



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14946/2016

THE IMMIGRATION ACTS

Heard at : UT(IAC) Birmingham
On : 15 May 2017

Decision Promulgated
On : 19 May 2017

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

DIONE HENE BERYL PEARL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Waithe, instructed by Solomon Shepherd Solicitors
For the Respondent: Ms Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Cameroon, born on 29 May 1990. She has been given permission to appeal against the decision of First-tier Tribunal Judge Graham dismissing her appeal against the respondent's decision to refuse her human rights claim.

2. The appellant entered the UK on 26 August 2010 with leave to enter as a Tier 4 (General) Student valid until 31 December 2012. On 10 September 2013 she was granted leave to remain under EX.1(b) of Appendix FM of the immigration rules as the spouse of a British citizen, Kevin Andrew Hunt until 10 March 2016, on the basis of her husband's relationship with his British child from a previous relationship, Conor Charlton Hunt, born on 8 October 1997. On 9 March 2016 the appellant applied for further leave to remain as the spouse of Kevin Andrew Hunt, but this time on the basis of his relationship with his daughter from a previous relationship, Emily May Hunt.

3. The respondent refused the appellant's application in a decision dated 9 May 2016. The respondent did not accept that the appellant could meet the eligibility requirements of paragraph R-LTRP.1.1.(c)(ii) as she had failed to satisfy the specified evidence requirements in Appendix FM-SE to show that she could meet the financial requirements of the immigration rules. She had provided evidence in relation to her self-employment as a mobile hairdresser showing annual earnings of £5,478 for the financial year 2014-15. However, with regard to her earnings from employment with Accord Group, she claimed to earn £14,400 per annum but had failed to provide the required evidence of that income. She had provided 8 months' payslips dated June 2015 to February 2016 from Accord and bank statements for the five month period from September 2015 to January 2016. She had not provided an employers' letter but instead provided a zero-hours employment contract dated 11 March 2014. The respondent was accordingly unable to corroborate her claimed salary. Having found that the appellant could not meet the requirements for the 5-year partner route, the respondent considered the 10-year partner route. The respondent concluded that, whilst the appellant had a genuine and subsisting relationship with a British partner, there was no evidence of insurmountable obstacles to family life continuing outside the UK for the purposes of EX.1.(b) of Appendix FM, as there was no evidence to show that her spouse had a relationship with his child Emily May Hunt. The respondent considered that the appellant could not meet the relevant criteria in paragraph 276ADE(1) on the basis of private life and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules. The respondent noted that the appellant's spouse's son Conor was no longer a child and that at the time of the previous application her spouse was the subject of a 12 month non-molestation order preventing him from going near his ex-partner and their daughter Emily. There was no evidence of his claimed regular contact with his daughter and the respondent considered that it was in Emily's best interests to remain in the UK with her mother.

4. The appellant appealed against that decision and her appeal was determined on the papers by First-tier Tribunal Judge Graham on 1 August 2016. For the appeal the appellant produced a letter from her employer and submitted that the respondent ought to have exercised discretion in paragraph D(e) of Appendix FM-SE because she had given a valid reason for not supplying an employment letter, namely that an applicant with a zero hours contract could not produce an employment letter to satisfy section Appendix FM-SE Part 2(b). The judge noted that the appellant accepted that she had not produced corresponding 6 months of bank statements with her application but she had submitted the missing bank statement for the appeal. The judge considered that the appellant ought to have, but had not, requested that the respondent exercise discretion. The judge

considered that the respondent was not required to exercise discretion to contact the appellant for the missing document, since the application would have been refused in any event due to the lack of an employer's letter. She found that an employment letter could and should have been supplied with the application and that the appellant could not, therefore, meet the financial requirements in Appendix FM for the 5-year partner route. The judge went on to consider the 10-year partner route but found that there were no insurmountable obstacles to family life continuing outside the UK for the purposes of EX.1. The judge noted that the appellant's spouse's son was an adult and that there was no evidence of emotional dependency. With regard to his daughter Emily, the judge found no evidence to support the claim that the restraining order had been lifted and that the appellant's spouse saw his daughter every weekend and no evidence of any contact between them. The judge found there to be no exceptional circumstances outside the rules and that the requirements in Appendix FM and paragraph 276ADE could not be met. Accordingly she dismissed the appeal in a decision dated 17 August 2016.

5. Permission to appeal to the Upper Tribunal was sought by the appellant and initially refused in the First-tier Tribunal. Permission was then granted in the Upper Tribunal on 14 March 2017, essentially on the grounds that there were arguably no clear findings as to whether the appellant met the maintenance requirements of the immigration rules. The matter then came before me.

