



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04579/2017

THE IMMIGRATION ACTS

Heard at Manchester
On 12th November 2018

Decision & Reasons Promulgated
On 21st November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MRS. FAIZA TABASSUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr. D Marrington, Alam Ahmed Ltd

For the Respondent: Mr. Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal ("FtT") Judge Hollis promulgated on 9th January 2018. The FtT Judge dismissed the appellant's appeal against the respondent's decision of 5th February 2017 refusing her application for leave to enter the UK as the spouse of Mr. Imran Zubair, a British Citizen.
2. Broadly stated, the respondent was not satisfied that the appellant's sponsor is employed as claimed, by AV Asia Enterprises Ltd as a Machine Operator and that he was earning £18,720.00, as claimed. The respondent noted that the appellant had

previously applied for a spouse visa that had been refused because the Entry Clearance Officer was not satisfied that the appellant's sponsor's employment was genuine, and the appellant had not addressed the concerns regarding that employment.

3. The appeal was dismissed by FfT Judge Hollis. Permission to appeal was granted by Upper Tribunal Judge Black on 1st August 2018. The matter comes before me to consider whether or not the decision of FfT Judge Hollis involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
4. At the conclusion of the hearing before me, I announced that in my judgement, the decision of the FfT is infected by a material error of law and the decision of the FfT is set aside. I informed the parties that as to the disposal of the appeal, it is appropriate for me to remake the decision and I do so allowing the appeal, on human rights grounds. I said that I would give the reasons for my decision in writing. This I now do.

The decision of the FfT Judge

5. The FfT Judge set out a summary of the findings and reasons for the decision at paragraphs [19] to [41] of the decision. The Judge found, at [32], that the appellant's sponsor is genuinely employed as claimed by AV Asia Enterprises Ltd as a Machine Operator. The Judge went on to consider whether the minimum income requirements set out in the Immigration Rules are met. At paragraph [35], the Judge stated:

"I, therefore conclude, on the evidence taken as a whole that the Appellant's sponsor is genuinely employed as claimed but that his gross annual income for the relevant period prior to the date of the application before me, namely, the 24th January 2017, was less than the minimum of £18,600 required by the rules."

6. The Judge noted that the appellant and her husband have maintained their married life using modern methods of communication and there is no evidence that family life could not continue in that way whilst a fresh application is made. The Judge found that there was no reason why the sponsor cannot travel to Pakistan during his annual holidays and maintain any family life, and that there are no exceptional circumstances to show the refusal of the application is in breach of the appellant's Article 8 rights. The Judge was not satisfied that the appellant and sponsor have a family life that ought to be protected by Article 8. The Judge stated, at [42], as follows:

"In the light of the above conclusions, I find that the decision appealed against would not cause the UK to be in breach of the law or its obligations under Article 8 [of] the 1950 Convention. The UK Government has done no more than apply its valid Immigration Rules and Law to the Appellant's application in furtherance of its legitimate aims of proper immigration control and the economic well-being of the UK in refusing the application and the Appellant has failed to show, on the balance of probabilities, that she met the relevant rule."

