



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/12567/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On: 29 January 2016

Decision & Reasons Promulgated  
On: 3 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

THE ENTRY CLEARANCE OFFICER (WARSAW)

Appellant

and

MRS BUKURIE JAHIRI-KLIMENTI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr Faton Klimenti (sponsor)

**DETERMINATION AND REASONS**

1. The Entry Clearance Officer (ECO) appeals the decision of First-tier Tribunal Judge J S Law, promulgated on 21 April 2015, allowing an appeal against a decision to refuse the respondent leave to enter the United Kingdom as a partner.

**Background**

2. The respondent applied for leave to enter the United Kingdom as the partner of Faton Klimenti on 25 March 2013. A notification dated 28 November 2013

informed the respondent that her application fell to be refused because she did not meet the income threshold required under Appendix FM and/or the evidential requirements under Appendix FM-SE were not met. Consequently, her application had been put on hold pending the case of MM & Others.

3. The said application was refused on 18 August 2014 under paragraph EC-P.1.1 because the sponsor did not meet the income threshold of £18,600. It is noted that following the ECO's request for additional information, the respondent sent 6 months worth of pay slips and bank statements. The total income shown on the pay slips was £6,696.88, which equated to an annual income of £13,393.76. It was not considered that there were any exceptional circumstances, which would warrant a grant of entry clearance outside the Rules.
4. In appealing the ECO's decision, on 4 October 2014, the respondent indicated that she understood the decision to refuse given the sponsor's income at the time of the original application. Nonetheless, it was said that the sponsor had changed his employer since the decision and was now working for one employer for 40 hours per week at a rate of £7.90 per hour and for a second employer for 14 hours per week at a rate of £6.31 per hour. This was said to amount to a total annual income of £21,025.68. Further documentary evidence was enclosed including pay slips. An indication was given that further documents would follow.
5. An Entry Clearance Manager (ECM) reviewed the decision to refuse entry on 12 December 2014, however the original decision was maintained. The ECM commented on the additional evidence submitted with the appeal and noted that the sponsor's employment began 17 months after the original application; that he had been employed in both these temporary jobs for around 4 months and it was unclear what his total annual income was. It was said that the respondent should apply again, providing the required evidence. A request was made that the tribunal not take into consideration any additional evidence provided at the appeal, as such evidence could be used to support a fresh application.
6. The respondent requested a paper hearing of her appeal. The FTTJ allowed the appeal on the basis that the evidence before him of continuing employment showed that the Rules were met. The appeal was also allowed on human rights grounds owing to the delay in the appeal being heard.

#### Error of law

7. The appeal was received on 28 May 2015, whereas the FTTJ's decision was promulgated on 21 April 2015. The application conceded that it had been made 22 days out of time owing to "*administrative error resulting in the allocation of the case to a caseworker who was not experienced in this type of application.*"
8. The single ground of challenge was that the FTTJ had materially misdirected himself in accepting evidence, which post-dated the application. While it was accepted that the FTTJ might look at evidence up to the date of the decision, this did not alter the substance of the Rules, which required the income to have been in

place for a period of twelve months, whereas the second employment had been held for only four months. Reference was made to Appendix FM-SE 13. Criticism was also made of the FTTJ's decision to allow the appeal under Article 8 ECHR, absent findings of exceptional circumstances.

