



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14400/2017

THE IMMIGRATION ACTS

Heard at Field House, London
On 18 January 2019

Decision & Reasons Promulgated:
On 20 February 2019

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

K

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr T Lindsay

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (hereinafter "the tribunal") which it made following a hearing of 3 October 2018; whereupon it dismissed her appeal from the Secretary of State's decision of 27 October 2017 refusing to grant leave to remain in the United Kingdom ("UK") either under the Immigration Rules or under Article 8 of the European Convention on Human Rights ("ECHR") outside the Rules.
2. The tribunal had granted the claimant anonymity. I am not sure why that is. But since nothing was said about anonymity at the hearing before me I have decided to preserve the status quo and continue that grant.
3. By way of brief background, the claimant is a female citizen of Sri Lanka and she was born on 10 December 1972. She is married to her sponsor who, to preserve anonymity, I shall simply call S. He is a naturalised British citizen but he was born and resided in Sri Lanka until July 2001. He and the claimant married each other in Sri Lanka in August 1997. That marriage subsists. They have a daughter who, again for the purpose of preserving anonymity, I shall simply call T. As to the pattern of immigration history, S entered the UK on 24 July 2001 and, it seems, claimed asylum. His claim was refused but he was nevertheless granted permanent stay under what is sometimes referred to as "the legacy exercise". He has subsequently gone on to naturalise. T arrived in the UK on 9 January 2009 when she was aged 10 years old. She is by now, of course, an adult. She was granted discretionary leave to remain. She was subsequently granted permanent stay in October 2016. The claimant had remained in Sri Lanka throughout the above period but she sought and obtained entry clearance in order to join S and she entered the UK, for that purpose, on 22 September 2014. In accordance with standard practice she was given leave to enter under Appendix FM of the Immigration Rules as the spouse of a person settled in the UK. That was limited leave but with the facility for her to, in due course, apply for permanent leave assuming relevant requirements contained within the Immigration Rules could be shown to be complied with.
4. On 19 June 2017, within the terms of the initial period of leave, the claimant applied for further leave under Appendix FM to the Rules. However, on 27 October 2017 the Secretary of State refused that application. The sole ground for refusal was that the evidence provided demonstrated that the claimant and S had a joint annual income of £14,625.00 which was below the prescribed necessary threshold level. As to the possible applicability of Article 8 outside the rules, it was decided that there would not be insurmountable obstacles to family life continuing abroad. The claimant appealed to the tribunal.
5. The hearing, as noted, took place on 3 October 2018. Both parties were represented. The claimant, S and T all gave oral evidence. The tribunal then received oral submissions from the representatives. On 7 November 2018 the tribunal's decision was sent to the parties.
6. It was accepted on behalf of the claimant that she did not satisfy the requirements of Appendix FM to the rules as at the date of application (the relevant date for the purposes of an assessment under the rules). The claimant's representative, though, sought to argue that the substantive requirements and the evidential requirements had been met by the date of the tribunal hearing. It was not argued, as I understand it, that that was conclusive with respect to the appeal but rather that, if right, it was a significant factor weighing in favour of the claimant with respect to any exercise of the proportionality test which might be required under Article 8 outside the rules.

7. The tribunal, before coming to the position outside the rules, considered whether paragraph EX.1 of the Rules might be met. However, it decided not, because of what it clearly found to be a paucity of evidence regarding obstacles to family life continuing in Sri Lanka. For quite similar reasons it decided that the claimant could not benefit from paragraph 276ADE of the Rules either. Its decision and its reasoning as to those matters has not been the subject of further challenge so I need say no more about it.

8. The tribunal then went on to consider the position under Article 8 outside the rules. It took some time over this and it said this:

“ 26. In terms of whether it is appropriate to consider Article 8 outside the scope of the Immigration Rules, I have gone on to do so, to take into account the impact of the decision on all family members, although no exceptional reasons to do so were raised by the appellant. This is not a relationship where the couple married, in the full knowledge that they could not choose in which country they lived, they did not know when they married that they would be faced with the dilemma of which country to live in. Nor is it a family life that has been without considerable upheaval, in the separation of the appellant, sponsor and their daughter, over many years. This is a human rights appeal and all family members’ protected rights must be considered (Beoku-Betts v SSHD [2008] UKHL 39).

