



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/21163/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 June 2018

Decision & Reasons Promulgated  
On 26 June 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR VIJAY KUMAR  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Miss Z Ahmad

For the Respondent: Mr T Lay of Counsel instructed by Abbott Solicitors

**DECISION AND REASONS**

1. This is the appeal of the Entry Clearance Officer but I will refer to the original appellant, a citizen of India born on 28 September 1988, as the appellant herein.
2. The appellant applied for an entry clearance to join his wife, the sponsor, in the United Kingdom. The application was refused on 9 August 2016 on the basis that the

appellant's income fell below the £18,600.00 required. It was not a case where evidential flexibility could be applied. The appellant's sponsor's gross annual income was insufficient to meet the £18,600.00 requirement. The decision was confirmed by the Entry Clearance Manager on 1 February 2017. It was noted that the sponsor appeared to have two employers (Beebys Limited and APT Care Ltd) to the end of April 2016. As the application had been submitted on 25 July 2016 the relevant six month period for the provision of evidence was January to June 2016. While payslips and corresponding bank statements had been submitted, no employer letter for either employment had been submitted. The sponsor had appeared to have taken employment with Marble Commercial Contracting but again no employer letter had been submitted and employer letters were specified evidence. Any breach of the appellant's human rights was proportionate. There were no exceptional circumstances.

3. The appellant's appeal came before a First-tier Judge on 10 October 2017. The judge had before her letters from employers confirming the sponsor's employment which generated a gross income of £15,400.06 from APT Care Ltd and £10,444.65 from Beebys Limited. The judge had the benefit of payslips, bank statements and P60s to substantiate the claim and letters had been supplied from both employers to confirm the sponsor's employment. The case proceeded on the basis of submissions. The Presenting Officer was Miss Akhtar.

4. The judge's conclusions were as follows:

"14. I have seen evidence that the sponsor was indeed earning over and above the necessary amount to meet the financial requirements under the Rules. I have also seen letters from her employers confirming her employment. As conceded by Miss Akhtar, the only reason that the appellant did not meet the Rules was because those letters did not contain 2 pieces of necessary information, namely the type of employment and her annual salary. In every other aspect, it is not disputed that the appellant meets the criteria under the Rules.

15. There is no dispute in this case that the relationship is genuine and subsisting and that family life exists between the appellant and his wife and children. The real issue for me to determine is whether the refusal decision is proportionate to the need for effective immigration control. In carrying out this balancing act, I have taken into account the fact that the appellant meets the Rules in all essential aspects, save for the mandatory details as set out above.

16. I have regard to the statutory considerations in section 117B and I note that there are no statutory considerations which indicate that it is indeed in the public interest to refuse the application. Whilst the appellant does not meet the Rules and could not be permitted to enter under the prohibited 'near miss' principle, I do take into account the fact that if he were to make a

further application, this would be almost guaranteed to be granted. I find therefore that this is a situation as foreseen by **Chikwamba** and affirmed in **R (on the application of Agyarko and Ikuga) v SSHD [2017] UKSC 11**. I find therefore that the decision is disproportionate and this appeal must succeed accordingly.”

The judge accordingly allowed the appeal on human rights grounds.

5. The Entry Clearance Officer applied for permission to appeal. The letters did not contain mandatory specified evidence and the concerns of the Entry Clearance Officer had not been addressed. It was not guaranteed that a further application would be accepted. Reliance was placed on **SS (Congo) [2017] UKSC 10** at paragraph 83. The income figure of £18,600.00 had been arrived at following work by the Migration Advisory Committee. The Committee had arrived at an income figure:

“... above which the couple would not have any recourse to welfare benefits, including tax credits and housing benefits. That being a legitimate aim, it is also not possible to say that a lesser threshold, and thus a less intrusive measure, should have been adopted ...”.

6. It was in the public interest that people seeking leave to enter the UK were financially independent and reference was made to Section 117B(1). There were no exceptional compelling factors that would make the decision disproportionate. Family life had been enjoyed at a distance and this could continue.
7. Permission to appeal was granted by the First-tier Tribunal on the basis that it was arguable that the judge had ignored the financial burden that the appellant and his family might place upon the UK and failed to properly consider the public interest in immigrants being self-financing.
8. At the hearing Miss Ahmad relied on **SS (Congo) [2015] EWCA Civ 387** at paragraphs 31 to 33. The Tribunal was required to give the new Rules greater weight – they were not merely a starting point for the consideration of proportionality. The Rules provided significant evidence about relevant public interest considerations.
9. Miss Ahmad submitted that at paragraph 15 the judge had accepted that the appellant could not meet the Rules. In paragraph 16 the judge had considered Section 117B but this remained a powerful factor as emphasised in the grounds. The judge had neglected to apply a two-stage approach. Compelling circumstances needed to be demonstrated – I was referred to paragraph 51 of **SS (Congo)**. Family life could continue outside the UK. Miss Ahmad also referred to **Chen v Secretary of State (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC)**. She referred me to paragraphs 39 and 36 where reference is made to **Chikwamba**, although Miss Ahmad acknowledged that the judge had referred to **Chikwamba**.

