



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06015/2015

THE IMMIGRATION ACTS

Heard at Field House
On 17 May 2017

Decision & Reasons Promulgated
On 21 June 2017

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MS MILICA GACIC

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Blair, Counsel instructed by David Tang & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Serbia, born in 1980. She made an application for leave to remain as a spouse, but that application was refused in a decision dated 17 September 2015.

2. Her appeal against that decision came before First-tier Tribunal Judge Carroll (“the FtJ”) on 30 September 2016, following which she dismissed the appeal. Permission to appeal against her decision was granted on the basis that the FtJ erred in failing to take into account evidence of the appellant’s husband’s earnings, which evidence post-dated the respondent’s decision but which showed, arguably, that the appellant was able to meet the financial requirements of Appendix FM in terms of salary.

The grounds and submissions

3. In the grounds, reference is made to section 85 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) to the effect that even though the appellant did not meet the financial requirements of the Rules as at the date of the application or decision, the evidence showed that she did meet those requirements at the date of the hearing and the FtJ should have taken that evidence into account.
4. It is said in the grounds that there was no dispute but that the sponsor had been employed by a new company since October 2015 and that his annual salary was £18,999.96. He had produced a P60 and payslips. The FtJ had failed to make any findings in terms of whether the documents would satisfy Appendix FM and simply dismissed the appeal on the basis that the documents were not before the respondent.
5. In submissions on behalf of the appellant, Ms Blair, anticipating submissions on behalf of the respondent to the effect that the Rules state that the evidence must relate to the date of application, relied on what she said was the evidential flexibility within the Rules.
6. It was also submitted that if the only reason for the appellant being required to leave the UK was so that she could make an application for entry clearance from abroad, the appeal should have been allowed. She relied on the decision in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40.
7. It was submitted that the arguments in relation to *Chikwamba* were advanced before the First-tier Tribunal.
8. On behalf of the respondent Mr Clarke submitted that given that this was a human rights appeal, the Rules could only assist in terms of the proportionality assessment. It was accepted that the Tribunal can take account of evidence provided at a hearing but here the appellant could not succeed under the Rules because the evidence needed to relate to the date of application. The evidential flexibility relied on on behalf of the appellant in Appendix FM, paragraph D, did not apply. It was open to the judge to “resile” from being a primary decision maker in respect of evidence not seen by the respondent. That evidence was only relevant to a consideration outside the Rules and in a consideration of *Chikwamba*.

9. Although it was initially submitted that the *Chikwamba* argument was not advanced before the FtJ, I pointed out to the parties that, albeit not entirely clear, it did appear from the FtJ's manuscript record of proceedings that *Chikwamba* was cited in argument.
10. Mr Clarke relied on the decision in *R (On the application of Chen) v Secretary of State for the Home Department (Appendix FM - Chikwamba - temporary separation - proportionality)* IJR [2015] UKUT 00189 (IAC) in particular at [39]. The appellant would need to show that there would be significant interference with family life by temporary removal, and this had not been demonstrated. At [11] of the FtJ's decision it was pointed out that it had not been argued on behalf of the appellant that there were insurmountable obstacles to family life between the appellant and her spouse in Serbia.
11. The FtJ had looked at the appeal outside the confines of the Article 8 Rules but found that there were no exceptional or compelling circumstances meaning that the appeal should be allowed under Article 8.
12. Ms Blair submitted that the witness statement of the appellant and her spouse did refer to difficulties in their being separated. She said that she understood that they were asked questions at the hearing about their ability to support themselves.
13. There had never been any consideration of the *Chikwamba* argument. Although that is not a matter that is in the grounds, it is the only way that the grounds could be read. There would be no public interest in entry clearance being refused. There was a need for anxious scrutiny given that this was a human rights appeal.

Conclusions

14. The FtJ pointed out at [9] that the evidence submitted in support of the application related to the appellant's spouse's employment which came to an end in September 2015. Reliance was placed on his employment since October 2015 at an annual salary of £18,999.96. The FtJ referred to a number of documents in the appellant's bundle, including a P60 and payslips together with copies of bank statements. The FtJ noted that the sponsor's contract of employment at page 59 of the bundle was dated 26 August 2015.
15. It is accepted that none of this information was put before the respondent, and did not form the basis of the application for leave to remain or of the respondent's decision. Although it was submitted that it had been argued that the financial requirements of the Rules were met at the time of the decision (assuming this means the respondent's decision), that is not apparent from the FtJ's decision. Indeed, at [9] the FtJ stated that the appellant does not dispute that she was unable to meet the financial requirements of Appendix FM (implicitly, in terms of the evidence that was before the respondent).
16. The grounds of appeal and the appellant's skeleton argument, the latter being dated the day of the hearing before me, both advanced the appeal on the basis that the FtJ

was wrong not to take into account the evidence of the sponsor's finances and employment at the date of the hearing, and that as at that date the evidence demonstrated that the financial requirements of the Rules were met. It is said at [8] of the skeleton argument that there is no reference in the Rules to having to meet the requirements at the date of application only. It is suggested at [9] that some criteria, for example an age criteria at the date of application, apply but "there is no such requirement in respect of the financial requirements". It is also said at [9] that the Rules do not limit the financial evidence to the date of application. According to [14] of the skeleton argument "The matter is very straightforward". The FtJ had found that the appellant did not meet the Immigration Rules, but that this was incorrect and that as a result she had "purported to refuse a human rights appeal incorrectly".

