



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/20786/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 24 April 2018**

**Decision & Reasons Promulgated
On 2 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**D E
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S A Canter, counsel
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge H Graves (“the FTTJ”) promulgated on 7 February 2018, in which she dismissed the appellant’s appeal against the refusal of her application for leave to remain on human rights grounds.
2. Whilst no anonymity direction was made in the First-tier Tribunal, I make such a direction because of my references to the appellant’s and her husband’s personal circumstances.

Background

3. The appellant was born on [] 1981. She is a citizen of Turkey. The appellant and her husband, also a Turkish citizen, met at school in Turkey; they developed a relationship and married in 2011. On 9 September 2013 the appellant was granted entry clearance as a spouse to join her husband in the UK. This was valid until 9 June 2016. The appellant applied for further leave to remain pursuant to Appendix FM of the Immigration Rules, on 3 June 2016.
4. The respondent accepted the suitability requirements were met and that the relationship was genuine and subsisting. However, she found the appellant did not meet the financial requirements in that she was unable to demonstrate the sponsor was earning a minimum income of £18,600. At the date of application the appellant was only able to demonstrate her husband had been working full-time for two months; prior to that period he had been ill and had returned to work part-time. His earnings were therefore below the required threshold. The respondent refused the application because the appellant had not met the income requirements in Appendix FM. Nor did the respondent accept the decision breached the UK's obligations under Article 8 of the European Convention on Human Rights.
5. At the hearing before the FTTJ, the appellant conceded she did not meet the requirements of Appendix FM or FM-SE at the date of application. However, it was submitted that, at the date of hearing, the appellant's husband was earning over the required threshold of £18,600 and that the appeal should be allowed on Article 8 grounds, outside the Rules. Original payslips, bank statements and a P60 were provided to the FTTJ. The appellant conceded, before the FTTJ, that the bank statements did not reflect the whole of the appellant's husband's cash earnings as they had not all been credited to the account.
6. The FTTJ concluded "the decision to remove the appellant amounts to a proportionate interference in the rights of the appellant and her husband under Article 8". She further found that "the availability of entry clearance does constitute an alternative to any finding that her removal is disproportionate in any event". The appeal was dismissed.
7. Permission to appeal was granted because "although rules based examination of the case is date of application the Judge should have considered why, if the appellant met the rules, that removal was still said to be proportionate." Hence the matter came before me.

Submissions

8. Mr Canter relied on the grounds of appeal and made further oral submissions. These can be summarised as follows:
 - a. The burden of proof was not on the appellant; it was for the respondent to justify the interference with the protected rights.
 - b. It was open to the FTTJ to assess the evidence to establish whether the appellant fulfilled the criteria in the Immigration Rules at the date of hearing (**Chikwamba v SSHD [2008] UKHL 40** and **Agyarko v SSHD [2017] UKSC 11**).
 - c. Contrary to the FTTJ's assertion at [17] the appellant had provided, at the date of hearing, the evidence required pursuant to FM-SE for assessment of income.
 - d. The FTTJ had criticised the appellant for poor copies of documentary evidence but this had been undertaken by the respondent who held those documents.

- e. The FTTJ erroneously stated the payslips did not reflect the information in the P60. This was factually incorrect. Originals had been given to the FTTJ.
 - f. The assessment of the evidence as “patchy” was incorrect; the appellant had provided all the evidence required pursuant to FM-SE to show his earnings up to and at the date of hearing.
 - g. The allegation that the appellant was not financially independent (for the purposes of s117B of the Nationality, Immigration and Asylum Act 2002) had not been put to the appellant at the hearing.
 - h. Contrary to the FTTJ’s findings otherwise, the appellant had given reasons why she could not stay with her family on return to Turkey while making an entry clearance application. This should have been taken into account as part of the proportionality assessment. It was not.
 - i. The FTTJ’s comments on **Agyarko** and **Chikwamba** did not reflect the guidance in those authorities.
 - j. The FTTJ found the appellant and her husband inherently reliable witnesses; this was sufficient for the appeal to be allowed.
 - k. In summary, the FTTJ’s reasoning, assessment of the evidence and the relevant authorities and legislation was flawed and revealed multiple errors of law.
9. Ms Pal, for the respondent, referred to various findings made by the FTTJ. She submitted the FTTJ was unable to find, on the evidence before her, that the sponsor was earning the required income. She was entitled to find the evidence was lacking. The FTTJ had noted the difficulties the appellant claimed she would face if she had to return to Turkey to make an entry clearance application. While the FTTJ had noted that the appellant’s and sponsor’s evidence was not unreliable, it was the unreliability of the financial evidence which had caused her to conclude there was not a disproportionate interference with the appellant’s family life. It was submitted that there was no material error of law; the facts as found were open to the FTTJ on the evidence before her.
10. I asked the appellant’s counsel, who had appeared before the FTTJ for the appellant, to identify the documentary evidence, as required by Appendix FM-SE at the date of hearing, which was not before the FTTJ. He said all relevant documentary evidence was provided to the FTTJ to show that the appellant’s sponsor was earning above the required threshold and that he had done so for the previous year; the only aspect of FM-SE which had not been met was the requirement that the sponsor’s cash income from salary was reflected in his bank statements (those bank statements having been produced also). I asked Ms Pal whether she was able to confirm this was the case and she confirmed that this was indeed the “only item missing”.