9. FTTJ Macdonald, who refused permission on 27 July 2015, did so on the basis of the "*unexplained*" and "*significant*" lateness of the application.
10. Upper Tribunal Judge Kopieczek noted that FTTJ Macdonald had refused the application as opposed to not admitting it. Given that the application to the Upper Tribunal was in time, there was no basis in the Tribunal Procedure (Upper Tribunal) Rules 2008 for refusing to admit the application to the Upper Tribunal where it has been refused under the First-tier Tribunal Rules rather than not being admitted. With regard to the grounds, it was said to be arguable that the FTTJ erred in taking into account evidence, which post-dated the date of decision, both in relation to the Rules and Article 8 ECHR.
11. This appeal was initially listed for a hearing on 18 December 2015. The sponsor did not attend and nor was he represented. Instead, a friend of the sponsor, Mr Hayes, attended, intending to represent him. As that friend was not legally qualified or registered with the OISC, I adjourned the appeal in order for the sponsor to attend on the next occasion.
12. This matter came back before me on 29 January 2016. The sponsor attended the hearing along with Mr Hayes. After explaining the procedure to the sponsor, in English, which he spoke fluently, I heard submissions from Mr Tufan and the sponsor, in turn.
13. Mr Tufan argued, in simple terms for the sponsor's benefit, that there was a requirement for specified evidence in the form of 6 months' pay slips, bank statements showing that pay and a letter from an employer to be submitted with the visa application. While the FTTJ had directed himself appropriately at [6] of the decision, he had erred in taking into account new evidence from the sponsor of a second, part-time job, in finding that the financial requirements were met. At [13] the FTTJ had noted a change of circumstances since the application was made. Such compliance had to be shown at the time of the application. The remedy was for a fresh application to be made. Mr Tufan's view was that were an application for entry to be made now, the respondent would succeed.
14. With regard to Article 8 ECHR, Mr Tufan, relied on SS (Congo) and submitted that the FTTJ identified no compelling circumstances which justified the respondent being granted entry clearance outside the Immigration Rules.
15. Mr Klimenti told me that at the time of the application for his wife's entry to the United Kingdom he was earning the minimum wage and that his income was well below the figure of £18,600. In September 2014, they received the ECO's refusal decision and he subsequently found two new jobs. Currently, he had only one job which paid him around £19,000 a year and he had sent evidence of his latest

earnings to the Upper Tribunal after learning of the ECO's appeal.

16. I invited Mr Klimenti to tell me of any reasons why he thought his wife ought to be granted entry clearance if the Immigration Rules were not met. He explained that it had been hard for him to find employment, which paid the £18,600 required. He had been working for the minimum wage for a long time. He was of the view that the minimum income threshold was unfair. If his wife was allowed to come to the United Kingdom she could work as well. It was hard for him with only one person working. The visa application fee was too high as well and for this reason he did not want to have to apply again. He stressed that he had lived in the United Kingdom for 24 years, paying taxes throughout.

#### Decision on error of law

17. After hearing submissions, I announced that I had found a material error of law in the FTTJ's decision. The FTTJ recognized at [6] of the decision and reasons that he was constrained by Section 85A of the 2002 Act and might only consider circumstances appertaining at the date of the decision. However, at [11], the FTTJ notes that there "*was now evidence that his employment had changed... evidence of these employments were produced in the bundle and were relied upon for their appeal.*" The FTTJ relies on the fact that the ECM commented on this new evidence of employment in the review. However, it is clear from the review, that the ECM has not accepted that the new employment evidence is capable of satisfying the Rules at the date of the application, in that the following is said "*I would note that the sponsors' current employment began 17 months after the original application*" and that he had been so employed for only 4 months at the time of the ECM's review. Furthermore Appendix FM-SE requires proof of income to be provided for a period of twelve months, where the employment has lasted less than six months prior to the date of application. Evidence of 12 months income, prior to the application, decision or review was not before the ECO/ECM. Accordingly, the FTTJ erred in finding that the requirements of the Rules were met either at the date of application, the decision or the ECM's review.
18. In a short paragraph, [14], the FTTJ also allowed the appeal under Article 8 ECHR, mentioning the delay, which had enabled the sponsor to meet the minimum income requirements. As indicated above, that income level was reached only after the ECO's decision but the requirements of Appendix FM-SE were not met. The FTTJ did not carry out an adequate proportionality assessment or identify any compelling circumstances justifying allowing the appeal on this basis.

19. The decision of the FTTJ is therefore set aside.

#### Decision on remaking

20. I decided to immediately remake the decision, however neither the sponsor nor Mr Tufan had much more to say by way of submissions.
21. The sponsor accepted that between the date of application and ECO's decision, he

was unable to meet the minimum income threshold. It was only after the decision was made that he was able to obtain two new sources of income, which combined to give him a high enough income, averaged out over the following year, that is from September 2014 until September 2015. Accordingly, the appeal is dismissed under the Immigration Rules.

