



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26189/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3 February 2014

Determination Promulgated
On 21 February 2014

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS KAMALINI SUKUNTHAN

Respondent

Representation:

For the Appellant: Mr G Saunders, Home Office Presenting Officer
For the Respondent: Ms C Physsas, Counsel instructed by Selva & Co

DETERMINATION AND REASONS

1. The respondent's appeal against the decision of the Secretary of State refusing her application for leave to remain in the UK as a dependent spouse was allowed by First-tier Tribunal Judge Birk under the Immigration Rules, Article 8 of the ECHR and s.47 of the Immigration, Asylum and Nationality Act 2006.

2. First-tier Tribunal Judge Ievins granted the Secretary of State permission to appeal on one ground only; that it is arguable that in requiring the respondent i.e. Secretary of State to request missing evidence went beyond the evidential flexibility policy set out in paragraph 245AA of the Immigration.
3. Judge Ievins said that the grounds in respect of the judge's findings on Article 8 amounted to no more than a disagreement with those findings. With regard to the judge's decision allowing the appellant's appeal against the s.47 removal directions, he said that the judge erred in law in failing to appreciate that s.47 had been amended on 8 May 2013 allowing the Secretary of State to give written notice of removal at the same time as giving notice of a pre-removal decision. Both the reasons for refusal letter and the notice of refusal to vary leave to remain and the decision to remove were dated 17 June 2013, which was after the coming into force of the amended s.47.
4. The respondent first entered the UK as a dependant on her student husband on 20 September 2005. She was granted leave valid until 30 April 2007 on the same basis. She was then granted further leave to remain until 30 April 2009. In the meantime her husband had switched to Tier 1 (Post-study Work) Migrant under the Points-Based System (PBS). On 20 October 2008 she was granted further leave to remain in the UK as a dependant of a Tier 1 (Post-Study Work) Migrant until 20 October 2010. On 13 December 2010 she was granted further leave on the same basis until 13 December 2012.
5. On 22 August 2012, he applied for indefinite leave to remain in the UK under the Long Residence Rules, having completed ten years' continuous lawful residence in the UK. The respondent however could not apply for settlement under the Long Residence Rules since she had not completed ten years' legal residence in the UK.
6. As the respondent's leave to remain was due to expire on 13 December 2012, she applied for further leave to remain in the UK. It is said in the grounds of appeal that she sought advice from the Home Office and they advised her that she should make the application on form FLR(M), which she duly did on 26 November 2012. At section 2.1 of form FLR(M), the respondent ticked the box saying she was applying for an extension of stay in the UK as the spouse of a person present and settled in the UK even though her husband did not have settled status at the time. At section 12 the appellant said her partner's passport was with another part of the UKBA. She gave her husband's name, date of birth, passport number and reference number. She submitted with her application her passport, financial documents of her husband, his payslips, P60 and bank statements.
7. I am told that the respondent's husband was granted indefinite leave to remain on 6 March 2013. On 8 March 2013 a copy of her husband's grant of indefinite leave to remain was sent to the UKBA in support of her application. The argument here was that by sending this letter the Secretary of State would have been aware that her

husband had been granted indefinite leave to remain and would have invited the respondent to submit any missing documents in consideration of her application. This did not happen.