Findings

11. The only issue to be decided by the FTTJ was whether the decision placed the UK in breach of Article 8 of the European Convention on Human Rights.
12. At paragraph 10 the FTTJ identifies the burden of proof. The FTTJ states merely, “In human rights appeals, it is for the appellant to show that there has been an interference with her human rights.” However, in Article 8 appeals of this type, the burden of proof is on the appellant to show that the respondent’s decision interferes with her right to respect for her private and family life. If the appellant is able to establish that, it is then for the respondent to

justify the interference under Article 8(2). The FTTJ has not cited the terms of Article 8 or the guidance in the various authorities such as **Razgar v SSHD [2004] UKHL 27**. This would not ordinarily be necessary if it were clear that the relevant guidance had been followed but here there is no indication that that is the case. I can only conclude that the FTTJ has misdirected herself as to the burden of proof.

13. The FTTJ refers at [1] and [25] to the respondent having made a decision to remove the appellant from the UK. That is not the case. She made a decision to refuse the application for further leave remain. That is the extent of her decision. The FTTJ took into account the nature of the respondent's decision in her assessment of proportionality and this calls into question the reliability of her assessment since it is based, at least in part, on a false premise.
14. It was agreed by the parties before me that the only factor missing for a finding that, at the date of hearing, the appellant fulfilled the criteria in Appendix FM-SE was the lack of correlation between his cash earnings with the credit entries in the bank statements. The FTTJ criticised the appellant at [6] for providing poor copies of documentary evidence but the originals were provided, as is acknowledged later in that paragraph. This, together with the agreed position before me that the only issue not addressed by the appellant at the hearing was the correlation of his salary with his bank statements, casts doubt on the finding that the evidence was "patchy at best" at [20].
15. The FTTJ states at [14] the appellant had not raised any "compassionate, compelling or exceptional circumstances that have not been provided for under the Immigration Rules." In **R (Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)** it was held that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. Both this appellant and her husband had explained in their statements that they could not remain in Turkey for more than a "short visit". The appellant's husband states that when the appellant applied for a spouse visa from Turkey in about 2011 it "took her about 2 years to obtain a visa. During this time her parents gave us a very hard time". The FTTJ concluded at [25] that she had "not found that the appellant and sponsor's oral and documentary evidence is inherently unreliable or incredible." Despite this the FTTJ did not take into account, in her assessment of proportionality, the impact of a possible two year separation while the appellant applied for entry clearance. Given that the couple were attempting to have a child and had encountered difficulties with conception, such a separation would amount to compassionate circumstances.
16. The FTTJ has, in considering the issue of proportionality at [20] decided this was not a "case where the appellant's application was refused for a technical issue, ... This is an appeal where the application did not meet the requirements, both substantive and evidential." This misses the point. It had been conceded that the appellant did not meet the Rules at the date of decision, the issue to be decided was the proportionality of the interference with the appellant's right to a family life. The FTTJ has failed to have regard to the issue of whether she fulfilled the criteria in the Rules, as regards her family life, at the date of hearing. It is highly relevant that she considered the witness evidence to be inherently reliable; that

evidence was that the sponsor had earned over the income threshold for over a year by the date of the hearing. This a factor of relevance to the assessment the public interest pursuant to s117B(3) of the 2002 Act. The FTTJ's findings suggest she was looking back at the situation at the date of decision rather than the appellant's circumstances at the date of hearing: see for example the reference to the appellant being "unable to meet the substantive financial requirements of the application" at [24] where she also refers to the sponsor's income having fallen well below the threshold; this was prior to the date of application and did not reflect the situation at the date of hearing.