27. In answering the questions in R (on the application of Razgar) v Secretary of State for the Home Department [2004] UKHL 27, I find there is clear family life and the appellant and sponsor will also have established private lives here during a period of lawful residence, however, I have no real evidence about any ties here to the community. I find it is a reasonable inference that they have established a private life, through work and length of residence. The couple have been residing here together, lawfully. Their relationship is of lengthy duration, dating back to the 1990s, and they do have an adult daughter together who lives with them. The genuine nature of their relationship has been accepted by the respondent. I further find that the appellant’s removal would interfere with those protected rights and those of the sponsor, since it would require the sponsor and their daughter to leave the United Kingdom to be with the appellant, or in the alternative, the couple will be separated again.

28. In considering the question of whether removal amounts to a disproportionate interference in those rights I do attach significant weight to the public interest. I find that it is the view of the respondent and of Parliament that it is in the public interest for those seeking to sponsor a spouse to settle here to be in a position to maintain themselves. This is reflected both in the requirements of the Immigration Rules and further in decisions of the higher courts (MM (Lebanon) v SSHD [2017] UKSC 10) as well as the statutory considerations. Maintenance of immigration control is also in the public interest.

29. Even by the date of hearing, the evidence of income did not meet the evidential requirements in Appendix FM-SE, and I am not sure why, since the couple have legal representation. Neither the appellant or the sponsor are in permanent salaried employment. The sponsor makes no reference in his statement to any employment before 2016. He says he worked between June and October 2016 for one employer, then for another two months with two different employers, until December 2016, when he was unemployed until September 2017. They made the application in June 2017 and so he was out of work in the six months preceding the application and for three months after that. He says he was then in employment between September 2017 until January 2018. He says his next employer, for whom he worked only part time, between January and July 2018, refused to give him any payslips. He has not provided an employment contract, employer’s letter or bank statements showing regular monthly income from that employment, even if he cannot get payslips. I find that concerning. The sponsor says he then started work for Kolak Snacks Ltd, through a

recruitment agency. There are no details in his statement but there are payslips covering the period 23 August 2018 to 27 September 2018, which is roughly one month. By the date of hearing, the sponsor was only able to evidence income of £1,090.33 from employment in the last nine months. In the last two years, he has been out of work for the majority of the period. He is not in regular employment and each employment role typically lasts only a short period. I have only been provided with payslips and a bank statement for the month before the hearing and I have been provided with no explanation for that.

30 The appellant was on contract with a care agency. She was in this role from 2015 to October 2016, was out of work for two months, then started working in housekeeping for Avery Homes in December 2016 for twenty hours a week, but says she works more hours some weeks. In the tax year preceding the application she earned £14,312.03 gross. In the six months preceding the date of hearing she earned £6,293.76. The financial evidence for the appellant also did not meet the requirements of Appendix FM-SE even by the date of hearing, in that there was no employer's letter, only two months payslips for July to September 2018 and one month's bank statements for June 2018. It has not been explained to me why consistent evidence for the full period, showing income into her account and corresponding documents from the employer has not been provided. However, an employer's letter saying she is employed on an 'as and when' basis was provided to the respondent in June 2017.

31. It concerns me greatly that this Tribunal granted an adjournment at the request of the appellant, specifically so that she and the sponsor could obtain documentary evidence of their income. Even were there to have been an issue with the sponsor's payslips, it should be possible to provide evidence of income through bank statements. Such evidence would be within the control of the appellant and sponsor, but has not been provided. I have suspicions that the reason why no evidence has been provided of the sponsor's claimed six month employment in the six months before the last hearing, is because he was not in fact employed at all. There is no suggestion that the employer has been reported to the police for withholding payslips, or to any regulatory body, and even if he could not get payslips, it is not at all difficult to request records of employment from HMRC. I am also concerned about the lack of bank statement evidence, which should be easily available. I note that the family members are living in London, where the cost of living is very high. The sponsor has not been working, or works sporadically. The appellant only works twenty hours a week. Their daughter was also only working part time. Given the likely cost of living, compared with their low income for three adults, and the omission of key documents I would usually expect to have been provided with, I suspect that they subsidise their income from benefits, and so are reliant on public funds.

32. The respondent says combined income for the appellant and sponsor in the year before the date of application was £14,625. That falls significantly below the income threshold that the respondent, and Parliament, say is required for a couple to be able to maintain themselves without being reliant on public funds and becoming a burden on the state.

33. At the date of hearing, assessing the six month period before the hearing itself, even taking the evidence at its highest, the sponsor relies on £1,090.33 income, according to the gross annual income year to date figure on his payslip, and the appellant's most recent payslip says she has earned £6,293.76 so far in the six months of this tax year. This means that if contemplating an annual figure, the couple are still significantly below the minimum income threshold, and even estimating ahead for this tax year, their income is no higher than at the date of application. Given that they were granted an adjournment to obtain more financial evidence of employment, and knew the hearing was looming, their income is no higher than it was in June 2017.

