Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05083/2015**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 8 February 2018	**On 9 April 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

OSASU WALTER OKAEBEN

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer
For the Respondent: The Sponsor, Mrs U Okaeben

DECISION AND REASONS

1. Although this is an appeal by the Entry Clearance Officer ("ECO"), we will, for convenience, refer to the parties as they appeared before the First-tier Tribunal.

Background

2. The appellant is a citizen of Nigeria who was born on 15 July 1975. On 22 February 2008, he entered the United Kingdom as a student. His initial leave was subsequently extended on the same basis until 5 January 2013.

3. On 7 December 2012, he applied for a residence card as the spouse of a French national. That application was refused by the Secretary of State and the appellant

appealed but that appeal was withdrawn in May 2014. The appellant then made a fresh application as the spouse of an EEA national. Neither he nor his spouse attended, when invited, an interview at the Home Office and the appellant withdrew this application in February 2015 and voluntarily departed from the UK on 12 May 2015.

4. Whilst in the UK, the appellant met the sponsor. Although the details are not clear to us, it appears that they started seeing each other in August 2014. In December 2014, the appellant proposed to the sponsor. They married in Nigeria, first in a traditional ceremony on 4 June 2015 and secondly in a church ceremony on 6 June 2015. It appears that the appellant divorced his French wife in April 2015.

5. The sponsor is a British citizen who was born in the UK in 1981. She went, with her parents, to Nigeria in 1982 and returned in 2002 as a student. She undertook a Master of Pharmacy degree at the University of Greenwich and, as we understand it, is now a self-employed pharmacist.

The Decision

6. In August 2015, the appellant applied for entry clearance as the spouse of the sponsor under the 'partner' provisions in Appendix FM of the Immigration Rules (HC 395 as amended). On 7 August 2015, the ECO refused the appellant's application. First, the ECO was not satisfied that the relationship between the sponsor and appellant was "genuine and subsisting" or that they intended to live together permanently in the UK. Secondly, the ECO was not satisfied that the appellant met the financial requirements in E-ECP.3.1. by having established her self-employment income in the UK on the basis of "specified documents" as required by Appendix FM-SE.

7. On 4 December 2015, the Entry Clearance Manager upheld the ECO's decision under the Rules and also on the basis that the refusal of entry clearance did not amount to a breach of Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

8. The appellant appealed to the First-tier Tribunal. His appeal was limited to the ground that the refusal of entry clearance breached his human rights, namely Art 8 of the ECHR.

9. Judge R G Walters allowed the appellant's appeal under Art 8. First, he accepted that the relationship between the appellant and sponsor was a "genuine and subsisting" one. Secondly, Judge Walters accepted that the appellant had failed to provide some of the "specified documents" required to establish the sponsor's income. In particular, and this was accepted by the appellant's representative before Judge Walters, there had not been produced the required annual self-assessment tax return to HMRC nor the personal bank statements of the sponsor for the twelve-month period covered by the required tax return.

10. Nevertheless, Judge Walters went on to find, at para 37, as follows:

> "37. I therefore considered whether the ECO had discretion to allow the appeal under this head even though personal bank statements for the same 12 month period as shown in the template the tax returns had not been provided. I find that he did have such a discretion. He should have exercised in the Appellant's favour as there was substantial evidence from HMRC to the effect that the Sponsor was self-employed during the relevant financial year and during that year had earned £19,049".

11. Then at para 38–42, Judge Walters went on to find that the appellant had established a breach of Art 8 as:

> "I do not find that the interference was in accordance with the immigration law".

The Appeal to the Upper Tribunal

12. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that Judge Walters was not entitled to find that the ECO could have granted entry clearance under the Rules despite the absence of the "specified documents".

13. On 8 November 2017, the First-tier Tribunal (Judge Page) granted the ECO permission to appeal.

14. Before us, the ECO was represented by Mr Richards. The appellant was represented by his wife, Mrs Okaeben (the sponsor).

Discussion

15. Mr Richards submitted that the judge had been wrong to allow the appeal under Art 8 on the basis of his finding in para 37 that the ECO had a discretion to "allow" the appellant's application even though the specified documents were missing.

16. Mr Richards pointed out that only one bank statement had been submitted before the judge, and none were submitted before the ECO. He accepted that the sponsor had now produced the complete bank statements. The sponsor confirmed that she now had the bank statements. She was unable to explain why those statements were not submitted to the ECO.

17. In fact, neither the annual self-assessment tax return required by Appendix FM-SE nor the full bank statements were made available to Judge Walters at the First-tier Tribunal hearing. He records in paras 30 and 33 respectively that the appellant's (then) legal representative confirmed that none of these documents were in the appellant's bundle at the hearing.

18. It is clear that entry clearance as a spouse may only be granted under the 'partner' provisions in Appendix FM (see E-ECP.3.1–3.2) if the applicant establishes that (for these purposes) the sponsor has the requisite self-employed income on the basis of "specified evidence" as set out in Appendix FM-SE. It is not disputed before us, nor could it be, that under Appendix FM-SE the appellant had to establish the sponsor's self-employed income by producing, inter alia, her annual self-assessment tax return to HMRC (see para 7(b)(i)) and personal bank statements covering the same twelve-

month period as that return (see para 7(f)). These documents were neither supplied with the application to the ECO nor were they produced to Judge Walters.

19. With respect to the judge, we are unable to see how the ECO could, using the judge's words, "allow the appeal" (presumably he meant "grant the application") despite their absence. The only provision which appears to permit an ECO to allow an application despite 'failings' in the documentation is in para D(d) of Appendix FM-SE but that only applies where the applicant has submitted a document in the wrong format, or a copy and not an original document, or a document does not contain all the specified information. In those circumstances, if the missing information is verifiable from other documents or by website enquiry, then "exceptionally", providing the ECO is satisfied the documents provided are genuine, the application may be granted.