17. There is no reference in the grounds or in the skeleton argument to any argument relating to Article 8 more widely, and none specifically in relation to the *Chikwamba* point.
18. Ms Blair sought to suggest that the grounds could only be read in that context in terms of a wider Article 8 argument. However, it is clear that the grounds upon which permission was granted are predicated on the proposition that the appellant did not need to establish that the financial requirements of the Rules were met at the date of the decision.
19. It is apparent that it was only after Ms Blair was provided by Mr Clarke with an extract from Appendix FM-SE on the day of the hearing before me, that it was recognised that there is a 'timeline' in respect of the provision of financial information relating to the date of application. For example, in Appendix FM-SE, 2(a)(i) it refers to payslips covering a period of six months prior to the date of application in terms of salaried employment. Another example is at paragraph 13 which states that in the calculation of gross annual income a person needed to have been employed by their current employer for at least six months and been paid throughout the period of six months prior to the date of application etc. Under paragraph A1(b)(ii) it requires that in order to meet the financial requirements of the Rules the requirements as to time periods must be met.
20. The premise of the appeal in relation to the FtJ's failure to take into account financial evidence that was not provided at the date of the application and was not before the respondent, is flawed.
21. Whilst it does appear to be the case that the decision in *Chikwamba* was referred to at the hearing before the FtJ, the grounds of appeal do not rely on any argument in terms of any failure on the part of the FtJ to consider that issue. There was no application to amend the grounds of appeal, either in advance of the hearing or indeed at the hearing itself. I do not accept that the grounds incorporate such an argument.
22. Furthermore, it is not in any event the case that the FtJ failed to consider the issue of the appellant applying for entry clearance from Serbia as a partner. At [11] she said

that it would be open to the appellant to make such an application. The grounds do not challenge her conclusion in that respect. Likewise, in the same paragraph the FtJ said that it had not been argued on behalf of the appellant that there were insurmountable obstacles to their continuing family life in Serbia. She said that the phrase “insurmountable obstacles” in paragraph EX.1(b) imposed a high hurdle to be overcome, referring to the decision of the Court of Appeal in *Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440 (now see [2017] UKSC 11). Again, there is no challenge in the grounds to that aspect of the FtJ’s decision.

23. Although it is said that the witness statements of the appellant and her spouse refer to the difficulties that there would be in separation, that is not a matter that is dealt with in detail, merely being stated as indicative of the closeness of their relationship. There was no evidence before the FtJ which would indicate that a temporary period of separation would amount to any significant interference with her family life with the sponsor (see [39] of *Chen*).
24. The FtJ did consider Article 8 more widely, referring to the appellant’s leave to remain having been a temporary one, as a student, and that she could have had no expectation of any more permanent grant of leave. She accepted that they had family life together and that the appellant will have established a private life in the UK, albeit that there was no evidence from any friends or community organisations. She referred to s.117A–B of the 2002 Act and noted the public interest considerations that arise. She noted that the appellant’s private life was established at a time when her immigration status was precarious.
25. Although it is said in the grounds that the FtJ erred in failing to make a finding in terms of whether the ‘new’ evidence of the sponsor’s employment met the requirements of the Rules, the argument is based on the fallacy that it would meet those requirements. The fact is that the evidence did not meet the requirements of the Rules in terms of the time of its submission. The failure to meet the requirements of the Rules was plainly a relevant public interest factor to be taken into account. The FtJ said at [14] within a consideration of Article 8 proper, that the appellant did not satisfy the requirements of the Rules. I do not consider that there is any error of law in the FtJ’s not having made an express finding in terms of whether the new financial information would, hypothetically, meet the requirements of the Rules if that evidence or information was provided at the relevant time.
26. In terms of the appellant’s reliance on what is said to be the evidential flexibility aspects of Appendix FM-SE, paragraph D provides that the Secretary of State will only consider documents submitted with the application, and only in limited circumstances will documents submitted after the application be considered. Those circumstances can be summarised as reflecting what is known as ‘evidential flexibility’, for example, a document in a sequence being missing. Nothing in paragraph D indicates any discretion on the part of the respondent in relation to documents which simply fail to meet the requirements of the Rules.

27. In summary, I am not satisfied that there is any error of law on the part of the FtJ in the terms upon which permission was granted, or indeed on any other basis.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek

21/06/17