



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/06759/2013

THE IMMIGRATION ACTS

Heard at Field House
On 31st March 2013

Determination Promulgated
On 17th April 2014
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IBSTAM YASIN

Respondent

Representation:

For the Appellant: Mr Diwnycz, Home Office Presenting Officer
For the Respondent: The Sponsor in person

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Hillis made following a hearing at Bradford on 8th January 2014.

2. The claimant is a citizen of Pakistan. He applied for come to the UK to join his wife, Sobia Ahmed, but was refused on the grounds that he had failed to show that his Sponsor's annual income met the minimum level required by paragraph E-ECP 3.1, namely £18,600.
3. The judge recorded that the contract of employment dated 2nd February 2010 shows that the Sponsor's starting gross annual income was £16,845. The Appellant made his application on 21st November 2012, and one month later the Sponsor received a promotion and increase in salary to a figure in excess of the required minimum.
4. The annual salary which she was receiving at the time that the decision was made, namely 21st February 2013, was £19,260.
5. The judge wrote as follows:

“The relevant date of the Sponsor's income to be assessed is the date of decision and, therefore, her income on 21st February 2013 met the requirements of ECP 3.1 as set out above.

It is in my judgement significant that, due to local difficulties, there was no Entry Clearance Manager Review of the application. Additionally the delay between the application being made on 21st November 2012 (wrongly stated as 2011) and the date of decision of 20th February, namely, fifteen months, is due to no fault of this Appellant.

Given the long delay between application and decision I find that reliance on the fact that the Appellant had not submitted a full six months of bank statements immediately prior to the application date is inadmissible in this appeal. In my judgement the requirement of six months bank statements is to show consistency in the claimed earnings and it was not envisaged in this requirement that such a long period between application and decision would take place. It is more important in the context of this appeal that the bank statements and wage slips for the six month period immediately prior to the date of decision is more helpful to the Respondent in assessing the validity and merits of this application.

In reaching this conclusion I have taken into account the Respondent's discretion to exercise evidential flexibility and can find no valid reason for it not being extended to this Appellant given the length of the delay in deciding his application.”

6. On that basis he allowed the appeal both under the Rules and under Article 8.

The Grounds of Application

7. The Secretary of State sought permission to appeal on the grounds that the judge had erred in law in concluding that the relevant date from which to assess the case was the date of the ECO decision. For Appendix FM and Appendix FM-SE the significant

date is the date of application and the significant evidence is from the specified period before that date, and not the date of decision. The Tribunal has not addressed the relevant evidence for the period of six months prior to 21st November 2012 (the date of application) and has produced an incorrect finding.

8. Furthermore the Rules of specific evidence are comprehensively set out in Appendix FM-SE to the Immigration Rules which set out what types of evidence are required, the periods they cover and the format they should be in. The Tribunal decided to disregard the requirements, which is quite wrong. It is clear that at the specified evidence shows that at the date of the application the Appellant could not satisfy the income threshold of the requirements of the Rules.
9. The appeal was also allowed under ECHR. It was made clear in Gulshan [2013] UKUT 00640 that the Article 8 assessment should only be carried out when there are compelling circumstances not recognised by the Rules. The Tribunal did not identify any such circumstances. Gulshan also makes it clear that an appeal should only be allowed where there are exceptional circumstances, namely ones where refusal would lead to an unjustifiably harsh outcome. The ECO applied the law as it stood and treated this case in the same way as any other. Given that, post-decision, it would appear that the Sponsor met the income threshold requirements a fresh application may now be successful, the outcome could not be considered to be unjustifiably harsh.
10. Permission to appeal was granted by Judge Brunnen for the reasons stated in the grounds on 20th February 2014.

The Hearing

11. Mr Diwnycz relied on his grounds.
12. The Sponsor relied on submissions prepared for her by Global Immigration and said that from her understanding the out of country applications are usually assessed as at the date of decision. As at the date of application she provided a letter from her employer which confirmed that she was receiving a gross salary of £17,474 increased upon promotion to £19,260 on 30th November 2012. She also asked that consideration be given to the case of MM (R on the application of) [2013] EWHC 1900 when it was held that £18,600 was a grossly disproportionate interference with the right of affected persons to live their family life in the UK.

Findings and Conclusions

13. The judge erred in two respects. Firstly Appendix FM -SE sets out the specified evidence, in respect of salaried employment in the UK, which must be provided. It includes inter alia, wage slips covering:
 - (i) a period of six months prior to the date of application if the applicant has been employed by their current employer for at least six months, or

- (ii) in respect of any period of salaried employment in the period of twelve months prior to the date of application if the Appellant has been employed by their current employer for less than six months.

- 14. It is clear therefore that the relevant date is the date of application. As at that date the sponsor was not in a position to meet the requirements of the Rules because her salary was not at a level of £18,600.
- 15. It was therefore not open to the judge to allow the appeal under the Rules.
- 16. So far as Article 8 is concerned, it is difficult to see how it can properly be said that the decision is disproportionate. The requirements of the Rules are not met and only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them (R on the application of Nagre v SSHD [2013] EWHC 720 (Admin)). MM did not strike down the Rules as being incompatible with the UK's obligations under the ECHR although it did suggest a number of alternative levels of income which might mitigate their effect.
- 17. No compelling circumstances have been cited other than the obvious one, namely that the Appellant was in a position to meet the requirements as at the date of decision and still is now. Article 8 is not a mechanism for disregarding the effect of the Immigration Rules as clearly set out in Appendix FM. The appropriate course for this Appellant is to make a fresh application which on the basis of the facts as found by the Judge and not disputed by the Respondent, ought to succeed.

Decision

- 18. The original judge erred in law. His decision is set aside. It is remade as follows. The claimant's appeal is dismissed on all grounds.

Signed

Date

Upper Tribunal Judge Taylor