



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/01881/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6th May 2014

Determination Promulgated
On 26th June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR SAMET OZATA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ISTANBUL

Respondent

Representation:

For the Appellant: Mr A Burrett (Counsel)
For the Respondent: Miss A Everett (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Stanford promulgated on 2nd January 2014, following a hearing at Taylor House on 17th December 2013. In the determination, the judge allowed the appeal of Samet Ozata.

The Respondent Secretary of State applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Turkey, who was born on 23rd February 1991. He is the husband of the Sponsor, Summeya Ozata, a person present and settled in the UK.

The Appellant's Claim

3. The Appellant's claim is that he is entitled to join his sponsoring spouse, Summeya Ozata, in the UK because he has satisfied the requirements listed in paragraph E-ECP3.2 and can point to a gross annual income of at least £18,600 on behalf of his sponsoring wife in the UK.
4. The Respondent rejected the application for two reasons. First, the Sponsor had been working at the Strood Kebab and Burger House but had left her employment in August 2012, and this was evidenced by her P45, which had been provided with the Appellant's application. The Respondent could not take into account the period that the Appellant's husband had not worked at this time. In any event, she had been paid cash in hand and the monies that she was allegedly receiving were not in her bank account. Second, the sponsoring wife had other employment, at Little Stars Day Nursery, and this showed an average income of £580 per month, although she was also paid in cash, so that this sum also was unreliable as a financial income.

The Judge's Findings

5. The judge had regard to the fact that the Sponsor, a British citizen, had met the Appellant in Turkey in 2010. She had regularly gone on holidays to Turkey. This was since her arrival in the UK in 2003 with her parents. The Appellant was a neighbour of their family. After they had met in 2010 they remained in contact by Facebook. In 2011, the Appellant asked the Sponsor to marry him. They had an engagement party in September 2011 while her family was on holiday in Turkey. When in August 2012, the family of the Sponsor went to Turkey again on a holiday, the Appellant and the Sponsor got married on 27th August 2012 the Sponsor stayed in Turkey. The Appellant applied for a visa to come to the UK. That application was refused on 27th November 2012. As it turned out, the only reason for the refusal was that the Appellant could not satisfy the financial requirements in paragraph E-ECP.3.2 of Appendix FM.
6. The judge had regard to the fact that the Sponsor produced evidence to show that the P45 was issued in error. Letters from the Sponsor's employer and from the accountant, who dealt with the employee's wages explained, that this was an error and that the Sponsor was not leaving employment. She is merely taken unpaid leave. Indeed, upon resumption of work, the Sponsor continued to be paid and wage slips issued on resumption of work confirmed the earlier employment (see paragraph 23).

7. The judge, accordingly, concluded that the Sponsor provided evidence of her earnings in the six months before the application as required by the Rules. A P45 had been included, but this was in error, and given this fact,

“It is likely that the Respondent would have been satisfied about the level of her annual income since, for the six months before the application, her earnings were evidenced as being £11,010.83. That would suggest an annual income of over £22,000, above the minimum required by the Rules” (paragraph 25).

Therefore, at the time of the application and the decision, the Sponsor’s employment was actually continuing. The Sponsor had no income during the three months of September, October, and November, because it was during this time that the Sponsor had married the Appellant, and had taken time off in order to be with him, and to support his application for leave to come to the UK (paragraph 27). The appeal was allowed.

Grounds of Application

8. The grounds of application state that the judge erred in law because the Rules required that a person in the Appellant’s position must produce specified documents covering specific periods of time which the Appellant had not done. The Sponsor had taken a three month leave of absence from her place of work (without pay) in order to spend an extended holiday in Turkey with her husband immediately following their marriage. Therefore, the Appellant could not fulfil the requirements of Appendix FM. He could not demonstrate that his wife was in receipt of income in excess of £18,600 per annum. Second, the judge had also allowed the appeal under Article 8 ECHR grounds and this too was wrong because the Appellant had been unable to show that there were “exceptional” circumstances or that the result of the decision by the Secretary of State was such as to impose “unjustifiably harsh circumstances” on the Appellant.

