UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: OA/11878/2014**

THE IMMIGRATION ACTS

Heard at Field House on	**Decision and Reasons Promulgated on**
18 January 2016	**29 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS AGATHA OZOEMENA OKENYI
NO ANONYMITY DIRECTION MADE

Respondent

Representation
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Sponsor present

DECISION AND REASONS

1. I shall refer to the appellant as "the entry clearance officer" and the respondent as "the claimant."

2. The claimant is a Nigerian national born on 10 February 1987. Her appeal against the decision of the entry clearance officer dated 10 September 2014 refusing her application for entry clearance as a spouse under Appendix Armed Forces of the Immigration Rules was dismissed by the First-tier Tribunal Judge in a decision promulgated on 6 July 2015.

3. The Judge found that she could not succeed under the Immigration Rules as she had not satisfied the English test requirement, although the other requirements had been satisfied as at the date of decision [25].

4. The Judge then went on to consider the appeal under Article 8 and allowed her appeal on human rights grounds.

5. He noted that after the date of the decision the claimant had subsequently passed the English test to the relevant standard. He stated at [33] that

> "... against this in human rights appeals on entry clearance refusals the Tribunal looks at the circumstances at the time of the decision , the view having been taken that the correct approach, where there is a post-refusal change of circumstances, is for the [claimant] to reapply. It has been open to this [claimant] to re-apply since she achieved the desired English result last November."

6. He referred again at [36] to the fact that she had now passed the English test, and that he has made positive findings as to the relationship. He stated that that assuming the same evidence were to be provided in respect of maintenance and accommodation, the claimant should succeed on any future spouse entry application under the Rules. She is free to apply immediately "... and to do so may well be the quickest way to bring this litigation to an end." [36].

7. He found that the present refusal constituted an interference with the parties' family life by preventing them from living together and potentially with the sponsor's private life, since if he relocated to Nigeria he would bring his British army career to an end.

8. He stated at [37] that in considering the issue of proportionality, he has taken into account the fact that even if the claimant were in the UK, there would be significant periods of separation when her husband is on tours of duty, so that a decision to refuse entry clearance which had the effect of continuing the present separation, might not be greatly increasing the periods of separation, although it no doubt does increase it. He also took into account the fact that the sponsor cannot relocate now without breaching military law.

9. In the circumstances, he concluded that exceptionally it would be a disproportionate interference with the family and private life of the claimant and sponsor to refuse her entry clearance. The strongest elements in the claim were the couple's well established family life, the inability of the sponsor now to return to Nigeria to enjoy family life without breaching military law, and the effect on doing so on the sponsor's private life as evinced by his career in the British Army [38]. He accordingly allowed the appeal on human rights grounds [39].

10. On 2 November 2015, First-tier Tribunal Judge Colyer granted the ECO permission to appeal against the decision, on the basis that it was

arguable that he erred by taking into account that the claimant had now passed the English language test. Moreover, he misdirected himself in failing to properly apply the principles set out in SS (Congo) [2015] EWCA Civ 387.

11. Mr Kotas submitted that the Judge materially erred in taking into account the fact that the claimant had now passed the English language test. The relevant date had been the date of decision. That was the only relevant matter. It ought to have been concluded that it was open to the claimant to make a fresh entry clearance application in which she could provide the recent English language test result.

12. He referred to [57] of SS, supra, where the Court of Appeal dealt with a submission that there appeared to be a reasonable prospect that within a period of weeks or months, they would in fact be able to satisfy the requirements of the Rules. They maintained that the secretary of state should have taken this into account when deciding whether to grant leave to enter outside the rules.

13. The Court of Appeal held that this affords very weak support for a claim for a grant of leave to enter outside the rules. The secretary of state remains entitled to enforce the Rules in the usual way, to say that the Rules have not been satisfied and that the applicant should apply again when the circumstances have indeed changed. This affects the fair balance between the interests of the individual and the public interest.

14. The Court of Appeal held that generally it is fair that the applicant should wait until the circumstances have changed so the requirements in the rules are satisfied and then apply, rather than attempting to jump the queue by asking for preferential treatment outside the rules in advance.

