



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06730/2019 (P)

THE IMMIGRATION ACTS

Decided Under Rule 34
On 19 November 2020

Decision & Reasons Promulgated
On 19 November 2020

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

DANIELE NERES NUNES LIMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

1. The parties have agreed that this appeal is suitable for determination on the papers. Having regard to their views and to Osborn v The Parole Board [2014] 1 AC 1115 and considering the over-riding objective of dealing with cases fairly and justly, I also consider that to be the appropriate method of disposal.

Background

2. The appellant is a Brazilian national who was born on 17 April 1995. She appeals, with permission granted by the First-tier Tribunal, against a decision which was issued by Judge Hussain on 4 November 2019, dismissing her appeal against the respondent's refusal of her human rights claim.

3. The appellant is married to another Brazilian national called Juan De Alemida Lima. Mr Lima ("the sponsor") is employed by the Universal Church of the Kingdom of God. He held leave to remain under Tier 2 of the Points Based System ("PBS") in reliance on that employment. On 27 September 2016, the appellant entered the United Kingdom holding entry clearance as the spouse of a Tier 2 Migrant. The leave to enter which was duly conferred was valid until 6 December 2018.
4. The sponsor duly completed five years' residence under the PBS and applied for Indefinite Leave to Remain. Whilst that was pending, the appellant made her own application for leave to remain as the spouse of a settled person under Appendix FM of the Immigration Rules. The sponsor was granted ILR but the appellant's application was refused. There was a single ground of refusal under the Five-Year Route in Appendix FM:

'The circumstances of your family in the United Kingdom require you to demonstrate that you meet the financial requirement of £18600. You have failed to demonstrate that you or your partner have an annual income of £18600, either separately or with combined earnings. You therefore fail to fulfil E-LTRP 3.1 to E-LTRP 3.3 of Appendix FM of the Immigration Rules.'
5. The respondent went on to conclude, under the Ten Year Route, that there were no insurmountable obstacles to family life continuing in Brazil; that there would be no very significant obstacles to the appellant's re-integration; and that the appellant's removal was a proportionate course of action under Article 8 ECHR.
6. An appeal was lodged. Whilst the appeal was pending, the appellant's solicitors made two requests for reconsideration. In the first, it was submitted that the decision under challenge was wrong, for the following reason:

"As per the Employment letter dated 10 December 2018, the Sponsor Spouse is employed by the Universal Church of the Kingdom of God (UKCG) and receives total salary package of £30,000 per annum. This package is made up of a basic salary of £16,800 per annum (sic) and then a further accommodation allowance of £13,200 per annum (£1,100 per month)."
7. It was submitted that the two sums, in combination, were more than sufficient to meet the requirement of £18,600 and that paragraph 18 of Appendix FM-SE permitted the appellant to rely on the total package.
8. On 29 May 2019, the respondent refused the reconsideration request. Although she accepted that there was a basic salary of £16,800, she did not accept that the £13,200 could be counted towards the Minimum Income Threshold ("MIR"). She reached that conclusion for the following reasons:

"£13,200 accommodation allowance is rejected. Contract of employment stated 'free accommodation'. No mention is made of any nominal charge,

there is no evidence the Appellant has received the £13,200 as an income and no evidence it has been paid back as an accommodation cost.”

The Appeal to the First-tier Tribunal

9. The appeal therefore came before Judge M B Hussain (“the judge”), sitting at Taylor House on 13 September 2019. He received bundles of documents from both parties and he heard oral evidence from the appellant, the sponsor and the HR manager of UKCG, Lisa Hodgkinson. The evidence which was focused on the point at issue was that the sponsor received a remuneration package which included accommodation which was paid for by the church, directly to the landlord.
10. In his reserved decision, the judge concluded that the appellant was not entitled (for the purposes of Appendix FM) to rely on the ‘accommodation allowance’ which was provided by the church. In reaching that conclusion, the judge attached particular significance to paragraph 18(c) of Appendix FM-SE. He therefore found that the appellant was unable to satisfy the Immigration Rules. In considering the appeal with reference to Article 8 ECHR itself, the judge concluded that aspects of s117B of the Nationality, Immigration and Asylum Act 2002 militated against the appellant and that the respondent had established that her decision was proportionate.

