



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/05647/2013

THE IMMIGRATION ACTS

Heard at Field House
On 28th August 2014

Determination Promulgated
On 5th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MRS OLAJUMOKE TOLU AKOMOLADE
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - LAGOS

Respondent

Representation:

For the Appellant: No representation

For the Respondent: Mr Deller – Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by Mrs Olajumoke Tolu Akomalade, a citizen of Nigeria born 2nd May 1982. She appeals against the decision of the Respondent made on 14th January 2013 to refuse entry clearance as a partner under Appendix FM of the Immigration Rules. The Appellant appealed against that refusal and the appeal was heard by First-tier Tribunal Judge Herbert on 14th February 2014. He allowed the appeal

under Article 8 ECHR, relying on the decision in **MM, R (On the Application of) v The Secretary of State for the Home Department [2013] EWHC 1900**. Permission to appeal was granted to the Secretary of State and on 5th June 2014, having heard submissions, I found that there was a material error of law in the determination of Judge Herbert and I set it aside with no preserved findings of fact.

2. The Entry Clearance Officer (ECO) refused the application because he was not satisfied that the Appellant meets the requirements of the Immigration Rules. He noted confusion about the date the Appellant and Sponsor met and that it seems from the marriage Certificate that although the Appellant had said that they were married on 15th December 2012, it was actually 15th December 2011. No evidence of phone contact was provided and only three instances of electronic communication. The ECO was not therefore satisfied that the relationship is genuine and subsisting or that the couple intend to live together permanently in the UK. The ECO also refused the application on financial grounds because although the Appellant had said that the Sponsor earns £25,000 per annum, the P60 she had submitted for his earnings for the tax year 2011 to 2012 showed a sum of only £12,014.78. In addition the Appellant had not submitted all the documents required under Appendix FM-SE of the Rules to confirm his financial circumstances.
3. The Sponsor, Mr Saidu, appeared at the hearing. He had submitted additional documentation in the days prior to the hearing but the Respondent had not received this and some time was given to Mr Deller to consider it. Among the documents was the Sponsor's P60 for the year to April 2014 which showed income from self-employment. The P60 up to April 2013 was also produced and it too showed a sum (of around £6,500) from self-employment. The Sponsor had written a letter expressing his disappointment at the fact that his appeal had been allowed and then overturned, saying that he had provided all the necessary evidence to the ECO and to Judge Herbert at the hearing before him. He said that he does meet the financial requirements and that he does not understand why his appeal has been dismissed.
4. I asked Mr Saidu if evidence of his earnings from self-employment as a caterer had been before the ECO. He said that it had not because he had only really begun to build up that business after he had completed the application. He agreed that there was no mention of it in the application form. He had provided some other documents relative to his earnings and financial situation, most of which had not been before the ECO and some of which post-dated the decision.
5. Judge Herbert had found that the marriage is genuine and subsisting and I have no issue with that finding. I agree that the Appellant has provided sufficient evidence to show that her marriage to the Sponsor is a genuine and subsisting one.
6. The only issue therefore is that of the Sponsor's earnings and the question of whether he meets the minimum earnings requirement of £18,600. It seems to be that at the date of the hearing before me today he did meet that threshold. Unfortunately he had never consulted a solicitor and was not represented and did not appreciate the

complexity of the requirements set out in Appendix FM and in particular of Appendix FM-SE.

7. Both Mr Deller and I explained to the Sponsor that the relevant date in this case is the date of the decision. It is clear that the P60 for the year to 6th April 2013 could not have been with the ECO in January 2013 when he made the decision because it would not have been issued at that time and the Sponsor in any event conceded that the business was not up and running when the application was made and determined. There was therefore no evidence relative to the date of decision that the Appellant met the requirements of the Rules and the appeal must therefore fail.
8. It was also explained to the Sponsor why Judge Herbert had allowed the appeal on human rights grounds and again I made it clear to him that I would not be able in his case to find that refusal of entry clearance to his wife would amount to a disproportionate interference with their family life. It is clear that Judge Herbert had made up his mind that he was going to follow the decision of Justice Blake in **MM** and as a result of that he really did not give proper consideration to the question of whether or not the Appellant could meet the requirement that he provide evidence of earnings of at least £18,600 per annum. He did not address the issue of documentary evidence and so the Appellant was unaware that he had failed to comply with Appendix FM-SE. The Appellant therefore clearly found it difficult to understand why he had not been advised at the hearing before the First-tier Tribunal that he had not provided the necessary documentation. I gave the Appellant some details of Appendix FM-SE relative to both employment and self-employment and made it clear to him that I could not allow the appeal and that the best solution would be for him to submit a fresh application enclosing all the required documentation as soon as practicably possible.
9. I would hope that a fresh application can be dealt with as promptly as possible.

Decision

The appeal is dismissed.

No anonymity direction is made.

Signed

Date: 5th September 2014

N A Baird
Deputy Upper Tribunal Judge