



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09071/2015

THE IMMIGRATION ACTS

Heard at Field House
On 23 May 2018

Decision & Reasons Promulgated
On 4 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

Entry Clearance Officer - UKVS Sheffield

Appellant

and

BABOUCARR DARBOE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Ms S Allen, Sponsor, without legal representation

DECISION AND REASONS

1. The Entry Clearance Officer has been granted permission to appeal the decision of First-tier Tribunal Judge Hendry in which she allowed the appeal of the respondent Mr Darboe against refusal to grant him entry clearance to enter the United Kingdom

as the spouse of the sponsor, Ms Shanice Allen. The Entry Clearance Officer's decision was made on 10 September 2015 in response to an application made by Mr Darboe on 15 June 2015.

2. The respondent will from now on be referred to as the applicant for ease of reference.
3. The applicant is a national of Gambia born on 8 December 1991. He made an online application for entry clearance on the basis that he was married to Shanice Allen, the sponsor who was born on 15 June 1992. They married in Gambia on 1 October 2014. They met in Gambia on 18 December 2012 when Ms Shanice visited the country on holiday with her mother in December 2013. They had met at Mr Darboe's workplace called Chico's Senegambia. He offered to show them around and they became friendly with each other and their relationship deepened. Since they met, the sponsor has been to Gambia twice on 28 March 2014 when she stayed for ten days and again on 27 September 2014 when she stayed for eight days. It was during this latter visit that they married.
4. It was not in dispute that the sponsor is a British citizen and is settled in the United Kingdom. It was also accepted that she fulfilled all the requirements to sponsor a partner to enter the United Kingdom.
5. The relationship requirement under E-ECP.2.1 was accepted by the ECO following an interview with the sponsor. It was not in dispute that the applicant and the sponsor had a genuine relationship, were legitimately married and intended to live together in the future.
6. It was also accepted that the applicant met the English language requirement.
7. The only issue therefore according to the judge in this appeal was whether the applicant satisfied the financial requirements set out in E-ECP.33. This paragraph states that the financial requirements are met if the sponsor receives one of the listed benefits. The sponsor received carer's allowance as she cares for her mother. Her mother received disability living allowance and personal independence payment. The sponsor was registered as a main carer for her mother with City & Hackney Carers Centre since February 2012. The sponsor had to demonstrate that she was able to accommodate and support herself and the applicant without recourse to public funds.
9. The evidence given by the sponsor at the hearing was that she had continued to look after her mother during her university studies, and, after she graduated, she had found employment which would fit with her caring responsibilities. She found work on the basis of a "zero hours" contract with Fleet Tutors in September 2013. She had not been given a letter confirming the employment because it was not that sort of job. She had no guaranteed hours. If she worked in a month, she would receive a payslip at the end of that month, and the due amount paid into her bank account on the 20th of each month. She was paid £25 per hour.

10. The sponsor lived with her mother Mrs Brown in a property that they had lived in for about fourteen years. The current assured tenancy agreement had commenced on 15 September 2014. Her mother had written a letter to confirm that the applicant would live with the family in her house. Her weekly rent was £148.62. There was confirmation from her mother's landlords that the property would not be overcrowded.
11. The sponsor said in evidence her income from her earnings was limited, but with the carer's allowance, and her mother's benefits, she would have sufficient to support the applicant without recourse to public funds. She expected the applicant to find work once he arrived in the UK.
12. As her brother, now aged 17, had grown older, he had become more able to undertake some care of their mother, and this had taken a little of the pressure from the sponsor. Also, the local council had become aware of the difficulties the family was experiencing, and a professional carer now came to assist her mother every morning. As a result, the sponsor had stopped working for Fleet Tutor about a year ago, and had started working full-time, initially as a community support worker, but she had then moved on to other educational roles, because she wanted to teach and was currently working for ASEND as a Learning Support Assistant. The nature of the arrangement was that she was self-employed, but she was paid on a PAYE basis by the parent company ISS. She was contracted to work five days each week from 8.30 to 5pm. As a result, her carer's allowance had stopped at the beginning of the year.
13. The sponsor said in evidence that she and the applicant had discussed what would happen if the application failed. She could not go to Gambia because of her mother, and because she wanted to obtain a teaching job here. The applicant would have to apply again. This was why she had looked for other employment, although she could not do this until she was given more assistance in looking after her mother by the local authority.
14. The judge found that the application relied on the fact that the sponsor was receiving carer's allowance. Appendix FM-SE specified that, in such a case, the applicant must produce documentation from the DWP confirming receipt of the benefit by the sponsor, and a bank statement showing the credit to her account. The sponsor had sent in a number of bank statements showing the carer's allowance being credited to her bank account, and this seemed to have been accepted by the ECO.
15. The judge stated that in order to demonstrate "adequate maintenance" the applicant had to produce evidence from whatever source/s of income the sponsor had from her part-time earnings. He had to provide a letter from her employer, payslips and bank statements covering the same six months period, with credits of pay being shown to the bank account.
16. The judge said that the sponsor had produced her payslips for more than the required six months. The sponsor had more than one bank account, an account with

