



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24397/2016

THE IMMIGRATION ACTS

Heard at Field House
Heard on 12th of September 2017
Prepared on 15th of September 2017

Decision & Reasons Promulgated
On 9th October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS YINING SHEN
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Haywood of Counsel
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of China born on 11th of December 1988. She appeals against a decision of Judge of the First-tier Tribunal Lloyd sitting at Birmingham on 16th of December 2016 in which he dismissed on the papers the Appellant's appeal against the Respondent's decision dated 10th of October 2016. That decision was to

refuse the Appellant's application for leave to remain as the spouse of a person present and settled in the United Kingdom. The Appellant had married Mr Tariq Shihai, a United Kingdom citizen, ("the Sponsor") on 31st of October 2013.

2. The Appellant entered the United Kingdom on 30 July 2009 with entry clearance as a Tier 4 (general) student valid until 25th of October 2011. She made in time applications for this leave to be extended and leave was granted until 30th of January 2014. On 17th of January 2014 she applied for leave to remain as the spouse of the Sponsor and this was granted valid until 17th of July 2016. On 13th of July 2016 she made a human rights application for leave to remain as a spouse. It was the refusal of this application on 10th of October 2016 which gave rise to the present proceedings.

The Explanation for Refusal

3. The refusal was solely on the basis of the financial requirements and associated evidential requirements of Appendix FM and Appendix FM-SE of the Immigration Rules. The Sponsor was required to show that he had a gross annual income of at least £18,600. The Appellant stated in her application that not only did the Sponsor earn this amount but she also had self-employed earnings of £5,653 from her self-employed business trading as "Shining Shen Make Up." Various bank statements and wage slips were provided with the application which showed that the Sponsor's gross earnings were £1549.17 per month which equated to an annual income of £18,590.04. The Sponsor's income was approximately £10 short of the required threshold.
4. The Respondent did not accept the Appellant's self-employed earnings as the evidence supplied did not satisfy the requirements of Appendix FM-SE paragraph 7 (c), (g) and (h). These requirements were proof of registration with HMRC as self-employed if available, evidence of ongoing self-employment through evidence of payment of Class II national insurance contributions and if the business was not required to produce audited accounts then unaudited accounts for the last full financial year along with an accountant's certificate of confirmation. The refusal letter did not take into account the claimed financial support towards living costs received from the Appellant's parents or family in China.

The Appellant's Case

5. The Appellant disputed the reasons for refusal. The Sponsor's actual salary was £18,600 per annum but due to an error by the firm's accountant the gross income he received was as calculated by the Respondent that is £10 short. His boss and the accountant had now fixed that problem and she referred to supporting documents from the employer. The supporting document was a letter from the employer dated 20th of October 2016, just over 3 months after the application. The letter stated that in line with the firm's policy the Sponsor's wages had been increased by £100 and his annual salary would now be £18,900. His wages had been due for review prior

to the application but due to the busy nature of the firm that was overlooked. There was evidence of the Sponsor's training contract for a fixed term starting from 2nd of September 2013.

The Decision at First Instance

6. As I have indicated the matter was listed for hearing as a paper appeal, the Appellant having only paid the £80 fee required. The Judge could thus only consider the matter on the basis of the papers before him. He noted that the Sponsor's salary was stated at page 2 of the training contract which was in a form recommended by the Solicitors Regulation Authority. The amount of salary was inserted in handwriting in the appropriate space but had been partly obscured. It appeared to say £18,600 but according to the Judge the 6 in that figure had either been smudged or overwritten and it was not clear what was originally written. The increase in the Sponsor's wages had been made after the date of application and did not tally with the Sponsor's statement that he was previously earning £18,600. Nor did the letter from the employer refer to any form of mistake or underpayment in the Sponsor's wages prior to the date that the letter was written. The Judge found that the Sponsor was earning £18,590 per annum prior to the application.
7. There were still no accounts provided for the Appellant's self-employed earnings. Tax returns obtained from HMRC were provided along with bank statements showing various deposits in 2015 well into 2016. Some of these were in cash but many were via bank transfer and contained references to make up, individuals names and bridal service deposits. The stated turnover was below the personal allowance of £10,000 so no tax was payable. The Judge accepted that the Appellant did have some self-employed earnings for the appropriate period but did not make precise findings on the level of those earnings during the specified period although they clearly would have exceeded the necessary £10 per year. Appendix FM did not allow 3rd party support albeit that it was being received. The monies from abroad did not therefore count. The actual income was well above the required figure of £18,600 but it could not be evidenced in accordance with the Rules.
8. As the Appellants failed under the Rules the Judge proceeded to consider whether the Appellant could succeed outside the Rules under Article 8. The Appellant and Sponsor had a family life together. Since September 2016 the Appellant had been employed by Elite Associates. The Appellant's failure under the Rules might be described as a near miss and there were strong indications that the financial requirement might be met at the date of hearing. Nevertheless Article 8 did not guarantee an Appellant a choice of country in which to enjoy family life together with their spouse and there was no reason why family life could not be pursued in China. The only evidence of private life in the United Kingdom was evidence of study and work. The Appellant still had family members in China but there was no other evidence regarding the Sponsor's ties to the United Kingdom. Since family life could be pursued in China there would therefore be no interference with the family life by requiring the Appellant to return to China. Any interference would be