10. Mr Lay relied on his skeleton argument rather than the response that had been filed. He submitted there was a need for caution in considering the case law. Reference was made to **MM (Lebanon) [2017] UKSC 10** which had been referred to as **SS (Congo)** in the grounds. I was referred to **TZ (Pakistan) [2018] EWCA Civ 1109** and **Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC)**. The degree to which an appellant substantively met an Immigration Rule will be a weighty consideration in his or her favour in the proportionality assessment. The weight to be given to the public interest was not static. Counsel referred to paragraph 28 of **TZ (Pakistan)**. It was submitted that the approach taken by the First-tier Judge in paragraph 16 of her decision was correct. It followed that the appellant had almost but not completely met the requirements of the Rules but had in any event met the substantive part of the Rule in that the sponsor had been found to earn £7,000.00 above the minimum income requirement. The judge had noted in paragraph 16 that there were statutory considerations which indicated that it was indeed in the public interest to refuse the application. Although the Entry Clearance Officer had referred to Section 117B(1) and the maintenance of effective immigration controls being in the public interest there had been no respect in which the appellant had sought to undermine such controls. He was not an overstayer and had no adverse immigration history.
11. Reliance on paragraph 83 of **MM** in the grounds was misconceived. In that case there had been a challenge to the minimum income requirement on judicial review. While the general challenge to the principle and level of the MIR failed, the critical issue was whether entry clearance if refused outside the Rules also would disproportionately interfere with Article 8 rights. The appellants in **MM** had in fact been successful. The Supreme Court had found that the respondent's guidance was unlawful in failing to ensure that the best interests of children were taken into account in "outside the Rules" decision making. It was submitted in paragraph 23 of the skeleton argument that the only respect in which the First-tier Judge had failed to take into account a relevant consideration in the proportionality assessment was in not having regard to the appellant's British citizen child. The sponsor had in fact provided sufficient evidence of her earnings to prove that the substance of the MIR was met. There was no financial burden on the taxpayer in this case.
12. Miss Ahmad in reply submitted that the main argument was that the judge had failed to appreciate the test in **SS (Congo)**. The appellant failed to meet the requirements of the Rules. She appreciated that the financial requirements had been met and accordingly was not relying on paragraph 83 of **MM (Lebanon)**.
13. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the decision of the First-tier Judge if it was materially flawed in law.
14. The decision is a short one but no worse for that. The case proceeded by way of submissions. The judge noted that as a human rights appeal was involved she had to consider the position as at the date of hearing. The judge was plainly satisfied that the sponsor met the financial requirements of the Rules. This was indeed conceded by the Presenting Officer. The application letters failed to contain two pieces of required

information – the type of employment and annual salary. It was not disputed that the appellant met the requirements of the Rules in every other aspect. There was no dispute that the relationship was genuine and subsisting and that family life existed between the appellant, his wife and children. In my view the judge correctly summarised the matter in paragraph 15 of her decision. The judge did note that children were involved and this was plainly a relevant matter as Counsel points out following **MM (Lebanon)**. I do not find that the judge erred in referring to **Chikwamba** in paragraph 16. She does qualify the word “guaranteed” with the word “almost”. Clearly public interest considerations are an important factor. However, in this case it was expressly conceded that the appellant met all the relevant criteria under the Rules apart from the two evidential requirements. Not only were the financial requirements met, but they were exceeded comfortably as Counsel points out.

15. Permission to appeal was granted on the basis that the judge had ignored the financial burden that might be placed upon the UK, but that is to misunderstand the position. On the findings of the judge the sponsor had demonstrated compliance with the MIR and indeed on the judge’s assessment had been earning over and above the necessary amount.
16. While I have taken very careful account of the points made by Miss Ahmad, I am not satisfied that the judge materially erred in law for the reasons advanced by Counsel. Accordingly the appeal by the Entry Clearance Officer is dismissed and the decision of the First-tier Judge to allow the appeal on human rights grounds is confirmed.
17. The First-tier Judge made no anonymity direction and I make none.
18. The First-tier Judge made no fee award and I make none.

Signed

Date 22 June 2018

G Warr, Judge of the Upper Tribunal