



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02520/2018

THE IMMIGRATION ACTS

Heard at Field House
On 26 September 2019

Decision & Reasons Promulgated
On 14th October 2019

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

WIPAPORN [W]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr Antony [W], Sponsor

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Thailand born on 9 July 1986. She appeals against the decision of Judge Mailer promulgated on 26 February 2019 dismissing her appeal against a decision of the respondent dated 29 November 2017 refusing her application for entry clearance submitted in April 2017.
2. The appellant is married to Antony [W], a British citizen (“the sponsor”). She applied for entry clearance under the partner provisions of Appendix FM. Judge

Mailer dismissed the appeal on the basis that the financial requirements were not met.

3. This matter has a detailed history. The appellant's appeal against the respondent's decision was originally dismissed by Judge Roots on 20 August 2018, again on the basis that the financial requirements of the Rules were not met. That decision was later reviewed by Resident Judge Phillips of the First-tier Tribunal, on the basis that the supporting financial documents which had been provided by the appellant and the sponsor to demonstrate the sponsor's income had not been placed before the judge. As such the decision was set aside and reheard on the papers by Judge Mailer.
4. Before Judge Mailer there were clearly some documents, but which documents is not entirely clear. Judge Mailer did not list the documents submitted, although referred to various of them. Judge Mailer held that there was insufficient evidence to demonstrate that the financial requirements were not met, in particular the sponsor's self-employed income as declared to HMRC for the relevant year was for £16,090 rather than the minimum which was £18,600.
5. Permission to appeal was granted to the Upper Tribunal on the basis that Judge Mailer had failed to have regard to the relevant documents that were submitted. It appears that there may have been a repeat of the administrative error which beset Judge Roots' decision. The key issue for my consideration is which documents were submitted to the judge below, and if they were submitted could they have made a difference.
6. Before me Mr Tarlow said that he was without a file on the part of the respondent and he did not have a copy of the appellant's bundle. His submission was that the matter should remain in my hands.

Discussion

7. The Entry Clearance Review Manager listed the series of documents which had been submitted as part of the appeal, and that list is the only record of the documents which appear to have been provided to the First-tier Tribunal. Those documents should have been sent separately to the respondent and to the tribunal. The documents listed by the review manager (in the form the list appears in the review) were as follows:

Starts

- a. IAFT-6
- b. Notice of refusal
- c. Grounds of appeal
- d. 2016/2017 year end accounts
- e. Extract of online tax return; 90% completed
- f. Letter dated 11/1/2018 x 2
- g. Evidence of the pension entitlement (sponsor's parents)

h. Evidence of attendance allowance

Ends

8. The sponsor maintains that the above documents, in addition to his bank statements, were submitted to the First-tier Tribunal. He explained that he uses his personal current account for everyday use, and to manage his business as a sole trader. However, having considered the tribunal's file in detail, there appears to have been no record of the bank statements having been linked to the file placed before Judge Mailer. The sponsor subsequently provided further copies, ahead of the first hearing before me (the postmark on the cover envelope post-dated Judge Mailer's decision on the papers). There was no other record of those documents on the Tribunal's file.
9. Before me, the sponsor (who represented the appellant in person) submitted in clear and cogent terms that the bank statements had been provided to the First-tier Tribunal ahead of the matter being considered by Judge Mailer, which had not been provided to the judge. He also stated that he wrote to request an oral hearing, but that the matter proceeded on the papers with no explanation as to why he had not been able to attend in person to present his wife's case.
10. In my view, in light of the clear confusion which has beset this case on a previous occasion and given the lack of clarity which results from the respondent not being in possession of his file or the bundle, I am prepared to give the sponsor the benefit of the doubt. I accept the submissions made by the sponsor that there were documents, in particular his personal bank statements, that had been provided to the First-tier Tribunal which had not been considered by the judge. I am also prepared to accept that, in providing those documents, he may have requested an oral hearing.
11. Included in the missing documents were the sponsor's personal bank statements that, he contended, demonstrated that his earnings from self-employment exceeded the minimum income threshold.
12. At [23], Judge Mailer stated that no bank statements had been provided to the Entry Clearance Review manager by the appellant. At [24], he concluded that the required specified evidence had not been provided.
13. As such, I find that there was an error of law in the decision of Judge Mailer dated 26 February 2019. Through no fault of the judge, the sponsor's personal bank statements which appear to have been sent by the appellant and sponsor to the tribunal had not been placed before him when he considered the case on the papers. I stress that there is absolutely no error on the face of the judge's decision itself. It is a model of a decision on the papers. However, the wider circumstances meant that the decision involved the making of an error of law.
14. Having considered the statements the sponsor said he submitted but were not considered, it is clear that they do record a degree of financial activity which may, had they been considered, have led the judge to reach a different decision. Given the procedural history of this matter, and given the sponsor's request to hold an oral

