



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/10641/2019 (P)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decisions & Reason Promulgated

On 9 October 2020

On 20 October 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

BRENDA MICHELE ALEXANDER

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Ms J Norman, counsel, instructed by Anglia Immigration Law

For the Respondent: Mr A McVeety, Senior Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote

hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of Grenada, with date of birth given as 15.11.72, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 24.3.20, dismissing her human rights appeal against the decision of the Entry Clearance Officer, dated 22.5.19, to refuse her application made on 4.3.19 for entry clearance to the UK as the spouse of [SD], a British citizen, pursuant to Appendix FM of the Immigration Rules.
2. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.
3. The relevant background can be summarised as follows. The appellant is married to [SD], a British citizen. They first met and began a relationship in 2016. They married in the USA in August 2018. The sponsor is the carer for his 90-year-old mother in the UK, in respect of which he receives Carer's Allowance. He is unemployed but receives income support, a Council Tax reduction, and Housing Benefit. The application was refused as the Entry Clearance Officer was not satisfied that the appellant could meet the eligibility financial requirements in Appendix FM or that there would be adequate maintenance for the sponsor and the appellant without further recourse to public funds. His income was calculated on the formula where his net income after deduction of housing costs must meet or exceed the income support level of £114.85 per week for a British citizen family of equivalent size, with the consequence that the Entry Clearance Officer found a shortfall.
4. Although the grounds of appeal to the First-tier Tribunal complained that the Entry Clearance Officer had miscalculated by including Council Tax, at the First-tier Tribunal appeal hearing the appellant's representative conceded that there remained a shortfall of some £4.55 per week. It follows that the appellant could not meet the specified sources requirements of Appendix FM and FM-SE.
5. In summary, the grounds assert that the judge erred in law by failing to apply the proper test in paragraph 21A of Appendix FM-SE, and failed to conduct a proper proportionality assessment.
6. Permission was granted on all grounds by the First-tier Tribunal Judge on 15.6.20, who considered it arguable that, in an otherwise careful and detailed assessment, the judge erred in his consideration of proportionality.
7. The appellant argued that the shortfall could be met by the income of the appellant's mother-in-law. In normal circumstances, promises of third-party financial support cannot count towards the financial requirement. However, the grounds as drafted rely on paragraph GEN 3.1 of Appendix FM, which provides an alternative where there are exceptional circumstances. It is

submitted that the judge erred in law by not considering whether the decision could result in unjustifiably harsh consequences but only whether there would be such consequences. It is argued that the judge applied the incorrect test and that on the facts of the case, including those found by the judge at [48] of the decision the circumstances could render refusal a breach of article 8 on the basis that it could result in unjustifiably harsh consequences for the applicant. At [48] the judge found that the mother-in-law's offer of financial support was "*genuine, credible and reliable.*"

8. GEN 3.1 provides as follows:

"GEN.3.1.

(1) *Where:*

(a) *the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. applies, and is not met from the specified sources referred to in the relevant paragraph; and*

(b) *it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child; then*

the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph).

(2) *Where the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. is met following consideration under sub-paragraph (1) (and provided that the other relevant requirements of the Immigration Rules are also met), the applicant will be granted entry clearance or leave to remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1. or D-LTRC.1.1. or paragraph 315 or 316B of the Immigration Rules.*

9. It is clear that the judge only considered *would* rather than *could*, which, as Ms Norman put it, opens the gateway to consideration of third party support. The judge did not consider the *could* or even 'might' aspect. This was an obvious error of law which infected the whole of the decision so that it must be set aside.

10. Mr McVeety agreed with Ms Norman's interpretation of GEN 3.1 and further agreed that on the particular facts of this case, where the sponsor had given up his employment to care for his elderly mother the refusal of the application for a shortfall of less than £5, *could* result in unjustifiably harsh consequences for the appellant or her partner so that the judge should have considered the genuine offer of third-party support. On the facts of this case I am satisfied on any view of the circumstances that the appeal should have been allowed.

11. In the circumstances and for the reasons set out above, I find an error of law in the decision of the First-tier Tribunal so that it must be set aside and remade.

Decision

The appellant's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

I remake the decision in the appeal by allowing it.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 9 October 2020