The Appeal to the Upper Tribunal

11. There are two grounds of appeal. The first is that the judge misdirected himself in law in concluding that the appellant could not satisfy Appendix FM in the manner set out above. The second is that the judge misdirected himself in law in his assessment of proportionality outside the Immigration Rules, with particular reference to the Public Interest Considerations in s117B of the 2002 Act.
12. The papers were placed before Upper Tribunal Judge Gill at the height of the pandemic. Judge Gill formed the provisional view that the appeal might properly be considered on the papers, and she issued standard form directions seeking the views of the parties on that course of action and on the merits of the appeal.
13. Submissions were received from the respondent (written by Mr Whitwell, a Senior Presenting Officer) but nothing was received from the appellant. The papers were then placed before Upper Tribunal Judge Sheridan, who was concerned by the absence of submissions from the appellant’s solicitors. In light of the pandemic, he extended time for their submissions. Written submissions were duly received from the appellant’s solicitors. Insofar as it is necessary to extend time yet further, I am satisfied that it is appropriate to do so in light of the pandemic-related difficulties set out by the appellant’s solicitors.

Submissions

14. It is submitted by the appellant that the sponsor receives a contractual allowance for accommodation and that it may be counted towards the calculation of the Financial

Requirements. It is submitted, as it was before the FtT, that the accommodation is part of the sponsor's salary package and that there is nothing in the Immigration Rules which prohibits reliance on such a sum. In relation to ground two, it is submitted that the judge erred in his application of s117B(3) of the 2002 Act because the appellant is not a burden on the public purse and this provision did not weigh against her in the scales of proportionality.

15. For the respondent, Mr Whitwell submits that the judge decided the point under Appendix FM correctly. The sponsor did not receive a sum of money in addition to his basic salary and the additional sum could not properly count towards the calculation required by the Immigration Rules. In relation to ground two, it is accepted by the respondent that the judge erred in law in his approach to s117B(3) but it is submitted that the error was not a material one.

Analysis

16. I am satisfied that the judge erred in law in two respects. His first error was to conclude that the free accommodation provided to the sponsor by the church fell under paragraph 18(c) of Appendix FM-SE. Paragraphs 18(a)-(c) are as follows:
'(18) When calculating income from salaried employment under paragraphs 12A and 13 to 16, this paragraph applies:
 - (a) Basic pay, skills-based allowances, and UK location-based allowances will be counted as income provided that:
 - (i) They are contractual; and
 - (ii) Where these allowances make up more than 30% of the total salary, only the amount up to 30% is counted.
 - (b) Overtime, payments to cover travel time, commission-based pay and bonuses (which can include tips and gratuities paid via a tronc scheme registered with HMRC) will be counted as income, where they have been received in the relevant period(s) of employment or self-employment relied upon in the application.
 - (bb) In respect of a person in salaried employment at the date of application, the amount of income in sub-paragraph (b) which may be added to their gross annual salary, and counted as part of that figure for the purposes of paragraph 13(a)(i) or 13(b)(i), is the annual equivalent of the person's average gross monthly income from that income in their current employment in the 6 months prior to the date of application.
 - (c) Payments relating to the costs of UK or overseas travel, including (for example) travelling or relocation expenses and subsistence or accommodation allowances, and payments made towards the costs of living overseas, will not be counted as income.'
17. Sub-paragraph (c) is not concerned with the free provision of living accommodation in this country. As is clear from its first ten words, the sub-paragraph is designed to

ensure that the costs of travel inside and outside the UK are not to count as income under Appendix FM. The rationale for that is quite clear: those are payments which are made as and when necessary, so as to ensure that an employee is not out of pocket as a result of employment-related travel. The sums in question arise when an employee travels away from their home at the employer's request; this paragraph has nothing to do with the free provision of a home, as provided to the sponsor by UKCG in this case.