17. The FTTJ has found "a lack of documentary evidence" [21], but, before me, it was agreed that the appellant had produced sufficient evidence to comply with the financial requirements of Appendix FM and FM-SE with the exception that the sponsor's cash salary was not reflected in his bank statements. The FTTJ appears to have focussed at [21] on the documentary evidence from the date of application to the date of decision. This does not address the appellant's case which was that she met the income threshold at the date of hearing. The appellant provided documentary evidence, compliant with FM-SE (save with regard to the content of bank statements), covering the period required by FM-SE, as at the date of hearing (February 2018). The FTTJ makes much of the fact that the respondent had not had the opportunity to "verify, check and investigate claimed income" but there was no suggestion in the reasons for refusal that the sponsor's documentary evidence of his earnings had given rise to concerns in this regard and the sponsor had remained in the same employment as that disclosed to the respondent.
18. **MM (Lebanon) [2017] UKSC 10** makes it clear that, in the proportionality assessment, the FTTJ is entitled to take into account all sources of income, including from third parties, subject to appropriate scrutiny. The FTTJ has focussed on the documentary evidence solely by reference to the Rules. While this is appropriate to identify whether the appellant fulfilled the criteria in the Rules at the date of hearing, a wider assessment is required for the purposes of assessing proportionality (**MM (Lebanon)** refers). The FTTJ failed to undertake that wider assessment, instead focussing on adherence to FM-SE. She should have taken into account the totality of the evidence, including the witness evidence which she had found inherently reliable. Were it not for the absence of record in the bank statements of the sponsor's income, the appellant would otherwise have demonstrated she fulfilled the criteria in Appendix FM-SE for the grant of further leave to remain. There was reliable and credible evidence (according to the FTTJ) to explain the reason for that gap in the evidence.
19. The FTTJ refers to s117B and the public interest in financial independence at [22] but has only taken into account, in making that assessment, the inability of the appellant to meet the requirements in FM-SE. She has not carried out a holistic assessment of the appellant's financial circumstances at the date of hearing. For example, it is the appellant's evidence that she worked part-time until the refusal of her application when she was no longer permitted to work. The FTTJ has also ignored the appellant's evidence, which she considered inherently reliable, that the appellant would work again if permitted to do so. These are matters of relevance to the assessment of financial status. Such evidence should have been taken into account in the proportionality assessment (**MM (Lebanon)**).
20. This is a decision which is fatally flawed as a result of the application of the wrong burden of proof and an inadequate assessment of the evidence. These are fundamental errors of law which taint the assessment of proportionality. Had they not been made the outcome might have been different.