Submissions

9. At the hearing before me on 6th May 2014, Miss Everett, appearing on behalf of the Respondent Secretary of State, submitted that the error in this case really arose from what was said at paragraphs 25 to 26. Here the judge finds that the evidence produced by the Appellant is such that there would have been income to satisfy the £18,600 requirement under the Rules. However, given that the Sponsor had spent an extended period of leave in Turkey, it was clear that she was unable to do so, and the judge had actually found that if one deducted a quarter off the annual income, that the Sponsor had not worked, then her income was in the region of £16,500 (paragraph 26). Therefore, the Appellant could not satisfy the financial requirements.
10. For his part, Mr Burrett submitted that there was no error of law here at all. This is because the judge had proceeded in the way that he had done because he had recognised at the outset that the issuing of the P45 was done in error (see paragraphs 23 to 24), and that after return back from Istanbul to the UK, the Sponsor had

recommenced her employment and her income began to flow as usual on this basis again. If the Sponsor had not left her employment, then she continued to enjoy the earnings that she always had then. These earnings on an annual basis amount to £22,000, which was above the minimum required by the Rules (see paragraph 25). The Sponsor had got married in the three months in Turkey and that was the reason why she had taken unpaid leave. This did not mean that she was not working and it did not mean that she was not in receipt of an income.

11. In the alternative, however, the judge also allowed the appeal on the basis of the High Court judgment in MM [2013] EWHC 1900 (see paragraph 39), and the judge held that,

“The figure would be exceeded by the Sponsor if she were not spending some unpaid leave in Turkey with her husband. Her employers envisage her returning to work at the end of periods of unpaid leave when her annual income would be in the region of £22,000” (paragraph 40).

12. In reply, Miss Everett submitted that even if the Sponsor had taken off three months from work, it did not follow, as the judge suggested at paragraph 41, that it would be unjustifiably harsh for her to make a fresh application, because that was the inevitable consequence of her taking time off from work. It was not unjustifiably harsh because she would succeed next time if her income was in place.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. There are two reasons for this.
14. Firstly, as far as the Rules are concerned, the judge was entitled to find that, given that the P45 had been issued in error, and given that the Sponsor had not given up her employment, but had only taken unpaid leave to go to Turkey to get married and spend time with her husband, her usual income of £22,000 per annum was intact. The judge concluded, “It is likely that the Respondent would have been satisfied about the level of her annual income” and this was because the Sponsor had already earned in the first six months £11,010.83 (paragraph 25).
15. Second, and in any event, even if there is an error, there is no material error, because the judge then allowed the appeal equally also on the basis of Article 8 ECHR grounds. The judge took into account, as he was perfectly entitled to do, the fact that the Sponsor had “Chosen to take unpaid leave while retaining her employment. She has done this to nurture her relationship and spend time with her husband” (paragraph 37). He had regard to the fact that the Sponsor had lived in the UK for over ten years “and is a British citizen”. He found that, “She wishes to live in the United Kingdom with her husband” (paragraph 38). He also concluded that, “She has established that she has employment from which she could earn a gross income well above the minimum required by the Rules ...” (paragraph 39). The fact that the

Sponsor could earn an income that was considerably over that required by the Rules was an important factor to be placed in the balance of considerations. This the judge did do.

16. The judge had regard to **MM [2013] EWHC 1900** where consideration had been given to the Respondent Secretary of State's own interests and observed that she had set in Rules "A figure at a level which she regards as in the public interest to require" but this was a figure which "Would be exceeded by the Sponsor if she were not spending some unpaid leave in Turkey with her husband" (paragraph 40). In these circumstances the judge was entirely correct to conclude in the way that he did, especially to find that it would be unreasonable to require a fresh application to be made (paragraph 41). The test is whether the decision issued by the judge was irrational or perverse. It was not.

Decision

17. There is no material error of law in the original judge's decision. The determination shall stand.
18. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

24th June 2014