18. It seems, unfortunately, that the judge focused on the words 'accommodation allowance' in paragraph 18(c), and concluded that this was precisely what was provided by UKCG for the sponsor. To do so was to take those words out of the context in which they appear, however. Had the judge taken the context provided by the paragraph into account, he would not have concluded that the sponsor was in receipt of an 'accommodation allowance' which was caught by this provision, which is directed to accommodation costs incidental to travel.
19. I am not satisfied the judge's error was material to his analysis under the Immigration Rules, however. Even if paragraph 18(c) did not apply to the accommodation received by the sponsor, it is quite clear that the rent for that accommodation – which is paid by the church – cannot count towards the calculation performed under Appendix FM and FM-SE. I have set out a substantial part of paragraph 18 because the part set out above shows that what matters, for the purpose of this Appendix, is the sustainable *income* received by an individual. Salary payments provide the baseline income and the respondent permits – via paragraph 18 – various other types of payment from employer to employee to count for these purposes.
20. Contractually agreed London Allowance or a Recruitment and Retention Allowance would be permitted, for example, because they represent forms of payment which might be depended upon for the future. In the appellant's case, however, the sponsor is not entitled to a specific sum by way of additional income; what he is contractually entitled to is nothing more and nothing less than accommodation. That accommodation might be worth £1100 per month but it might be worth significantly more or significantly less. It might, in particular, be worth significantly less if the church exercised its right to rely upon paragraph 12(e) of the Trainee Assistant Pastor's Code of Honour and Conduct (a copy of which was before the FtT):

 'The Assistant Pastor understand that the Church is a religious community and he will be required to share accommodation with fellow Assistant Pastors and their families.'
21. There is no reason to doubt what was said by the Church in relation to the accommodation, which is that it paid rent of £1100 per month. But the Church could, at any time, introduce additional people into the property, as a result of which the amount of rent due for the sponsor (and the appellant) would be reduced proportionately. Alternatively, given what is guaranteed is accommodation and not a sum, the Church would be quite within its rights to move the sponsor and the

appellant to accommodation which is considerably cheaper than £1100 per month. Ultimately, therefore, it would be wrong to see the sum currently paid by the church to the sponsor's landlord as part of his income under Appendix FM of the Immigration Rules. For those reasons, which are different from those relied upon by the judge, I consider that his error was immaterial to the outcome of the appeal insofar as it depended upon the appellant's ability to meet the Five Year Route.

22. It is accepted by the respondent that the judge erred as claimed in ground two. It is not necessary to set out s117B(3) in full; it provides that it is in the public interest that those who seek to remain in the UK are financially independent. In Rhuppiah [2018] 1 WLR 5536, the Supreme Court accepted the concession made by the respondent in that case that the Court of Appeal had erred in upholding the decisions reached below insofar as it had concluded that a person was required by s117B(3) to be financially independent of another. What was required, instead, was that the individual should not be a burden on the state. It follows that the judge erred in concluding at [29] of his decision that s117B(3) militated against the appellant because she did not meet the income threshold under the Immigration Rules. There has never been any suggestion that the appellant represents a burden to the public purse, even if she is unable to meet the MIR.
23. It follows from that conclusion that the judge erred in entering s117B(3) on the 'balance sheet' of considerations which were relevant to his proportionality assessment. That is necessarily a material error of law. I set aside the decision of the FtT in that respect, and I shall remake the decision on the appeal on the basis of the material which was before the FtT.
24. The appropriate starting point is that the appellant does not meet the requirements of the Five-Year Route under Appendix FM for the reasons I have given above. I should perhaps add that there was a second string to her bow under the Five Year Route, which was that her husband had recently been made a full Pastor which UKCG, with an income of just over the MIR. The judge did not accept that he was entitled to attach weight to that claim due to a paucity of evidence. There is no appeal against that finding, which was properly open to the judge and was, in any event, inevitable.
25. The appellant is also unable to meet the requirements of the Ten-Year Route. She is unable to establish that there would be insurmountable obstacles to the continuation of her family life in Brazil. In fairness to the appellant and the solicitors who have represented her throughout, the contrary was not really asserted before the FtT. There is no apparent reason why it would cause the very serious hardship required by paragraph EX2 of Appendix FM for these two Brazilian nationals to return to Brazil.
26. Nor can the appellant meet the Private Life provisions of the Immigration Rules. There is no proper evidential basis for concluding that she would have very

significant difficulties in reintegrating into life in Brazil and the fact that she left there only four years or so ago would strongly suggest the opposite.