Error of Law

7. The appellant accepts that paragraph E-ECP.3.1 of Appendix FM requires an applicant to provide specified evidence of a gross annual income of at least £18,600. The appellant claims that the FfT Judge erred in his analysis of whether the minimum income requirement could be met because the FfT Judge relied upon a P60 for the year ending 5th April 2017 that showed a gross annual income of £17,484 for the period 6th April 2016 to 5th April 2017. The drop in the appellant's earnings during that tax year was caused by unpaid leave in April and May 2016. The appellant claims that Appendix FM-SE requires, in respect of salaried employment in the UK, payslips covering a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months, as here. The applicant claims that there was evidence in the form of wage slips for the 6-month period between June 2016 and December 2016 that established that the appellant's sponsor was paid £1560 gross per calendar month, amounting to £18,720 per annum.
8. On behalf of the appellant, Mr Marrington submits that the FfT Judge erred in resolving the question as to whether the minimum income requirement found in the immigration rules could be met, by reference to the P60 for the year ending April 2017. He submits that the evidence before the FfT Judge established that the appellant's sponsor had been employed by AV Asia Enterprises Ltd since 11th May 2015, and that there was evidence before the FfT Judge, in the letter from AV Asia Enterprises Ltd, that the appellant's sponsor was paid £1560 gross per calendar month. He submits that there was also evidence in the form of wage slips for the 6-month period between June 2016 and December 2016 (*at pages 42 to 55 of the appellant's bundle*) that establish that the appellant's sponsor received a gross salary of £1560 per month and the wage slips were supported by the corresponding cheques and personal bank statements for the same period, showing that the salary has been paid into an account in the name of the appellant's sponsor.
9. On behalf of the respondent, Mr Diwnycz submits that it is unfortunate that the wage slips for April and May 2016 (*that are to be found at pages 37 and 38 of the appellant's bundle*), do not explain that the reduction in hours during those two months was caused by unpaid leave. He accepts, properly in my judgment, that the wage slips for the 6-month period between June 2016 and December 2016 that were before the FfT Judge, establish that the appellant's sponsor received a gross salary of £1560 per month, and that that amounts to a gross salary exceeding the required £18,600 per annum.
10. Paragraph E-LTRP.3.1(a)(i) of Appendix FM of the Immigration Rules requires that the appellant must provide specified evidence of a gross annual income of at least £18,600. Insofar as is relevant, Appendix FM-SE A1(2) provides as follows:

In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:

- (a) *Payslips covering:*

(i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or

(ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.

(b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:

(i) the person's employment and gross annual salary;

(ii) the length of their employment;

(iii) the period over which they have been or were paid the level of salary relied upon in the application; and

(iv) the type of employment (permanent, fixed-term contract or agency).

(c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

...

11. The appellant made her application on 24th January 2017. She was required to provide payslips covering a period of 6 months prior to the date of application (i.e. June 2016 to December 2016), and personal bank statements corresponding to the same period. For the relevant 6 months prior to the application, the FfT Judge had before him the payslips and bank statements relating to the sponsor's employment, which the FfT Judge found to be genuine, that demonstrated that the appellant's sponsor received a gross salary of £1560 per month. That amounts to a gross salary exceeding the required £18,600 per annum.
12. In my judgement, the FfT Judge erred in his analysis of the sponsor's gross salary by reference to the P60 for the year ending 5th April 2017. Although it is right that during that tax year, the appellant's sponsor in fact received a gross annual income of £17,484, that did not undermine the evidence from the sponsor's employer that the appellant's sponsor received a gross salary of £1560 per month, amounting to a gross annual income of £18,720. The shortfall during the tax year ending 5th April 2017 was explained by the unpaid leave that the appellant's sponsor had taken during that tax year in April and May 2016, to travel to Pakistan to visit the appellant. Appendix FM-SE only required the appellant to provide payslips covering a period of 6-months prior to the date of application, as the sponsor had been employed by his current employer for at least 6 months, together with personal bank statements corresponding to the same period as the payslips showing that the salary has been paid into an account in the name of the appellant's sponsor. That specified evidence was indeed provided, and was before the FfT Judge.

13. Having found that the appellant's sponsor is genuinely employed as claimed, in my judgement, the FfT Judge erred in concluding that the minimum income requirement was not met. The Judge failed to consider the explanation for the reduced earnings during the tax year to 5th April 2017 and failed to appreciate that Appendix FM-SE required the appellant to establish the minimum income requirement by reference to payslips and bank statements covering a period of 6-months prior to the date of application, because the sponsor had been employed by his current employer for at least 6 months.
14. In any event, the FfT Judge appears, at paragraph [42] to simply find that the decision to refuse entry clearance is not in breach of Article 8 because the respondent has done no more than apply the immigration rules in furtherance of the legitimate aims of proper immigration control and the economic well-being of the UK, in circumstances where the appellant has failed to show, on the balance of probabilities, that she met the relevant rule. The judgments of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 and in MM (Lebanon) establish that the fact that the rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.
15. It follows that in my judgement, the decision of the FfT Judge is infected by a material error of law and must be set aside.