mitigated by the possibility of the Appellant making a fresh application. Maintenance of effective immigration controls in the public interest.

9. There were no other considerations under section 117B of the 2002 Act that would adversely affect the Appellant. At paragraph 30 the Judge somewhat ambiguously said “having considered all of this together, I find that the decision made by the Respondent was not proportionate and accordingly I dismiss the appeal on human rights grounds”. It is not entirely clear what the Judge meant by this phrase since if the decision was not proportionate then the appeal should have been allowed under Article 8. If the decision was proportionate to the legitimate aim pursued, then the correct course would be to dismiss the appeal. Under the heading “notice of decision” the Judge did dismiss the appeal on human rights grounds and I assume therefore that there was a typographical error in paragraph 30.

The Onward Appeal

10. The Appellant appealed against the Judge’s decision in grounds settled by Counsel. After 2 introductory pages, which could perhaps have been omitted the grounds of onward appeal made four main points. The first (and for reasons which I will shortly explain the only ground which had merit) was that the Judge should have considered the facts as they were at the date of his consideration. If it was likely that the Appellant could satisfy the financial requirements of the Rules at that time the appeal should have been allowed.
11. The 2nd ground claimed that the policy of the Rules was that people who could support themselves financially should not be required to conduct family life abroad. The grounds purported to rely on section 117B (3) of the 2002 Act for this submission. This ground was plainly wrong. It is well established that the subparagraph is not a positive factor for an Appellant if they should satisfy the subparagraph, rather it is a negative factor if they do not.
12. The 3rd ground argued that the Judge had failed to take adequate account of the private lives of the Appellant and her husband. The Sponsor had a lack of connections to China and it had not been explained why it was not relevant that there was evidence of study and work nor had the Judge taken into account the importance of British citizenship. This ground overlooked the Supreme Court decision in the case of Agyarko upholding the Court of Appeal that it was not a factor of particularly significant weight that an adult British citizen did not wish to relocate to the country of origin of his or her spouse.
13. The 4th ground argued that the Judge should have treated the £10 shortfall in the husband’s income to be de minimis and/or should have taken the size of that shortfall as relevant to the proportionality exercise. The grounds sought to argue with an Upper Tribunal authority that the de minimis principal was no more than another way of arguing for the discredited near miss principle. The 4th ground sought to explain the difference between de minimis and the near miss principle.

With great respect to the drafter of the grounds paragraph 13 of the grounds espoused a distinction without a difference. Perhaps more soundly paragraph 14 the grounds argued that the de minimis principal should not apply in human rights case as opposed to Immigration Rules case.

14. The application for permission to appeal came on the papers before Designated Judge Shaerf on 26th of July 2017. In granting permission to appeal he noted that the Judge had been entitled to consider evidence of matters at the date of hearing by reason of section 85 (4) of the 2002 Act. The Judge had arguably erred in failing to explain why he would not consider such evidence. The assessment of proportionality was in error as the Judge had not taken into account the Sponsor's nationality, his personal circumstances and his lack of connections to China. The appeal was restricted human rights grounds and it was an arguable error of law not to weigh in the assessment of the proportionality of the Respondent's decision the extent to which the Appellant met the requirements of the Rules. A near miss arguably might have had a material impact on such an assessment.
15. The Judge arguably erred in not giving greater weight to the Appellant's own earnings as provided for in Appendix FM E-LTRP. 3. 2. Although not set out by the Designated Judge, this subsection provides that when determining whether the financial requirements in Appendix FM are met only certain sources may be taken into account but these include the income of the partner from specified employment or self-employment and the income from specified self-employment of the applicant.
16. The Respondent replied to the grant of permission by letter dated 4th of August 2017. It was submitted that the grounds were without merit. The Judge had correctly directed that this was a human rights only appeal but an important factor would be the Immigration Rules. When considering cases outside the Immigration Rules the public interest had to be considered through the lens of the Immigration Rules. There was no suggestion that the Judge had limited the evidence to the date of application. He correctly noted the requirements under the Rule and at paragraph 19 was considering post decision evidence from the employer. The letter then complained that the remaining grounds were misconceived (a submission with which I would agree for the reasons I have given above). The Respondent's letter noted that the Appellant had requested the matter to be dealt with on the papers. Whilst the grounds argued a failure to take into account an impact on the Appellant's private life they failed to identify what evidence of private life had been put before the Judge or he had failed to take into account.

