



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11440/2017

THE IMMIGRATION ACTS

Heard at Field House
On 3rd January 2019

Decision & Reasons Promulgated
On 16th January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MRS. ESIN PERTEK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. J A Trussler, instructed by Kinas Solicitors

For the Respondent: Mr S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal (“FtT”) Judge Ruth promulgated on 23rd July 2018. The FtT Judge dismissed the appellant’s appeal against the respondent’s decision of 15th September 2017 refusing her application for leave to remain in the UK as the spouse of Ibrahim Pertek.

2. Broadly stated, the respondent was not satisfied that the appellant was able to meet the financial requirements set out at paragraphs E-LTRP3.1 to 3.4 of Appendix FM of the immigration rules. That is, the requirement to provide specified evidence of a gross annual income of £18,600. The appellant had claimed that the requirement was met through her partner's employed income, as a hairdresser, from two companies, Hair Bella Design and Hair Bella. The respondent noted that the appellant had provided payslips for her sponsor's earnings covering the period between October 2016 and January 2017 from Hair Bella Design, and for the period between October 2016 and March 2017 from Hair Bella. The appellant had also provided letters from her sponsor's employers confirming that he is paid in cash, as he does not have a bank account. In the absence of bank statements, the respondent concluded that it was not established that the appellant's sponsor actually received the funds detailed in the payslips. As the income claimed could not be verified, the respondent was not satisfied that the minimum income requirement was met. The respondent considered the application of paragraph EX.1 of Appendix FM, but concluded that there was no evidence of any insurmountable obstacles to the family life established by the appellant and her partner, continuing outside the UK.
3. In his decision, the *FtT* Judge noted, at paragraph [6], that the appellant appeals the respondent's decision asserting that it was contrary to her rights under Article 8 of the ECHR. The appeal was dismissed by *FtT* Judge Ruth.
4. Permission to appeal was granted by Upper Tribunal Judge Dr H Storey on 21st November 2018. The matter comes before me to consider whether or not the decision of *FtT* Judge Ruth involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
5. At the conclusion of the hearing before me, I reserved my decision. I said that I would give my decision and the reasons for my decision in writing. This I now do.

The decision of the FtT Judge

6. The FtT Judge set out a summary of the issues in the appeal, and the evidence that was before the Tribunal at paragraphs [1] to [11] of the decision. At paragraphs [12] to [14] of the decision, the Judge records the submissions made by the parties. Importantly, at [13], the FtT Judge noted the submission made on behalf of the appellant that it was accepted that the appellant could not satisfy the requirements of the rules because of a shortfall in the sponsors salary. The Judge however goes on, in that paragraph, to record that he was nevertheless *“asked to accept the sponsor’s evidence that he receives around £3000 per annum in tips, and that this takes his income over the financial threshold ...”*. The appellant’s case therefore, was that the minimum income requirement could be met, provided the Judge accepted the evidence of the ‘tips’ received by the appellant’s sponsor.
7. The Judge’s findings and conclusions are set out at paragraphs [17] to [43] of the decision. The Judge found, at [18], that he was in no doubt that both the appellant and the sponsor gave credible evidence and that they did their best to set out the circumstances as they genuinely believe them to be. At paragraph [19], the FtT Judge accepted the sponsor’s formal earnings insofar as they could be established from the evidence before him. Although there remained some ambiguity about the sponsor’s income, the Judge was prepared to accept that the sponsor earned somewhere between £16,380 and £17,100.72 per annum. On any view, that finding in itself was insufficient to satisfy the minimum income requirement of £18,600. It was only if the Judge accepted the submission advanced on the appellant’s behalf, that the sponsor’s evidence establishes that he receives around £3000 per annum in tips, that the minimum income requirement under the immigration rules could be met.
8. To that end, the Judge found at paragraphs [20] to [22] of the decision as follows:

“20. The difficulty with the evidence, however, is that even putting it at its highest the sponsor could not precisely state how much he earns in terms of tips

and he was only able to estimate. He said he receives approximately £60 worth of tips each week and that this makes up around £3000 of tips each year.

21. These figures were approximate only and the appellant could not be more specific. Furthermore, there was absolutely no corroborative evidence whatsoever to support the figure of £3000 per year in tips. It seems to me that the appellant has been on notice of the need to evidence his income since September last year, a period of around nine months. If he does receive such a significant amount in tips it would surely have been possible to provide some evidence of this, including a more detailed oral testimony not amounting mainly to guesswork and estimation. The appellant has not, for example, pointed to any particular deposits in the bank account opened in September 2017 to support his claim of significant tips and provides no supporting evidence from anybody else or in any other documentation.

22. On that basis, I conclude that although the sponsor has done his best to estimate the amount of tips he receives, this is too vague and uncertain to justify the conclusion he probably earns enough to take the income over the £18,600 threshold.”