hearing does not seem to have been considered, in my judgment the most procedurally fair approach to the appellant and sponsor was to enable a fresh hearing to take place, to enable everything to be considered afresh. As such, at the hearing on 31 July 2019, I set Judge Mailer's decision aside and directed that the matter be reheard before me in the Upper Tribunal, in order for the sponsor to speak to the financial documents I would direct him to provide.

Directions

15. I issued the following directions to ensure that the appellant was able to present her case by reference to the full financial circumstances of the sponsor, at the date of the hearing:

'The Appellant must serve on (i) the Home Office and (ii) the Upper Tribunal a further copy of the documents she wishes to rely upon.

These documents should demonstrate how the Appellant claims she met the financial requirements under Appendix FM-SE (i) at the date of the application for entry clearance, and (ii) at the date of the hearing on 26 September 2019. The sponsor should make sure that all evidence required under Appendix FM-SE is provided.

The Upper Tribunal will need to consider whether the requirements of the Immigration Rules were met at the time of the application for entry clearance and may also need to consider the position as at 26 September 2019.'

The resumed hearing was initially listed for 27 August 2019, and the sponsor attended. However, he did not have evidence of his up to date earnings on that occasion. It appears he had not understood the directions. Out of fairness to the sponsor, I adjourned the hearing again, until 26 September 2019, to enable him to attend with the relevant documents. On 25 September 2019, the sponsor provided an updated set of documents, as outlined below.

REMAKING DECISION

16. On 26 September 2019 I reheard the appellant's appeal. The sponsor appeared for the appellant and Mr Tarlow again represented the respondent.

Legal framework

17. This is an appeal brought under Article 8 of the European Convention on Human Rights. The essential issue for my consideration is whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be refused entry clearance, in light of the family life she claims to enjoy with the sponsor. This issue is to be addressed primarily through the lens of the Immigration Rules, and also by reference to the requirements of Article 8 of the Convention directly (see Razgar [2004] UKHL 27 at [17]). The Rules relevant to this particular case are contained in Appendix FM, specifically paragraph E-ECP.3.1, which governs the so-called "minimum income requirement".

18. In addition, there are a number of statutory public interest considerations that are set out in Part 5A of the Nationality, Immigration and Asylum Act 2002 to which I must have regard.
19. It is for the appellant to establish on the balance of probabilities that her non-admission would breach the United Kingdom's obligations under the European Convention on Human Rights.

Documentary evidence

20. Pursuant to my directions, the sponsor provided a bundle of evidence, including:
 - (a) Bank statements for the year ending 2016/2017;
 - (b) HMRC Self-Assessment, April 2017;
 - (c) Tax Return for 2016/2017;
 - (d) Accounts for year ending 5 April 2017;
 - (e) Accountant's letter, 11 January 2018;
 - (f) Bank statements for year ending 2017/2018;
 - (g) Tax return 2017/2018;
 - (h) Accounts for year ending 5 April 2018;
 - (i) Bank statements for year ending 2018/2019;
 - (j) HMRC Self-Assessment Statement, April 2019;
 - (k) Tax Return for 2018/2019;
 - (l) Accounts for Year Ending 5 April 2019;
 - (m) Bank Statements, 8 April 2019 to 24 September 2019.

The hearing

21. At the remaking hearing, I gave the sponsor the opportunity to take me through the evidence. There was no cross-examination. Mr Tarlow submitted that the financial requirements were still not met, and that the most appropriate remedy for the appellant would be a fresh application, once the sponsor's earnings had exceeded the MIR.

