Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01158/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th July 2019	**On 14th August 2019**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

MRS VICTORIA ADESOLA OLANUBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Corben, instructed by Wimbledon Solicitors (Merton Rd)
For the Respondent: Mr Bramble, Home Office Presenting Officer

DECISION AND REASONS

The appellant is a national of Nigeria who was born on 1st October 1960. She appeals against a decision which was issued by First-tier Tribunal Judge Plumptre on 14th March 2019. Permission to appeal was initially refused by Judge Saffer in the First-tier Tribunal but was granted by Upper Tribunal Judge Eshun in light of the unusual history of this case about which it is necessary to say a little at this stage.

The application which was made to the Entry Clearance Officer was an application under paragraph 352A of the Immigration Rules; that is, an

application for entry clearance as the spouse of a recognised refugee. The application was refused by the Entry Clearance Officer and the decision was maintained by an Entry Clearance Manager on the basis that a valid TB certificate had not been produced and on the basis that the sponsor was not in fact a recognised refugee in the United Kingdom.

An appeal was lodged and efforts were made to clarify the status of the sponsor, Mr Olanubi. It transpired as a result of a response which was received to a Pre-Action Protocol letter lodged by the appellant's solicitors that Mr Olanubi was not in fact a recognised refugee in the United Kingdom. Instead, Mr Olanubi had been granted indefinite leave to remain many years ago, seemingly on compassionate grounds and potentially, although this is not entirely clear, under the Regularisation of Overstayers Scheme, which was in operation from around 1997. That clarification of his status was, I am told by Mr Corben, only made clear shortly before the first listing of this appeal before the First-tier Tribunal. That listing was on 7th December 2018 at Hatton Cross before Judge Gandhi. No application was made to adjourn that hearing and Mr Corben appeared before Judge Gandhi on that date, when the respondent was represented by a Presenting Officer called Miss Madhovi.

Mr Corben explained to Judge Gandhi that it was his intention to pursue the appeal on the basis that the appellant in fact met the requirements of Appendix FM for entry clearance as the spouse of a settled person because, although Mr Olanubi was not a recognised refugee, it was common ground between the parties at that stage that he did have indefinite leave to remain in the United Kingdom.

An argument was then erected by Miss Madhovi that the appellant's entitlement under Appendix FM was a new matter as defined in Section 85A of the Nationality, Immigration and Asylum Act 2002 and the Record of Proceedings before Judge Gandhi shows that extensive argument was directed towards that question, both on the part of Miss Madhovi and on the part of Mr Corben. Having heard the competing submissions, Judge Gandhi came to the conclusion that the Upper Tribunal's decision in **Mahmud [2018] Imm AR 264** did not prevent the appellant relying upon his entitlement under Appendix FM in support of his application on human rights grounds before the First-tier Tribunal.

An application was made at that point by Mr Corben for an adjournment so that the appellant could obtain an English language certificate to show that she satisfied the English language requirement under Appendix FM. I should record also that following Judge Gandhi's ruling it was confirmed by Miss Madhovi, the Presenting Officer, that as far as she could see the only remaining issue which needed to be satisfied under Appendix FM of the Immigration Rules was that to which Mr Corben directed his application for an adjournment. In other words, the Presenting Officer's stance was that the outstanding requirement under the Rules was English language, and English language only.

So it was that the appeal was adjourned and on 8th February 2019 an English language certificate obtained from the British Council in Nigeria was filed with

the Tribunal in preparation for the appeal, which was due to resume on 20th February 2019. The appeal did indeed resume on that date, when it came before Judge Plumptre. Before Judge Plumptre, Mr Corben appeared for the appellant and no Home Office Presenting Officer appeared for the respondent. Matters appear at this stage to have gone somewhat awry. That, to my mind, is because the ex tempore ruling which was given by Judge Gandhi was not recorded in writing and was not the subject of any directions which were issued by the Tribunal thereafter.

The difficulty which arose at the start of the hearing before Judge Plumptre was that there was no consideration of the issues which arose under Appendix FM although it appears to have been understood by Judge Plumptre that Appendix FM was indeed to be her focus. In what is on any view a comprehensively reasoned decision Judge Plumptre made findings which were favourable to the appellant in all but one respect. That respect was that she was not satisfied, having considered the oral and documentary evidence before her, that the relationship between the appellant and the sponsor was a genuine and subsisting relationship such as to qualify under Appendix FM.

As contended in the grounds of appeal which were filed before the First-tier and renewed before the Upper Tribunal, the clear difficulty with that finding is, as Mr Bramble now accepts, that Judge Plumptre did not put Mr Corben or the sponsor on notice in any way that she was to explore the question of whether or not the relationship was genuine and subsisting. As Mr Corben has quite properly noted before me today in submissions, there was no opportunity for either oral or documentary evidence to be directed towards addressing that concern on the part of the judge. As a result, it is accepted by Mr Bramble, and rightly so, that the finding that the relationship was not genuine and subsisting was a finding which was reached in a procedurally improper way by Judge Plumptre. I agree with that concession although in light of the history of this appeal Judge Plumptre's error was potentially understandable, particularly where the respondent was unrepresented before her so as to clarify the issues which remained in dispute.

As a result of that conclusion the proper course is for Judge Plumptre's decision to be set aside insofar as it contains a single conclusion which is adverse to the appellant. I see no reason to remit the appeal to the First-tier Tribunal so that that matter can be reconsidered by a different Judge of the First-tier Tribunal and I reach that conclusion because in response to the concern expressed by Judge Plumptre the appellant's solicitors have filed and served a bundle under cover of letter dated 16th July 2019 which contains a raft of evidence directed to show that the relationship between the sponsor and the appellant is, contrary to Judge Plumptre's concern, very much a genuine and subsisting relationship.

The sponsor has attended the hearing today. He has made an additional statement in support of the relationship between him and the appellant. Offered the opportunity to cross-examine the sponsor about that statement and about the supporting material exhibited to it, Mr Bramble has declined the opportunity and, again, if I may say so, rightly so. The evidence contained in the supplementary bundle shows entirely clearly that the relationship between

the sponsor and the appellant is a genuine and subsisting one and has been for many years and I am able to find accordingly. Having done so and having considered the positive findings made by Judge Plumptre in relation to all of the remaining requirements under Appendix FM, I conclude, and Mr Bramble does not object to me drawing this conclusion, that the appellant satisfies the requirements for entry clearance as a spouse and the appeal is allowed on Article 8 grounds accordingly.

Notice of Decision

The decision of the First-tier Tribunal is set aside. I remake the decision on the appeal, which is allowed on Article 8 ECHR grounds.

No anonymity direction is made.

Upper Tribunal Judge M J Blundell

6 August 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. The respondent reached the correct conclusion on the application which was presented to her.

Upper Tribunal Judge M J Blundell

6 August 2019