IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19475/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 October 2015	**On 21 October 2015**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MRS DIANA AKOSUA YEBOAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER -ACCRA

Respondent

Representation:
For the Appellant: No representation
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is an appeal against Judge of the First-tier Tribunal Herlihy who, in a determination promulgated on 15 May 2015, dismissed the appellant's appeal against a decision by the Entry Clearance Officer to refuse to grant her entry clearance to the United Kingdom as the spouse of Mr C. Boateng, her husband. The appellant is a national of Ghana and her date of birth is 22 February 1981. She wished to join her partner in the United Kingdom. They were married on 31 December 2011. The appellant made an

application on 22 July 2013 to enter the UK under to Appendix FM and Appendix FM-SE of the Immigration Rules. This application was refused on 17 September 2013.

The refusal of entry clearance

2. The basis of the refusal was threefold. The Entry Clearance Officer was not satisfied that the relationship between the appellant and her partner was genuine and subsisting. Secondly, the Entry Clearance Officer was not satisfied that the appropriate financial evidence had been provided by the appellant. Reference was made in the Notice of Decision to bank accounts that had been provided covering the period from 13 September 2012 to 12 October 2012, then from 13 December 2012 to 11 January 2013 and then from 22 May 2013 to 9 July 2013. A requirement of Appendix FM-SE was that the bank statements had to cover a period of 6 months prior to the date of the application. The appellant had not provided the six months worth of bank statements for the requisite period and the application was refused on that basis. The Entry Clearance Officer also refused the application on the basis that the proposed accommodation would not be adequate.

The decision of the First-tier Tribunal

3. The First-tier Tribunal was satisfied that the appellant and the sponsor were in a genuine and subsisting relationship and that the accommodation would be adequate. The First-tier Tribunal was not however satisfied in respect of the requirements relating to the bank statements.

4. It is clear from paragraph 6.7 of the determination that the appellant's failure to provide six months' worth of bank statements was not in dispute. The judge noted the large gap in the provision of the bank statements from 11 January 2013 to 22 May 2013. The judge noted that, at the date of the hearing, the bank statements had still not been submitted by the sponsor. It was therefore clear to the judge that the appellant failed to comply with the requirements of Appendix FM-SE.

5. At 6.8 the judge did consider an argument advanced by the Appellant's representative that the Entry Clearance Officer should have made a request to the appellant to provide the missing bank statements pursuant to paragraph D(b) of Appendix FM-SE. The judge stated however that the Entry Clearance Officer could not be expected to assume the failure to provide the bank statements had been a mere oversight or omission as it was clear that some bank statements had been provided and, in any event, the respondent made the decision to refuse the application on a number of other grounds, thereby removing any discretion to make such a request.

6. The judge then went on to consider Article 8 outside of the Immigration Rules. At 8.5 of her decision, having considered all the evidence in the round, the judge did not find the decision disproportionate as the sponsor

and the appellant shared a common heritage and culture, both hailing from Ghana. The judge noted that the families of the sponsor and the appellant lived in Ghana. The judge was of the view that the sponsor clearly had strong links with Ghana and there was no reason why family life could not continue in that country.

7. At 8.6 of her decision the judge noted that, although the appellant was now likely to meet the requirements of the Immigration Rules, that was not a matter that she could take into account as she was bound by the circumstances existing at the date of the decision, even with respect to Article 8.

The Grounds of Appeal to the Upper Tribunal and the grant of permission

8. The grounds, which appear to have been settled by the appellant without legal assistance, stated that his solicitors had not informed him of the need to provide six months' worth of bank statements prior to the application. He claimed the relevant bank statements were held by him although they were not in his actual possession at the date of the hearing. He requested a review of the First-tier Tribunal's decision.

9. The grant of leave, dated 23 July 2015, was given by PJM Hollingworth, judge of the First-tier Tribunal. Judge Hollingworth found it arguable that the First-tier Tribunal judge, "… should have approached the matter on the basis of the circumstances existing at the date of the hearing insofar as consideration of whether a breach of Article 8 was involved". The judge also stated, "A further arguable error of law arises in relation to the absence of delineation within the consideration of proportionality of the effect of the evidence adduced in relation to the Immigration Rules by way of contradistinction to the potential effect of the missing documentary evidence in relation to the Immigration Rules had that been available." It is not entirely clear to me what Judge Hollingworth meant in respect of this second arguable error of law.

