.

3. On 3 October 2014, First-tier Tribunal Judge Frankish granted the entry clearance officer permission to appeal.

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4. The entry clearance officer had refused her application on the basis that she had not produced evidence of having passed an appropriate English language test under paragraph E-ECP.4.2 of the rules. Although she provided a Higher National Diploma in Accountancy from a polytechnic, that did not meet the required standard.

5. Although it had been initially contended by the entry clearance officer that she had not met the financial requirements, this was conceded after review [2].

6. However, the entry clearance officer was still not satisfied that the parties were in a genuine and subsisting marriage and that they intended to live permanently together in the UK.

7. First-tier Tribunal Judge Cohen found that in the light of the totality of the evidence, the parties were in a genuine and existing marriage and intended to live permanently with each other in the UK [11].

8. He had regard to the "final reasons" for the refusal, namely the failure to provide evidence of having passed the appropriate English language test. The sponsor informed the Tribunal that he had "misread" the exceptions [12]. The claimant had taken an HND in Nigeria, which he (incorrectly) believed to be the equivalent of a degree and that she had therefore been exempt.

9. After discovering that this was not the case, the claimant took the IELTS and passed with marks at 6.5 and 7.0 throughout. The test results were produced to the Tribunal [12].

10. Judge Cohen found that "... the fact that the claimant would take the English test was 'reasonably foreseeable' to the entry clearance officer." In finding that this evidence "can be admitted before me" he went on to find that she now met all the requirements under the rules and her appeal was accordingly allowed under the rules.

11. At paragraph 15 of his determination Judge Cohen stated that "for the sake of completeness" even if he had not allowed the appellant's appeal under the rules, ".....that I allow the same on human rights grounds in any event." The basis was that she met the requirements under the rules "in all respects." Whilst the entry clearance officer may argue that the English language test was not available at the date of decision, he found that the requirement that she makes a fresh application for entry clearance and be delayed further, just so the English language certificate can be considered when she has satisfied all the other criteria, "would be totally

disproportionate in all the circumstances" and contrary to the respondent's requirements to maintain effective immigration control.

12. There was no public interest element in refusing her claim for entry clearance. Although he stated at the end of the determination under the heading "Decision" that the appeal is allowed under the Immigration Rules, without reference to allowing it on human rights grounds, it is clear that he intended to, and in fact did allow the appeal on Article 8 grounds [15].

13. Mr Nath submitted that the Tribunal should not have considered evidence that post-dated the decision, having regard to the provisions of s.85A(1) of the Nationality, Immigration and Asylum Act 2002. It is provided that an appeal against an immigration decision refusing the claimant entry clearance (s.82(2)(b)) meant that the Tribunal was only able to consider the circumstances appertaining at the time of the decision (s.85A(2)).

14. The English language test certificate was only produced on the date of the hearing and the test had been taken after the date of the decision. The decision was dated 11 September 2013. I was informed that the claimant took the examination on 12 October 2013 and the certificate was dated 23 October 2013.

15. In the claimant's grounds of appeal, received by the Tribunal on 4 October 2013, she stated that the English language test was to be held on 12 October 2013.

16. Mr Nath also submitted that the Judge in any event failed to conduct a proper Article 8 assessment outside the rules and in particular failed to give adequate reasons allowing the appeal on those grounds. He failed to follow the 'guidance' set out in Gulshan where it was held that after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

17. On behalf of the claimant, Mr Davison accepted that the claimant had only undertaken the test after the date of decision.

18. Mr Davison relied on the decision of Mr Justice Turner in judicial review proceedings before the Administrative Court in Zhang [2013] EWHC 891 (Admin)

19. In that case, counsel for the secretary of state sought to persuade the High Court that in the face of repeated authoritative pronouncements to the

contrary, it was still only in an exceptional or a small minority of cases that Article 8 would frustrate the requirement that an applicant should leave the country before making an application [76].

20. Mr Justice Turner dealt with the contention on behalf of the secretary of state that returning an applicant to his home country in order to make an entry clearance application may still be proportionate in a small number of cases. That however implied that returning an applicant to his home country will, more often than not, involve a disproportionate interference with his Article 8 rights.

21. Mr Davison submitted with regard to the entry clearance officer's second ground of appeal that the "Gulshan test" has gone. Judge Cohen's findings in relation to proportionality is sustainable.

22. Mr Nath replied that the Gulshan approach has not disappeared.

**Assessment**

23. The claimant did not provide a certificate at the date of application that she had passed an English language test with a provider approved by the UKBA. Nor did she hold an academic qualification which was the equivalent to the standard Bachelor's or Master's or PhD degree in the UK.

