Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05081/2020**

THE IMMIGRATION ACTS

Heard at Field House
On 11th November 2021

Decision & Reasons Promulgated
On 09th December 2021

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR KRISHNA BIR THAPA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Frances Allen, counsel instructed by Paul John & Co Solicitors
For the Respondent: Mr Esen Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant applies with permission to appeal the decision of First-tier Tribunal Judge Solly ("the judge") who, on 15th June 2021, dismissed the appellant's appeal against the Secretary of State's decision dated 20th March 2020 to refuse his application for leave to remain in the United Kingdom under Appendix FM as the spouse of a person with indefinite leave to remain. The appellant appealed to the First Tier Tribunal ("FtT") on human rights grounds.

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2. The appellant submitted, in the grounds for permission to appeal, that the judge made an error of law in finding that the appellant did not satisfy the financial requirements of the Immigration Rules. The wife of the appellant produced her first year pay slips as proof of her income until the date of hearing which was conducted on 11th June 2021. She also produced her P60 for the tax year April 2020 to April 2021 which evidenced she earned in excess of the required threshold of £18,600 as set out under the financial requirements E-ECP3.1. His application resulted in a human appeal, and the relevant period of income was from June 2020 to 2021. The judge failed to consider the gross income from the P60 and based her calculation on the aggregate of the last six pay slips of the appellant's wife. It was submitted that the relevant pay slips considered by the judge from January 2021 to June 2021 was when the wife was on furlough and the COVID guidance from the UKVI specifically stated that if the salary had been reduced owing to furlough income it would be considered as if they were earning 100% of the salary. Secondly, the judge failed to consider the Immigration Rules that the appellant only needed to prove a gross annual income, and this was satisfied by the wife having a total annual gross income of £20,053.98 when considering the period from June 2020 to May 2021. As per **Agyarko** [2017] UKSC 11 an erroneous factual consideration which formed a significant part of the decision undermined the decision.

3. The appellant could not return to Nepal and make an application owing to the current pandemic situation and there were special circumstances in his case which required consideration under the **Chikwamba** [2008] UKHL 40 and **Agyarko** principles; there was no public interest in his removal from the UK. The Article 8 assessment of the judge in the present appeal was perverse as it failed to give adequate weight to the fact that the appellant was not dependent on public funds.

4. At the hearing before me Ms Allen submitted that the appellant was certain to succeed on the basis of his wife's income should he return to Nepal. The question of his suitability was not raised during the reasons for refusal, and he had satisfied the English language requirement and he was independent financially.

5. Mr Tufan submitted that the financial requirement was not met, albeit there were six months worth of pay slips because it was not shown in the evidence that he could meet the threshold of £18,600. That said he could not meet the Immigration Rules because he did not have the relevant immigration status however Mr Tufan also relied on the case of **Younas (section 117B (6) (b); Chikwamba; Zambrano) Pakistan** [2020] UKUT 129 (IAC).

Analysis

6. The appellant maintained he cannot comply with the rules whilst in the UK (because of his immigration status) but had satisfied the financial criteria, which the judge miscalculated, and if he were to make an entry clearance application, he would be certain to succeed and therefore the Immigration Rules or rather the public interest should be outweighed even whilst the appellant is in the UK.

7. The decision records that the parties agreed that the matters for determination before the judge were

   (1) paragraph 276ADE(1)(vi);

   (2) paragraph EX1(b) of Appendix FM to the Rules; and

   (3) Article 8 based leave outside the Rules.

8. There was no challenge in the grounds to the consideration and findings by the judge in relation to paragraph 276ADE(1)(vi) or EX1(b). Thus, there was no challenge to the issue of very significant obstacles on return under Paragraph 276ADE(1)(vi) on the part of the appellant. The refusal letter identified that there were no insurmountable obstacles to the appellant or his partner continuing their family life in Nepal. The judge found that the appellant and wife could, with reference to paragraph EX.1(b) return together whether for a short time or longer'. There was no challenge to this finding at paragraph 39. It is in that context that the judge considered the appeal.

9. The appellant could not satisfy the Immigration Rules; he failed to satisfy the requirement under Appendix FM E-LTRP 2.2 because he did not have the relevant immigration status. He entered the UK on 31st March 2011 as a student and his leave was extended until 3rd December 2015 and thereafter, he was without leave. As the judge noted, at paragraph 55, the appellant married his wife while his residence was unlawful albeit apparently, he did not tell her of his immigration status. Further at paragraphs 34 and 35 the judge noted that the last six months' pay slips prior to the hearing had been produced but the up to date employer's letter had not been produced and that was also a requisite of Appendix FM.SE and thus not fulfilled. The failure to produce that letter was acknowledged by the appellant's representative. That was part of the financial criteria and not met.