34. The couple therefore now rely on third party support. The fact that their daughter says she has paid rent and bills means they are not able to afford to do so without her help on occasion. I have not been provided with a tenancy agreement, bills, council tax or other utilities, or a financial schedule, to establish their income and outgoings and just how large the shortfall is in their income to meet their liabilities. Their daughter only earned £3,900.20 in the tax year 2017 to 2018 and no evidence has been provided about her income in the tax year preceding the date of application, and she says she was also unemployed for at least part of the year preceding her hearing. By the date of application, she had earned just £2,431.73 according to the year to date figure on her payslips. In the month of the hearing her gross monthly income was £849.53 and she had earned just under £5,000 in the first six months of this tax year.

35. The appellant therefore relies on income that falls significantly short of the minimum income threshold for herself, the sponsor, and even including income from their adult daughter, it still falls well below the minimum income the respondent says a couple need to survive on. She has not provided any evidence about her financial liabilities or sufficient evidence to establish that income over any real period, since the evidence is patchy.

36. The respondent has also amended her Rules, since the date of decision, to address the need to make provision for circumstances in which a decision may breach protected rights, such as where refusal amounts to ‘unjustifiably harsh consequences’ for the appellant and her family (*Agyarko & Ikuga v SHHD* [2017] UKSC 11). The respondent has also acknowledged that, in circumstances where refusal of the application could otherwise breach ECHR Article 8, she must take into account other credible and reliable sources of earnings or finance available to a couple in considering whether they meet the minimum income requirement under Appendix FM (*MM (Lebanon) v SSHD* [2017] UKSC 10).

37. While she has not defined what amounts, in the respondent’s view, to such circumstances within the Rules themselves, she has set out in her October 2017 policy guidance, factors that might tend towards a grant of leave to remain where the applicant cannot meet the strict evidential requirements, such as (c), which considers family relationships. I do accept that despite the periods of separation, this is a close family with ties of financial and emotional interdependency, and that now that the appellant and her daughter have finally been reunited after a long period of separation, and so the continuation of this relationship is particularly important. I also accept that culturally, family life may not cease between adult children and their parents at the moment such a child reaches their majority, and weight should be attached to the importance of the mother and daughter bond, in the particular circumstances of this case. In relation to (d), while I do not have any reliable evidence to weigh, I do accept the family have gone to great lengths and made considerable sacrifices to pursue family life across two different countries and that the sponsor has not been back to Sri Lanka in seventeen years. It is also relevant to consider the family’s history under (i), which addresses the fact that they formed family life at a time when they did not know they may not be able to live together in the same country, and since they have been reunited here, have been present here lawfully throughout. There are also no factors that might increase the public interest in the appellant’s removal, such as criminality, abuse of the system or fraudulent claims. I do not have sufficient evidence about the background to the daughter’s status to make any findings about that.

38. Even taking into account alternative sources of income, the couple have not demonstrated that they have sufficient resources to be able to support themselves and not become a burden on public funds. Given the absence of key evidence, my concern is that the family are already reliant on public funds. The appellant did not complete the section of her application form that relates to income and whether the family is already reliant upon public funds since her arrival. In terms of the statutory considerations under 117B, they have not

established any competency in English, any integration in this country, and have not established that they will not be a burden upon the state. Little weight should be attached to her private life here, whilst her leave has been precarious, but that does not apply to the relationship with the sponsor, her daughter, or to the private lives of those who are settled here. However, I find that Parliament intended for those seeking to live here to support themselves, and in the absence of any real evidence of compelling and compassionate factors, or reasons why they could not settle again in Sri Lanka, or even reasons why the appellant cannot re-apply for entry clearance from Sri Lanka (R (on the application of Chen) v Secretary of State for the Home Department IJR [2015] UKUT 189 (IAC) considered), I find the public interest outweighs the family's rights under Article 8.

39. I will say that I had been provided with compelling or cogent evidence of obstacles to life in Sri Lanka, difficulties the family would face with settling there, or to pursuing an entry clearance application, and detailed and consistent evidence about their finances to suggest they can support themselves, or that their ties here should outweigh the public interest in the appellant's removal, I would have allowed the appeal, mindful of the length of the relationship, the family's history and the years they have lived together here. However, the evidence was simply not there and the Tribunal cannot speculate. Even oral evidence only could have been adduced, but was not."

9. So, all of that is why the appeal failed. But that was not the end of the matter because the claimant, still represented at that stage, sought and obtained permission to appeal to the Upper Tribunal. The grounds were, in summary, to the effect that the tribunal had failed to properly calculate the level of joint earnings at the date of the hearing before it; that in considering third party support (from T) it had erroneously required that T herself demonstrate she was earning over the requisite £18,600.00 threshold; it had overlooked some of the evidence concerning financial standing; and it had unlawfully speculated to the effect that the claimant might be or was in receipt of public funds.