15. Mr Kotas also submitted that the Judge erred in his approach by finding that the sponsor could not relocate and that would result in a breach of military law. All UK based spouses and sponsors in the army are expected to carry out their duties. The Judge was thus not entitled to find that the circumstances are exceptional as that would mean all army personnel’s' circumstances are to be treated as compelling and the rule would serve no useful purpose.

16. In reply, Mr Okenyi stated that his wife is now pregnant. He had visited her in August 2015 and left her on 12 September 2015. She is staying with his parents. They are taking care of her. He maintains contact with her by telephone.

17. He said that he is supposed to be in Canada but has not been able to go. Accordingly, this has affected his work.

18. Mr Kotas informed the Tribunal that the claimant's application was made on 15 May 2014 and a decision was made on 10 September 2014. He ascertained that 13% of applicants have their applications considered

between 10 and 30 days and that 86% of the applications are considered after 60 days. Provided the circumstances relating to maintenance continue to apply, the application would most likely be considered in a reasonably short period.

Assessment

19. The First-tier Tribunal Judge found that the claimant could not satisfy the immigration rules as she could not satisfy the English test requirements. He found that all the other elements were satisfied as at the date of decision. The English test requirement had by the date of the hearing been satisfied. Those finding have not been disputed.

20. As noted, the Judge also stated at [36] that assuming the same evidence is provided relating to maintenance and accommodation, the claimant should succeed on any future spousal entry clearance application under the relevant Rules. In that respect, she was free to apply immediately "and to do so may well be the quickest way to bring this litigation to an end."

21. I have had regard to [53] of the decision in SS, where it was held that good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the secretary of state's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive rules. If an applicant says that they should be given more preferential treatment with respect to their evidence than the rules allow for, and more individualised consideration of their case, good reasons should therefore be put forward to justify that.

22. The First-tier Tribunal Judge did not consider the approach taken by the Court of Appeal in SS. He found that "exceptionally" it would be a disproportionate interference with the family and private life of the claimant and her husband to refuse her entry clearance. That was based primarily on the well established family life and the inability of the sponsor to return to Nigeria now to enjoy family life without breaching military law.

23. There is force in Mr Kotas's argument that the approach taken by the Judge with regard to the specific Rule was erroneous. UK based spouses and sponsors who are in the army, are nevertheless expected to carry out their duties. To hold that the circumstances in this case are exceptional would mean that all army personnel's' family circumstances were to be treated as exceptional and compelling with the result that the rules would serve no useful purpose.

24. In such a case, the claimant should have submitted a properly supported application for leave to enter once the requirements of the rules could be properly satisfied.

25. I find that the Judge erred in concluding that exceptionally it would be a disproportionate interference with their private and family life to refuse to grant her entry clearance. I do not find that there were compelling circumstances shown as to why the Rules should not be applied in the claimant's case in the usual way. The circumstances were not such as to entitle the claimant to "jump the queue."

26. I accordingly set aside the decision of the First-tier Tribunal and re-make it.

27. For reasons already given, I conclude that no sufficiently compelling circumstances have been advanced to justify the grant of leave on Article 8 grounds. I do not find that there would be significant interference with family life with a temporary separation. There is nothing disproportionate in the entry clearance officer's application of the rules according to the terms in her case. The statistics show that 13% of settlement visa applications from Abuja are considered within 30 days and 86% are considered within 60 days.

28. In giving effect to the need to meet the public interest which is in issue, the requirement that the claimant make an entry clearance application from abroad does not constitute a disproportionate interference with her right to respect for family life.

29. Although the entry clearance officer refused her application under paragraph 23(d) of the relevant Appendix on the basis that the relationship was not genuine and subsisting, the Judge properly found on the evidence that it was a subsisting relationship. Moreover, they intend to live together permanently as husband and wife [22]. The entry clearance manager had already conceded the issue relating to the financial requirements [23].

30. Accordingly the only outstanding issue was the English language test which had not been satisfied as at the date of the decision.

31. As this has now been satisfied, it is to be expected that her application will be considered on the basis set out within a short period following its submission.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

I substitute a fresh decision dismissing the claimant's appeal.

No anonymity direction is made.

Signed Date 28 January 2016
Deputy Upper Tribunal Judge Mailer