Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39075/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons Promulgated**
On 24th June 2015	**On 15th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D. KELLY

Between

MR SIMON OMOKE OGUDU
(ANONYMITY NOT ORDERED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Dr E Mynott, Legal Representative
For the Respondent: Mr M Dwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria who was born on the 25th December 1984. He has been granted permission to appeal, upon a renewed application, against the decision of First-tier Tribunal Judge Saffer to dismiss his appeal against the Respondent's refusal of his application for further leave to remain in the United Kingdom as the spouse of a British citizen.

2. In order to understand the arguments that were put to me by Dr Mynott – arguments that have little if anything to do with those that were raised before Judge Saffer or those for which permission to appeal to the Upper Tribunal has been granted – it will be necessary to trace the history of these proceedings back to a decision of the Tribunal that pre-dates that which is the subject of this appeal.

3. The subject of the present proceedings is an application that was made by the appellant as long ago as the 6th December 2011. That application was for leave to remain as the spouse of a person who is settled in the United Kingdom. It was originally refused, on the 12th June 2012, on grounds that the appellant have failed (i) to show that the marriage was subsisting, and (ii) to provide an English language test certificate in the form prescribed by the Immigration Rules. The appeal against that decision came before Judge Wright, sitting at Hatton Cross, on the 5th October 2012. In a decision promulgated on the 24th October 2014, Judge Wright allowed the appeal against the respondent's decision because, contrary to the law as it stood at that time, the Notice of Immigration Decision combined a decision to refuse further leave to remain with a decision to remove the appellant from the United Kingdom. The Tribunal observed that in those circumstances a lawful decision remained "outstanding" and that this would now need to be taken "in the light of this determination and the information then available to her (including with reference to Mr Gabbitas' previous advice of 17/2/2012) and in light of any new information then to hand, such as any original English language test certificate in speaking and listening from an approved English language test provider and/or any further 'marriage subsisting' evidence submitted by the appellant in the meantime, and the effect of the appellant's marriage to a British citizen" [paragraph 20].

4. The reference to the advice of a 'Mr Gabbitas' was to that contained within a Home Office internal memorandum that had somehow entered into the public domain. It recommended that the appellant be granted discretionary leave to remain (outside the Immigration Rules) notwithstanding the fact that he had failed to submit an English language test certificate.

5. The respondent reconsidered and again refused the application on the 17th September 2014. It is this decision that is the subject of the instant appeal. By this stage, and by virtue of transitional provisions, the application now fell to be considered under both under Part 8 the 'old Rules' and Appendix FM of 'new Rules' that had been introduced on the 9th July 2012. It was refused on the same grounds as before (see paragraph 3, above). On this occasion, the Respondent also considered whether the appellant qualified for a grant of leave to remain under the private and family life provisions of the Rules as set out in paragraph 276ADE and Section Ex.1 of Appendix FM of the Immigration Rules. So far as the former was concerned, the respondent concluded that the length of appellant's residence in the United Kingdom and his continued ties to Nigeria disqualified him from a grant of leave to remain on private life grounds. So

far as the family life was concerned, the respondent concluded that the appellant did not meet the eligibility criteria for consideration on this ground under the Rules. Having concluded that there were no 'compelling circumstances' to merit consideration for a grant of discretionary leave to remain outside the Rules, the respondent decided to refuse the application.

6. In the course of making his findings, Judge Saffer stated that he was satisfied that the appellant's marriage was genuine and subsisting, a finding which the respondent has not sought to challenge. He nevertheless concluded that there were not any "compelling circumstances" such as to warrant a grant of discretionary leave to remain (outside the Rules) by reason of the appellant's continued failure to submit an English language test certificate. The circumstances upon which the appellant had relied in support of his claim to be exempted from this requirement was his inability to sit an English language test without the return of his passport, which he had of course lodged with the respondent at the time when he had submitted his application.

7. The original grounds of application for permission to appeal against Judge Saffer's decision are accurately summarised by the Judge (Monica J. Pirotta) who refused it:

> "The grounds of the Application asserted that the Judge committed errors of law because he had misunderstood or not applied the policy of exceptional circumstances, and failed to consider that the Appellant could not submit his passport because the Secretary of State had it in the application and could not make an application to the Nigerian High Commission for a new passport because they required the expired passport to be returned to them first.
>
> He argued that the IJ had not taken into account the impact on the Appellant of the decision, failed to pay regard to the attempts by the Appellant to obtain the English language qualification, and unjustly ignored the obstacles forced in the Appellant's way. He further argued that the requirement for the language certificate was not in accordance with the law, that the IJ had misapplied the Appendix FM and Ex.1 as the appellant had a relationship with his partner."

8. In refusing permission to appeal on the above grounds, Judge Pirotta said this:

> "The Determination shows that the IJ took an accurate and adequate note of the factual basis of the application showing the Appellant had to provide, with his application, evidence of a language test which met the criteria and had failed to do that. The Appellant could have withdrawn the application or obtained the certificate before making the application, but chose instead to go ahead without one of the mandatory documents required for this class of application. The responsibility for that course of action is that of the Appellant and nobody else. The Appellant did not meet the criteria under Appendix FM, there were no grounds to engage EX1. There were no insurmountable obstacles to returning to Nigeria to take the relevant test and making an application to return from out of country. The

> interference with his private life would be temporary, limited and necessary to respect the Immigration Rules, proportionate to his circumstances, and a legitimate aim. The remedy lay in the Appellant's hands."