The Hearing Before Me

17. As a result of the grant of permission to appeal the matter came before me to determine whether in the first place there was a material error of law such that the decision fell to be set aside and re-made. If there was not, then the decision at first instance would stand. Counsel for the Appellant accepted that the point in issue

was a narrow one. At the date of application the Sponsor's income was £10 short of the limit. The issue was whether the evidential requirement in Appendix FM-SD was satisfied and thus made up the shortfall. It was difficult to see what the public interest was in the removal of the Appellant. The Supreme Court had decided that the Immigration Rules were compatible with Article 8 but the Tribunal had to be free to look at Article 8 even if the Respondent could be prescriptive about the Rules. It was a near miss not so much in terms of the shortfall but in the failure to document but the Appellant could meet the requirements. The appeal should have succeeded.

18. In reply the Presenting Officer relied on the Rule 24 response which I have summarised above. The Appellant could not meet the Rules firstly because of the shortfall but secondly in relation to the Appellant's self-employment. The question then was whether the Judge went on to consider Article 8 outside the Rules correctly. That the Rules could now be met was one factor in the proportionality exercise but this was a paper case. There was nothing on the grounds to indicate what had been served on the Tribunal for the Judge to rely on under Article 8. There was no evidence about the Appellant's wider circumstances. In any event, she could make a fresh application. If there were deficiencies in the application only the Appellant could remedy them. As this was a paper case one ought to be able to see what had been provided by the Appellant in support of her claim. Was there further information such that the Judge had inadequately assessed the circumstances of the Appellant and her husband? If there was not the Judge was entitled to find the public interest in immigration control outweighed the Appellant interference.
19. In conclusion Counsel argued that part of the problem with the determination was that it had not been stated what weight had been given to the relevant factors in the Article 8 assessment. That the Appellant could now meet the Rules was a strong indication that the Judge should have allowed the appeal. The Judge was not constrained by what was said in the Rules. Nothing turned on credibility. Nothing was said in the determination about the Sponsor's status. The parties have been married since 2013. There was a material error of law in the decision and the Appellant should be entitled to succeed outright but if there was a need for further findings of fact then the case should be remitted back to the First-tier.

Findings

20. The First-tier Judge had to decide whether the Appellant could in fact meet the income requirements of the Rules. The Judge found that the Sponsor's earnings were £10 short of the required limit at the date of application. The evidence that the Sponsor had had an increase in his earnings since the application was somewhat dubious as the Judge pointed out. Although the Appellant declared self-employed earnings sufficient to take the joint family income over that limit, as the earnings had not been evidenced correctly the Judge held they could not be admitted. Having said that, the Judge evidently felt that the Appellant could demonstrate that

she had sufficient earnings. Indeed, provided she could show she was working it would be difficult to fail to show that she was not earning at least £10 per annum.

