



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12673/2016

THE IMMIGRATION ACTS

Heard at Newport
On 19 September 2018

Decision & Reasons Promulgated
On 17 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

SOBIA NIAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Manley, Counsel

For the Respondent: Mr Howells, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan who was born on 26 September 1985. She entered the UK on 3 November 2010 as a Tier 4 student and made a further in time application in the same capacity which was granted until 30 June 2013. On 22 April 2013 she applied for leave to remain as the spouse of a settled person which was rejected on 10 May 2013. She applied again as a spouse on 6 June 2013 and this application was granted until 11 March 2016. She then applied on 7 March 2016 as a spouse and her application was refused on the grounds of financial eligibility.

2. The Appellant appealed against that decision to the First-tier Tribunal under Section 82(2) of the Nationality, Immigration and Asylum Act 2002 and alleged that the Respondent's decision breached her human rights. That appeal came before First-tier Tribunal Judge MM Thomas who in a decision and reasons promulgated on 6 June 2017 dismissed her appeal on human rights grounds.
3. The Appellant sought permission to appeal against that decision and permission was granted on renewal to the Upper Tribunal by Deputy Upper Tribunal Judge Coker. She considered that it was arguable that the Judge failed to properly consider the Appellant's circumstances as they were evidenced at the date of the hearing and failed to place adequate weight on her positive immigration history and compliance with the Immigration Rules.
4. The appeal therefore comes before the Upper Tribunal in order to determine whether there was a material error of law in the decision of the First-tier Tribunal such that it must be set aside.

The Grounds

5. Ground 1 asserts that the Judge misdirects herself as to the burden of proof in relation to Article 8 of the ECHR.
6. Ground 2 asserts that there was no dispute that the allegedly missing evidence, namely the bank statements and letter from the employer required by Appendix FM-SE, were before the First-tier Tribunal at the date of the hearing. The First-tier Tribunal, it is alleged, materially erred in failing to recognise that this was a human rights appeal and whilst the Rules were a starting point, the statutory provisions, namely s.85 (4) and (5) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) do not place any limitations on the evidence that the First-tier Tribunal could consider. The Judge failed to recognise that there was no public interest in removal where the requirements of the Rules were met at the date of the hearing.
7. Ground 3 asserts that given there was no dispute about the fact that the evidence showed that the income threshold was met at the date of the hearing the Judge erred in failing to consider **Chikwamaba (FC) v SSHD** [2008] UKHL 40. The Judge had failed to consider whether it was proportionate to remove the Appellant given the fact that the Rules were met at the date of the hearing, including the evidential requirements.
8. Ground 4 asserts that as the Supreme Court made clear in **MM (Lebanon) & Ors, R (on the applications of) v SSHD and another** [2017] UKSC 10, there is a difference between the evidential requirements (Appendix FM-SE) and the substantive requirements (Appendix FM). Where, as in this case, the substantive requirements were met, even if two documents were not submitted with the application that could not be a reason to dismiss the appeal.

9. Ground 5 asserts that given the documents were provided in respect of the employment as listed at [34] of the determination, the First-tier Tribunal erred in failing to appreciate that the requirement to have evidence of employment in the form of a letter from the employer did not mean that the evidence had to be limited to one letter and the First-tier Tribunal was entitled to consider the P60, employment contract and other evidence together in order to see if the requirement of Appendix FM-SE was met.