The error of law hearing

10. There was no appearance by the sponsor or a representative on behalf of the appellant at the error of law hearing. The appellant and the sponsor were informed of the date, the time and the location of the appeal hearing by a Notice of Hearing sent by first class post on 23 September 2015. having satisfied myself that the appellant had been informed of the hearing I considered that it would be in the interests of justice to proceed with the hearing pursuant to rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Duffy made submissions on behalf of the Entry Clearance Officer which I duly recorded.

Discussion

11. The grounds of appeal, as distilled in the grant of permission to appeal, take issue with the judge's failure to consider Article 8 as of the date of the hearing. It is however perfectly clear from **AS (Somalia) [2009] UKHL 32** that consideration of Article 8 in respect of an out of country entry clearance appeal is to occur at the date of the decision and not the date of the hearing. The judge therefore did not fall into legal error by restricting her consideration to the factual matrix existing as of the date of the decision.

12. The next ground relates to the judge's assessment of the bank statements. The appellant knew of the Entry Clearance Officer's concerns with the bank statements, or, at the very least, ought to have known of the concerns at the date of the hearing. He was, after all, represented by counsel. It was obvious from the Notice of Decision that issue had been taken with the absence of six months' worth of bank statements prior to the date of the application, i.e. from January until June/July 2013. Those bank statements have now been provided, but they were not before the First-tier Tribunal judge. I am not satisfied that the First-tier Tribunal judge erred in law in proceeding with the appeal in circumstances where she did not have the relevant bank statements before her and where it was not reasonably foreseeable that the statements would be provided. For the reasons given by the judge at paragraph 6.8 of her decision I am satisfied that the respondent was entitled to refuse to make any request for the missing bank statements. These bank statements were clearly going to the heart of the decision and ought to have been provided at the hearing before the First-tier Tribunal. No reasonable explanation has been provided for the failure to provide the statements at the hearing.

13. I have considered the possibility that the judge may have made a mistake of fact amounting to an error of law in terms of the availability or potential availability of the bank statements. I have considered the case of **E & R [2004] EWCA Civ 49** in which the Court of Appeal considered the circumstances in which a mistake of fact can amount to an error of law.

14. At paragraph 66 the Court of Appeal indicated, firstly, that there must be a mistake as to an existing fact including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been established in the sense that it was not contentious and objectively verifiable. Thirdly, the appellant or his advisers must not have been responsible for the mistake, and, fourthly, the mistake must have played a material although not necessarily decisive part in the Tribunal's reasoning. Applying those principles to the present facts I am satisfied that the appellant stumbles at the third leg, i.e. that he or his advisers were responsible for the mistake. The appellant's explanation for the failure to provide the documents as that his solicitors had not advised him to do so. In these circumstances I am not satisfied that the judge has materially erred in law in failing to adjourn the matter to enable the bank statements to be provided or deferring her decision. I note that no adjournment application had, in any event, been made by the appellant's representative.

15. I will briefly deal with the judge's assessment of Article 8. The judge correctly identified the proper approach to consideration of Article 8 pursuant to the well-known case of **Razgar** [2004] 2 AC 368. At 8.5 the judge took account of a number of relevant factors relating to the sponsor's links and associations with Ghana. The judge gave sustainable reasons why, in her opinion, it was not unreasonable to expect the sponsor to relocate to Ghana in order to maintain her relationship. The judge noted at 8.6 that the appellant was now likely to meet the Immigration Rules but indicated that she was not entitled to take into account the evidence that had not been provided to her and that there was nothing preventing the appellant from putting in a fresh application. I am satisfied that the judge has not erred in law in her consideration of Article 8. Following the case of **SS (Congo)** [2015] EWCA Civ 387 in the Court of Appeal the appellant would have to demonstrate that there were compelling circumstances outside of the Immigration Rules requiring a grant of leave to enter under Article 8. The appellant has not demonstrated the existence of compelling circumstances and consequently the judge did not materially err in law in her article 8 assessment.

Notice of Decision

The First-tier Tribunal did not make any material error of law.

The appeal is dismissed

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Blum

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Upper Tribunal Judge Blum