Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14361/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 March 2018	**On 29 March 2018**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR BABATUNDE OPEYEMI ODUNSI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr J Plowright, instructed by Perera & Co Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of the First-tier Tribunal allowing the appeal of Mr Odunsi against the decision of the Entry Clearance Officer refusing his application for entry clearance to the United Kingdom as a partner under Appendix FM of HC 395.

2. The appellant, as I will refer to Mr Odunsi as he was before the judge though of course he is technically now the respondent and I will hereafter refer to the Entry Clearance Officer as the respondent has a somewhat complicated immigration history and I will take that from the Counsel's chronology set out in the Rule 24 response. He initially came to the United Kingdom as a visitor in 2005 and

overstayed. In 2006 he attempted to open a bank account with a counterfeit British passport, was removed from the United Kingdom on 1 August 2006, then returned as a visitor having been granted entry clearance on 29 November 2006 to 29 November 2008. When he attempted to re-enter the United Kingdom in 2008 he was told there was an outstanding prosecution and when he attempted to open a bank account in 2006 using the counterfeit British passport he was prosecuted, convicted and sentenced to six months' imprisonment and subsequently removed. He married the sponsor, Mrs Showunmi, in September 2015 and made the application for entry clearance a couple of months later. He was refused under paragraph 320(11) of the Immigration Rules in relation to the offence that he had committed and also on the basis that the sponsor was not present and settled in the United Kingdom or being admitted for settlement on the basis that the relationship was not genuine and subsisting and that he had not provided a recent letter of employment or his sponsor's P60. So those were the matters that the judge had to consider and the judge concluded that the claim succeeded on the basis that the relationship was a genuine one. He noted that the refusal under paragraph 320(11) is discretionary and said this:

> "I also note that the aggravating features in this case that the appellant attempted to open a bank account using a fake British passport in 2006 is not in my view sufficiently aggravating such as to justify refusal taking into account all the circumstances. This was not a case of violence, it was not a recent offence, it was an offence that took place some 10 years ago and the appellant had been punished by a short term of imprisonment and therefore in my view although there is no excuse for the appellant to have committed that offence and he admits this in his witness statement, nevertheless is not sufficiently aggravating in the circumstances of this case generally to justify refusal."

3. As regards the sponsor's earnings he concluded as well as there being sufficient to show this was a genuine marriage and one subsisting and entered into on the basis of love and affection, he noted a letter from the sponsor's employer in which it had been said that she was working at the relevant time for Yarrow Housing Limited. There are references to that in the bundle and moving on to work for Croydon Children's Services and he took into account documentation in relation to that. He says that the appellant's, it must be of course the sponsor's P60s for 2016, 2015, 2013 and 2012 were contained in the respondent's, a mistake there because as she made clear in her oral evidence she had not provided the P60 for April 2015 and she had not thought it was necessary to include that and he allowed the appeal under Article 8 on the basis that the appellant met the requirements of the Immigration Rules. That was a weighty factor to take into account when considering proportionality with regard to the discretionary refusal under paragraph 320(11).

4. There are three grounds of challenge to this decision and I should say I found very helpful and objective the submissions by both representatives in this case and I am grateful to them both. The first point is that permission was granted on all grounds by First-tier Tribunal Judge Holmes. The first ground of challenge was with regard to Appendix FM-SE and it was said that no reasons had been given for why the

requirements of that section of the Rules had been met. There is secondly a challenge to the findings about the relationship being genuine and subsisting and thirdly, in relation to the paragraph 322(11) the findings of the judge and the date of the offence. It was said that the offence was in 2008 and therefore not over ten years ago.

5. Turning to the first of these it is necessary to look at the reasons for refusal which were in fact quite brief in this regard. The decision maker said, "you have not provided a recent letter of employment or your sponsor's P60, you have therefore not provided all the required specified evidence". Looking at the matter first, the P60, it is clear from the wording of the Rule that a P60 may also be submitted in respect of paid employment in the United Kingdom and is not required to be and therefore the absence of the P60 could not in my judgment be said to be fatal and the judge's mistake in relation to that is therefore also not fatal. It is clear that the employment with Yarrow Housing Limited rather than Croydon Council is the relevant employment to be taken into account and in this regard we have a letter from Yarrow Housing Limited of 26 July 2016 which sets out the details of the sponsor's employment. She has been employed on a permanent full-time basis with them since 7 February 2005 and refers to her earnings and the additional income she has. Although we spent a good deal of time on the mathematics of this it appeared that the figures ultimately fell slightly short of the £18,600 required under the Rules. That was not, as was emphasised by Mr Plowright and accepted by Ms Everett, an issue of concern to the decision maker and therefore in the end the point is an academic one and it seems to me that the appellant had provided evidence of a kind sufficient to satisfy this requirement of the Rules. It was not evidence that was before the decision maker but it was something the judge was entitled to take into account and therefore the first ground of challenge falls away on the basis that the only document that was mandatory under the Rules was a document that had been provided by the appellant.

6. The second issue then is that of the genuineness and subsistence of the relationship. It is right, I think as Ms Everett says, that this is not the clearest of determinations but that being said there is a good deal of consideration of the relationship in this case. The judge set out in some detail the sponsor's evidence and also noted evidence from the appellant's sister as to the relationship. There are numerous other letters from family members including from the appellant's mother confirming the nature and strength of the relationship and it seems to me that it was properly open to the judge to find that the relationship was genuine and subsisting on that basis.

7. The final issue is the refusal under paragraph 320(11) and this concerns really what was said by the judge, in particular at paragraph 36, and I have set that out already. It is perhaps not a view that would have been taken by every judge but I think it was a view that was open to the judge to take and the challenge to that is in my view a matter of disagreement only. I should say also that as was accepted by Ms Everett the offence was in fact committed in 2006 as the judge said. The grounds got that wrong, it was a conviction that occurred in 2008 after he had returned to the United Kingdom so the essence of the point there falls away and as I say I think the judge was entitled to conclude as he did about 320(11) at paragraph 36 in particular and

therefore the challenge as set out in the grounds is not made out and the decision of the judge allowing this appeal therefore stands.

8. No anonymity direction is made.

Signed Date

Upper Tribunal Judge Allen