



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05962/2015

THE IMMIGRATION ACTS

Heard at Field House
On 29 June 2017

Decision Promulgated
On 16 August 2017

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

ATIF SHABBIR

Respondent

Representation:

For the appellant: Mr Staunton, Senior Home Office Presenting Officer
For the respondent: Mr Z. Nasim, Counsel instructed by Legal Rights Partnership

DECISION AND REASONS

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Entry Clearance Officer (ECO) is the appellant in the appeal to the Upper Tribunal.
2. The appellant appealed against the respondent's decision to refuse a human rights claim within the context of an application for entry clearance as a spouse made on 14

May 2015. The ECO refused the application in a decision dated 12 August 2015 because insufficient evidence was produced to meet the financial requirements.

3. A First-tier Tribunal judge allowed the appeal in a decision promulgated on 06 December 2016. She made the following findings:

- “8. Mr Nazim’s position was that the Sponsor was not a salaried employee and it was therefore necessary to look at six months’ employment from November 2014 to April 2015 and that showed an income of £9490 for a six-month period. The situation is somewhat complicated as the Sponsor has two jobs and in respect of one of them there as a change of accountant so that there are wage slips from three different companies.
9. I am not satisfied that the appellant produced employers’ letters for a six-month period prior to the date of the application in accordance with the rules because the letter from Carlton Villages Services Ltd does not provide information about the sponsor’s pay and her length of time with the company. That information was not provided until 7 September 2015. That information is however now before me and it does show that the sponsor has been working for the same company, who used their accountants to deal with the payroll, from October 2013 and that her salary from that business as of 7 September 2015 was £8566.68. in the year to April 2015 she earned £13,362.39 from Compass Group according to the P60 from that organisation.
10. The appellant’s bundle includes a letter from Medirest of 4 October 2016 showing that she is working full-time earning £17,010.67 per annum excluding overtime and it confirms she has been employed by Medirest since November 2013. It appears that she is paid through the Compass Group and there are payslips from them for 2016 all of which confirm her gross income to be £17,010. Even without her second job she therefore is earning sufficient to maintain the appellant.
11. Whilst the appellant did not meet the strict requirements of the rules at the date of decision I am satisfied that his wife is currently earning £17,010 per annum and would therefore meet the requirements of appendix FM with regards to salary. As it is only the financial position and the specified documents which were put in issue I can find no public interest reason to require the appellant to reapply. If he were to reapply today he would meet the financial requirements and there is therefore no public interest in excluding him.”

4. The ECO appeals on the ground that the First-tier Tribunal applied the wrong income threshold. The First-tier Tribunal allowed the appeal despite finding that the appellant did not meet the strict requirements of the immigration rules without considering whether there were any compelling circumstances that might justify a grant of entry clearance outside the rules: *SSHD v SS (Congo) and Others* [2015] Imm AR 1036 referred.

Decision and reasons

Error of law

5. After having considered the submissions made by both parties I concluded that the First-tier Tribunal decision involved the making of an error of law and set aside the First-tier decision.

6. The judge referred to the correct income threshold when summarising the respondent's reasons for refusal [2], but in the course of her findings she concluded that the sponsor's earnings of £17,010 would meet the salary requirements of Appendix FM [11]. On the face of it this finding indicates that the wrong income threshold might have been applied. Although the judge referred to two sources of income earlier in the decision [9], it is not sufficiently clear from her conclusion in [11] whether more than one source of income formed the basis of the decision. The judge's comment at the end of [10] that, even without her second job, the sponsor was earning sufficient income to maintain the appellant, reinforces the suggestion that she considered an income of £17,010 to be sufficient. The application of the wrong income threshold and/or the lack of clarity in the reasoning amounts to an error of law.

Re-making the decision

7. The entry clearance application was made on 12 May 2015. The respondent refused the application in a decision dated 12 August 2016. This is a 'new style' appeal following amendments made to the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") by the Immigration Act 2014. The appellant has a right of appeal to the Tribunal because the respondent decided to refuse a human rights claim.
8. Paragraph GEN.1.1 of Appendix FM of the immigration rules makes clear that the route is for those seeking to enter or remain in the UK on the basis of their family life. Appendix FM sets out the requirements to be met and, in considering applications under that route it reflects how, under Article 8 of the European Convention of Human Rights, the balance will be struck between the right to respect for private and family life and public interest considerations relating public security and the maintenance of immigration control. An application for entry clearance as a spouse under Appendix FM is therefore a 'human rights claim' giving rise to a right of appeal. The respondent's policy on "Rights of Appeal" also confirms that an application for leave to enter or remain as a family member under Appendix FM will be treated as a 'human rights claim' giving rise to a right of appeal.
9. The previous long standing position under section 85A(2) was that the Tribunal could only consider "the circumstances appertaining at the time of the decision" in an appeal against a decision to refuse entry clearance. Section 85A of the NIAA 2002 was repealed by the Immigration Act 2014 ("IA 2014") subject to transitional and savings provisions (SI: 2015/371). The remaining provision relating to the assessment of evidence in 'new style' appeals is section 85(4), which states:

“(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.”
10. The consequence of these changes is that the Tribunal is no longer required to consider the circumstances appertaining at the time of the decision in an appeal involving an entry clearance decision. The right of appeal arises against a decision to

refuse a human rights claim. Whether an appeal relates to the refusal of a human rights claim in the context of refusal of entry clearance or leave to remain the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision. The only restriction is the new provision contained in section 85(5)-(6) relating to consideration of 'new matters'.

11. The repeal of section 85A of the NIAA 2002 harmonises the treatment of evidence in statutory appeals. The Tribunal must now consider all appeals on the evidence as it stands at the date of the hearing.
12. In so far as the requirements of the immigration rules might form one part of a private and family life assessment made by the Tribunal under Article 8, any requirements for evidence covering a certain period of time prior to the application might need to be considered. If an appellant met the requirements of the immigration rules it is likely to provide a strong indication of where the balance should be struck in light of the policy expressed in paragraph GEN.1.1 of Appendix FM. However, the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including any matter arising after the decision, as part of a holistic assessment of the human rights claim. Whether the appellant met the strict requirements of the immigration rules might form one part of that overall assessment.
13. It is not disputed that the appellant is in a genuine and subsisting relationship with a British citizen. They have a four-year-old daughter (DOB: 06/08/13) who is also a British citizen. She lives with her mother in the UK. The sponsor says that she visits the appellant in Pakistan every year and they are in daily contact by telephone. I find that the evidence shows that the appellant has established a family life with his wife and daughter.
14. The respondent recognises that it would normally not be reasonable to expect a British child to leave the UK, or to expect the child to be separated from a parent, unless there are strong public policy considerations such as criminality or a "very poor immigration history": see Immigration Directorate Instructions: "Appendix FM Section 1.0b Family Life (as a partner or parent) and Private Life: 10 Year Routes" (August 2015) referred to in *MA (Pakistan) & Ors v UT (IAC) & SSHD* [2016] EWCA Civ 705. No strong public policy considerations would appear to apply on the facts of this case. The effect of the decision is to prolong the separation of the appellant from his wife and daughter in circumstances where it would not be reasonable to expect the child to leave the UK. For these reasons, I concluded that the decision to refuse entry clearance shows a lack of respect for the appellant's family life that is sufficiently grave to engage the operation of Article 8 (points (i) & (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349).
15. The state can lawfully interfere with an applicant's family life if it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the

case. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see *Hesham Ali v SSHD* [2016] UKSC 60.

16. The application was refused on the sole ground that insufficient evidence was produced to show that the appellant met the financial requirements contained in Appendix FM. At the date of the application on 14 May 2015 the appellant was required to produce specified evidence outlined in Appendix FM-SE to show that his wife earned a gross annual income of at least £18,600. The requirements set out in Appendix FM-SE are complex and are likely to be difficult for a lay person to understand. The appellants' wife was in non-salaried employment. The specified evidence he was required to produce included payslips for six months prior to the date of the application, a letter from the employer who issued the payslips and personal bank statements corresponding to the same period as the payslips showing that the salary had been paid into the account (paragraph 2(a)-(c) Appendix FM-SE).
17. The appellant's wife worked for the same employer for at least six months. The appellant was required to show that she had been paid throughout the period of six months prior to the date of the application at a level of gross annual salary which equalled or exceeded the required level of income relied upon in the application (paragraph 13(a) Appendix FM-SE). Further provisions are set out in the immigration rules as to how to calculate gross annual income from salaried and non-salaried employment (paragraph 18 Appendix FM-SE). In this case the required level of income was £18,600.
18. The appellant's wife says that she had two sources of income at the date of application. First, she worked as a catering assistant for a company called Medirest (part of the Compass group). Second, she worked for a Pizza Hut franchise, which traded under the name Charlton Village Services Ltd. The company was taken over by Oasis West Solutions Ltd in April 2015.
19. Mr Nasim argued that the sponsor's income from her employment with Medirest, taken alone, was sufficient to meet the financial requirements of the immigration rules. He set out various calculations with reference to the payslips in his written arguments. The appellant produced copies of his wife's payslips covering the period from November 2014 to May 2015. The payslips indicate that she was paid for 'non-salaried employment', which is defined in paragraph 18(d) of Appendix FM-SE as paid on an hourly rate or according to the work undertaken. The gross annual income covering the six months' payslips was £9,490.31. For the purpose of calculating the gross annual income of non-salaried employment at the date of the application under paragraph 13(a)(i) of Appendix FM-SE the level of gross annual

salary relied upon “shall be no greater than the annual equivalent of the person’s average gross monthly income from non-salaried employment in the six months prior to the date of the application, where that employment was held throughout that period” (paragraph 18(e) Appendix FM-SE). Therefore, the sponsor’s average monthly income in the relevant six-month period preceding the application was £1,581.72, which for the purpose of calculating the gross annual income amounts to £18,980.64.

20. The appellant produced three letters from Medirest dated 02 September 2015, 04 October 2016 and 05 October 2016. Although this evidence was not sent with the original application nothing in the wording of paragraph 2(b) of Appendix FM-SE would appear to preclude me from considering it. The only requirement is that the letter sets out various pieces of information relating to the sponsor’s employment. Although it is not clear why the information could not be included in one letter, the set of correspondence appears to contain the specified information regarding her employment history and salary rates.
21. The appellant also produced the sponsor’s personal bank statements, which show the relevant net salary payments from the Compass Group entering her account. The statements are consistent with the information contained in the payslips.
22. For the reasons given above I am satisfied that the evidence now before the Tribunal shows on the balance of probabilities that the appellant met the financial requirements of the immigration rules at the date of the decision. For the sake of completeness, at the date of the hearing, the evidence shows that the appellant’s wife continues to work for Medirest and now works for a second company called Sound Sorba. Her combined gross annual income from both sources of employment continues to be over the £18,600 threshold.
23. A holistic assessment of Article 8 might also take into account other family life factors such as the appellant’s relationship with his wife, the best interests of their child (which is to be brought up by both parents) and the adverse effect of continued separation. If an appellant did not meet the requirements of the immigration rules it might also be necessary to consider the public interest factors outlined in section 117B of the Nationality, Immigration and Asylum Act 2002 (“NIAA 2002”) insofar as they might have any relevance to entry clearance applications.
24. However, is not necessary to consider those matters in detail in this decision. The immigration rules are said to strike a fair balance for the purpose of assessing an application under Article 8. In circumstances where the evidence shows that the appellant met the relevant requirements the decision to refuse entry clearance showed a lack of respect for the appellant’s family life that was disproportionate in the circumstances of this case (points (iv) & (v) of Lord Bingham’s five stage approach in *Razgar*).


25. I conclude that the First-tier Tribunal decision involved the making of an error of law. The decision is set aside and remade. I conclude that the respondent's decision to refuse the human rights claim is unlawful under section 6 of the Human Rights Act 1998.

Decision

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

I remake the decision and ALLOW the appeal

Signed 
Upper Tribunal Judge Canavan

Date 15 August 2017