



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/01783/2016
HU/01786/2016
HU/14257/2015

THE IMMIGRATION ACTS

Heard at Field House
On 5th February 2018

Decision & Reasons Promulgated
On 21st February 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

CLAUDIA [R]
CHANTE [S]
[D S]

(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Akusu-Ossai of Counsel

For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal against the decision of First-tier Tribunal Judge Zahed promulgated on 10 May 2017, in which the Appellants' appeals against the decisions to refuse their applications for entry clearance to the United Kingdom dated 5 November 2015 were dismissed on human rights grounds.

2. The Appellants are nationals of Grenada, who are mother and her two children born on [] 1974, [] 1997 and [] 2004 respectively. The Appellants sought entry clearance to the United Kingdom to join the Sponsor, [MS], the first Appellant's husband and the second and third Appellant's father.
3. The Respondent refused the applications on 5 November 2015 under paragraph E-ECP.3.1 of Appendix FM of the Immigration Rules which required the Sponsor to have a gross income of at least £24,800 per annum, on the basis that specified evidence of self-employment as required in paragraph 7(a), (b)(ii), (d), (e) and (f) of Appendix FM-SE had not been submitted with the application. The Respondent stated that the Appellants were invited to submit additional documents to rectify the omission, but nothing further was provided.
4. The Appellants provided further documents with their notice of appeal (having denied receipt of any earlier invitation to submit further documents) and relied upon Article 8 of the European Convention on Human Rights. On review, an Entry Clearance Manager maintained the refusals on 18 August 2016. In so doing, it was noted that all of the specified evidence had now been provided apart from bank statements covering the whole financial year from 6 April 2014 to 5 April 2015. In any event, the documents showed the Sponsor's net profit from self-employment to be £19,217 for the financial year 2014/15 which was less than the required amount under Appendix FM. The refusal was not considered to be in breach of Article 8 of the European Convention on Human Rights.
5. Judge Zahed dismissed the appeals in a decision promulgated on 10 May 2017 on the basis that the minimum income requirement in Appendix FM was not met such that the Appellants could not meet the requirements of the Immigration Rules and further, that the refusal was not a disproportionate interference with their right to respect for family life under Article 8 of the European Convention on Human Rights as family life could continue with visits as it had done to date.

The appeal

6. The Appellants appealed on the basis that the First-tier Tribunal erred in its conclusion that the minimum earnings requirements of the Immigration Rules had not been satisfied and erred in concluding that there was no disproportionate interference with family life contrary to Article 8 of the European Convention on Human Rights taking into account the best interests of the children under section 55 of the Borders, Citizenship and Immigration Act 2009.
7. In relation to the Immigration Rules, it was specifically claimed that the First-tier Tribunal erred in equating net profit from self-employment with gross earnings, the correct figure to use for this was the Sponsor's turnover of his business (which was in excess of £63,000) and that in any event, by the date of the hearing, there was evidence before the First-tier Tribunal that the Sponsor's net profit was £25,300, which exceeded the minimum earnings requirement for the year 2015/16. In the alternative, the grounds of appeal claimed (i) that the First-tier Tribunal erred in

failing to consider separately that the minimum earnings requirement had been met for the First Appellant; and (ii) that following MM (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the First-tier Tribunal should have considered other potential earnings or finance for the family to meet the requirements.

8. Permission to appeal was granted by Judge Davies on 8 December 2017 on all grounds.
9. At the hearing, Counsel for the Appellants relied on all of the written grounds of appeal, but accepted that for a person who is self-employed, their net profit is their gross income for the purposes of the Immigration Rules.
10. The Home Office Presenting Officer submitted that the only ground of appeal with any strength was in relation to whether the minimum earnings requirement had been met and accepted that she was in some difficulty given that the First-tier Tribunal did not expressly consider or refer to the latest tax return showing earnings over the minimum level in the decision. It was accepted that the relevant documents showing this were before the First-tier Tribunal and the Home Office Presenting Officer confirmed that there were no further issues of, for example, supporting specified evidence in relation to these earnings.

Findings and reasons

11. Judge Zahed erred in law in failing to take into account evidence before him of the Sponsor's earnings in the financial year 2015/16, which showed net profit from self-employment of £25,300 which was in excess of the minimum earnings requirement in paragraph E-ECP.3.1 of Appendix FM of the Immigration Rules. That evidence was before the First-tier Tribunal at the date of hearing but not referred to at all in the decision. The statement in paragraph 4 of the decision that the Judge had taken all the documents into account in reaching his decision was wholly insufficient.
12. The failure to meet the minimum earnings requirement (in substance) was the only outstanding reason for refusal under the Immigration Rules by the time of the appeals, as shown by the Entry Clearance Manager's Review statement and confirmed by the Home Office Presenting Officer at the hearing before me. The First-tier Tribunal was entitled to take into account evidence arising after the date of the decision and erred in failing to do so in these appeals. As I have found an error of law in failing to take into account relevant material, it is not necessary to consider the first ground of appeal as set out in the two alternatives relied upon by the Appellants.
13. The failure of Judge Zahed to find that the Appellants met the requirements of the Immigration Rules led to a material error of law in his assessment of their right to respect for private and family life under Article 8 of the European Convention on Human Rights. The fact that the Appellants met the requirements of the Immigration Rules for a grant of entry clearance means that the refusal can not,

contrary to the findings of Judge Zahed, be a proportionate interference with the right to respect family life for the purpose of the maintenance of immigration control. There is no substantive public interest in maintaining the refusals when the requirements of the Immigration Rules have been met. Judge Zahed therefore erred in law in conducting the balancing exercise required under Article 8 of the European Convention on Human Rights and concluding that the appeals should be dismissed on human rights grounds. That was a material error of law affecting the outcome of the appeals and it is necessary to set aside the decision.

14. The parties agreed at the hearing that if an error of law was found, it would be appropriate for me to remake the decision on the basis of information before me and without the need for a further hearing. For the reasons already given above, the Appellants' appeals are allowed on human rights grounds. In circumstances where there is documentary evidence that the Sponsor meets the minimum earnings requirements, I find that the Appellants meet the requirements of paragraph E-ECP.3.1 of Appendix FM of the Immigration Rules. Further, where there is no evidence before me to the contrary and the Respondent does not maintain the refusals of entry clearance on any other grounds, it would follow that the Appellants meet all of the relevant requirements for grants of entry clearance as the spouse/children of a person present and settled in the United Kingdom under Appendix FM of the Immigration Rules.
15. There is no dispute in the present appeals that family life exists between the Appellants and Sponsor and the refusal of entry clearance interferes with such family life, particularly their ability to live together as a family unit. Although the decision to refuse entry clearance is in accordance with the law, it is not in accordance with the Immigration Rules and as such, it is neither necessary in a democratic society for one of the specified interests in Article 8 of the European Convention on Human Rights, nor would it in any event be proportionate to any such legitimate aim. There is no substantive public interest in refusing entry clearance to persons who meet the requirements of the Immigration Rules for a grant of entry clearance where family life exists.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is necessary to set aside the decision.

The appeals are allowed on human rights grounds.

No anonymity direction is made.



Signed
Upper Tribunal Judge Jackson

Date 16th February 2018