9. The Judge then adopted the five-stage approach set out in **Razgar [2004] 2 AC 368**. The Judge was satisfied that the appellant enjoys a family life with her sponsor and that the decision to refuse leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8. The Judge found that because the requirements of Appendix FM were not met by the appellant, the respondent has acted in accordance with the law. The F&T Judge noted, at [30], that the real question is whether the decision is a proportionate response to the appellant’s established family life, in the light of the public interest in immigration control.
10. The Judge noted that the appellant cannot satisfy the minimum income requirement of the rules, and that the specified evidence, including bank statements for the six months leading up to the date of the application, could not be provided. The Judge accepted that there would certainly be ‘serious obstacles’, to return to Turkey, particularly for the appellant’s sponsor, but concluded, at [35], that “*those are not*

obstacles which could not be overcome or which would involve very serious hardship.". At paragraphs [36] to [40], the FfT Judge concluded:

“36. Both the appellant and the sponsor are nationals of Turkey and are intimately familiar with that country. The appellant has lived in Turkey for all of her life until 2014 and the sponsor has been travelling regularly to Turkey over the years, including quite recently. They both speak the language and although the appellant has diabetes, high cholesterol and high blood pressure, there was no evidence before me to suggest she would not be able to receive treatment for those difficulties in Turkey.

37. The couple is now faced with the choice of either the appellant returning to Turkey to make an application to return when the sponsor’s income reaches the relevant level, or moving to Turkey as a couple to carry on their family life together. While I accept it would be very disruptive indeed for the sponsor to be required to do this, this is not a matter which presents insuperable obstacles, cannot be done or which is a difficulty that cannot be overcome.

38. The sponsor has a long established professional skill as a hairdresser and works in the United Kingdom within the Turkish community. There is no reason on the evidence before me, why he could not establish himself as a hairdresser in Turkey if that is the choice he and his partner make. Furthermore, having satisfied the financial requirements at the point of entry clearance, there seems to me to be no reason why the sponsor cannot do so again in due course. When that becomes the case, if this is the choice the couple make, the appellant can make an application for entry as a spouse from Turkey.

39. In the final analysis Article 8 does not provide a free choice for individuals to decide where they exercise their family life and the financial threshold represents a bright line rule.

40. It is a matter of choice for the appellant and sponsor as to whether the appellant returns to Turkey to await the sponsor’s increase in income or the couple decide to move together to Turkey. In either case, I conclude that this would not involve significant hardship or insurmountable obstacles.

11. At paragraph [43], the Judge concluded that the refusal of leave to remain would not be a disproportionate interference with the appellant's rights under Article 8 of the ECHR and it follows that her appeal was dismissed.

Error of Law

12. The appellant accepts that Appendix FM of the immigration rules requires an applicant to provide specified evidence of a gross annual income of at least £18,600. It was uncontroversial that the relevant specified evidence referred to in Appendix FM-SE of the rules was not provided in support of the application. It is accepted that the appellant had been unable to provide the corresponding bank statements covering a period of 6 months prior to the date of the application. An explanation for this was provided.
13. On behalf of the appellant, Mr Trussler adopts the grounds of appeal and submits that having accepted the appellant and her sponsor to be credible witnesses, who had done their best to set out their circumstances without exaggerating their financial circumstances, the Judge erred in rejecting the evidence of the income received by the appellant's sponsor in the form of the tips received, of approximately £60 per week. He submits that receiving income in the form of 'tips' is commonplace within 'hairdressing', and it was irrational of the Judge to conclude that the evidence was too vague and uncertain to justify the conclusion that the appellant's sponsor probably earns enough to take the income over the £18,600 threshold. If the Judge had accepted that evidence as credible, as he should have done, the Judge would have been satisfied that the minimum income requirement was met, and absent any other countervailing factor weighing against the appellant, the appeal would have been allowed on Article 8 grounds.
14. Mr Trussler refers to the evidence of the appellant at paragraph [10] of her statement dated 30th June 2018, confirming that she is eager to find a suitable job and wishes to work and contribute to the family's income. Her evidence before the F&T Judge was that she had received job offers but had been unable to start working because her

leave to enter had expired, and her passport was with the respondent. Mr Trussler submits that although the question of whether the minimum income requirement was met, was a relevant factor, it was not determinative of the human rights appeal in the way set out by the FfT Judge. The appellant's sponsor has lived in the United Kingdom for a period in excess of 20 years and expecting the appellant and her sponsor to live in Turkey together, or apart, whilst an application for entry clearance is made by the appellant, is wholly disproportionate to the legitimate aim of immigration control.