9. The appellant renewed his application to the Upper Tribunal. Deputy Upper Tribunal Judge Chapman granted permission in the following terms:

> "It is arguable that the Judge erred materially in law (i) in failing to consider whether the appeal could succeed via the EX1(a) route, given his findings of fact and given that the Appellant made an in time application to vary his leave and was not required by this route to fulfil the English language requirement. It is further arguable that the Judge erred in his application of the principle set out in Chikwamba v SSHD [2008] UKHL 40 i.e. whether there was "good reason" per Lord Brown at 42, for the Appellant to return to Nigeria to apply for entry clearance, but rather put forward reasons as to why it would not be unreasonable for the Appellant to return to Nigeria to obtain entry clearance."

10. Dr Mynott nevertheless presented the appeal in a manner that was unencumbered by the terms in which permission to appeal had been granted by Deputy Judge Chapman. He did not therefore address the legal issues that they raise, and it is thus necessary for me to do so before I turn to consider his submissions.

11. The flaw in the first argument that was raised by Deputy Judge Chapman lies in its assumption that Section Ex. 1 provides a separate and free-standing route to settlement under the Immigration Rules. It does not. Whilst it is true that many of the eligibility requirements for leave to remain as a 'partner' are made subject to the application of Section Ex.1, this is not the case with regard to the requirement for an English language test certificate under Section E-LTRP.4. In the case of the requirement to submit an English language test certificate, there is a general exemption where "there are exceptional circumstances which prevent the applicant from being able to meet the requirement". The appellant did not however meet this test in the instant case, however, for reasons that are touched upon in the decision of Judge Saffer and which are more fully explained in the reasons that were given by Judge Pirotta in refusing permission to appeal. However, had the appellant met the "exceptional circumstances" test for non-production of an English language test certificate, it would have followed from Judge Saffer's unchallenged finding that the appellant's marriage was subsisting that the appeal fell to be allowed under Section E-LTRP itself, without any need to consider Section EX.1 of Appendix FM at all.

12. So far as the second argument raised by Deputy Judge Chapman is concerned, this is based upon a common misconception of the rationale in Chikwamba v SSHD [2008] UKHL 40. That rationale applies only to cases where the sole reason for refusal of an in-country application for leave to remain is because the Rules require the applicant to submit his application from abroad. In such cases it will be necessary for the respondent to show

that there is 'good reason' to expect the appellant to fulfil this requirement if it is not to be held disproportionate for Article 8 purposes. In this case, however, it was not a requirement of the Rules that the appellant should in the first instance seek entry clearance from abroad if he wished to continue family life in the United Kingdom. On the contrary, the possibility of the appellant having to make such an application was a direct consequence of his failure to meet all the substantive requirements for leave to remain and, thus, his putative removal. The rationale in Chikwamba did not therefore have any application to the facts of this case.

13. For the above reasons, I am satisfied that Judge Pirotta was entirely right to refuse permission to appeal and that Deputy Judge Chapman was equally wrong to grant it.

14. I therefore turn, finally, to the arguments of Dr Mynott. As I have previously observed, whatever merit these arguments may have, the appellant has not been granted permission to advance them. I therefore consider them only for the sake of completeness.

15. The first argument is that the Secretary of State acted unlawfully in failing to have regard to the advice that she received from her caseworker concerning the grant of discretionary leave (outside the Rules) [see paragraphs 3 and 4 above]. This argument did not even feature in the grounds of appeal to the First-tier Tribunal and there does not appear to have been there any application before Judge Saffer to amend the grounds so as to include it. It is therefore difficult to see how Judge Saffer can be said to have erred in failing to consider it. So far as the detail of the argument is concerned, Dr Mynott submitted that the Secretary of State had completely ignored the basis upon which the appellant's first appeal had been allowed by Judge Wright. That submission is however based upon a less-than-accurate representation of the reason that Judge Wright gave for allowing the appeal which, it will be recalled, had been based upon the rather technical legal position at that time concerning the lawfulness of combining a decision not to grant leave to remain with a decision to remove the applicant from the United Kingdom. It follows that Judge Wright's observations concerning the circumstances that the Secretary of State might wish to consider when making her "outstanding" lawful decision were essentially *obiter dicta*, and thus not legally binding upon her.

16. The second argument is that in considering "exceptional circumstances" Judge Saffer erred by failing to apply the Secretary of State's policy guidance concerning leave to remain outside the Immigration Rules. However, the Tribunal did not have the necessary jurisdiction to substitute its own exercise of a discretion outside the Immigration Rules for that of the Secretary of State (see Section 85(6) of the Nationality, Immigration and Asylum Act 2002 as it then stood). Moreover, the appropriate test for exemption from the requirement to submit an appropriate English Language test certificate is to be found within the Rules themselves [see paragraph 11, above]. The appellant did not meet that test for the reasons

that were explained in detail by Judge Pirotta (above) but which may be summarised by saying that the only reason that the appellant found himself having to rely upon the exemption was his own failure to obtain an appropriate English language test certificate before (rather than after) he submitted his passport with his application for further leave to remain. The Common Law duty to act fairly towards an applicant is engaged only in circumstances which arise after he has submitted his application and which are beyond his control. Neither of these things could be said to have appertained in the appellant's case. Indeed, it would be strange if an applicant were able to rely upon the way in which he has chosen to arrange his affairs as a reason for avoiding the legitimate requirements of immigration control. The appellant's claim to have belatedly passed the relevant English language test is thus irrelevant to the issue of the legal soundness of Judge Saffer's decision, and his application to admit his recently-acquired certificate is therefore refused.

17. I am therefore satisfied that Dr Mnynott's arguments could not have availed the appellant even if he had been granted permission to advance them.

Notice of decision

18. The appeal is dismissed.

Anonymity is not ordered

Signed Date

Judge D Kelly
Deputy Judge of the Upper Tribunal