24. An English language certificate was only produced on the date of the hearing. It is accepted that the test was taken during October 2013. The certificate was signed on 23 October 2013. Accordingly, it was taken a month after the date of refusal.

25. That evidence was not admissible, having regard to the provisions of s.85A of the 2002 Act. Accordingly, the Tribunal only had jurisdiction to consider the circumstances pertaining at the date of decision. At that date, it is evident that the claimant did not meet the English language test requirement.

26. The Judge found that the fact that the claimant would take the English test was "reasonably foreseeable to the respondent." The basis for that finding, however, has not been given. In any event, the evidence was not admissible. Accordingly, I find that the First-tier Tribunal erred in finding that she had met all the appropriate requirements under the immigration rules [12] and [15].

27. With regard to the alternative basis, namely Article 8, I agree with paragraph 3 of the reasons for decision granting the entry clearance officer

permission to appeal. Judge Frankish stated that the Judge's approach arguably amounted to a near miss approach which has been repeatedly proscribed by cases such as Patel and Others v SSHD [2013] UKSC 72. He also noted the absence of any consideration of compelling circumstances “before undertaking the proportionality” decisions.

28. I also note that the claimant did not raise any Article 8 grounds as part of her grounds of appeal before the First-tier Tribunal.

29. I find the reliance on Zhang, supra, to be misplaced. There, the claimant concluded that she would have no option but to go back to China and stay there for as long as it took to “surmount the bureaucratic hurdles which there awaited her before she could expect to be granted leave to enter the UK as a 'partner'.” [9] She did return on 15 September 2011 to China. Entry clearance was granted on 25 October 2011. The university in the UK which had made her a job offer, lost patience and withdrew it. She challenged the legality of the immigration rule itself that she could not make an application for a partner visa unless she returned to China to do so.

30. It was in that context that Turner J in the administrative court at paragraph 78, concluded that the application of the blanket requirement to leave the country imposed by paragraph 319C(h)(i) of the Immigration Rules was unsustainable. It was not consistent with the decision in Chikwamba.

31. However, in the present case, the claimant is not being required to return to Nigeria as she is already there, having made an entry clearance application.

32. I find that Judge Cohen has not given proper reasons for finding that the decision would be totally disproportionate in the circumstances and contrary to the entry clearance officer's requirement to maintain effective immigration control [15].

33. In any event, that “near miss” rationale flies in the face of the rule and s.85A of the 2002 Act. The requirement to provide all the necessary evidence, including the English language certificate, had been signalled well in advance of its implementation. The claimant and her sponsor were consequently expected to submit that evidence with the application rather than after it had been refused. I do not regard that as being in any way unfair or unreasonable.

34. In Alam and Ors [2012] EWCA Civ 960, the Court stated [35] that it is true that bringing s.85A into force deprived applicants (in this case under the

points based system) of a "second bite of the cherry." However, the immigration rules, and the prescribed application form made it clear that the submission of the required documents was necessary. If they were not produced with the application, it would be refused. This may well result in "hard decisions" in individual cases. This however ensures consistency and predictability.

35. I find that the First-tier Tribunal Judge did not consider what compelling circumstances were not sufficiently recognised under the rules. I find that he was wrong to conclude that there was no public interest to refusing the application based on the requirements of maintaining effective immigration control, even though the claimant had met the other requirements under the rules.

36. In order to give effect to the interests of maintaining a fair, predictable and effective immigration control, the claimant should submit a further application for entry clearance. There is no evidence that there would be a significant delay before her application is considered. Nor is there any evidence put forward as to why her husband would not be able to travel to Nigeria to visit her pending the decision.

37. I accordingly find that the decision of the First-tier Tribunal involved the making of material errors of law. I accordingly set aside the decision and re-make it.

38. I find from the circumstances to which I have referred above that there would not be a disproportionate interference with the rights of the claimant or her husband to respect for their family life.

39. The claimant is not being required to return to Nigeria for the purpose of making an entry clearance application. She is already there. No reason has been given or suggested as to why her husband would not be able to be with her or visit her whilst the application is being considered.

40. In the interests of consistency and predictability in the maintenance of effective immigration control, I find that the decision in the circumstances is proportionate.

**Notice of Decision**

The claimant's appeal is dismissed.

No anonymity direction made.

Signed Date 8/12/2014

C R Mailer
Deputy Upper Tribunal Judge