DISCUSSION

15. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. In considering whether the respondent's decision was unlawful under s6 of the Human Rights Act 1998 on Article 8 grounds, the FfT Judge adopted the step by step approach referred to by Lord Bingham in Razgar -v- SSHD [2004] UKHL 27.
16. The issue in this appeal, as is often the case, was whether the interference is proportionate to the legitimate public end sought to be achieved. I accept, as Mr. Trussler submits, that although the appellant's ability to satisfy the Immigration Rules was not the question to be determined by the FfT Judge, it was capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.
17. Paragraph E-LTRP.3.1(a)(i) of Appendix FM of the Immigration Rules requires that the appellant must provide specified evidence of a gross annual income of at least £18,600. Insofar as is relevant, Appendix FM-SE A1(2) provides as follows:

'In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:

- (a) *Payslips covering:*

(i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or

...

(b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:

(i) the person's employment and gross annual salary;

...

(c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

...'

18. In SS (Congo) -v- SSHD [2015] EWCA Civ 387, the Court of Appeal considered the proper approach to applications for leave to enter the UK outside the Immigration Rules on the basis of ECHR Article 8 following the Court of Appeal's decision in MM (Lebanon) -v- SSHD [2014] EWCA Civ 1985. In each of the six conjoined cases, the applicants had applied for leave to enter as the family member of a British national or recognised refugee living in the UK. Each had been refused leave because the sponsor's income did not meet the minimum requirements in the Immigration Rules Appendix FM and Appendix FM-SE. The Entry Clearance Officer rejected SS's application for leave to enter, on the grounds that her sponsor husband's income was below the £18,600 required, and that documents submitted in support of her application did not meet the requirements set out in Appendix FM-SE. At paragraphs [50] to [53] of his judgment, Lord Justice Richards considered the evidential requirements set out in Appendix FM-SE which stipulate the form of evidence required to substantiate claims that the substantive financial requirements under Appendix FM, have been met. He stated:

"51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in

Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.

52. *This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.*

53. *Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. In this regard, the evidence Rules (like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8 : compare AJ (Angola) , above, at [40], and Huang , above, at [16] (“There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; ... the need to discourage fraud, deception and deliberate breaches of the law; and so on ...”). Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare *Stec v United Kingdom*, cited at para. [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that.”*

19. The specified evidence required in support of an application is there to establish an audit trail between what is earned by a sponsor as shown in wage slips, and what is credited into the bank account. In respect of salaried employment, Appendix FM-SE requires an applicant to produce payslips, a letter from the employer and personal bank statements corresponding to the same period as the payslips showing that the salary has been paid into an account in the name of the applicant and their partner jointly. The production of those documents in support of an application provides an audit trail that an applicant is employed as claimed, at a salary that meets the income threshold and that the payment of that salary is corroborated by the payments into the bank account. I can well understand where, as here, an applicant or sponsor claims to be in receipt of a salary or income but there is a gap in the evidence such as a lack of bank statements demonstrating payment of that income into a bank account, some explanation is to be called for, supported wherever possible by some corroborative evidence. That is particularly so where, as here, the income is in cash and some of that income (*the tips*) is undocumented. One might for example expect to see evidence of that income having been declared to HMRC and the relevant tax liability upon that income having been met. A Judge might legitimately in such a case conclude that he or she cannot be satisfied that the income claimed, is in fact derived from the employment.
20. Here, it is right to note that the Judge found both the appellant and his sponsor to be credible witnesses who did their best to set out the circumstances, as they genuinely believed them to be. It does not however follow in my judgement, that the FfT Judge was therefore bound to accept the evidence of the appellant's sponsor, that in addition to the income supported by payslips, and HMRC documentation, he received 'tips' of around £3000 each year. At paragraphs [20] to [22] of his decision, the FfT Judge sets out the particular reasons why he was unable to accept the evidence that the tips received by the appellant's sponsor justify the conclusion that he probably earns enough to take the income over the minimum income requirement. The FfT judge was entitled to find that on the evidence, the appellant

has not established that the minimum income requirement could be met for the reasons given in the decision.

21. The judgments of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 and in MM (Lebanon) establish that the fact that the rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.
22. The immigration rules require the appellant to provide the specified evidence of a gross annual income of at least £18,600. As Lord Justice Richards noted in SS (Congo), and the Supreme Court noted in MM (Lebanon), the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources. There is no doubt that avoiding a financial burden on the state is relevant to the fair balance required by Article 8.
23. In deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control, the FfT Judge refers, at [31], to s117B of the Nationality, Immigration and Asylum Act 2002. In my judgment, the FfT Judge carefully considered whether the refusal of leave to remain is disproportionate to the legitimate aim of immigration control. I have carefully considered the criticisms made of the FfT Judge's assessment of proportionality. Here, it cannot be said that the Judge's analysis of the evidence is irrational or perverse. The Judge did not consider irrelevant factors, and the weight that he attached to the evidence either individually or cumulatively, was a matter for him. It was in my judgment open to the FfT Judge to conclude that, weighed against the maintenance of firm immigration control, the decision is not disproportionate for the reasons set out at paragraphs [35] to [42] of the decision, in particular.