Findings

22. The respondent accepted that the relationship requirements of Appendix FM were met. As such, the existence of a genuine and subsisting marriage relationship

between the appellant and the sponsor confirms that Article 8 is engaged by their relationship and the respondent's refusal to grant entry clearance. To assess whether that refusal was and is proportionate, in the first instance it is necessary to view the appeal through the lens of the Immigration Rules.

23. I find that the Entry Clearance Officer did not err in law when rejecting the original application for entry clearance. The sponsor had not provided the specified evidence required by Appendix FM-SE to demonstrate that he earned £18,600. In the tax year leading to the application, the sponsor had declared a taxable income of £16,909, which plainly fell short of the minimum income requirement. There was no evidence of savings of the magnitude which would be required to make good any shortfall, identified by the Entry Clearance Officer as £20,227.50 (the shortfall multiplied by 2.5, plus £16,0000). As such, this appeal cannot succeed on the basis that the materials before the Entry Clearance Officer were incorrectly assessed as not meeting the requirements of the rules at the date of the application. The Entry Clearance Officer correctly analysed the supporting evidence presented to her, and properly concluded that the requirements of the Immigration Rules were not met. Nothing in the materials now submitted by the sponsor demonstrates that that decision was unlawful or not open to the Entry Clearance Officer by reference to the materials provided with the application.
24. I also consider that the Entry Clearance Review Manager was entitled to conclude that the 2016/17 accounts which had been provided with the appeal did not demonstrate that the minimum income requirement was met. The sponsor had declared his 2016/17 taxable income as £22,603, and in support had provided copies of a partially complete tax return, demonstrating that it was 90% complete. The sponsor explained that he printed the summaries shortly before he finalised them and said that they were an accurate reflection of his finances. However, I consider the review manager to have been correct to conclude that the sponsor's pre-submission tax return was incomplete, and not yet final. It was yet to be submitted, and the response of the review manager was entirely reasonable.

Date of the hearing – 26 September 2019

25. I turn now to the position at the date of the hearing on 26 September 2019. As the Court of Appeal recently noted in GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630 at [7], it is necessary for a court or tribunal to ensure that any action it takes is compliant with the requirements of the Human Rights Act 1998:

“When a Court is required to address an issue relating to fundamental norms or human rights that Court must ensure that any order that *it* makes is also compliant with such rights. Under section 6 Human Rights Act 1998 all public bodies, including courts, must apply the Act and thereby the ECHR. It follows that if an appellate court finds that a lower court or tribunal acted lawfully by reference to the evidence before it but that based upon the facts now known to the appeal court to uphold the decision would violate fundamental norms, then the appellate court must ensure that the decision it takes is compliant with the law.” (Emphasis original)

26. Having analysed the sponsor's bank statements, the accountant's report, and all other financial documents submitted, I find that the sponsor does not meet the minimum income requirement at the date of the remaking hearing before me on 26 September. Although the sponsor provided an accountant's report and accounts made up to 5 April 2019, the income recorded on his bank statement covering the period reflected in those accounts is less than the gross income set out in the accounts.
27. For the purposes of this analysis, I have adopted a generous approach to the sponsor's bank statements; where there are ambiguous transactions (for example, incoming transactions which do not appear to be attributable to a named company), I have included those figures in my calculations. I have set out the details in the **Annex** to this decision; I will refer only to the summary figures here.
28. The accounts state that the sponsor's income for the financial year to 5 April 2019 was £25,371, with fuel and expenses totalling £6,175 (fuel, £2,141; other expenses, £4,034) giving a final profit of £19,196. By contrast, only £22,991.97 of income is recorded on the bank statements, which must be set against the total expenses of £6,175 listed for the year. This gives a revised profit figure of £16,816.97, which does not meet the MIR of £18,600.
29. In any event, the financial year to 5 April 2019 does not, taken at its highest, represent a contemporary picture of the sponsor's financial situation. The fact that the sponsor is so close to the threshold could be a weighty factor in the proportionality assessment I will perform shortly, if it were the case that his income has continued at that rate. It has not. As the calculations set out in the Annex demonstrate, in the six months leading to the hearing (April – September 2019), the sponsor's gross earnings have reduced to £3,410.00, which is considerably below the MIR, even when the MIR is reduced proportionately to cover only 6 months, i.e. to £9,300. In the 12 months to the hearing, the sponsor's gross income was £16,933.51.
30. The sponsor explained that his bank statements do not represent his full financial picture. He is paid in cash for some of his work, he said. He keeps records of those transactions, he explained, and provided the records to his accountant, which in turn his accountant used to prepare his accounts and tax return. He highlighted that the income declared to HMRC is at the "higher" rate contained in his annual accounts, observing that he has generated his tax liabilities on that basis.
31. The difficulty is that it is for the appellant to establish her case to the balance of probabilities standard. The sponsor has not provided any records of his cash transactions, for example copies of the details he submitted to his accountant. He has not obtained, for example, details of the workings adopted by his accountant to prepare his accounts. He has not provided copies of invoices, or even copies of correspondence with his clients to arrange the work he claims to have undertaken on this informal basis. While I have no reason to make an adverse credibility finding in relation to the sponsor, that does not mean that I must ascribe weight to unsubstantiated assertions unsupported by evidence. The financial details the