Appeal Hearing

6. Mr Waithe relied on the grounds and submitted that the judge had before her all the relevant documents to demonstrate an income of above £18,600 for the appellant and was duty bound to accept the evidence before her as admissible, in accordance with the principles in Mandalia v Secretary of State for the Home Department [2015] UKSC 59 and the statutory provisions in section 85(4) of the Nationality, Immigration and Asylum Act 2002. He relied on the judgment in MM (Lebanon) & Ors, R(on the applications of) v Secretary of State and another [2017] UKSC 10 in submitting that the Supreme Court identified problems with the £18,600 income threshold and that changes were to be made. The appellant met the requirements of the immigration rules. In the alternative the judge erred by failing to give proper consideration to proportionality in the context of Article 8 and failed to consider the best interests of the child.

7. Ms Pettersen submitted that the judge properly found that the respondent was not required to exercise discretion and request further documentation under the evidential flexibility provisions. The judge properly found that the specified evidence had not been provided and that the requirements of the immigration rules in Appendix FM-SE had not been met. The grounds referring to Article 8 and the best interests of the child were essentially a disagreement with the judge's decision. The judge properly considered all relevant material and did not err in law.

Consideration and findings

8. I note that the appellant's permission application was made out of time and that that matter was not addressed in the grant of permission. Neither was the matter raised at the hearing before me. However it has now come to my attention. For the sake of expedience and completeness I extend time and admit the application. However I do not consider the grounds to be made out and do not find there to be any errors of law in the judge's decision.

9. Mr Waithe submitted that the statutory obligation in section 85(4) of the 2002 Act could not be overridden and that, on the basis that the appellant had since produced evidence of an income of above £18,600 the judge ought to have accepted that the requirements of the immigration rules were met. However such a submission betrays a clear misunderstanding of section 85(4), a provision which the judge plainly had in mind and referred to at [9]. The substance of the respondent's decision was that the appellant had failed to provide mandatory specified evidence of her claimed income with her application. Evidence subsequently produced at the appeal hearing of the appellant's income, whilst arguably supporting the appellant's claim to earn the required level of income, was nevertheless clearly not capable of rectifying an omission to produce the documents with the application.

10. Neither was the appellant assisted by the principles set out in Mandalia since her circumstances differed to that case, as there was not simply a failure to provide one category of specified evidence listed in Appendix FM part 2, but she had failed to provide two of the categories of specified evidence. The judge had full and careful regard to the documents provided by the appellant and those not provided. She considered the explanation provided by the appellant for failing to produce that evidence with her application and gave detailed consideration to the question of whether the respondent ought to have contacted the appellant and to have provided her with a further opportunity to provide the missing documentation, in accordance with the evidential flexibility provisions in paragraph D of Appendix FM-SE, in particular D(c) and (e). She also considered relevant case law in regard to the circumstances in which the respondent would consider exercising discretion, noting that the appellant had made no request for such an exercise of discretion. At [20] to [22] the judge gave cogent reasons for rejecting the appellant's explanation for not providing an employer's letter and for concluding that such a letter could and should have been supplied with the application. She was perfectly entitled to conclude that the evidential flexibility provisions did not assist the appellant in light of the limited evidence provided with the application and that the production of the documents post application and decision did not resolve the reasons for refusal under Appendix FM-SE. The judge accordingly properly found that the appellant could not meet the financial requirements of the immigration rules with respect to the 5-year partner route.

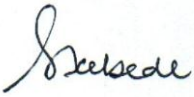
11. As for the 10-year partner route, the relevant issue was whether or not there were insurmountable obstacles to family life continuing outside the UK. That was a matter fully and properly considered by the judge at [24] to [27]. The appellant had previously

succeeded under EX.1(b) on the basis of her husband's relationship with his son from a previous relationship. However, as the judge found at [24], his son was no longer a child and the relationship would not therefore cause obstacles to family life continuing outside the UK. The judge considered the appellant's spouse's relationship with his daughter and gave cogent reasons for concluding that that was also not a reason for finding there to be insurmountable obstacles to family life outside the UK given the lack of evidence of that relationship and of any contact between the parties. The judge considered the best interests of the child Emily both in the context of "insurmountable obstacles" under EX.1(b) as well as in the context of compelling circumstances outside the immigration rules on wider Article 8 grounds, providing full and cogent reasons for concluding that the appellant could not succeed on either basis.

12. Contrary to the assertion in the grounds and the submissions made by Mr Waithe, the judge conducted a full and proper consideration of all relevant matters both within and outside the immigration rules and provided cogent reasons for concluding that the public interest outweighed the interests of the appellant and that the decision was not in breach of her Article 8 rights. The judge was perfectly entitled to reach the decision that she did on the evidence before her. There are no errors of law in her decision. I uphold the decision.

DECISION

13. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed 
Upper Tribunal Judge Kebede

Dated: 16 May 2017