



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01234/2020

THE IMMIGRATION ACTS

Heard at Field House
On 7 April 2021
Extempore

Decision & Reasons Promulgated
On 19 April 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MS YOKE FONG LEE
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam, Counsel instructed by David Tang & Company
For the Respondent: Ms C Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of the Secretary of State made on 10 January 2020 to refuse her further leave to remain as the spouse of a person present and settled here. Her initial appeal against that decision was dismissed by First-tier Tribunal Judge Singer but for the reasons set out in my decision of 15 December 2020 (a copy of which is attached) that decision was set aside. Most of the relevant details of how the appeal proceeded are set out in that decision and it is sufficient to record that in this case the only reason that the appellant was refused further leave to

remain was that she had not met the financial requirements to be granted further leave to remain as the spouse of a person settled here, albeit by a relatively small amount of money.

2. Since I handed down my decision setting aside the decision of Judge Singer the situation has changed somewhat in terms of the evidence available. I have been given evidence under cover of emails of 26 March 2021 and 6 April 2021 which set out the current circumstances of the appellant and her husband. To summarise, what they have been able to do is to operate a takeaway restaurant which has, perhaps unsurprisingly, during the pandemic done extremely well in terms of its profitability. As is stated in the letter from David Tang & Company acting for the appellant that at the time of their writing to the Upper Tribunal on 14 October 2020 the takeaway business had only been a business for a few months. It had been difficult to predict. It is also said that at the First-tier Tribunal hearing in July the sponsor estimated that his annual profit would be in the region of 25,000 but that the annual report covering the period of 7 January 2020 to 31 January 2021 showed a net profit of 26,665, giving net salaries for the appellant and sponsor of roughly £17,000.
3. What is also said, importantly, is that the net profit of the business for the last eight months plus the combined salaries of both the appellant and the sponsor were £44,100, well beyond the expected annual profit of £25,000. As is said, that would clearly exceed the £18,600 required by Appendix FM of the Immigration Rules as being the level of financial support necessary for the appellant to be granted leave to enter or leave to remain.
4. Looking at this material, it does appear to me to meet the requirements necessary as set out both in Appendix FM and Appendix FM-SE to show that the evidential requirements of the Immigration Rules are met albeit that the original documents have not been presented to me but I have no reason to doubt that they are available and, as Mr Lam pointed out, the reports relating to the setting up of the company and its reporting requirements are matters of public record. In light of that and in light of Ms Everett's quite proper concession that there would be some difficulty in the light of the Chikwamba [2008] UKHL 40 and subsequent jurisprudence in arguing the public interest and in the light of the current pandemic, I consider that, for the reasons I now give, the appeal falls to be allowed.
5. In reaching that conclusion I note what was said in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) at [90]:

90. *Chikwamba* pre-dates Part 5A of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"), which was inserted by the Immigration Act 2014. Section 117A(2) of the 2002 Act provides that a court or tribunal, when considering "the public interest question," must have regard to the considerations listed in section 117B (and 117C in cases concerning the deportation of foreign criminals, which is not relevant to this appeal). The "public interest question" is defined as "the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2)". There is no exception in Part 5A of the 2002 Act (or elsewhere) for cases in which an appellant, following removal, will succeed in an application for entry clearance.

Accordingly, an appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the 2002 Act including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on *Chikwamba* does not obviate the need to do this

6. I am satisfied that, on the facts of this case, article 8(1) is engaged, given the likely separation, and that entry clearance would be given.
7. In this case it is evident and it is not in dispute that all the other requirements of the Immigration Rules are met save for the failure to provide evidence of sufficient income when the application was made. That is no longer the case. There is no suggestion of any other basis on which the decision could have been refused and I conclude on the basis of the evidence that it is highly likely that any application for entry clearance would be met, given it is not in dispute that the relationship is genuine and subsisting, that the relevant English language qualifications are met and for that matter now that the financial requirements are met.
8. The current difficulty is that, unlike before the pandemic, it is not at all clear whether and how the appellant would return to Malaysia to make an application to return, how she would be able to do so because that would require a personal appointment for her to give biometric details as well as supplying documents and how long it would take for the application to be processed. It is also unclear as to how long it would take her to be able to return to the United Kingdom once she had been issued with a visa.
9. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest and this weighs heavily in favour of removal. I treat sections 117B(2) (ability to speak English) and 117B(3) (financial independence) as neutral factors, as the appellant's partner clearly earns a sufficient income for the couple not to be a burden on the. Section 117B(4) is not applicable because the appellant has not been in the UK unlawfully. Section 117B(5) (little weight to a private life established when a person's immigration status is precarious) does not apply to the appellant's relationship with her partner because (a) the relationship engages her family, rather than private, life; and (b) it was established before she came to the UK; ie not at a time when her immigration status was precarious.
10. Adopting the balance sheet approach recommended by Lord Thomas in Hesham Ali (Iraq) v Secretary of State for the Home Department [\[2016\] UKSC 60](#) we find that weighing in the appellant is favour is that the requirements of the rules are now met and that separation from her partner is of unknown duration.
11. Weighing on the other side of the balance sheet is that even though the appellant's removal will be followed by her re-entry, there is, a less strong public interest in her being required to leave the UK given she now meets the rules. I consider that the public interest in this case is diminished in line with *Chikwamba* and the subsequent case law because of the difficulty that the appellant would have in that it is not at all