sponsor sought to establish would be relatively easy to substantiate in documentary form, especially given he claims to have documented everything for his accountant. Merely declaring income at a particular level to HMRC does not, when analysed alongside the other evidence, demonstrate that the sponsor earned the level at which the declaration was made.

32. It follows, therefore, that the sponsor's financial position as at the date of the hearing is that his self-employment does not generate sufficient income to satisfy the requirements of the MIR. Although in her application, the appellant suggested that the sponsor's parents may be able to provide a degree of financial support, there was no evidence from them to that effect. When the proportionality of refusing the appellant entry clearance is viewed through the lens of the Immigration Rules, the refusal decision was and is proportionate.
33. It is still necessary to consider, by reference to the wider considerations of proportionality, whether there are reasons outside the Immigration Rules which demonstrate that the continued refusal of entry clearance would be unjustifiably harsh, and therefore disproportionate. In order to conduct this assessment, I will adopt a balance sheet approach.
34. Factors in favour of refusing entry clearance include:
 - (a) The maintenance of effective immigration controls is in the public interest (section 117B(1) of the 2002 Act);
 - (b) The appellant is unable to meet the requirements of the Immigration Rules, for the reasons set out above;
 - (c) Little weight should be given to family life established at a time when a person's immigration status is precarious; by analogy, the family life established by the appellant and the sponsor has taken place entirely within the confines of a situation in which the appellant has never enjoyed leave to remain in the United Kingdom, the relationship having begun with the appellant and sponsor initially living in different continents.
35. Factors in favour of granting entry clearance include:
 - (a) The disruption to family life between the appellant and the sponsor has been ongoing for some time, causing great difficulty in the maintenance of their relationship;
 - (b) It has taken longer for this matter to be resolved in the Tribunal due to two earlier decisions of the First-tier Tribunal being set aside due to documents being misplaced by the Tribunal administration;
 - (c) The appellant speaks English, meaning she will be less of a burden on taxpayers, and would be better able to integrate into society (section 117B (2) of the 2002 Act);

- (d) Although the sponsor does not meet the MIR, it is clear he does make some money from his self-employed courier business, and the earnings for the tax year to 5 April 2019 did not fall significantly short of the MIR requirements;
- (e) The sponsor explained that he suffered a light industrial injury to his arm, for which he is (separately) seeking compensation. His earning potential may have been impacted by this development.

36. I consider that the reasons in favour of refusing entry clearance outweigh those in favour of granting it. The public interest in the maintenance of effective immigration control is a weighty factor. While it is capable of being outweighed by exceptional circumstances which would render a continued refusal unjustifiably harsh, there are no such exceptional circumstances in the present matter. The Secretary of State bears the unique constitutional responsibility – and expertise – to set the level of the minimum income requirement, and the sponsor has failed to meet that requirement. There is no medical evidence or other similar material setting out the impact of the sponsor’s light industrial accident on his self-employment. The interference in the combined Article 8 family life rights of the sponsor and the appellant is justified by their combined failure to meet the requirements of the Immigration Rules. There is nothing to stop the sponsor from increasing his earnings in the future (or ensuring more accurate record keeping), to pave the way for a successful entry clearance application in the future.