10. The Judge who granted permission relevantly said this:

"It is arguable that the judge may have erred by miscalculating the income available to the appellant and her spouse, which was relevant as to whether the Rules could be met and thus the proportionality of the decision in assessing the human rights grounds of appeal."

11. The case was then listed for an oral hearing before the Upper Tribunal (before me) so that consideration could be given as to whether or not the tribunal had erred in law and, if it had, what should flow from that. The Secretary of State was represented by Mr T Lindsay to whom I am grateful. The claimant was not represented and did not attend. There is an explanation. Her solicitors had written to the Upper Tribunal shortly prior to the hearing indicating that she had been unable to pay for representation. Accordingly, those solicitors invited the Upper Tribunal to make a decision based upon the written grounds of application and upon the content of a skeleton argument which had been provided for the purposes of the hearing which had taken place before the tribunal on 3 October 2018. No request for a postponement or adjournment was made.

12. In the circumstances I decided to proceed in the absence of the claimant or a representative for her. I do appreciate it is unfortunate that she was not represented. But there was no indication before me that, if I were to adjourn to a future date, she would be represented at a reconvened hearing. Additionally and in any event, as noted, no such application to adjourn had been made. Indeed, I have been expressly invited to make my decision as to error of law without adjourning.

13. Mr Lindsay, for the Secretary of State, urged me to conclude that there was no error of law in the tribunal's decision. I have so concluded for the reasons which I shall now set out.

14. It will be apparent from the passage which I have set out above that the tribunal took considerable care over the appeal, over its reasoning and over its ultimate decision.

15. Turning to the individual grounds of appeal then, I am not persuaded that the tribunal did miscalculate the evidence of joint income as at the date of the appeal hearing. As to that, the tribunal found on the basis of the material before it that S had only earned a little over £1,000.00 during the six month period prior to the hearing (in paragraph 33 of the written reasons) and that the claimant had only earned just under £6,300.00 during the same period (see the same paragraph). There is nothing in the arguments made or in the material before me to suggest that those important findings were incorrect. I appreciate it was (at least I think) asserted that S had been working for a longer period than had been evidenced by wage slips. But the tribunal, although it did not say so in terms, had effectively decided that any such earnings had not been demonstrated. It made the point at paragraph 31 that had payslips genuinely not been available despite S having genuine employment, he could have relatively easily evidenced such claimed employment from other sources. So, I am not persuaded that there has been any relevant miscalculation.

16. As to Ground 2, the tribunal did, as it was required to as a potentially relevant matter under Article 8 outside the rules, consider and address the question of third party support. Indeed, it accepted that T had provided financial assistance in the past. At paragraph 34 of its written reasons, though, it made the point that there was a paucity of evidence regarding T's financial circumstances and financial commitments in order to demonstrate an ability to provide such ongoing support and that the evidence suggested her own earnings were quite limited. I can find nothing in that paragraph, in paragraph 35 or in anything else in the written reasons which supports the proposition that the tribunal was requiring T to demonstrate she had an income of £18,600.00 prior to taking her potential ability to support into account. Since the tribunal did not do that it cannot be said that it erred in doing that. Rather, it was simply making the point that the evidence as to available third party support was insubstantial.

17. As to Ground 3, depending on how one chooses to read what the tribunal had to say at paragraph 30 of its written reasons, it might be that it did overlook or at least fail to refer to some bank statements in the name of the claimant herself. But, in truth, that was not a central issue. None of those bank statements, for example, comprise evidence regarding earnings of S. Nor do they suggest that the earnings of the claimant herself were greater than the tribunal found they were.

18. As to Ground 4, it is right to say that the tribunal expressed its suspicion that the claimant and her family might be in receipt of public funds. I am not sure that doing that was particularly helpful. But I am satisfied it did not actually make a finding to that effect nor did it allow the suspicions it had to influence its decision.

19. In the circumstances, therefore, I conclude that the grounds advanced on behalf of the claimant have not been made out. Accordingly, I conclude that the tribunal's decision did not involve the making of an error of law with the implication that that decision will, therefore, stand.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. That decision shall stand.

The claimant is granted anonymity. That grant was initially made by the First-tier Tribunal but I continue it under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall identify the claimant or any member of her family. The grant of anonymity applies to all parties to the proceedings. Failure to comply might lead to contempt of court proceedings.

Signed:

Date: 28 January 2019

Upper Tribunal Judge Hemingway