Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: OA/16115/2014**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision Promulgated**
On 14 March 2016	**On 8 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

HADIJAT AYOMIDE MORENIKEJI JENYO

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sarwar

For the Respondent: Mr Duffy

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Appellant is a citizen of Nigeria born on 24 May 1990 married to Oladayo Jenyo a British citizen on 6 April 2014.The Sponsor is a member of the British Armed Forces who enlisted on 7 September 2008.
3. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Alty promulgated on 22 June 2015 which dismissed the Appellant's appeal against a refusal of entry clearance to the UK as the spouse of the Sponsor.
4. The refusal which was dated 6 October 2014 was on the basis that the Appellant did not meet the requirements of Paragraph 20(b) (c) and 75 of Appendix Armed Forces of the Immigration Rules. The refusal letter gave a number of reasons:
   (a) There was insufficient evidence of a genuine and subsisting relationship and that they intended to live together permanently.
   (b) Although the Appellant states that they have been in a relationship since 9 December 2012 the Sponsor was not divorced from his previous wife until 7 January 2014.
   (c) The Sponsors evidence was that his relationship with his previous wife broke down in 2012 and they separated but that wife made a claim for indefinite leave to remain on 29 October 2013 on the basis of a subsisting marriage to the Sponsor.
   (d) The tenancy agreement did not confirm that the Sponsor had permission for the Appellant to live at his address.

<u>The ECM Review</u>

5. The Entry Clearance Manager acknowledged that the refusal letter was mistaken in asserting that the Sponsor had previously been married as it was the Appellant so the Respondent maintained the challenge as to how a relationship was started and maintained when one of them was already married; noted that the sponsr accepted he had made a mistake and that he separated from his first wife in 2013 not 2012; there was still no evidence that the parties could live together in the Sponsors accommodation; there was no breach of Article 8.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Alty ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :

   (a) Recorded the Appellants evidence at paragraph 18 which explained the apparent discrepancies in relation to their relationship and how it started.

   (b) Noted at paragraph 20 that:

   "As this is an appeal against a refusal of entry clearance, I can only consider the circumstances as they were at the date of decision. Post-decsion evidence can be considered to the limited extent that it sheds light on the circumstances as at the date of the decision and I admit such evidence to that extent."

   (c) She found that on the evidence before her the accommodation requirements were met.

   (d) Found that the eligibility requirements for members of the Armed Forces are set out at paragraph 20 of the Appendix.

   (e) Found that the Sponsor divorced his previous wife on 7 January 2014 and married the Appellant on 6 April 2014 in Nigeria.

   (f) She found that the evidence of their marriage, photographs, bank statements phone cards and mobile screen shots was insufficient evidence of the subsisting nature of their relationship and the reasons were set out at paragraph 35 of the decision onwards.

   (g) She found although the Appellant and Sponsor had met they had not spent time as a couple prior to their marriage meeting only once during the sponsors holiday in Nigeria in December 2012 not meeting again until the sponsor travelled to Nigeria in March 2014.

   (h) She found that there was little else in the evidence to indicate a relationship of real substance prior to the application.

   (i) She found the evidence as to when their relationship began and the circumstances in which it began was inconsistent between the evidence provided pre decision and post decision. She did not find the explanations for these discrepancies were adequate.

(j) She found that the circumstances and speed with which the Sponsor and Appellants relationship developed against his evidence of being 100% committed to his former wife in October 2013 was inherently unlikely.

(k) She concluded that given the inconsistencies in the evidence of the Sponsor and Appellant, the implausibility of the Sponsors account of the circumstances of the breakdown of his previous marriage and the lack of evidence of face to face contact prior to their marriage that the relationship was not genuine and subsisting and the requirements of the Rules were not met.

(l) Article 8 was not engaged as the relationship was not genuine.

(m) She dismissed the appeal on all grounds.

7. Grounds of appeal were lodged arguing that the Judge erred in considering the circumstances as at the date of application and not the date of decision and challenging her findings of fact.

8. Permission was initially refused and the application was renewed relying on the earlier grounds of appeal and additionally arguing that the Judge had failed to take into account section 85 and 85A of the Nationality Immigration and Asylum Act 2002 .

9. On 21 October 2015 Upper Tribunal Judge Jordan gave permission to appeal.

10. At the hearing I heard submissions from Mr Sarwar on behalf of the Appellant that :

(a) The Judge in paragraph 20 stated that the requirements of the Rules were to be met at the date of application but did not take into account section 85 of the 2002 Act which allowed her to take into account post decision evidence that was relevant to that decision.

(b) He relied on Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC) to argue that the Judge was permitted to rely on post decision evidence if it reflected on the circumstances of the relationship at the time of the application.