Nationwide into which her carer's allowance was paid, and an account with Barclays. She said she saw copies of these statements at the hearing, and it clearly showed that the sponsor's pay from Fleet Tutors was credited to the Barclays Bank account, albeit a month later than the date of the payslip. She was not sure whether the ECO had seen these statements.

17. The judge said that it was not in dispute that the sponsor had not provided a letter from Fleet Tutors confirming her employment. The sponsor said she had asked for such a letter, but that the company would not issue it to her because she was not employed in the formal sense. In the absence of a letter from the employer, which the applicant was required to provide under Appendix FM-SE, the judge found that the applicant could not satisfy the financial requirements of Appendix FM for entry clearance in relation to family life under the Immigration Rules. She found that the appeal could not succeed on that basis.
18. Consequently, the judge considered the applicant's appeal under Article 8 ECHR outside the Rules. She relied on the judgments in **SS (Congo) [2015] EWCA Civ 387**, and **Sunasse [2015] EWHC 1604 (Admin)** which stated that the Immigration Rules were a detailed expression of government policy on controlling immigration and protecting the public. The judge relied on other relevant case law including **MF (Nigeria) [2013] EWCA Civ 1192**.
19. From paragraph 78 onwards the judge made findings by applying the principles set out in **Razgar**.
20. The judge held that the evidence from the sponsor indicated that the refusal by the ECO had had a negative impact on their married life. There was no dispute as to the validity of the relationship between the parties. The sponsor is a British citizen and is not required to leave the jurisdiction. She had no connection to Gambia. In any event she is tied to the UK because of her caring responsibilities towards her mother. She was born in the UK and had lived in the UK all her life. The judge held that it was abundantly clear that if the applicant was not granted entry clearance their family life would be seriously affected.
21. The judge held that if not granted entry clearance the applicant's family life will be affected. He and the sponsor have not been able to live together, following their marriage in October 2014. The applicant and the sponsor could live in Gambia but the sponsor would be unable to continue caring for her mother and providing support for her younger brother, who is aged only 17. The judge said that the HOPO stated quite correctly that it was open to the applicant to make a new application for entry clearance, and to produce all the evidence required under Appendix FM-SE, which would more likely to be available to her than it had in 2015. She no longer received carer's allowance because circumstances had meant that she could work longer hours, and she appeared to be earning more than the £18,600 earnings threshold.

22. The judge found that the applicant had passed the English language test. The couple had already spent more than three years living apart since their marriage and she noted that the sponsor had worked full-time since September 2016 and appeared to earn over the earnings threshold of £18,600. The sponsor wished to train to teach so that she could obtain permanent employment, though would struggle to do this without additional support because of her caring responsibilities towards her mother. She and her mother had a home which her mother had rented for about fourteen years. The sponsor had confirmed that the accommodation would be available to the applicant. The sponsor's mother had a reasonable income from the state benefits to which she was entitled and it was clear that the household functioned as a unit and would continue to do so.
23. In relation to whether the interference was proportionate to the legitimate public end sought to be achieved, the judge found that during the course of the years since they had married, they had spent approximately four months together. During that time the sponsor had worked to improve her own career prospects, and to care for her mother. The application had taken over two years to reach a Tribunal for determination, and the sponsor was clearly dismayed at the HOPO's suggestion that she should apply afresh. She had not been able to afford representation, and had found the process very difficult, whilst working and looking after her mother.
24. The judge then relied on paragraph 60 of the Supreme Court's decision in **R (on the application of Agyarko) v SSHD [2017] UKSC 11** and made the following findings:

"80. The information I saw in this appeal pointed to the likelihood that the sponsor now earned income to satisfy Appendix FM, and that she was able to accommodate the appellant. I was satisfied there would be no need for him to have recourse to public funds. In considering the issue of proportionality and the likely impact on the family life of the appellant and the sponsor, I found this decision was not proportionate. The validity of the marriage was accepted. The appellant did not satisfy the requirements of the Rules primarily because she was unable to produce a letter confirming her employment at that time, because of the nature of that employment, and because she was said not to have produced the required bank statements, although it was not clear whether they had been sent to the ECO or not. The appellant and sponsor had already lived apart for three years. It did not appear to be in the interests of their family life – and to be 'unjustifiably harsh' – for this to continue for what could be an indeterminate time whilst the appellant made another application.

81. I remind myself that the test is one of balance of the competing interests of each party. It is of course in the public interest that there is a consistent immigration policy and I note the provisions of s.19 of the Immigration Act 2014 which sets out the public interest considerations. However, in this case, I found that there were exceptional circumstances in this appeal, such as would justify entry clearance to the United Kingdom outside the Rules."

25. It is these findings that have led to the ECO to lodge an application for permission to appeal. Permission was granted by First-tier Tribunal Judge Buchanan in the following terms:

“3. In addressing exceptional circumstances at [79] + [80] the Judge concludes (A) that ‘the information I saw in this appeal pointed to the likelihood that the sponsor now earned sufficient income ... and that she was able to accommodate the appellant.’ It is arguably a material error of law, as contended in the Grounds para 3 to fail to make a clear finding at date of hearing as to whether the requirements of Appendix FM were met. The Judge also concludes at [80] (B) that ‘the appellant did not satisfy the requirements of the Rules ... because she was unable to produce a letter confirming her employment at that time’ but where circumstances changed between application and appeal as noted at [78] (where it is stated ‘the appellant had worked full-time since September 2016 and appeared to earn over ... £18,600’), it is arguably an error of law, as contended in Grounds para 3, to fail to make a clear finding on level of income and to fail to identify whether ‘specified evidence’ as defined in the Rules had formed the basis for the ‘appearance’.”

26. Ms Everett submitted that the judge misdirected herself at paragraph 80. The judge agreed that the applicant had not met the Immigration Rules. She said that looking at the decision it was impossible to see how that had been rectified by the evidential information. The judge effectively was saying that now that the applicant satisfies the Immigration Rules or the appearance of seemingly to satisfy the Immigration Rules she could now allow the appeal under Article 8, and that it would be harsh for the applicant to reapply for entry clearance. Ms Everett said this was an error because the judge would have to find circumstances outside the Rules to allow the Article 8 appeal. In any event the Immigration Rules require specified evidence and it was not adequate for the judge to say that because the Rules appear to have been met.
27. She said that at paragraph 81, the judge stated that there were exceptional circumstances but has not identified or given reasons as to what the exceptional circumstances were.
28. The sponsor Ms Allen was not sure what financial documents she had sent to the ECO on the applicant’s behalf because it was a long time ago. She had given the documents to the judge at the hearing.

FINDINGS

29. I agreed with the submissions made by Ms Everett at paragraph 26 above as to why the judge’s findings at paragraph 80 disclosed an error of law. The judge failed to identify the information that she saw and how that information satisfied the financial requirements of the Immigration Rules. The judge’s finding that the evidence now pointed to the likelihood of the applicant satisfying the Immigration Rules was not a basis upon which the judge could allow the appeal under Article 8. If, as the judge said, the sponsor had worked full-time since September 2006, and appeared to earn over the earnings threshold of £18,600, then the HOPO was correct in suggesting that

it was open to the applicant to make a new application for entry clearance and to produce all the evidence required under Appendix FM-SE. The judge said that the sponsor was dismayed at this suggestion, yet she had said in evidence that she and the applicant had discussed what would happen if the application failed. She could not go to Gambia because of her mother. The applicant would have to apply again.