The hearing

10. I heard submissions from both representatives which I summarise here. Mr Manley submitted that at the date of the hearing it was not in dispute that all the documentation was provided. There was no actual dispute that the Appellant met the financial requirements at the date of the hearing. With regard to the misdirection in respect of the burden of proof the Judge misdirected herself both at [11] and [59]. The Judge placed the burden of proving both the existence of family life under Article 8 (1) and proving the decision was disproportionate on the Appellant.
11. With regard to Grounds 2 and 3, the Judge gave little or no weight to the fact that at the date of the hearing the Rules were satisfied. At [55] the Judge stated that she attached little weight to the fact that the specified evidence requirements had been met at the date of the hearing. Having decided that she met the Rules she found that she had to go back to make an application that was bound to succeed.
12. With regard to Ground 4, the Judge further failed to make a distinction between the substantive and evidential requirements.
13. Regarding Ground 5, the only dispute was whether bank statements were submitted with the application. The documents were available at the date of the hearing. Not only was the error material but the decision should be re-made without further evidence and the appeal should be allowed. As from the date of the last spousal visa she now had completed five years and in allowing appeal there should be indefinite leave as opposed to a period of 30 months.
14. Mr Howells submitted in respect of Ground 1 that [11] was a standard paragraph and although the Judge might have set out a fuller exposition of the burden of proof it was not a material error. He accepted that there was an error at [59] which placed the burden on the Appellant to prove that the decision was disproportionate. However, it was clear from [57] that a proper proportionality exercise was carried out.
15. With regard to Ground 2, the Respondent had a discretion to waive the requirement of specified documents. It was clear that the decisions taken under Appendix FM related to evidence submitted with the application and certainly before the decision. It was not in dispute that the Appellant did not provide the specified evidence with the application. The Judge found that evidence had now

been adduced at [55] but little weight was to be attached and it was open to her to make that finding.

16. Ground 3 was parasitic on Ground 2 and, in any event, she did not address herself to entry clearance. With regard to Ground 4, it was not in dispute that specified evidence had not been provided at the date of application. With regard to Ground 5, there was a requirement for a letter from the employer confirming certain specified information. In summary, there were no material errors of law in this determination.
17. Mr Manley replied that it was clear that in order to make a lawful decision the Judge had to set the scales correctly and what was apparent was that the **Chikwamba** principles had not been applied and that had to be fatal to the proportionality assessment. He maintained that the appeal had to be allowed on all grounds.
18. Mr Howells agreed that if I were to find a material error of law the decision in the appeal could be remade without hearing further evidence.

Discussion

19. The Judge firstly considered whether the specified evidence required by Appendix FM-SE was produced by the Appellant to the Respondent with her application. The First-tier Tribunal Judge concluded at paragraph 36 of the decision that the specified financial evidence was not provided at the time of the application. The Appellant had contended that she had produced the specified bank statements and the Judge found against her on this. She then found that there were no insurmountable obstacles to the couple continuing their family life in Pakistan and further determined that the requirements of paragraph 276ADE 1 (vi) were not met.
20. The Judge then considered the appeal outside the Rules. The Appellant argued that she had now provided all the specified evidence and that her husband, as a British Citizen, should not be forced to leave the UK. As the Respondent had accepted that there was a genuine and subsisting relationship the only issue was whether the Respondent's decision was proportionate.
21. The core paragraph of reasoning is at [55]:

“I accept that the Appellant has now adduced the specified evidence to confirm her financial status at the time of the application. Nevertheless, the application was refused because the Appellant failed to engage with the immigration authorities by not providing the requested information and as such has acted in a way that undermined the system of immigration control. I therefore when undertaking the proportionality exercise attach little weight to the fact that the specified evidence requirements have now been met as the failure to provide the information was the fault of the Appellant.”

22. The Judge then addressed the s117 B factors, found that the Appellant had always known her status was precarious and stated that the circumstances were not so compelling that the Appellant's Article 8 claim would outweigh the public interest in removal.
23. I find that there is a material error of law for the reasons both identified in the grounds and the grant of permission. Whilst this is an appeal on human rights grounds, the relevance of the Immigration Rules is, as recently found by the Court of Appeal in the case of **TZ (Pakistan) v SSHD [2018] EWCA Civ 1109**, that if an Appellant meets the requirements of the Immigration Rules his removal is not proportionate. It was not in dispute that at the date of the hearing the Appellant met both the substantive and evidential requirements of the Rules (Appendix FM and FM-SE). The reason the Judge gave for not according any weight to this was that it was the Appellant's fault that documentation was not submitted with the application and this undermined the system of immigration control. The Judge failed to give weight to the fact that if the requirements of the Rule are met at the date of the hearing there can be little or no public interest in removal.
24. Further, as the Appellant argues at Ground 4, the Supreme Court made it clear in **MM (Lebanon)** at [76] that the rules as to the quality of evidence necessary to satisfy the income test was a matter of practicality rather than principle and the Tribunal could draw on its own expertise:

“76. As Lord Reed explains (*Agyarko*, para 47), this approach is consistent with the margin of appreciation permitted by the Strasbourg court on an “intensely political” issue, such as immigration control. However, this important principle should not be taken too far. Not everything in the rules need be treated as high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight. The tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases. The former naturally include issues such as the seriousness of levels of offending sufficient to require deportation in the public interest (*Hesham Ali*, para 46). Similar considerations would apply to rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise.”
25. I find that the Tribunal erred in placing significant weight on the Appellant's failure to satisfy the evidential requirements of the Rules at the date of the application and failing to accord significant weight to the fact that the Appellant satisfied the Rules at the date of the hearing. In the light of her finding that the Appellant did satisfy the Rules at the date of the hearing I further find that the

Judge erred in failing to consider whether it was proportionate to require her to seek entry clearance. The misdirection at paragraph 57 in relation to the burden of proof is also an error of law which in the context of the decision as a whole must also be regarded as material.

The Re-making of the decision

26. It is accepted that the Appellant enjoys family life with her husband having been granted a spouse visa from 6 June 2013 to 11 March 2016. There is no issue in this case that Article 8 (1) is engaged.
27. In addressing the questions in **Razgar [2004] UKHL 27** the proposed interference is of sufficient gravity to engage the operation of Article 8, the interference is in accordance with the law and necessary in a democratic society. The remaining question is therefore whether the interference is proportionate to the legitimate public end sought to be achieved.
28. It was not in dispute that the Appellant met the requirements of the Rules at the date of the hearing. Her partner had demonstrated an income of £32,000 by reference to the specified evidence required under Appendix FM-SE. The significance of the meeting the Rules is that removal is not proportionate as explained by the Court of Appeal in **TZ**.
29. Further, in **Agyarko [2017] UKSC 10** Lord Reed said at [51] that if an applicant, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal and that point was illustrated by **Chikwamba**. In **Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC)** the Tribunal confirmed that the **Chikwamba** principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the United Kingdom.
30. It is clear that had the Appellant applied at the date of the hearing she would have been granted leave to enter. The Respondent has advanced no good reason why she should return to seek entry clearance in circumstances where she has been in a genuine and subsisting relationship since 2013 and she has a good immigration history.
31. I am required to take the factors in section 117 B of the 2002 Act into consideration. Sections 117A and 117B are found in part 5A of the 2002 Act and apply in all cases where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8.

Section 117A is as follows:

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

- (a) breaches a person's right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
 - (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
 - (a) in all cases, to the considerations listed in section 117B, and
 - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
 - (3) In subsection (2), "*the public interest question*" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
32. The considerations referred to in section 117A(2)(a), which are said by that provision to be applicable in all cases where the public interest question is under consideration, are as follows:
- (1) The maintenance of effective immigration controls is in the public interest.
 - (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
 - (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
 - (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
 - (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

33. The little weight provisions do not apply to her relationship as it was established when she was here on a spousal visa. Her status was precarious and hence little weight can be attached to her private life but that is not the real issue in this appeal. The Appellant speaks English and is financially independent. However, she can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of fluency in English, or the strength of financial resources as these are neutral factors (**Rhuppiah** [2016] EWCA Civ 803).
34. The maintenance of immigration control is in the public interest but it is not in the public interest to remove the Appellant who has enjoyed family life with her husband since 2013 on the basis of a grant of spousal leave and who, at the date of the hearing, met the requirements of the Rules. There are no countervailing public interest considerations. The fact that she did not meet the evidential requirements of the Rules at the date of the application cannot be a sufficiently weighty factor on the public interest side of the scales to render removal proportionate.

Notice of Decision

There is a material error of law in the decision of the First-tier Tribunal and I set it aside.

The appeal allowed.

No anonymity direction is made.

Signed

Date 26 September 2018



Deputy Upper Tribunal Judge L J Murray