8. On 17 June 2013, the Secretary of State refused the application under Appendix FM of the Immigration Rules. The Secretary of State had considered the respondent's application on the basis of her marriage with a person settled in the UK (as stated by her at section 2.1 of form FLR(M)) and had contended that the respondent had failed to satisfy the financial requirements for leave to remain under the Immigration Rules. The Secretary of State contended that the respondent was required to meet the £18,600 financial requirement and the payslips of the sponsor provided by the respondent did not show sufficient income to meet the financial requirements of the Rules.
9. Mr Saunders submitted that the respondent had confused the UKBA by stating on her application form that her husband was settled in the UK.
10. I am told that a letter explaining the situation was sent with the respondent's application to the Secretary of State. I do not have a copy of this letter. However, because the respondent had said that her husband had settled status when she made the application, the Secretary of State considered the application under Appendix FM. I was told by Counsel that under appendix FM the respondent was required to submit six months' payslips of her partner leading up to the date of application to show that she met the £18,600 financial requirement. This evidence was available. The Secretary of State should have asked the respondent to submit the missing documents as required by the Upper Tribunal's decision in **Rodriguez (flexibility policy) [2013] UKUT 00042 (IAC)**.
11. At the hearing below it was contended by the Secretary of State's representative that the Tesco statements for October and December 2012 and for BP did not show sums going into the account to meet the standard and that there was no requirement to seek evidence that could not be in existence at the time of the application. The judge found that the financial information that was provided by the respondent with her application form did not meet the requirements of the Immigration Rules. The respondent accepted that it was only with the provision of further documentation that she could show that she met the Rules for the application that she had made. The judge said this depended upon the flexibility policy being applied by the Secretary of State to such applications. She found that it was reasonable for the policy which was the subject matter in the case of **Rodriguez** for the Secretary of State to seek the missing information. Including that information showed that the financial requirements were met.
12. Permission was granted on the basis that the judge required the Secretary of State to request missing evidence in a way that went beyond the evidential flexibility policy set out in paragraph 245AA of the Immigration Rules.

13. Mr Saunders relied on the Court of Appeal's decision in **Rodriguez [2014] EWCA Civ 2** in which it said that the evidential flexibility policy and paragraph 245AA of the Immigration Rules only bear on applications made under the Points-Based System (PBS). Paragraph 245AA is included in the PBS under Part 6A. He said that this is a marriage case which has nothing to do with the PBS. There was therefore no requirement on the Secretary of State to ask for other evidence.
14. Counsel said it was odd that in the grounds, the Secretary of State relied on paragraph 245AA. She argued that Appendix FM-SE to the Immigration Rules relates to such an application. Appendix FMSE sets out the specified documents that must be provided by an applicant and it is only those documents that are reconsidered by the respondent.
15. Counsel accepted that the respondent did not provide six months' payslips; she submitted only three, namely September, October and November payslips of her husband. She also accepted that the bank statements did not show that the earnings were going into his NatWest Bank account. The Santander account was the cohabitation account. She further submitted that the respondent was not required to show that she met the financial requirement because at the time of her application her husband did not have indefinite leave to remain.
16. From the facts I find as follows. On the advice of UKBA the respondent submitted a form which is used by an applicant who is dependent on a partner who has leave to remain under the PBS. The respondent mis-stated the status of her husband, claiming at Section 2.1 that he had settled status when he did not. The Secretary of State made a decision on the respondent's application on 16 July 2013 and applied the Rules under Appendix FMSE which required her to submit specified documents namely six months' payslips or bank statements to show that her husband was earning £18,600 a year in order to meet the financial requirement. However the application which was made under the PBS did not require her to meet a specified financial requirement or submit such evidence because she was granted leave to enter or remain as a partner following an application made before 9 July 2012. The respondent completed Section 7B of the application form which required her to answer questions about her maintenance. It was to satisfy the maintenance requirement that the respondent submitted the financial documents that she did. The Secretary of State considered those documents but found that they were not sufficient to meet the requirements of the Immigration Rules. According to Counsel the respondent was required under Appendix FMSE to submit 6 months payslips leading up to the date of application. I find that the respondent could not satisfy this requirement.
17. I accept that **Rodriguez** which is about the evidential flexibility police and paragraph 245AA of the Immigration Rules only bears on applications under the Points-Based System. I find that the judge materially erred in law in applying **Rodriguez**. I accept that the respondent was advised by the UKBA to complete form FLR(M). I find that the respondent confused the Secretary of State by misrepresenting her husband's

status. In any event by the time the Secretary of State made her decision, the respondent's husband had acquired settled status and she was expected to meet the financial requirement in Appendix FM-SE. She was not able to meet this requirement for the reasons given by the Secretary of State.

18. I find that the judge materially erred in law. I set aside his decision allowing the respondent's appeal.
19. I remake the decision and allow the Secretary of State's appeal.

Signed

Date

Upper Tribunal Judge Eshun