



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00477/2016

THE IMMIGRATION ACTS

Heard at Liverpool
On 26 June 2018

Decision & Reasons Promulgated
On 19 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS ZAIBUNNISA MOHMED PATEL

Respondent

Representation:

For the Appellant: Ms Aboni, Presenting Officer
For the Respondent: Ms Faryl, AMS Solicitors

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of India born on 13.5.65. She made an application for entry clearance to join her husband and Sponsor in October 2015, having married in March 2015. This application was refused in a decision dated 7 December 2015. The Claimant appealed against this decision and her appeal came before First tier Tribunal Judge Andrew Davies for hearing on 14 July 2017. In a decision and reasons promulgated on 2 August 2017 he allowed the appeal.

2. The Entry Clearance Officer sought permission to appeal to the Upper Tribunal, in time, on the basis that the Judge had materially erred in finding

that the Claimant was able to meet the requirements of the Immigration Rules, given that the letter from the Sponsor's employer failed to comply with FM-SE [2] as it did not provide the period over which the Sponsor has been paid the level of salary nor whether his employment is permanent, fixed contract or agency.

3. Permission to appeal was granted by Judge of the First tier Tribunal Keane in a decision dated 16 February 2018, on the basis that arguably the Judge may have decided the Article 8 issue differently if his assessment had taken account of the fact that the Claimant was unable to meet the requirements of Appendix FM-SE and thus the Rules.

Hearing

4. Ms Aboni on behalf of the Entry Clearance Officer submitted that the requirements of Appendix FM-SE were not met and there were still deficiencies in the documentation. Whilst the grounds of appeal are fairly brief, the Judge relied on the Claimant being able to demonstrate that the Rules were satisfied does add weight in the proportionality assessment. She submitted that the Entry Clearance Officer is the primary decision maker and if the Claimant does satisfy the Rules it is up to her to make a fresh application. The Judge has failed to identify any compelling circumstances that should justify a grant of leave outside the Rules when the Claimant has not satisfied the Rules themselves. She submitted that he made a material error in allowing the appeal.

5. In her submissions, Ms Faryl submitted that the Judge did in fact set out that the issues to be met under the Rules assist him when considering proportionality. She accepted that the Entry Clearance Officer was the primary decision maker at the date of decision and the decision was supported by the Entry Clearance Manager. The Judge found against the Entry Clearance Officer and found in favour of the Claimant. The Judge should have considered whether the Claimant should be required to make a fresh entry clearance application. The Judge did consider Chikwamba [2008] UKHL 40 and the issue of the Claimant returning to India to make an entry clearance application and found that this would not be proportionate given that, on the evidence before him, the Claimant did meet the Rules and there was no public interest in requiring her to leave to make an entry clearance application when the Claimant could show she would meet the Rules.

6. Ms Faryl accepted that the Judge may have deviated somewhat in finding that the Claimant substantively met the Rules and that was a weighty consideration, given that clearly at the date of application and decision the Claimant did not, because of the shortcomings in the employment letter. If that was the only matter and it stopped there then it could be argued there was an error but the Judge went on to assess proportionality and came to

sustainable decision that the Claimant was not required to return to India. Consequently, the decision may contain an error of law but is not material. In response to my question as to how the Claimant entered the United Kingdom, Ms Faryl informed me that she came from Spain where she had a resident permit, which is valid until 3.1.22.

7. There was no reply by Ms Aboni.

Findings

8. I find no material error of law in the decision of the First tier Tribunal Judge. It is apparent from his decision and reasons that whilst at the date of decision of 7 December 2015, the requirements of the Appendix FM-SE were not met, a further letter dated 18 December 2015 was sent which confirmed the Sponsor's salary and that he was an employee [9]. The Judge considered the evidence as a whole and concluded at [10] that, from the Sponsor's payslips and bank statement that he had been employed for almost a year at the time of the letter of 18 December 2015 and had been paid the same level of salary throughout that period. The Judge expressly accepted that there were deficiencies in the information provided at the date of decision, but that there was little doubt that in practice the requirements of the Immigration Rules were met in substantive terms, notwithstanding the deficiency. I find that it was open to the Judge on the evidence to make this finding, which is not vitiated by error of law.

9. In any event, the appeal the Judge was required to determine was a human rights appeal as he correctly directed himself at [11] of the decision and reasons. The relevant date for that assessment is the date of hearing and thus the Judge was clearly entitled to take account of post decision evidence in his assessment of the proportionality of the decision. I find that at [14] when the Judge made reference to the Immigration Rules being satisfied he was clearly referring to the position before him at the date of hearing and the position if the Claimant had to return to India in order to make a fresh application for entry clearance. I find no error in the Judge's finding and conclusion, applying the judgments in Chikwamba [2008] UKHL 40 and Hayat [2011] UKUT 44 (IAC) that it would not be proportionate for the Claimant to make an entry clearance application again, the requirements of the Rules having been met. It was open to the Judge so to find, in light of the fact that the application for entry clearance had been refused on two bases only and the Judge found sustainably at [8] that the relationship was genuine and subsisting, a finding which has not been challenged.

10 The Judge went on to consider the public interest considerations set out in section 117B of the NIAA 2002 as part of his assessment of proportionality, expressly acknowledging that there were some defects in the original application but finding that those had been met by the submission of further evidence. I find no error of law in the Judge's approach.

11. I have concluded that the basis of the application for permission to appeal to the Upper Tribunal was misconceived in that the Entry Clearance Officer failed to appreciate that this was a human rights appeal and that the Judge was not only entitled but bound to consider post decision evidence in deciding on the proportionality of the Respondent's decision.

Decision

12. I find no error of law in the decision and reasons of First tier Tribunal Judge Andrew Davies. His decision allowing the appeal of the Claimant is upheld, with the effect that entry clearance should be granted.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

16 July 2018