21. I invited submissions as to how to proceed and Mr Canter indicated he would be content for the matter to be heard afresh in this tribunal. Ms Pal had no view as to how to proceed.
22. There is no suggestion that the evidence needs to be updated and I see no need for a fresh hearing. The parties are in agreement as to the evidence before the FTTJ at the date of hearing. I can also take into account the finding of the FTTJ (which was accepted by Ms Pal) that the evidence of the two witnesses is inherently reliable. I therefore remake the decision on the basis of the evidence before the FTTJ.
23. I bear in mind the public interest factors including those in s117A-s117C of the 2002 Act. The maintenance of effective immigration control is in the public interest. This appellant is not an overstayer. She has complied with the Immigration Rules. She has the benefit of leave pursuant to s3C of the Immigration Act 1971. She has had lawful immigration status throughout her stay in the UK. Her immigration record is exemplary.
24. At the date of hearing, the appellant had produced all the required evidence for compliance with Appendix FM-SE with the exception that her sponsor's bank statements did not reflect the totality of his cash income. A reasonable and credible explanation has been provided for that anomaly. The remaining evidence demonstrates his income exceeds the threshold of £18,600 for the required period (as agreed by the parties before me). Were the appellant to return to Turkey to apply for entry clearance, she would be in a position to demonstrate compliance with the Rules with the exception of the requirement to provide bank statements which correlate with her husband's income. That said, since the sponsor is now aware of this provision and in the same employment, he could organise his financial affairs to ensure that his bank statements reflect his cash earnings to comply with FM-SE. Were he to do so, and there is no reason to suggest otherwise, the appellant would certainly be granted entry clearance.
25. The FTTJ's findings on the credibility of the witness evidence have not been challenged by the respondent. I therefore adopt the FTTJ's paragraph 3 and find that the appellant had worked part-time for Eastenders Kebab about two months before her leave to remain was due to expire. She was unable to continue that work when her application was refused but it is her evidence that "had my visa application not been rejected, I would have carried on working at Eastenders Kebab. Once my visa is granted, I wish to continue working." On this evidence the appellant would be financially independent were she permitted to remain in this country. She would not be a burden on state.
26. The appellant speaks English, as evidenced by her being granted entry clearance as a spouse.
27. The appellant's husband has indefinite leave to remain in the UK; he has lived in this country for 16 years; he has permanent employment here and his evidence is that he would lose that employment were he to move abroad. He would find it difficult to find work in Turkey. If the appellant and her husband were to relocate, the appellant's husband may lose his immigration status: it took about two years for his wife's spousal visa to be granted when she applied in about 2011. Thus he would be out of the UK for a period of about two years which would put his indefinite leave to remain at risk.
28. Were the appellant to return to Turkey to apply for entry clearance to rejoin her husband here, this would cause extended disruption to their family life. It would cause an additional financial burden because she would be unable to stay with her family for more than a short period of about a week. It is her evidence that, due to her cultural and social norms, she

would be unable to work in Turkey as a married woman; she would be reliant on her husband in the UK. The appellant and her husband are having difficulty conceiving a child. A separation would set back their attempts to do so. This would have a significant impact on their family life.

29. The inability of the appellant to meet the documentary requirements as regards her husband's employment was due in part to his ill health and inability to work full-time for the prescribed period before her application. Rather than delay making her application until her husband returned to full-time work, she made it before the expiry of her leave to remain, albeit she could not, as a result of his part-time work, meet the income requirements in the Rules. This demonstrates a willingness to adhere to the Rules and a recognition by the appellant of the importance of not overstaying her leave here. There is no doubt the appellant's husband is working full time and earns in excess of the threshold income. His failure to meet the Rules arises from a lack of specific reference to his total earnings in his bank statements. This carries less weight in the proportionality exercise given the exemplary immigration record of the appellant and the fact that she would, in due course, certainly meet the entry clearance criteria were she to make an application for entry clearance in Turkey. There is little public interest in requiring her to return to Turkey and to wait the requisite number of months for her husband to transfer his monthly cash income to his bank account when there is reliable and credible evidence as to his earnings before the tribunal.
30. There are compelling circumstances in this case: the appellant was unable to demonstrate she met the criteria in the Rules at the date of application because of her husband's illness and consequent inability to work. If she were required to return to Turkey to apply for entry clearance this would entail a prolonged period of separation from her husband, judging by the length of time it took when she applied in about 2011: two years. This, at a time when the couple are attempting to start a family and are experiencing difficulties with conception.
31. For these reasons, given the particular circumstances of this family, the respondent's decision gives rise to a disproportionate interference with the appellant's and her husband's rights to a family life when weighed against the public interest in maintaining effective immigration control.

Decision

32. The making of the decision of the First-tier Tribunal did involve material errors on points of law.
33. I set aside the decision the remake it by allowing the appeal.

A M Black

Deputy Upper Tribunal Judge A M Black

Date 27 April 2018

Anonymity Direction

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this

direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Fee Award

The FTTJ did not make a fee award. I have considered making a fee award because I have allowed the appeal but do not make such an award. The appellant succeeded largely because she was able to produce at the hearing the requisite documentary evidence to demonstrate she met most of the criteria in the Immigration Rules; her own and her husband's oral evidence was required to explain the absence of correlation between the entries in the bank statements and the appellant's husband's evidence of income.

A M Black

Deputy Upper Tribunal Judge A M Black

Date 27 April 2018