21. The critical point was the date at which the assessment of earnings should be carried out. The section quoted by the Designated Judge in granting permission does not state a date by which the financial requirement must be met. The argument is whether section 85 (4) of the 2002 Act permits the Tribunal to take into account evidence which the Tribunal thinks relevant to the substance of the decision including matters arising after the date of the decision. That relates to appeals under section 82 (1) which for these purposes means a decision to refuse a human rights claim since there is no right of appeal under the Immigration Rules.
22. It is difficult to see how the Respondent's decision under the Rules could be said to be wrong unless the Respondent had incorrectly applied the evidential requirements of Appendix FM-SE. The Judge found that the Respondent had not incorrectly applied the evidential requirements, see particularly paragraph 21 of the determination. There was still no accounts provided although tax returns had been obtained from HMRC along with bank statements showing various deposits (of monies earned) from 2015 and well into 2016. The Judge accepted that those deposits were from the Appellant's self-employed earnings hence his conclusion that the Appellant could meet the requirements of the Rules at the date of hearing. Since the appeal was only on human rights grounds unless the evidence referred to in paragraph 21 had been before the Respondent it would be difficult to say that the Respondent's decision was wrong.
23. The Judge thus went on to consider the appeal outside the Immigration Rules under Article 8. As I have indicated a number of the arguments put forward by the Appellant in this case have little or no force. It is difficult to see how the Judge could have placed significant weight on the position of the Sponsor given the paucity of information before him. That the Appellant narrowly failed in relation to the Sponsor's income did not amount to a compelling circumstance which would mean that the appeal should be allowed outside the Rules under Article 8, see in particular paragraph 23 of MM [2017] UKSC 10 quoting with approval an earlier decision of the Upper Tribunal. More difficult is the fact that the Appellant could show that she could meet the financial requirements albeit not in the form required by the Rules.
24. The evidence before the Judge was sufficient to show that the Appellant could meet the Rules for the reasons I have given above. I agree with the submission made on the Appellant's behalf that that was a powerful factor to be taken into account in the proportionality exercise. This was a genuine and subsisting marriage and leave had previously been given to the Appellant by the Respondent for a relatively short period no doubt to confirm whether the relationship was genuine. The issue was a narrow one as Counsel for the Appellant correctly submitted to me. The Appellant could show that she and the Sponsor exceeded the financial limits by a substantial amount. In those circumstances as Counsel for the Appellant argued what was the

legitimate purpose being pursued in this case? That the Appellant narrowly missed the requirements of the Rules at the date of the Respondent's decision is not I accept a weighty factor for her. What is relevant is that by the date of the hearing she could show that she substantially met the Rules. A human rights assessment does not require the same strict evidential requirements that a Rules based assessment requires.

25. In those circumstances, I see little purpose in requiring the Appellant to have to make another application (and of course incur another fee) since on the evidence before me the Appellant would inevitably succeed under the Rules in a fresh application. It would not be a proportionate interference with the established family life of the Appellant and the Sponsor by requiring the Appellant to return to China to make an application from there for entry clearance as a spouse since she would be repeating an application she had previously made and which had been granted.
26. An issue was raised as to whether the Judge was entitled to say that family life could be continued elsewhere. I accept the Respondent's argument that there was nothing before the Judge to show that it could not. The burden of proving that it could not rested upon the Appellant and that burden had not been discharged. I accept the Respondent's criticisms of much of the grounds of onward appeal in this case which have somewhat obscured the core issue. That core issue was whether it was proportionate under Article 8 to refuse an application on financial and evidential grounds where the evidence was that the Appellant considerably exceeded the relevant requirements.
27. I indicated at the conclusion of the hearing before me that if I found there was a material error of law I would set the decision aside and give directions for the matter to be reheard. I consider there was a material error of law in the Judge's handling of the proportionality exercise in the light of his finding that the Appellant could exceed the financial requirements of the Immigration Rules by a substantial margin. That being so I set the decision of the First-tier Tribunal aside.
28. There is no need for further evidence or submissions since the matter has been fully ventilated both at first instance and before me. Such further evidence as there might be might well reinforce the indication that the Appellant could succeed under the financial requirements of the Rules but since the Judge found that she could there seems little point in adjourning just for that. Further evidence about the Sponsor's situation will not I find take the case any further in view of the authority of Agyarko. I do not therefore propose either to remit this case back to the First-tier or to list it for a continuation hearing since little purpose is to be served by either step. In my view the correct course of action in this case is to allow the appeal outright on human rights grounds as there are exceptional features (that the Appellant can show she meets the Rules) about this case which take it outside the normal run of cases. That the Appellant did not produce to the Respondent evidence in the correct form of her self-employment is a factor to be taken into account but is outweighed by the Judge's

finding of the true position, that the Appellant and Sponsor considerably exceeded the requirements.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I remake the decision by allowing the Appellant's appeal against the Respondent's decision to refuse to grant leave to remain.

Appellant's appeal allowed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 22nd of September 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

Although I have overturned the decision to dismiss the appeal, I do not interfere with the Judge's decision to make no fee award since the Appellant succeeded on the basis of post decision evidence which was not before the Respondent at the date of decision.

Signed this 22nd of September 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge