



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10470/2016

THE IMMIGRATION ACTS

Heard at Field House
On 28 November 2017

Decision & Reasons Promulgated
On 23 February 2018

Before

**THE HONOURABLE LORD MATTHEWS
SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE PERKINS**

Between

**MRS MABINTY KANU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr B Quee (Counsel) instructed by Quee & Mayanja Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sierra Leone, born on 12 March 1985. This is an appeal against a determination of First-tier Tribunal Judge Keith, which was promulgated on 10 July 2017, dismissing the appellant's appeal against the respondent's refusal of her application dated 7 December 2015 for entry clearance for settlement as the

spouse of a British citizen, Mr Sayoh Abu Kanu, the sponsor, under Appendix FM of the Immigration Rules.

2. In the refusal letter the respondent concluded that there was limited evidence of contact between the appellant and the sponsor, despite the couple having started a relationship on 14 August 2013 and married on 3 May 2015. The respondent did not accept that their relationship was genuine and subsisting for the purposes of the Rules. In addition, the respondent concluded that the appellant had not submitted payslips covering the relevant period prior to her application or a letter from the sponsor's relevant employer confirming employment details or personal bank statements for that period. These were mandatory requirements and the appellant had failed to meet the requirements of Appendix FM-SE.
3. The appellant appealed against the respondent's decision on 19 April 2016, referring to attached evidence of travel by the sponsor in and out of Sierra Leone, WhatsApp communications between the appellant and sponsor and certain evidence of financial support. Reliance was also placed on the fact that she had had a child with the sponsor, born in December 2015, who had sadly died three days after birth.
4. The Entry Clearance Manager reviewed the decision but confirmed it on 4 August 2016, without going into any detail.
5. The appeal before the First-tier Tribunal was heard on 7 July 2017. The appellant produced a bundle containing certain documents, including WhatsApp communications and a number of loose bank statements from December 2014 to April 2015. During the appeal reference was made on behalf of the appellant to the birth of the couple's second child, who was a British citizen. It was said that the birth certificate was with the respondent as the couple had applied for a passport but the Presenting Officer was not in a position to contest or accept that fact. The respondent contested the suggestion that the numerous documents now provided in the respondent's bundle had been included in the original application. The sponsor's instructions were that his wage slips from May to December 2013 had been included with the original application as well as correspondence in relation to his pension. His bank statements, it was said, had also been included with the original application. However, it was accepted that a letter from the sponsor's employer had not been included with the application. That, however, had now been rectified and a letter from the employer dated 20 June 2017 was included in the bundle.
6. The parties confirmed that by virtue of the date of the application the appeal was limited to human rights grounds only. There was an issue whether there was a genuine and subsisting marriage so as to establish a family life for the purposes of Article 8 of the Convention and a factual question whether all the documentation required under Appendix FM-SE had been supplied. That went, it was said, to the lawfulness and proportionality of the respondent's decision, albeit this was not an appeal which could go to the specific question of whether the Rules were met. That could only be answered in the context of the Article 8 claim. The judge set out the evidence which was laid before him at paragraphs 15 to 19 of the determination and

we need not go into that in detail. Thereafter the submissions are set out at paragraphs 20 and 21. The judge's understanding of the law can be found at paragraphs 22 to 26. No issue seems to be taken with that.

7. At paragraph 28 the judge found, and said that it was not in dispute, that the appellant had not complied with all the requirements in Appendix FM-SE, specifically the requirement in paragraph 2(b) of a letter from the sponsor's employer confirming the sponsor's employment and gross annual salary, the length of his employment, the period over which he was paid, the level of salary relied on and the type of employment. It was noted that the appellant's application was made on 7 December 2015 and the period relied on was a period of six months prior to December of that year. The letter from the employers, G4S, dated 20 June 2017 referred to income earned in the previous twelve months but did not refer to the level of income in 2015. It referred to a salary but did not confirm whether it was gross or net. It did confirm, however, that the sponsor had been employed by G4S as a security officer since 25 March 2012.
8. It was noted that the sponsor asserted that he and the appellant had enclosed as an appendix various evidential documents but not even in the Tribunal bundle at the hearing were all the relevant bank statements included. The appellant's representative had to provide loose statements. The application had been completed on behalf of the appellant by a Mr Ngegba and he had not provided a statement about what documents had been included. Neither the appellant's nor the sponsor's written statements provided detailed evidence about what had been included.
9. The judge noted the appellant's and sponsor's evidence that they had included all the required evidence other than the employer's letter and that they had now rectified that but the letter still did not meet the requirements of the appendix. The judge concluded that the sponsor's explanation in oral evidence that submission of payslips would suffice, instead of an employer's letter, showed a lack of knowledge, advice or assistance in completing the application, which was indicative of what was likely to have occurred, namely an absence of the required documentation. He also considered the vagueness of the appellant's and sponsor's written statements and did not regard their evidence as reliable. It was found that there were only limited documents provided in what is said in paragraph 31 to be "the Appellants " but which must mean "the application". These were wedding photographs and had no documents relating to income. Documents which were later provided were provided between February and April 2016 for the purposes of the appeal. That was found to be indicative of the appellant's approach generally, namely to have provided limited evidence at the initial application, more substantial evidence on appeal (to the ECM) and yet further evidence to the hearing.
10. At paragraph 32 the judge noted that evidence up to the date of the hearing could be considered but was conscious that the respondent had not, prior to the appeal, had much evidence with which to evaluate the appellant's relationship with her husband, the fact that they had a child, a British citizen, and that they met the income requirements of the Immigration Rules.

11. At paragraph 35 the judge found that in terms of assessing the couple's family life there was a poor quality wedding certificate, passport stamps indicating the sponsor's travels to Sierra Leone with many visits predating the claimed relationship, WhatsApp communications dated February to March 2016, which were likely to have been generated with the appeal in mind, evidence of money transfers, which postdated the application in 2015 and significant variations in the sponsor's pay as illustrated in a schedule of pay from February 2015 to June 2017, set out at pages 131 to 132 of the appellant's bundle. Paragraph 33 refers to this as the appellant's pay but it must be a typographical error.
12. At paragraphs 34 to 35 the judge said the following:
 - "34. While I find that the Appellant and Sponsor have married, as claimed, and while I was conscious that there is no requirement of corroboration, I was concerned about the regular Whatsapp communications for the purposes of the appeal; the lack of a birth certificate for the couple's second child (or even a copy, noting the explanation provided) and the lack of any other detail about the couple's family life together. I do not find that the Appellant has shown a family life with the Sponsor.
 35. I also do not find that the Appellant has provided an adequate explanation for a failure to provide documentation provided by Appendix FM-SE. The couple do not suggest that there was any difficulty in obtaining a letter from the Sponsor's employer for the relevant period; merely that they have not done so, not only in the application but in this hearing. The Sponsor's income appears to vary significantly, something which was not apparent from the employer's letter that was provided."
13. At paragraph 36 the judge indicated that the appellant had not shown that she had a family life with the sponsor, on the balance of probabilities. Paragraph 37 goes on as follows:

"Even had I concluded differently, ie that such a family life existed, I do not find that the Respondent's decision interfered with the Appellant's family life so as to engage Article 8. I attached limited weight to the assertions about the couple's child in the absence of a birth certificate. On the couple's own evidence, there was nothing preventing them from complying with Appendix FM-SE of the Immigration Rules; they have, at least in respect of the employer's letter, simply chosen not to do so. The requirements of Appendix FM-SE are for a legitimate aim; and are not, in the context of choosing not to comply with evidential rules, disproportionate. It remains open to the Appellant to resubmit her application with evidence which complied with Appendix FM-SE swiftly."
14. The appeal was dismissed on human rights grounds.
15. A number of grounds of appeal were raised but permission to appeal was refused in the First-tier Tribunal. Permission was sought from the Upper Tribunal and was granted on 9 October 2017. The grant of permission, amongst other things, said the following:

“There was a copy of the Appellant’s second child’s birth certificate in her Appeal Bundle. In addition, there was other evidence which was capable of establishing that the Appellant and her husband enjoyed a family life together and the Home Office Presenting Officer is recorded as stating that he did not wish to make any further submission on their relationship, despite the fact that there was now further evidence about it.

The First-tier Tribunal Judge failed to give cogent reasons for finding that they did not enjoy a family life together in the light of this evidence.

As a consequence, it is arguable that First-tier Tribunal Judge Keith’s decision contained arguable errors of law and it is appropriate to grant permission to appeal.”

16. Before us Mr Quee submitted that paragraph 37 was predicated upon the lack of a birth certificate and indeed that was referred to in paragraph 34 of the determination. The reality is that a copy of the certificate was at page 12 of the bundle and was before the judge. The original could not be provided at the date of the hearing, having been submitted to the UK Passport Office, and this was referred to at paragraph 18. This was an error of fact which was significant and permeated the whole decision as to the genuineness and subsistence of the marriage. Mr Quee submitted that there was other evidence which supported the genuineness and subsistence of the marriage, including the evidence of the sponsor himself and the Presenting Officer made no submissions challenging this.
17. The grounds of appeal have referred to other matters including WhatsApp communications which allegedly predated the period of February to April 2016. Mr Quee did not refer to that in his submissions but we do not think this is material. On the other hand, we are satisfied that the judge’s treatment of the birth certificate is a material error which can be said to have infected the whole decision as to the genuineness and subsistence of the marriage. The conclusion at paragraph 6 that the appellant had not shown that she had a family life with the sponsor cannot be sustained and falls to be set aside.
18. However, that is not the end of the matter.
19. Mr Quee submitted that the evidence before the First-tier Tribunal and indeed before us was such as to demonstrate that the appellant and her sponsor met the financial requirements. At the time the application was made the appellant was not represented by solicitors. Various documents were submitted which were not considered, according to the sponsor, but he accepted that the letter from the employer was not submitted to the Entry Clearance Officer.
20. Under reference to pages 133 and the following pages of the appellant’s bundle, which was before the First-tier Tribunal, these being bank statements, the entry showed that between January 2015 and December 2015 the total amount which went into the sponsor’s account by way of salary was £14,661.48. The pension amounted to over £6,000. We have no reason to quibble with these figures.