20. That cannot apply here. The appellant did not submit a document in the wrong format, neither did he submit a copy rather than an original, and the failing was not that a document failed to contain "all of the specified information". The failing in this appeal was the absence of documentation, namely the annual self-assessment tax return and the missing personal bank account statements.

21. Consequently, we see no legal basis for the judge's conclusion in para 37 that the ECO had a discretion to grant the application in the absence of the specified documents.

22. The sponsor, in a short skeleton argument, sought to rely upon the "evidential flexibility" provisions that are contained in para D(b) of Appendix FM-SE. That provision appears to go further than para 245AA (applicable in Points-Based applications) in contemplating an ECO requesting further documentation from an applicant. The provision is not limited to where a document is missing from a sequence, is in the wrong format, is a copy rather than an original, or is a document which does not contain all of the specified information. That is the limit of evidential flexibility in para 245AA in a Points-Based application under Part 6A of the Rules. In addition, para D(b)(ii) also includes a case where the applicant "[h]as not submitted a specified document". That would appear to be an extension of the "evidential flexibility" provision which, in para 245AA(c), specifically excludes the situation where there is a "missing" document unless it falls within para 245AA(b)(i), namely it is a document missing from a "sequence" of documents submitted.

23. In this case, the appellant's legal representative does not appear to have argued before Judge Walters that para D(b)(ii) applied such that the ECO should have exercised his discretion to seek further specified documentation from the appellant. That formed no part of the argument set out in the appellant's "grounds of appeal" or "amended grounds of appeal" prepared by his legal representative.

24. In any event, it does not seem to us that, if it had been relied upon, it was an argument that should succeed. Before the judge, the "missing" documentation was still not produced. It is difficult to contemplate that the ECO could be found to have irrationally or otherwise unlawfully failed to seek documentation from the appellant

when there was nothing to support its existence either then or, indeed, by the time of the appeal to the First-tier Tribunal.

25. In any event, that is not the basis upon which Judge Walters reached his conclusion in para 37. He did not find that the ECO had, on some basis, failed to comply with the "evidential flexibility" requirement in para D(b)(ii). Instead, he found in the appellant's favour on the basis that the ECO should have "allow[ed] the appeal" even without the specified documents. For the reasons we have already given, that was an error of law and the judge's conclusion in para 37 cannot stand.

26. The appeal was of course, limited to Art 8 and, therefore, his conclusion in para 37 could not found his conclusion in para 42 that a breach of Art 8 was established because the ECO's decision was not "in accordance with the immigration law".

27. We have considerable difficulty, in any event, in accepting that simply because a decision (if this be the established case) was not in accordance with the Immigration Rules, that necessarily means that a breach of Art 8 has been established because under Art 8.2 it cannot be shown that the decision was "in accordance with the law", including here the Immigration Rules. That, in our judgment, runs counter to the more limited scope given to the phrase "in accordance with the law" and, in other Articles in the Convention to prescribed "by law", recognised by the Strasbourg Court. Those words look rather to whether the "law" is not arbitrary, accessible and foreseeable in its application (see Sunday Times v United Kingdom (1970) 2 EHRR 245). That approach has been applied domestically in the UK (see e.g. R (Gillan) v Metropolitan Police Commissioner [2006] UKHL 12, in particular at [34]). In our judgment, even if the ECO's decision was not in accordance with the Immigration Rules, it did not obviate the need to determine whether the decision was a disproportionate interference with the appellant's family life.

28. In that context, it is clear to us that the appellant could not, and cannot, succeed under Art 8 in establishing that any interference with his family life with the sponsor is disproportionate. There is nothing inherently unlawful in requiring the appellant to establish that he meets the financial requirements in the Rules, on the basis of his sponsor's self-employed income, by requiring the production of the specified documents. They were not, and at least in the case of the annual self-assessment tax return to the HMRC, have still not been produced. In our judgment, there is nothing disproportionate in requiring the appellant to make a fresh application, relying on the specified documents required under Appendix FM-SE. There would, inevitably, be a continuing separation between the sponsor and appellant but that has effectively been ongoing since their marriage in 2015. Whilst we recognise the potential distress to both the appellant and sponsor, and indeed the sponsor was distressed before us, that in itself is not in our view sufficient to establish a breach of the appellant's human rights to respect for his family life in the absence of proof, as required under the Rules, that he meets the financial requirements.

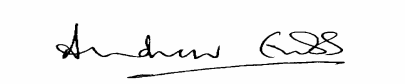
Decision

29. For all these reasons, therefore, we conclude that the judge materially erred in law in allowing the appellant's appeal under Art 8 of the ECHR.

30. We re-make the decision dismissing the appellant's appeal under Art 8.

31. As we indicated to the sponsor at the hearing, the proper course is for the appellant to make a fresh application submitting the required documentation. We see no reason why, and Mr Richards acknowledged this before us, the ECO should go behind Judge Walters' clear finding, having considered all the evidence including the sponsor's oral evidence, that the relationship between the appellant and sponsor is a "genuine and subsisting" one.

Signed



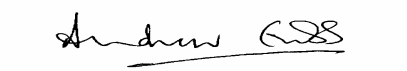
A Grubb
Judge of the Upper Tribunal

6, April 2018

TO THE RESPONDENT
FEE AWARD

As we have dismissed the appellant's appeal, no fee award is payable.

Signed



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