37. The appeal is dismissed.

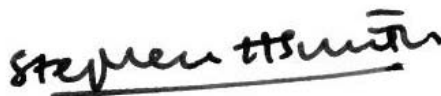
Notice of Decision

Judge Mailer’s decision involved the making of an error of law and is set aside.

I remake the decision, dismissing the appeal on human rights grounds.

No anonymity direction is made.

Signed
Upper Tribunal Judge Stephen Smith

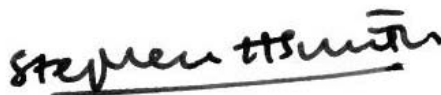


Date 7 October 2019

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal so there can be no fee award.

Signed
Upper Tribunal Judge Stephen Smith



Date 7 October 2019

ANNEX - Sponsor's Income

13 April 2018 - 4 April 2019 income	£22,991.97
Expenses	£6,175.00
Profit to 5 April 2019	£16,816.97

April 19 - Sept 2019 income £3,410.00

12 months to hearing on 26 Sept 19 £16,933.51

13-Apr-18	£35.00	24-Jul-18	£557.50	05-Nov-18	£90.00
16-Apr-18	£35.00	25-Jul-18	£557.50	06-Nov-18	£835.00
17-Apr-18	£55.00	25-Jul-18	£100.00	07-Nov-18	£60.00
26-Apr-18	£50.00	30-Jul-18	£131.00	08-Nov-18	£20.00
27-Apr-18	£50.00	31-Jul-18	£160.00	09-Nov-18	£30.00
30-Apr-18	£135.00	01-Aug-18	£160.00	12-Nov-18	£220.00
03-May-18	£25.00	06-Aug-18	£105.00	14-Nov-18	£50.00
10-May-18	£30.00	08-Aug-18	£405.00	15-Nov-18	£30.00
14-May-18	£50.00	13-Aug-18	£30.00	16-Nov-18	£200.00
15-May-18	£175.00	14-Aug-18	£35.00	19-Nov-18	£1,440.50
16-May-18	£60.00	15-Aug-18	£70.00	26-Nov-18	£35.00
23-May-18	£75.00	20-Aug-18	£552.35	30-Nov-18	£410.00
30-May-18	£210.00	23-Aug-18	£265.00	10-Dec-18	£40.00
31-May-18	£205.00	24-Aug-18	£90.00	11-Dec-18	£260.00
01-Jun-18	£135.00	29-Aug-18	£55.00	18-Dec-18	£975.00
04-Jun-18	£90.00	30-Aug-18	£427.11	28-Dec-18	£435.00
06-Jun-18	£70.00	31-Aug-18	£90.00	08-Jan-19	£407.50
07-Jun-18	£30.00	03-Sep-18	£374.00	15-Jan-19	£325.00
12-Jun-18	£40.00	04-Sep-18	£552.06	22-Jan-19	£405.00
14-Jun-18	£60.00	07-Sep-18	£520.00	28-Jan-19	£420.00
15-Jun-18	£120.00	18-Sep-18	£475.00	11-Feb-19	£1,197.50
18-Jun-18	£165.00	25-Sep-18	£705.00	04-Apr-19	£593.00
19-Jun-18	£70.00	02-Oct-18	£465.00	26-Apr-19	£560.00
25-Jun-18	£537.50	10-Oct-18	£896.95	10-May-19	£582.00
28-Jun-18	£265.00	18-Oct-18	£300.00	23-May-19	£190.00
29-Jun-18	£150.00	19-Oct-18	£30.00	10-Jun-19	£390.00
02-Jul-18	£75.00	22-Oct-18	£80.00	04-Jul-19	£180.00
03-Jul-18	£160.00	23-Oct-18	£20.00	18-Jul-19	£245.00
04-Jul-18	£65.00	24-Oct-18	£90.00	05-Aug-19	£525.00
06-Jul-18	£70.00	25-Oct-18	£800.00	12-Sep-19	£145.00
09-Jul-18	£35.00	29-Oct-18	£70.00		
10-Jul-18	£457.50	30-Oct-18	£80.00		
11-Jul-18	£1,200.00	01-Nov-18	£120.00		
17-Jul-18	£70.00	05-Nov-18	£60.00		
20-Jul-18	£30.00				