(c) The evidence that post dated the decision was material to the circumstances at the date of the application in that while she considered three money orders

that were submitted with the application she did not consider 3 others that pre dated the decision but were submitted after the application and 8 others that post dated the decision but were placed before her.

(d) The Judge stated that she would not consider the mobile screen shots of conversations as she stated they did not evidence circumstances at the time of the application. The Sponsor had his phone with him in court and had there been an issue about the date of the conversations this could have been resolved by viewing the phone.

(e) The Judge did not take into account evidence that the Sponsor had travelled to Nigeria after the date of his statement, from 12.5.2015-3.6.2015.

(f) The Judge did not take into account the wedding photographs.

11. On behalf of the Respondent Mr Duffy submitted that :

(a) The Judge was required by paragraph 20 of the Armed Forces Appendix to assess whether the Appellant met the requirements of the Rules at the date of application subject to the provisions of section 85 of the 2002 Act.

(b) It was therefore open to her to find that the Appellants and Sponsor had given contradictory evidence and therefore she did not find their evidence of their relationship was credible. As a result of this finding that the underlying relationship was not genuine the failure to look at screenshots of conversations or money transfers after the date of the application was not material to the outcome.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

13. The application the subject of appeal in this case was for entry clearance as the Spouse as a member of the UK armed forces and therefore it was governed by Appendix Armed Forces. The general eligibility requirements of the Appendix found at paragraph 20 provide:

"20. The general eligibility requirements to be met by the partner (P) of a member of HM Forces are that on the date the application is made:

…

(b) P and P's sponsor:

(iii) must intend to live together permanently; and

(c) the relationship between P and P's sponsor is genuine and subsisting."

14. The main challenge to the Judges decision is that in assessing whether the Appellant had met the evidential burden of establishing that at the time of application the Appellant and sponsor were in a genuine and subsisting relationship and intended to live together permanently she had failed to consider evidence that post-dated the date of application as she was entitled to by virtue of s85(4) of the Nationality, Immigration and Asylum Act 2002 which provides that in relation to matters to be considered in an appeal:

"[the Tribunal] may consider….any matter which it thinks relevant to the substance of the decision , including a matter arising after the date of the decision."

15. In this case that meant that the Judge was entitled to consider evidence submitted after the date of application if it shed light on whether the Appellant and sponsor were in a genuine relationship and intended to live together permanently at the date of application. I am satisfied that the Judge directed herself incorrectly in the body of her decision at paragraph 20 where she asserted that she could consider post decision evidence "*to the limited extent that it sheds light on the circumstances as at the date of that decision and I admit evidence to that extent*" which is not an accurate summary of section 85(4) as she is not concerned with the circumstances at the date of decision but rather at the date of the application. By contrast in her findings at paragraph 34 she asserted that the test she applied to the assessment of the evidence was whether the parties met the requirements of the Rules at the date of the application.

16. I therefore accept that the Judges statement of which evidence she took into account is unclear and contradictory and in practice she did not apply s 85(4). The Judge makes reference to only 3 money transfers on 3 January , 4 April and

19 May 2014 at paragraph 33 although she had before her 11 other transfers which, while they post-dated the application and decision, had they been considered may have been capable of supporting an assertion that at the time of the application the marriage was genuine.

17. I note that the Judge also in paragraph 33 refused to take into account mobile screen shots because they post-dated the application by a short period but given that they recorded conversations between parties who claimed to be in a subsisting relationship may have shed light on the relationship at the time of the application. The Judge also did not take into phone cards which she suggested were not 'conclusive that he was in touch with the Appellant' which is imposing a higher burden of proof on the Appellant than the law requires.

18. In Naz (subsisting marriage – standard of proof) Pakistan [2012] UKUT 00040 (IAC) the Tribunal held that post decision visits by a sponsor to his spouse are admissible in evidence in appeals to show that the marriage is subsisting. I accept that there was evidence before the Judge of a post decision visit . There is no reference to this visit and it is unclear whether the Judge determined that this was a matter she was not entitled to consider.

19. The failure of the First-tier Tribunal to address and determine the evidence that she was entitled to consider in determining whether the Appellant and sponsor were in a genuine relationship at the time of application constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

20. While there are other findings about credibility given the concerns about the evidential basis on which the Judge has determined this case I am satisfied that they should not stand.

21. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

22. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the failure to make clear what evidence has been taken into account in reaching the decsion.In this case none of the findings of fact are to stand and the matter will be a complete re hearing.

23. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed , before me.

24. I made the following directions for the resumed hearing:

- Hearing set for 2 hours.

Signed Date 4.4.2016

Deputy Upper Tribunal Judge Birrell