clear how long she would be separated from her husband, it may be months, it may be considerably longer than that, and that concern in and of itself is a factor to be taken into account.

12. Taking all these factors into account and bearing in mind that the requirements of the Rules would now appear to be met, I consider that on the particular facts of this case, given the previous good immigration history, given the fact that all the requirements of the Immigration Rules bar the financial requirements were met but that is no longer the case, that on these facts, and given the current pandemic and uncertainty, that the public interest in the removal is outweighed by the appellant's Article 8 rights and accordingly I allow the appeal on human rights grounds.

Notice of Decision

In summary, the decision of the First-tier Tribunal involved the making of an error of law and is set aside. I remake the decision by allowing the appeal on human rights grounds.

No anonymity direction is made.

Signed

Date 07 April 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION



IAC-FH-CK-V1

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

Appeal Number: HU/01234/2020

THE IMMIGRATION ACTS

**Dealt with at Field House without a Hearing
On 25 November 2020**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**YOKE FONG LEE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge R Singer, promulgated on 31 July 2020 dismissing her appeal against a decision of the respondent of 10 January 2020 refusing her further leave to remain as spouse of a person present and settled here.
2. The appellant's case is that the decision was such that to remove her was unjustifiably harsh pursuant to GEN.3.2 of Appendix FM and/or Article 8 of the Human Rights Convention. It was also argued there were insurmountable obstacles such that EX.1 was met. The respondent's case is, in brief, that the appellant did not meet the financial criteria to be granted further leave to remain in the United

Kingdom, although she met the eligibility and suitability requirements. The respondent concluded that she did not meet the requirements set out in EX.1 nor did she consider that she met GEN.3.2 or that removal would be in breach of Article 8 of the Human Rights Convention.

3. The judge heard evidence from the appellant as well as submissions from Mr Lam concluding:-
 - (i) that there were no insurmountable obstacles to the couple relocating to Malaysia;
 - (ii) that the appellant did not meet the requirements of paragraph 276ADE(1)(vi) of the Rules;
 - (iii) that although there were significant factors in the appellant's favour [46] and significant points weighing in favour of the respondent [45] that [47] the scales fell firmly on the side of the respondent such that the circumstances of the appellant's case were not sufficiently compelling to outweigh the public interest in controlling immigration.
4. The appellant sought permission to appeal on the grounds that the judge had erred:-
 - (i) in not taking into account when assessing proportionality under EX.1(b) that this appellant was in a different position to the majority of migrant in that she had been granted leave to remain as a spouse and that the reason for refusal was that they were £1,000 short of meeting the financial requirement, this diminishing the public interest in her removal;
 - (ii) in substituting "developed" for "established" in assessing her private life pursuant to Section 117B(5) although the family life was still given a significant amount of weight;
 - (iii) in failing, having adopted the balance sheet approach to explain why given the number of factors in favour of the appellant, these were outweighed by those in favour of the respondent.
5. On 30 September 2020 Upper Tribunal Judge Plimmer granted permission stating:
 - "1. It is arguable that although the FtT Judge set out in considerable detail the pros and cons of the relevant Article 8 balance sheet approach, there was a failure to provide adequate reasons as to why the scales fell firmly on the side of the respondent.
 2. This is an unusual case in which there were prima facie compelling reasons why the strong public interest (see in particular [46(g)] to [46(i)] of the FtT's decision) was outweighed and it is arguable that the reasons for concluding the opposite are inadequate.
 3. All grounds are arguable."
6. Subsequent to that on 12 October 2020 directions were issued by Upper Tribunal Judge Coker stating that she had reached the provisional view that it would be appropriate to determine whether the making of the First-tier Tribunal decisions

involved the making of an error of law and if so whether it should be set aside without a hearing. A timetable was given as to how and in what manner further submissions could be made and for any objection to this being determined on the papers should be given.

