



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/04331/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at : Field House
On : 27 September 2017**

**Decision and Reasons
Promulgated
On : 22 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

ZAIN JOMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr A Moran of Alex Moran Immigration & Asylum
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal on 24 July 2017.
2. The appellant is a citizen of Syria, born on 5 January 1988. She applied for entry clearance to the UK as a spouse, to join her husband, a Syrian citizen (hereafter "the sponsor") who has been granted leave to remain in the UK as a refugee from 11 March 2015 until 10 March 2020.
3. The appellant made her application for entry clearance on 23 December 2016. Her application was refused on 5 February 2017. The respondent

put in issue the Suitability, Eligibility and Financial requirements of Appendix FM of the Immigration Rules (“the Rules”). The respondent was satisfied that false information had been submitted with regard to the sponsor’s income and employment. The respondent noted the sponsor’s payslips stated that he was paid in cash while the employer’s letter stated that he was paid by cheque. The respondent further noted that the net pay shown on payslips dated 31 July 2016 and 30 November 2016 was not reflected by corresponding deposits into the sponsor’s bank account. The respondent thus concluded that the payslips were non-genuine. In consequence, the respondent could not be satisfied that the relationship was genuine and subsisting and that the couple intended to live together permanently in the UK and that the sponsor’s income was as claimed. She therefore refused the application under paragraph EC-P.1.1 (c) and (d) of Appendix FM. As for Article 8 of the ECHR, the respondent concluded that there was no basis to warrant a grant of leave outside of the Rules.

4. The appellant appealed that decision and her appeal was heard on the papers in the First-tier Tribunal on 7 June 2017 and dismissed in a decision promulgated on 16 June 2017.
5. The appeal was heard by First-tier Tribunal Judge A.J. Parker (hereafter “the judge”). The judge considered the evidence and the detailed submissions made on the behalf of the appellant. The judge on consideration of letters from the sponsor’s accountant and employer accepted the payslips were marked “cash” in error, and that in July and November 2016 the sponsor was overpaid by 20p. The judge found therefore that false information had not been provided and accepted that the suitability and eligibility requirements of the Rules were met. The judge however was not satisfied that the financial requirements were met. The judge noted the appellant had failed to provide all the documents submitted with the application. The judge further noted that there was an absence of payslips for 6 months prior to the date of application and original bank statements and “bank slips”, and thus concluded that there had been a non-compliance with Appendix FM-SE of the Rules. The judge accepted there was family life but taking all matters into consideration he concluded that the public interest was in the respondent’s favour and that the decision was proportionate. He dismissed the appeal under the Rules and on human rights grounds contrary to Article 8 of the ECHR.
6. Permission to appeal that decision was sought on the grounds that the judge had erred in dismissing the appeal on a basis not raised in the refusal which the appellant had no opportunity to address.
7. Permission to appeal was granted on all grounds.

Appeal hearing

8. At the hearing I heard submissions on the error of law. Mr Tufan conceded the judge materially erred in law for the reasons given in the grounds. He also observed that there was a clear misdirection as to the

law at [11] albeit this did not form part of the appellant's grounds. I did not therefore need to call upon Mr Moran.

9. Mr Tufan is correct in his submission that the judge made an obvious error at [11] in his legal self-direction. The judge failed to recognise that this appeal is governed by part 5 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") as amended by the Immigration Act 2014 introduced on 6 April 2015. The error is likely to have arose as a result of the judge's use of a template decision and there was clearly no jurisdiction to dismiss the appeal under the Rules. However, the appeal turns on substance rather than form and I am satisfied that Mr Tufan was correct to concede the appeal for the reasons given in the appellant's grounds. I accept the judge erred in dismissing the appeal on an issue not raised by the respondent in the refusal without giving the appellant an opportunity to address it, (see - RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039). I am satisfied that this was procedurally unfair and that in consequence the decision must be set aside.