10. That said, it is Ms Allen's case that the judge failed to recognise that the appellant's wife's income which included her overtime could show that she had reached the requisite amount of £18,600 prior to the date of application, but also more importantly in the lead up to the hearing date. Effectively it was submitted that was a relevant point to take into account under Article 8. That was, however, not a material error of law because, first, even if the required sum had been reached in terms of income, the appellant had not fulfilled the immigration rules, as the judge found and noted above on other issues, and their fulfilment is the starting point for an analysis under Article 8, reflecting as they do the position of the Secretary of State. At paragraph 34 the judge identified that the Home Office Presenting Officer pointed out there was no up to date letter from the employer and at paragraph 36 found, 'he [the appellant] fails the immigration status requirement of E-LTRP2.2 as well as not satisfying the evidential and financial conditions'. The employer letter was one of those conditions aside from the level of income. The judge at paragraph 49, identified that the necessary employer letter was 'likely' to be forthcoming, but he did not state 'certain'.

11. Secondly, and moreover, the application of **Younas** demonstrates that no material error of law was made by the judge's analysis. The judge cited this authority. At the headnote paragraph (i) of **Younas** states

(1) *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 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this.*

As stated at paragraph 97 when discussing how much weight should be attached to the public interest

> *"If there is no public interest in the person's removal then it will be disproportionate for him or her to be removed and no further analysis under Article 8 is required. On the other hand if there is at least some degree of public interest in a person being temporarily removed, then it will be necessary to evaluate how much weight is given to that public interest so that this can factored into the proportionality assessment under Article 8(2)".*

And at paragraph 98

> *'We have found that the appellant (a) entered the UK as a visitor even though her real intention was to remain in the UK with her partner; and (b) remained in the UK despite stating in the 2016 application that she would leave after 6 months. We agree with Mr Lindsay that, in the light of this immigration history, the public interest in the appellant's removal from the UK is strong; and the strength of that public interest is not significantly diminished because she will be able to re-enter the UK. The integrity of, and the public's confidence in, the UK's immigration system is undermined if a person is able to circumvent it, as the appellant has attempted to do by entering the UK as a visitor with the intention of remaining permanently. Requiring the appellant, in these circumstances, to leave the UK in order to make a valid entry clearance application as a partner, far from being merely a disruptive formality, serves the important public interest of the maintenance of effective immigration controls'.*

12. Thus, 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 117B. **Younas** confirms there is no exception in part 5A of the 2002 Act for an appellant who argues that they will succeed in an application for entry clearance following a removal. Paragraph 117B(1) still applies and this provides that the *maintenance of effective immigration control* is in the public interest. In this case, as the judge noted, Section 117B(4) was applicable because the appellant commenced the relationship when he was in the UK without lawful leave.

13. The judge noted that it was the appellant's position that should the application be made at the date of the hearing it would succeed. As stated at paragraph 98 of

Younas, the integrity and the public confidence in the UK's immigration system will be undermined if a person is able to circumvent the immigration rules by pointing to the fact that by the time of the hearing, he can theoretically fulfil the requirements of the rules. In fact, in this case, as seen from above, even by the date of the hearing the appellant had not shown that he had fulfilled all of the requirements of the immigration rules in relation to the financial criteria.

14. In this instance, however, the judge at paragraph 52 specifically factored in '*the strong public interest expressed in Section 117 that it is in the public interest that those who do not have a right to remain here do not do so. This is a factor for me to take into account in considering Article 8 outside the rules and it weights against him to a significant extent and is exacerbated by his poor immigration history*'. This was a significant factor the judge was entitled to rely upon.

15. Further, the question of temporary separation was considered. Having already recorded the respondent's evidence in relation the speed of applications from abroad (which again was not challenged), the judge took a fact sensitive approach and found, there were no very significant obstacles in the appellant returning to Nepal (this was not challenged by the appellant) and that there was no indication that temporary removal (including from his wife) would be disproportionate. It is clear when taking the balance sheet approach, the factors weighed against removal were that the appellant and his wife would be separated but weighing on the other side of the balance sheet was that for the reasons explained above there was nonetheless a strong public interest in being required to leave in order to comply with the immigration requirements.

16. I have noted at paragraph 55 the judge specifically found that the appellant married his wife while his residence was unlawful, and he did not tell her of his immigration status. It was open to the judge to give little weight to a family life developed during such a time. The judge was aware that this was not a case where there are children involved. The judge at paragraph 56 also did not conclude that 'any of her [the wife's] health conditions are a factor that in the balance weight in his favour'. He recorded that the appellant and his wife could reside in Nepal [46], which would include at the very least whilst the appellant was making an application, and that finding does not appear to have been challenged.

17. Ms Allen submitted that in the case of the pandemic it was inappropriate to expect people to fly around the world. First, that was not a factor which was raised in the grounds of appeal to the First-tier Tribunal or in the skeleton argument before the First-tier Tribunal and, secondly, countries and airlines have systematically imposed restrictions and health requirements with which travellers must comply, but travel continues. The pandemic is global affecting the United Kingdom and Nepal and it will be a matter for the Secretary of State to consider the administration of travel and issues of logistics on removal.

18. I find the First-tier Tribunal decision contains no material error of law and the decision will stand. The appeal remains dismissed.

No anonymity direction is made.

Signed H Rimington Date 29th November 2021

Upper Tribunal Judge Rimington