21. The issue was that the financial requirement was met. That was what Parliament had wanted people to demonstrate. The question now was, if we were satisfied that there was family life and the sponsor's income met the requirements, would it be fair and proportionate to make the appellant re-apply.
22. Reference was made to R (On the application of Agyarko) v SSHD [2017] UKSC 11.
23. Such an application might take another four or five months. Mr Quee said he was familiar with these matters. The application would cost approximately £1,236 and the sponsor had to pay £500 NHS fees. A TB test would have to be taken at a cost of US\$120, and the English language requirements would have to be met again.
24. In reply Mr Nath said that the appellant was making what was in essence a Chikwamba point but in reality she was merely trying to circumvent the Rules. It was not disproportionate for her to be asked to reapply. She was not being asked to go back anywhere. The decision of the Entry Clearance Officer was that the documents were not there and the judge found that that was the case. It was not just a case of there being a birth certificate missing.
25. In further submissions Mr Quee said that this is a human rights appeal and the court should take account of any evidence up to the date of the decision. All the relevant material was before the judge and before us and the appeal should be upheld.

Discussion

26. As we have indicated we are quite satisfied that the First-tier Tribunal's decision on the genuineness and subsistence of the marriage cannot stand and must be set aside. We are satisfied on the evidence before us that there is indeed a genuine and subsisting marriage and that there is a child whose interests have to be considered, not least under Section 55 of the Borders, Citizenship and Asylum Act 2009. It appears that that child was with the appellant in Freetown and the sponsor had visited them, according to him, at least twice a year. There is no reason not to accept that. It would seem fairly obvious that it would be in the best interests of the child to have the love and support of both parents while growing up. That is of course a primary consideration but not the primary consideration.
27. On the evidence before us the financial requirements are met. On the basis of the documentation provided to us it would appear that they were also met at the time of the application. However we are in no position to challenge the findings that not all the documentation was submitted with the application. In particular it is accepted that the employer's letter was not so submitted. The letter which was ultimately submitted to the First-tier Tribunal, so far as relevant, reads as follows:

"Mr Sayoh Kanu has been continuously employed as a full time Security Officer with G4S Secure Solutions (UK) Ltd since 25 March 2002.

Mr Sayoh Kanu is contracted to a minimum of 40 hours per week and is currently paid at a site rate of £9.40 per hour. Therefore the basic annual salary is £19552.00.

Overtime is usually available but is not definite. He has earned £20232.10 in the last 12 months including overtime.

Although the employee is not known to me personally, all of our employees are 10 year security screened.”

28. The letter, as can be seen, suffers from the deficiencies specified at paragraph 29 of the determination. It does not tell us what the position was at the time of the application. We are not, however, concerned with deciding whether or not the Rules were met in any technical sense. For the purpose of a human rights determination we may look at the evidence rather more broadly and in doing that it appears to us as matters stand the financial requirements are met.
29. That however does not mean that the appellant succeeds. This is not a case where she would be sent back to her country of origin to make another application. She is already there. Doubtless another application may take a few months and will cost the sort of figures referred to by Mr Quee. That is unfortunate but is has to be laid entirely at the door of the appellant and her sponsor. As we have pointed out, at paragraph 37, the First-tier Tribunal Judge did not find that the respondent’s decision interfered with the appellant’s family life so as to engage Article 8. In making that decision, however, limited weight was attached to the assertions about the couple’s child in the absence of a birth certificate. To that extent that conclusion is somewhat vitiated. However, the remaining parts of that paragraph represent conclusions which were open to the First-tier Tribunal Judge and we are in any event in agreement with them. The Rules themselves are not disproportionate and it is open to the appellant to comply with them, if she chooses to make another application. As has been pointed out many times, Article 8 does not allow parties to choose where they wish to live. Firm, effective and consistent immigration control is plainly in the public interest and it is not disproportionate to insist on the Rules being observed. There may of course be cases where compelling circumstances exists for Article 8 considerations outside the Rules but this cannot on any view be said to be one of them.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)

Date: 29 November 2017