Re-making the Decision

10. The advocates were content for the tribunal to proceed to remake the decision based on the judge's preserved findings of fact.
11. Mr Moran submitted that the sole issue raised in the refusal had been resolved by the judge in the appellant's favour. He submitted that the relevant date for the tribunal's assessment was the date of hearing. Mr Moran submitted that save for a change of accommodation, the sponsor's circumstances had not changed since the date of application.
12. Mr Tufan did not rely on the Rule 24 response and he properly acknowledged that the requirements "appeared" to have been met albeit he did not concede the appeal.
13. I have decided this appeal considering all the documentary evidence before me.
14. The Grounds of Appeal are limited by statutory amendments to the 2002 Act on 6 April 2015. In this case the appeal is pursued on human rights grounds contrary to Article 8 of the ECHR. In an Article 8 appeal, it is for the appellant to show on the balance of probabilities that Article 8 is engaged. It is for the respondent to justify the proportionality of her decision. I have assessed the appeal as at the date of hearing.
15. While I recognise that this is a human rights appeal, it is incumbent on the tribunal to make findings in relation to the facts in issue. The factual dispute between the parties is resolved by the judge's findings of fact which are preserved at [20]-[21]. The judge accepted the explanation for the anomalies in the documentation relating to the sponsor's employment and income. The judge was thus satisfied that the documentation was not false and concluded the suitability and eligibility

requirements were met. The only issue is whether the financial requirements are met.

16. Pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 there is produced to me a duplication of the documentation submitted with the application to prove the financial requirements were met at that date as well as up-to-date evidence of the sponsor's financial circumstances. The original documentation was made available at the hearing. The specified evidence required pursuant to Appendix FM-SE is produced in the form of payslips, bank statements and an employment letter. That evidence relates to the period prior to the date of application from May 2016 to September 2017. I am satisfied that the documentation clearly shows the sponsor's income evidenced in compliance with the Rules exceeds the minimum income requirement at the date of decision and at the date of hearing, and I find accordingly.
17. Mr Moran rightly draws the tribunal's attention to the sponsor's change of accommodation since the date of decision. There is satisfactory and unchallenged evidence in the form of a property report demonstrating to the required standard that the accommodation is clearly adequate.
18. On the totality of the evidence, I am satisfied that the requirements of the Rules are met and I find accordingly.
19. It is against these core findings that I proceed to determine the appeal.
20. I have applied the five-step approach outlined by Lord Bingham in the House of Lords decision in R (Razgar) v SSHD [2004] UKHL 27. I have further borne in mind the judgements in, Huang [2007] UKHL 11 and Beoku-Betts [2008] UKHL 39. I remind myself that in assessing proportionality there is no separate test of exceptionality and I must consider the Article 8 rights of all affected persons.
21. There is clearly family life between the appellant and sponsor; there is no dispute about the relationship. I find that the refusal of leave to enter will interfere with that family life, as it will prevent further development by the appellant of her family life with her husband in the UK. The decision in relation to the appellant was in accordance with the law and was made in pursuit of a legitimate aim of maintaining effective immigration control for the economic well-being of the country.
22. The final question is whether the interference is proportionate to the legitimate public aim. The fact that the appellant satisfies the requirements of the Rules is a weighty factor in her favour in the balancing exercise required to determine proportionality and, whilst it is not determinative, Appendix FM of the Rules reflects how, under Article 8, the balance will be struck.
23. In reaching my conclusions, I have regard to the public interest considerations set out in section 117B of the 2002 Act. I take into account that the maintenance of effective immigration control is in the public interest. There is no dispute that the appellant speaks English as

this requirement is not put in issue before me, but I treat this as a neutral factor in the balancing exercise. I also take note that the appellant has not proved that she is financially independent within the meaning of that section (see - Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803), but her lack of financial independence must be balanced against the fact that she will be maintained and accommodated by the sponsor in the UK in accordance with the Rules. I also factor into my assessment that the sponsor is a refugee and could not therefore be reasonably expected to continue family life in Syria with the appellant.

24. In the circumstances, I find the factors that weigh in the appellant's favour demonstrate why the public interest in the maintenance of firm and fair immigration control should not prevail in this case.
25. Accordingly, I find that the respondent's decision to refuse entry clearance to the appellant amounts to an unjustified interference with her family life with the sponsor, and that it is not proportionate in terms of Article 8. I allow the appeal on human rights grounds.

DECISION

The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision and re-make it by allowing the appellant's appeal on human rights grounds.

Signed:

Deputy Upper Tribunal Judge Bagral
2017

Dated: 30 October

TO THE RESPONDENT **FEE AWARD**

I make a full fee award. I see no reason why the fee should not follow the event in this case.

Signed:

Deputy Upper Tribunal Judge Bagral
2017

Dated: 30 October