7. The respondent has not replied to the directions. The appellant's solicitors wrote to the Tribunal on 14 October 2020 stating:

"We are of the view that the grounds for permission to appeal are sufficiently clear to establish that there are errors of law with First-tier Tribunal Judge Singer's determination promulgated on 31 July 2020, hence we do not see that there is anything we could add to assist the Upper Tribunal.

We would respectfully request the Upper Tribunal to set aside the decision of the First-tier Tribunal and remake the decision rather than remit it back to the First-tier Tribunal for a fresh hearing. The reason being that First-tier Tribunal Judge Singer has set out the factors in favour of the appellant comprehensively but failed to explain why those compelling factors should be outweighed by the public interest. It is submitted that the Upper Tribunal is in a position with the available evidence to remake the decision on the appeal."

8. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. Given that no objection to this course of action has been raised, and bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, I am satisfied that in the particular circumstances of this case where no objection to a decision being made in the absence of a hearing that it would be right to do so
9. In deciding to make a decision without a hearing, I have borne in mind Rule 34 and the judgment of Fordham J in ICWI v President of the Upper Tribunal [2020] EWHC 3103 as well as the order made in that case. I note that the respondent has made no submissions in this case and that the applicant, who is legally represented, has made no objection to the matter being dealt with on the papers and has expressly said that they have nothing more to add. Further, for the reasons set out below, I have found that the decision of the First-tier Tribunal involved the making of an error of law and, as the appellant has requested, the decision of the First-tier Tribunal is set aside to be remade in the Upper Tribunal. In the circumstances, it cannot be said the decision not to have a hearing is unfair or has prejudiced the appellant.
10. As Upper Tribunal Judge Plimmer noted, the facts of this case are unusual. The appellant entered the United Kingdom with a properly issued visa to join her husband and it is only because his business was less profitable than had been expected that they were unable to meet the financial requirements for the appellant to be granted further leave to remain. Judge Singer sets out at paragraphs 45 and 46 of the decision, at paragraph 45(e), at the very end, the judge wrote that it was reasonable to expect the sponsor (the appellant's husband) to relocate and "it is a fact to which I give some weight".

11. At paragraph 46(a) the judge found that the appellant and sponsor had been in a relationship for many years, have a strong family life together albeit that it had developed in the United Kingdom whilst the appellant had been here “precariously”. Contrary to what is averred in the grounds of appeal I do not consider that this is any material error given the judge has attached a significant amount of weight to this. Similarly, I do not consider that it is any material error to say that the appellant would have developed her private life in terms of friendship and although he was required to give this little weight he considered it was nonetheless worthy of some respect. He also considered her improvement in English gave limited weight in her favour as did the degree of hardship albeit not one reaching paragraph 276ADE(1)(vi) of the Immigration Rules or EX.1 attracted weight. The judge drew particular weight to the current situation regarding coronavirus (46(g)) which he found to be a point strongly in the appellant’s favour. He also found strongly in her favour that the sponsor would have to face a difficult and grim choice of whether to remain in the United Kingdom until his wife can credibly make a successful entry clearance application, there being no way of knowing how long it would take for him to be able to demonstrate he met the financial requirement, or he would have to leave the UK and return to Malaysia giving up the rights and the life he has in the United Kingdom. He also noted that the parties were unlikely to be a financial burden on the state.
12. In the circumstances, I am satisfied that the judge has simply failed to explain why on the particular facts of this case, which are unusual, the scales fell “firmly” on the side of the respondent. Accordingly I am satisfied that the decision of the First-tier Tribunal involved the making of an error of law.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- (2) The decision is to be remade in the Upper Tribunal at a remote hearing. The findings of fact made by Judge Singer are preserved; the purpose of the hearing will be to make an appropriate, reasoned finding as to whether the factors identified by Judge Singer are sufficient to outweigh the public interest in removal.
- (3) No anonymity direction is made.

Signed

Date: 2 December 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul