



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01069/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7 February 2018

Decision & Reasons Promulgated  
On 01 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

ENTRY CLEARANCE OFFICER – SHEFFIELD

Appellant

and

MRS OYINDAMOLA ABIOLA WALLACE-NICOL  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr T Wilding, HOPO

For the Respondent: Mr J René, Counsel

**DECISION AND REASONS**

1. The Entry Clearance Officer has been granted permission to appeal the decision of First-tier Tribunal Judge Beg allowing the appeal of the respondent against refusal to grant her entry clearance to the United Kingdom as a spouse under Appendix FM of the Immigration Rules.
2. The respondent will from now on be referred to as the applicant for ease of reference.

3. The applicant is a citizen of Nigeria born on 22 February 1952. At the hearing before the judge the appellant's sponsor and husband confirmed that the applicant was his wife and that they married in Nigeria on 27 November 2014. He had stayed with his wife for four weeks after the marriage before he returned to the United Kingdom. He visited her in November 2016 when he stayed in Nigeria for four weeks. He is a dual national and travelled on his Nigerian passport. He said he has not been able to see the applicant more often because he works as a security officer. However, they kept in contact every day by telephone. He said he provided evidence of that.
4. The Entry Clearance Officer had given several reasons for refusing the applicant's application. The judge found in favour of the applicant on all the issues.
5. The judge found that the sponsor is a person who is present and settled in the United Kingdom. She also found that the applicant has submitted an IELTS certificate which she passed at A1 level on 19 January 2016. Therefore, the judge was satisfied that the applicant met the English language requirements.
6. The judge was also satisfied with the sponsor's evidence that he had travelled on his Nigerian passport as he was a dual national. She found that this was the reason why there was no Nigerian visa or date stamp in his British passport. The sponsor had submitted his flight ticket and booking reference at the appeal hearing which showed that he visited Nigeria on 9 September 2016.
7. The judge accepted that the sponsor kept in contact with the applicant regularly since the marriage by telephone. In evidence he said he spoke to his wife every day. The judge noted that the Entry Clearance Manager had stated that the telephone bills referred to a telephone number which was different from that given in the applicant's application form. She found that the sponsor was not cross-examined about that. The fact that it may be a different number from that given in the application form, was not evidence that the sponsor has not been telephoning the applicant in Nigeria. She found that there was substantial documentary evidence of telephone calls made by the sponsor to Nigeria in 2015 and 16. The judge took into account the photographs in the bundle. On the balance of probabilities, the judge found that the marriage between the applicant and the sponsor was a genuine and subsisting marriage. She also found that the couple do intend to live together permanently as husband and wife.
8. The judge held at paragraph 7 as follows
  7. The sponsor provided his pay slips from G4S Secure Solutions (UK) Limited. Additionally he provided his P60 for the year ending 5 April 2015 showing that he earned £24,514.12. He also provided his P60 for the year ending 5 April 2016 showing his earnings as £28,123.36. His P60 for the year ending 5 April 2017 shows that he earned £28,186.46. I find that the sponsor is required to have annual earnings of £18,600. His P60s clearly show that at the date of application and the date of decision, he earned well in excess of that sum. In conclusion and in taking the evidence as a whole, I find that the appellant meets the requirements of Appendix FM of the Immigration Rules.

9. Permission was granted by First-tier Tribunal Judge Parkes as follows:
  3. The grounds argue that the judge erred as she allowed the appeal under the Immigration Rules without taking a balancing exercise under Article 8 which should have been conducted through the prism of the Immigration Rules. The application had failed as the appellant had not provided the required documentation and the judge had not identified why it was disproportionate for the appellant to make a fresh application.
  4. As the appellant had not submitted the evidence required by Appendix FM and FM-SE the appellant could not have succeeded under the Rules. The fact that the appellant had submitted evidence for the hearing did not alter that fact. There was no analysis in the decision on the proportionality of a renewed application being made that did meet the Rules, the intention is that applicants should submit the evidence with the application and not after the event and that has been the position since the introduction of Appendix FM in 2012.
10. Mr Wilding did not support the argument in the grounds that the judge was required to consider the human rights appeal through the prism of the Immigration Rules, but even if the judge found that the applicant did meet the requirements of the Rules, the judge needed to carry out a balancing exercise under Article 8. Mr Wilding submitted that this was a wrong proposition in law.
11. Mr Wilding's argument however was that the applicant could not meet the Immigration Rules because the applicant failed to provide the required supporting evidence. He said the applicant was required to provide six months' bank statements, six months' pay slips and an employer's letter in order to satisfy the Immigration Rules in FM-SE. The difficulty for the applicant is that there was one missing pay slip and that was the pay slip for April 2016. Because of this missing pay slip, the applicant could not meet the requirements of the Immigration Rules.
12. He submitted that this issue could have been reconciled by the applicant at any stage up to and including the date of the hearing. The applicant's application was refused in 2016 and the Entry Clearance Manager's review was received in 2017. The applicant has had sufficient time to produce this evidence but has not done so. He said this missing document was sufficient to require the applicant to make a new application.
13. Mr René relied on his Rule 24 response and to paragraph 8(c). He said that there must be a degree of fairness and common sense with regard to the missing pay slip for April 2016. He said the ECM does not say that the sponsor's bank statements provided did not show the income for April 2006 and more so the pay slip for May 2016 was present and clearly showed that it was the second pay date period for the beginning of the tax year 2016/17 and the gross pay and actual pay for that month. He said the ECO could have reconciled that by looking at the bank statement for April 2016.

14. He submitted that even if the document was missing, there were other documents submitted by the applicant to reconcile the matter and the ECO could have applied a common sense approach.
15. He submitted that the ECO could have also applied evidential flexibility to his consideration of the missing document.
16. Mr Wilding submitted that there was no real merit in the evidential flexibility argument. He said evidential flexibility applied because previously applicants were barred by Section 85 to put in documents that were missing from an application. Since the 2012 Act which amended Section 85, the applicant had all the time from the refusal of the application until the date of hearing to submit the missing document.

### Findings

17. I was not persuaded by Mr Wilding's argument that the applicant should be required to make an entry clearance application because the sponsor's pay slip for April 2016 was missing from the documents that she had submitted to the ECO. I accept Mr René's argument that the ECO could have applied a common sense approach to this matter. There were other documents, such as the April 2016 bank statement which showed that the sponsor's pay for April 2016 had been paid into his bank account. There was a further document, namely the P60 for May 2016 which showed the applicant's gross pay and the actual pay for that month. The gross pay would have shown that the sponsor had been paid for April 2016.
18. Whilst I accept that the evidential flexibility policy does not apply because the applicant could have submitted the missing document at any time up to and including the date of hearing, I find that this should not have prevented the ECO from looking at other documents in order to reconcile the outstanding issue of the missing pay slip for April 2016.
19. In any event I find that a phone call from the ECO in Sheffield to the sponsor in London could also have resolved the matter. Had the ECO done so, the applicant would not find herself in the position that she is in.
20. Accordingly, I find that the judge did not err in her decision.
21. The judge's decision allowing the applicant's appeal shall stand.
22. The ECO's appeal is dismissed.

No anonymity direction is made.

Signed

Date: 23 February 2018

Deputy Upper Tribunal Judge Eshun