



**Upper Tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/01338/2019

THE IMMIGRATION ACTS

**Heard at Manchester
On 24 September 2019**

**Decision and Reasons Promulgated
On 26 September 2019**

Before

**Upper Tribunal Judge Pickup
Judge of the Upper Tribunal Dr Storey**

Between

**Vanessa Martinho Marques
[Anonymity direction not made]**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr C Timson, instructed by Masaud Solicitors
For the respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of the First-tier Tribunal panel comprising Designated Tribunal Judge McClure and First-tier Tribunal Lewis promulgated 8.5.19, dismissing her appeal against the decision of the Secretary of State, dated 14.1.19, to refuse the application made on 22.3.18 for leave to remain on human rights grounds.
2. Designated Tribunal Judge Shaerf granted permission to appeal on 3.6.19. Thus the matter came before us sitting as a panel in Manchester on 24.9.19.

3. At the outset of the hearing Mr Timson applied for an adjournment to enable the respondent to reconsider the decision in the light of the fact that the appellant's husband was, in August 2019, awarded Universal Credit, a state benefit allegedly exempting the appellant from the income threshold requirement of Appendix FM. However, the application was not supported by Mr Tan and we considered that such matters are for the appellant and the respondent to discuss in correspondence or a further application. We concluded that we were obliged to consider the appeal on the basis of the sole challenge to the decision to the First-tier Tribunal for which permission was granted.

Error of Law

4. For the reasons summarised below we found no material error of law sufficient to require the decision of the First-tier Tribunal to be set aside.
5. The relevant background is that the appellant is a Brazilian national who, in Brazil, married a British national on 4.10.13, following which she entered the UK in September 2015 with entry clearance and leave to remain as a spouse. It is common ground that entry clearance was granted on a mistaken understanding on the part of the respondent that her husband was in receipt of Carer's Allowance, which is a qualifying benefit exempting the appellant from meeting the minimum income financial threshold under Appendix FM. In fact, the husband was not in receipt of Carer's Allowance but Employment and Support Allowance (ESA), which is not a qualifying benefit under the Immigration Rules. There is no suggestion of an attempt to mislead and neither the appellant nor her husband are responsible for the misunderstanding that led to entry clearance. It is also accepted that entry clearance and leave to remain would not have been granted on the true facts as they were at the date of the respondent's decision.
6. Fast forwards an uneventful three years of her probationary leave and, within extant leave, in 2018 the appellant duly applied for further leave to remain as a spouse. This was refused on the sole ground that, having discovered its original error and on a true understanding of the husband's benefit situation, she could not meet the minimum income financial threshold under Appendix FM of the Immigration Rules, because ESA is not a designated benefit within paragraph E-ECP3.3 of Appendix FM, and does not exempt the appellant from the £18,600 income requirement. In consequence, the application was refused, against which decision the appellant appealed to the First-tier Tribunal.
7. In granting permission to appeal, Judge Shaerf observed that the bulk of the grounds amount to no more than a disagreement with the tribunal decision and did not disclose any arguable error of law, so that permission was refused on those grounds. We respectfully agree with that assessment. The fact that medical facilities in Brazil may not be of the same quality as those in the UK and that IVF fertility treatment may be financially out of reach, were not matters that could reasonably amount to insurmountable obstacles to family life continuing in Brazil under EX1 and EX2, and

could not reach the high threshold of article 3 ECHR. In any event, we note that Mr Timson did not attempt to resurrect those grounds in his submissions to us.

8. However, referring to paragraph 19 of the impugned decision, Judge Shaerf found it arguable that the tribunal erred in law in not taking into account the consequences of the respondent's error in granting leave on a misunderstanding as to the husband's state benefits. Whilst entry clearance to join her husband in the UK should have been refused on a true understanding of the facts, the appellant was in fact allowed entry with the expectation that she was on the 5-year route to settlement. It was considered arguable that the tribunal failed to consider whether the respondent should have exercised its residual discretion to grant further leave. Judge Shaerf granted permission on this ground only.
9. Mr Timson pursued his submissions in a different and more narrow way than either as was pursued at the First-tier Tribunal appeal hearing, or as expressed in the somewhat confused grounds. He did not rely on a 'legitimate expectation' as such. The oral argument advanced was that the impact of the error and the consequent years of family and private life the appellant had been allowed to build up under her leave to remain should have been given weight in the article 8 proportionality balancing exercise outside the Rules. It is asserted that the First-tier Tribunal gave insufficient consideration, if any, to this consideration.
10. We find a number of difficulties with Mr Timson's approach. First, it is difficult to see why the appellant should have the benefit of the original error in the grant of leave in a decision on her application for further leave to remain. It had been argued at the First-tier Tribunal appeal hearing that the respondent should have been bound by the error and that the tribunal need not consider the financial requirements. That was not an argument pursued before us by Mr Timson. In any event, as the tribunal panel pointed out at [19], the appellant, in the UK on the basis of three years' probationary leave as a spouse, had no legitimate expectation other than that she would be able to make a further application for leave and have that application decided on the Rules in operation at that time. She was always going to have to make an application for further leave to remain in which she would have to show that the Rules were met. If, for example, the husband had been in support of Carer's Allowance in 2015 and the original leave had been correctly granted, but he was now in receipt of ESA, which did not exempt the appellant from the financial requirements, the application could not have succeeded. As the First-tier Tribunal panel stated at [19] the unfortunate history "would at best only be a factor to consider in the proportionality balance."
11. It was Mr Timson's argument, referring us to [51] of the decision, that no such consideration in the proportionality balancing exercise is evident from the decision. However, given the content of [19], referred to above, as well as the various other ways in which the arguments put at that appeal hearing were recorded in the decision, we are satisfied that all due consideration was given. It is not necessary for the tribunal to make a detailed assessment, provided it is clear that all relevant and material considerations have been taken into account; the arguments on this issue

were very evidently at the forefront of the panel's mind. In any event, even if the First-tier Tribunal panel could or should have given more time or attention to that consideration, we are not satisfied that the error was material or could have resulted in a different outcome. We are not satisfied that the error, giving the appellant the advantage of three years family and private life in the UK, or any other impact of that error for which she was not responsible, would be sufficiently compelling circumstances to, exceptionally, justify granting leave to remain outside the Rules on the basis that the decision would otherwise be unjustifiably harsh. No legitimate expectation was created by the error and the appellant is not in any real way disadvantaged from the situation as it would have been had entry clearance been granted without a mistake as to the husband's state benefits. Whilst one may have sympathy with the appellant's situation, we find no legal basis on which to interfere with the decision. The grounds themselves cite the decision of the Court of Appeal in Aisweh v SSHD [2019], confirming that technical errors divorced from the factual merits of a case are "rarely an appropriate basis for an appeal..."

12. Our attention was also drawn to the appellant's bundle in which it appears that, post the decision of the First-tier Tribunal, in August 2019, the husband was awarded Universal Credit, which Mr Timson suggested would be sufficient to exempt the appellant from the financial threshold requirement. Given that there is no removal decision and given that it remains open to the appellant to make a further application for leave to remain relying on Universal Credit, it is difficult to see how the decision of the respondent can be regarded as now disproportionate. It follows that even if we found an error of law, which we do not, that error could not be sufficiently material to require the decision to be set aside.
13. In all the circumstances, and for the reasons set out above, we found no material error of law in the making of the decision of the First-tier Tribunal.

Decision

14. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

We do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.



Signed

Upper Tribunal Judge Pickup

Dated

5 December 2019

Anonymity

We have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, we make no anonymity order.

Signed

DMW Pickup

Upper Tribunal Judge Pickup

Dated

5 December 2019