27. Given these conclusions, it is for the appellant to show that there are exceptional circumstances which might warrant leave being granted on Article 8 ECHR grounds. It is not for the appellant to show that she surmounts a legal threshold of exceptionality, however; what is required is a proportionality assessment and what she must show is that her removal would give rise to unjustifiably harsh consequences: GM (Sri Lanka) [2019] EWCA Civ 1630, at [29]. In order to conduct that balancing exercise, it is important to have a clear picture of the matters weighing for and against removal.
28. On the appellant's side of the scales is the disruption which would be caused to her and her husband, and to their duties within the church, in the event of removal. They had hoped to make their home in the UK and they have both contributed significantly to the church's work. Ms Hodgkinson gave unchallenged evidence before the FtT about the outreach work undertaken by the appellant and his wife, which has involves providing support for women who have suffered domestic abuse. She also noted in her evidence that there is a shortage of pastors in this country, which is why the UKCG recruited people from overseas.
29. This is therefore not a case – such as Rhuppiah's – in which the removal of the appellant from the United Kingdom would bring about very severe consequences for the appellant or for another person. The appellant and her husband would be faced with an invidious choice – of her leaving the country alone or of them relocating together – and there would be a gap in the provision offered by the church, given the role the appellant and the sponsor have played in the community for a number of years.
30. The material question is whether those consequences are unjustifiably harsh on the facts of this individual case. Against those consequences I must weigh the Public Interest Considerations in Part 5A of the 2002 Act. The appellant speaks English and is not a burden on the public purse. She has never been in the country unlawfully (her leave is extended by operation of section 3C of the Immigration Act 1971 at present). She has been in the UK on a precarious basis but it is clear from recent Court of Appeal authority that this does not weigh against her under s117B(5), since that provision catches only private life: Lal v SSHD [2020] 1 WLR 858.
31. The only provision, therefore, which weighs positively against the appellant is s11B(1) of the 2002 Act, which states that the maintenance of effective immigration control is in the public interest. I remind myself that I must accord considerable weight to the respondent's policy, as expressed in the Immigration Rules, at a general level. The appellant is unable to meet the requirements of the Immigration Rules and this is necessarily a matter which counts against her.

32. I also remind myself of what was said by Lady Hale and Lord Carnwath (with whom the other Justices agreed) at [99]-[100] of MM (Lebanon) [2017] 1 WLR 771. Having concluded that the amended Rules were not irrational in the common law sense, they continued:

“[99] Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because “less intrusive” methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in *Mahad*, including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal.”

33. This is a case, in my judgment, where it is necessary to bear in mind that Article 8 ECHR is to be considered more broadly than under the Immigration Rules. The appellant and the sponsor are not entitled to rely on the provision of free accommodation in order to satisfy Appendix FM; that is the plain and ordinary meaning of the Rules. I am entirely satisfied, however, considering the evidence of Ms Hodgkinson and the Code of Honour and Conduct to which I have referred above, that the appellant and the sponsor will continue to be provided with free accommodation for as long as he remains employed by UKCG. Given the proportion of income which is spent by most people on their accommodation, this is a valuable benefit. To discount it in considering the weight which I should attach to immigration control in this particular case would lead to unacceptable results. An individual who earns £18,600 per annum but pays £1100 in rent would be left (discounting any tax) with £450 in his pocket. An individual such as the appellant, who earns £16,800 and pays no rent is left with £1400 in his pocket. The Immigration Rules enable the former individual to sponsor his spouse successfully, but not the latter.
34. I am entirely satisfied that the relationship between the sponsor and his church is not a contrivance, since that has been accepted throughout by the respondent, who has granted him limited leave and ILR in reliance on that relationship. I am also satisfied that the provision of free accommodation is part of the contractual relationship which has existed between the sponsor and the church for some years. It is a valuable benefit which cannot be withdrawn. Adopting the broader approach required by MM (Lebanon), I am satisfied that it would be absurd to treat the sponsor as a person who earns less than the MIR. That is not to say that the Rules are

irrational; the lines must be drawn somewhere and the respondent is entitled to take the view that cash income in cash is easier to assess than other forms of support.

35. Looking to the reality of this individual situation, however, I consider that the weight which can properly be attached to immigration control is limited. Balancing the competing considerations against each other, I come to the clear conclusion that the consequences of the appellant's removal would be *unjustifiably* harsh. The respondent is not able to persuade me, despite the weight which is to be attributed to the failure to meet the letter of the Immigration Rules, that the appellant's inability to meet those Rules renders her removal from the United Kingdom a proportionate course of action.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law. I set aside the decision of the FtT and I remake the decision on the appeal by allowing it on Article 8 ECHR grounds.

No anonymity direction is made.

M.J. Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 November 2020