Re-making the decision

16. The only ground of appeal available to the appellant is that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. As to the Article 8 claim, the burden of proof is upon the appellant to show, on the balance of probabilities, that she has established a family life with her husband, and that her exclusion from the UK as a result of the respondent's decision, would interfere with that right. It is then for the respondent to justify any interference caused. The respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances. If Article 8 is engaged, the Tribunal may need to look at the extent to which an appellant is said to have failed to meet the requirements of the rules, because that may inform the proportionality balancing exercise that must follow.
17. As to the human rights claim on Article 8 grounds, I adopt the approach set out by Lord Bingham in Razgar [2014] UKHL 27. I must first determine whether Article 8 of the ECHR is engaged at all. If Article 8 is engaged, I should go on to consider the remaining four stages identified in Razgar.
18. The respondent did not claim that the appellant is not married to, or in a genuine and subsisting relationship with her partner, who is a British Citizen. At paragraph [19] of his decision, the FfT Judge noted that the appellant's age, gender, nationality, and marital status are not in dispute.

19. I find that the appellant enjoys family life with her husband. I also find that the decision to refuse the appellant leave to enter may have consequences of such gravity as potentially to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the economic well-being of the country.
20. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. In **Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC)**, the Upper Tribunal held that the claimant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.
21. The respondent was not satisfied that the appellant's sponsor is employed and paid as claimed. The FfT Judge found that the appellant's sponsor is genuinely employed as claimed by AV Asia Enterprises Ltd. That finding is not challenged by the respondent. Before me, Mr Diwnycz, very fairly, accepted that the evidence before the FfT Judge was sufficient to satisfy the minimum income requirements set out in Appendix FM by reference to Appendix FM-SE. Appendix FM-SE required the appellant to provide payslips relating to her sponsor's salaried employment covering a period of 6 months prior to the date of application (*i.e. June 2016 to December 2016*), and personal bank statements corresponding to the same period. There is before me, the required evidence that demonstrates that the appellant's sponsor received a gross salary of £1560 per month. That amounts to a gross salary exceeding the required £18,600 per annum. There is also in the appellant's bundle (*at pages 6 to 8*), a copy of the appellant's sponsor's passport that shows that the appellant's sponsor travelled to Pakistan in April 2016. He entered Pakistan on 14th April 2016 and exited on 13th May 2016. I accept the explanation given by the appellant's sponsor that he took unpaid leave between mid-April and mid-May 2016, and that is why the P60 for the year ending April 2017 discloses a gross income during that tax year of £17,484.
22. I remind myself that section 117A of the Nationality, Immigration and Asylum Act 2002 requires that in considering the public interest question, I must (in particular) have regard to the considerations listed in section 117B. I acknowledge that the maintenance of effective immigration controls is in the public interest. On the evidence before me, and in light of my findings and the unchallenged findings made by the FfT Judge, I am satisfied that the appellant is able to meet the substantive part of the rules. There is nothing in my judgment that weighs against the appellant in a proportionality assessment.
23. Having carefully considered the evidence before me, and taking all the relevant factors into account including those in S117B of the 2002 Act, I am satisfied, on the facts here, that the decision to refuse the appellant leave to enter the UK as a partner, is disproportionate to the legitimate aim of immigration control. Accordingly, I am satisfied that the decision to exclude the appellant would be in breach of Article 8.

24. It follows that I set aside the decision of the FfT Judge and the appeal is allowed on Article 8 grounds.

Notice of Decision

25. The decision of the FfT Judge involved the making of an error of law such that it is set aside.
26. I re-make the decision and allow the appeal on Article 8 grounds.
27. No anonymity direction is made.

Signed _____ Date 12th November 2018

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

Although I have allowed the appeal on Article 8 grounds, I decline to make a fee award in favour of the appellant. The appeal has been allowed based on the evidence before me, including the explanation for reduce earnings during the tax year to 5th April 2017 and the evidence of the appellant's sponsor having travelled to Pakistan in April 2016, that was not before the respondent at the time of the decision appealed.

Signed _____ Date 12th November 2018

Deputy Upper Tribunal Judge Mandalia