22. With regard to Article 8 ECHR, I have had regard to what was said in SS (Congo) & Ors at [32];

“Accordingly, a court or tribunal is required to give the new Rules “greater weight than as merely as a starting point for the consideration of the proportionality of an interference with Article 8 rights.”

23. In addition, in view of the sponsor’s submission on the unfairness of the Rules, I have considered what was held in MM v others at [151], as follows;

“... the Secretary of State’s judgment cannot be impugned. She has discharged the burden of demonstrating that the interference was both the minimum necessary and strikes a fair balance between the interests of the groups concerned and the community in general. Individuals will have different views on what constitutes the minimum income requirements needed to accomplish the stated policy aims. In my judgment it is not the court’s job to impose its own view unless, objectively judged, the levels chosen are to be characterised as irrational, or inherently unjust or inherently unfair. In my view they cannot be. “

24. Given the delay in this case, I therefore consider the respondent’s human rights claim in line with the test in Razgar. Clearly, they have established a family life. The respondent’s decision does amount to interference in the proposed family life being carried out in the United Kingdom. I accept that it is not reasonable to expect the sponsor to relocate to Kosovo, when he has resided in the United Kingdom for 24 years and is working hard to support his wife. Consequently the only realistic venue for this family to be reunited is the United Kingdom. It is not in question that the ECO’s decision was in accordance with the law. I also find that it was necessary, in that the interference was in pursuit of one of the legitimate aims set out in Article 8(2).

25. In determining the proportionality of the ECO’s decision, I have had regard to the public interest considerations set out in section 117B of the 2002 Act. In terms of section 117B(1), I have attached weight to the fact that the respondent could not meet the requirements of the Rules at the relevant time in considering that the maintenance of effective immigration controls is in the public interest. The appellant has produced an English language certificate with her application and therefore I accept that she is able to speak English.

26. With regard to financial independence in (3), I have attached significant weight to the fact that the financial requirements of the Rules were not met at the time of the application, decision or ECM’s review.

27. In MM & Ors it was held that “*appropriate weight had to be given to the judgment of the Secretary of State*” in relation to the level of the income requirements.

28. The respondent has applied to come to the United Kingdom in order to take up family life. The family life which was established following the marriage took place at a time when it was known that the respondent did not have a right to come here, that is under conditions of "*known precariousness*" as said in [37] of SS (Congo) & Ors. The sponsor would also have been aware that, while earning the minimum wage he was not in a position to maintain the respondent. I take into consideration the fact that Article 8 does not confer an automatic right of entry and that the said Article imposes no general obligation on a state to facilitate the choice made by a couple to reside in it. I accept that family life could not reasonably take place elsewhere owing to the sponsor's employment, however the fact that family life involving the respondent could not realistically be carried out elsewhere does not entitle her to be granted leave to enter the United Kingdom.
29. Considering all the relevant issues, I do not accept that the interests of the parties in this case are of such a pressing nature that a good claim for leave to enter can be established outside the Rules.
30. I therefore consider that the obstacles to the family being reunited in the United Kingdom amount to no more than mere difficulties which resulted from their choice to marry at a time when the sponsor could not financially maintain the respondent in accordance with the Immigration Rules. I therefore conclude that the refusal of entry to the appellant was not a disproportionate decision.
31. The decision of the FTTJ is set aside and I substitute a fresh decision to dismiss the appeal against the refusal of her application under Appendix FM and on human rights grounds.

#### Decision

- (1) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law
- (2) The decision of the FTTJ to allow the appeal is set aside.
- (3) I substitute a fresh decision to dismiss the respondent's appeal against the refusal of her application for entry clearance to the United Kingdom as a partner both under Appendix FM and Article 8 ECHR.

No application for anonymity was made and I could see no reason to make such a direction.

Signed

Date: 30 January 2016

Deputy Upper Tribunal Judge Kamara