Upper Tribunal
(Immigration and Asylum Chamber **Appeal Number: OA/21578/2012**

THE IMMIGRATION ACTS

Heard at: Manchester
On: 27th January 2016

Decision & Reasons Promulgated
On: 4th February 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

MRS CHINONSO OKEOMA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ABUJA

Respondent

Representation

For the Appellant: Mr F. Okeoma, Sponsor
For the Respondent: Ms C. Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Nigeria born on the 11th September 1985. On the 1st August 2012 she applied for entry clearance as the spouse of a British citizen present and settled in the UK.

2. In the three years and five months that have elapsed since then, her application has been passed from Entry Clearance Officer[1], to Entry Clearance Manager[2], to

[1] Entry Clearance refused on the 28th September 2012
[2] Case review dated 26th April 2013

First-tier Tribunal[3], to Upper Tribunal[4], to the Court of Appeal[5] and back down again to come before me. At this stage in proceedings no one doubts that the Appellant's marriage to her sponsor Mr Okeoma is genuine and subsisting. Nor is it in issue that since the original decision she has given birth to his British child, now living with her in Nigeria. That is a long time to wait, and a very long time for a father to be separated from his child and a husband from his wife. It is therefore with much regret that I had to inform Mr Okeoma that his wife's appeal could not be allowed. I hope the reasons why are adequately explained below.

My Findings

3. When the Entry Clearance Officer refused the application three matters were in issue. The first, whether this is a genuine marriage, was resolved in the Appellant's favour by the First-tier Tribunal and that decision stands. The remaining two under the Immigration Rules were as follows:

    i) Maintenance. The Sponsor's ability to support his wife fell to be assessed with reference to paragraph E-ECP.3.1 of Appendix FM. Under this provision Mr Okeoma had to show that he earned £18,600 gross per annum, but importantly had to do so in accordance with the provisions of paragraph 2 of Appendix FM-SE. He had supplied lots of evidence about his income: 6 months of wage slips and bank statements were supplied, along with a letter from his employer. Unfortunately this letter did not, as it was required to do, set out in terms what the Sponsor's gross annual salary was. The application therefore fell to be refused with reference to Appendix FM-SE (2)(b).

    ii) English Language . The application for entry clearance was supported by an IELTS certificate which showed the Appellant to have achieved an overall band score of 6.0, but only 2.0 in Listening. She did not therefore have the required standard of English to qualify for entry clearance as a spouse.

4. In his decision Judge Blum of the First-tier Tribunal accepted the Entry Clearance Officer's case that the Appellant could not show that she had met these requirements at the date of decision. He went on to consider whether refusal of entry clearance would be an unjustifiable interference with the human rights of the Appellant and Sponsor and in particular their family life together. Judge Blum made a careful assessment of all the facts, that this was a genuine relationship and that the Sponsor had originally been a refugee who still feared returning to live in Nigeria. He accepted that the Sponsor did earn

[3] Appeal allowed by First-tier Tribunal Judge Blum on the 29th October 2013

[4] Decision of the First-tier Tribunal upheld by Upper Tribunal Judge Moulden on the 7th October 2014

[5] Consent Order sealed by Lord Justice Underhill on the 13th November 2015

enough money to support his wife and that in those circumstances the justification for refusing entry clearance, 'the economic well being of the country' was not a matter that attracted great weight. Taking all those factors into account he allowed the appeal with reference to Article 8 ECHR.

5. The Entry Clearance Officer did not accept that decision. He appealed on the ground that Article 8 should only be applied in the most exceptional of cases, since the Rules themselves reflected the right balance between the rights of the individual and the rights of the state. When the case reached the Upper Tribunal, Judge Moulden found that Judge Blum had done enough to justify his decision and upheld it.

6. The Entry Clearance Officer appealed again, this time to the Court of Appeal. Shortly after the application had been lodged the Court of Appeal handed down judgement in SS (Congo) and Ors v SSHD [2015] EWCA Civ 387, a case which dealt with exactly the same issues. In that case the Court held that government acted reasonably in setting a minimum income threshold and that they were entitled to set out lists of 'specified evidence' that applicants had to produce before their claims about their earnings could be accepted. That meant that if an application failed for some small omission – for instance the failure of an employer to spell out what the actual earnings were even if these were evident from a payslip- the appeal had to fail under the Rules. It could only be allowed under Article 8 where "good reasons" could be shown why the particular applicant was entitled to more preferential treatment than other wives and husbands applying under the same rule. Put another way, there had to be some feature of the case which was compelling. As a result of the decision in SS (Congo) those then representing the Appellant properly recognised that the decisions of Judge Moulden and Judge Blum could not stand. That was because Judge Blum had failed to identify any good reason why the Appellant in this case should be entitled to entry clearance when she had failed to meet the requirements of the Rule.

7. The Court of Appeal remitted the matter to the Upper Tribunal for that assessment to be made. There are undeniably factors in this case which compel sympathy for the Appellant. She is on her own bringing up the couple's child, Mr Okeoma is here on his own and although he has made short visits cannot return to Nigeria on a permanent basis because of his protection issues there. Mr Okeoma explained that his wife does speak very good English (this is supported by the IELTS certificate which shows that she achieved a score of 7.0) but made the mistake of taking a difficult exam on a day that she was feeling unwell as a result of her pregnancy. They have waited a long time, having been caught in the maelstrom of litigation following the introduction of the 'new rules' and challenges to it. These factors do not, even taken cumulatively, amount to good reasons why *this* Appellant should be granted entry over other applicants in Nigeria who are seeking entry to join their spouses in the UK.

8. In view of the lengthy history of this appeal the Respondent will no doubt endeavour to assess any fresh application as quickly as possible.

Decisions

9. The decision of the First-tier Tribunal, insofar as it relates to human rights, has been set aside. The decision of the First-tier Tribunal to dismiss the appeal under the immigration rules is upheld.

10. The decision in the appeal is re-made as follows:

"the appeal is dismissed on human rights grounds".

11. I was not asked to make a direction for anonymity and on the facts I see no reason to do so.

Upper Tribunal Judge Bruce
29th January 2016