30. It seems that the only remaining reason under paragraph 80 for the judge allowing the appeal was that because they had lived apart for three years it would be unjustifiably harsh for that circumstance to continue for what could be an indeterminate time whilst the applicant made another application. I see that no evidence was led as to how long it would take for a reapplication to be made and considered if the applicant produced all the necessary documents.
31. I also find that the judge erred at paragraph 81 in stating that there were exceptional circumstances in this appeal without identifying what these circumstances were.
32. In the light of the above reasons, I find that the judge's decision on the applicant's appeal on Article 8 grounds cannot stand. It is set aside.
33. I remake the decision taking into account the evidence available to me at the date of my decision.
34. The judge made a finding that the applicant did not satisfy the requirements of the Immigration Rules. Because he was unable to produce a letter confirming the sponsor's employment.
35. Consequently, proportionality has to be assessed outside the Immigration Rules. I rely on **SS (Congo) [2015] EWCA Civ 387**, paragraph 38 of which is quoted by the Entry Clearance Officer in his grounds of appeal as follows:

"Secondly, however, what is in issue in relation to an application for LTE is more in the nature of an appeal to the state's positive obligations under Article 8 referred to in Huang at para. [18] (a request that the state grant the applicant something that they do not currently have – entry to the United Kingdom and the ability to take up family life there), rather than enforcement of its negative duty, which is at the fore in LTR cases (where family life already exists and is currently being carried on in the United Kingdom, and family life or any private life established in the United Kingdom will be directly interfered with if the applicant is removed). This means that the requirements upon the state under Article 8 are less stringent in the LTE context than in the LTR context. It is not appropriate to refer to the LTR Rules and the position under Article 8 in relation to LTR, as Mr Drabble does, and seek to argue that Article 8 requires the same position should apply in relation to applications for LTE."

36. I therefore find that the refusal of the entry clearance application because it failed to satisfy Appendix FM, did not alter the pre-existing "status quo", given the relationship had been formed outside the UK and had predominantly subsisted with only limited physical contact.

37. In assessing the public interest provisions in the proportionality exercise, I am required to consider the countervailing factors in the balancing exercise.
38. At the date of application and the ECO's decision, the sponsor was the main carer of her mother. The sponsor's mother suffered from systematic lupus erythematosus, acute pericarditis and thrombotic thrombocytopenic purpura. She had required additional assistance for some time, which had been provided by the sponsor, because her brother was younger. By the time the case came to the judge for determination, the sponsor's younger brother was 17 years old and was helping with the care of their mother. The council had provided a professional carer to assist them every morning in the care of the mother which had resulted in the sponsor ceasing to receive carer's allowance and allowing her to increase her employment to full-time. I find that this evidence does not detract from the fact that the sponsor still has the overall responsibility for the care of her mother. Her brother is 17 years old and can only do so much. The professional carer comes to assist her mother in the mornings. I find that the easing of the sponsor's responsibilities towards her mother does not mean that she can go off to Gambia and live there with the appellant. She is tied to the UK because of her caring responsibilities towards her mother. At the hearing the sponsor seemed quite stressed. She spoke about the effect this case was having on her on top of the care responsibilities she has towards her mother and her younger brother. I find that the sponsor's circumstances are exceptional.
39. The sponsor was born in the UK and has lived here all her life. She is a British citizen. She has no connection to Gambia other than the applicant. She and the applicant have not been able to live together following their marriage in October 2014. Her visits to Gambia to see the applicant have been brief, no doubt because of her caring responsibilities towards her mother. The sponsor's mother said in her statement that she wished the applicant would be able to come over and live with her daughter so that the daughter could be relieved of some of the stress and pressures that she was currently under. The applicant would also be able to share the responsibility of caring for her.
40. The sponsor said in evidence that she had been diagnosed in 2015 with congenital adrenal hyperplasia which resulted in regular hospital appointments, and added to her difficulties in caring for her mother. It seemed to me from the evidence that the sponsor was under great pressure all round. She was juggling so many balls. I find that if the applicant were to be allowed to come to the UK, he would provide her with companionship and assist with the care of her mother.
41. For these reasons I find that there are exceptional circumstances in this case which enable me to maintain the judge's decision to allow the appellant's appeal.

Notice of Decision

42. The ECO's appeal is dismissed.

43. No anonymity direction is made.

Signed

Date: 3 June 2018

Deputy Upper Tribunal Judge Eshun