



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10831/2017

THE IMMIGRATION ACTS

Heard at Field House
On 7th December 2018

Decision & Reasons Promulgated
On 13 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MRS. GRACE CHOE
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Miss M Butler, Counsel, instructed by Leathes Prior, Solicitors
For the respondent: Ms Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant has been given permission to appeal the decision of First-tier Tribunal Judge I F Taylor. In a decision promulgated on 7th September 2018 the judge dismissed the appellant's appeal against the respondent's refusal of his claim to remain on the basis of her article 8 rights.

2. The appellant is a national of the United States of America. She came to the United Kingdom on 31 August 2015 with leave valid until 30 January 2017 as a student. On 25 January 2017 she made an application for leave to remain under appendix FM of the immigration rules. This was on the basis of her family life with her partner, Mr James Keith Allen. He is a British national.
3. Her application was refused on 19 September 2017. There were no suitability issues and the eligibility grounds, both in terms of relationship and immigration status were met. The refusal was based solely upon the financial requirements.
4. A limited company, GG technology services Ltd was established in July 2016. Her partner is a director. The company provided IT services to another company, Willis Towers Watson limited. For the purposes of the immigration rule he was classed as being self-employed.
5. Appendix FM SE sets out specific necessary proofs were income derives from a limited company. This must include evidence that the company is registered in Companies House and tax returns for the company for a full financial year. Audited accounts if required or on audited accounts as an accountant certificate were to be provided. Furthermore, the company must provide business bank statements for the same 12 month period. The difficulty was that these requirements could not be met because the company at that stage had not been in existence for a full year.
6. Her partner also received payment of £1499.45 p gross as a member of the Army reserve force. The appellant is employed by Apple retail UK and her gross annual income totals £10,715.25 p. These 2 incomes total £12,214.70 p which do not satisfy the requirement of £18,600 in the rules.
7. No other basis was seen for the grant of leave under the rules and the respondent did not see any exceptional circumstances .

The First tier Tribunal

8. The grounds of appeal refer to section EX 1 of appendix FM and whether there were insurmountable obstacles to family life continuing outside the United Kingdom. The grounds also relied upon freestanding article 8 rights, pointing out that she and her partner have been together for over 2 years. It was contended they met the financial requirements, with a partner at that stage earning £28,800 per annum. Reliance was placed upon a number of decisions including Chickwamba -v- SSHD [2008] UKHL 40.
9. First-tier Tribunal Judge I F Taylor noted that the appeal was restricted to human rights grounds and the ability to meet the rules was relevant to any

proportionality assessment. The appellant was asked questions directed towards whether family life could be enjoyed in the United States of America.

10. Under the section headed 'my findings' the judge refers to the evidential requirements in appendix FM SE. At paragraph 16 the judge refers to the more recent financial evidence not being relevant to the decision taken because it relates to events post decision. The judge then concluded EX 1 did not assist.

The Upper Tribunal

Error of law

11. There is no dispute that family life exists in addition to private life and the sole issue related to finance. The appellant's partner change from being self-employed to being an employee on 2 October 2017. By the time of the hearing further proofs of income were available.
12. The difficulty with the judge's decision is that the judge has looked at matters solely through the prism of the immigration rules and at the financial situation at that time and does not then look at the case outside the rules. In article 8 assessment such as this outside the rules the relevant date is the date of hearing.
13. Ms Kiss has accepted that the judge materially errs in failing to refer to considerations outside the rules.

Remaking

14. Miss Butler referred to the evidence of finance as contained in the appeal bundles. The appellant's income and her partner's income from service in the army has never been in dispute. The earnings are documented in the bundles. The document bundle contains her partner's payslips, commencing 25 October 2017 when he became an employee through to 25 January 2018. The supplementary bundle contains further payslips through to June 2018. Notably the payslip for 23 March 2018 shows a gross pay to date of £19,573. This exceeds the threshold and is also recording only payments from 2 October 2017.
15. There is also a letter from her partner's employer dated 26 June 2018 confirming he is on a full-time permanent contract earning £35,000 per annum.
16. For the Upper Tribunal hearing a further supplementary bundle has been prepared showing payslips up to 26 November 2018. The last payslip shows a gross pay of £24,608.49 p.

17. Miss Butler submitted that it would be disproportionate to expect the appellant to return to the United States of America in order to make an application which most likely would succeed. She submitted there were no strong public interest considerations in requiring this.
18. There were no section 117 B factors against the appellant. She speaks English and has been here lawfully at all times. The evidence indicates that she and her partner are financially independent and will not be a burden upon the State.
19. Ms Kiss having considered the evidence about finance did not dispute the evidence produced. She indicated she was in agreement with Miss Butler that it appeared disproportionate in the circumstance to expect the appellant to leave and then reapply.
20. I indicated to the parties that bearing in mind the arguments advanced I was minded to remake the decision and allow the appeal on the basis of article 8. Neither representative suggested that there was any need to remit the matter back to the First-tier Tribunal. I am obliged to the appellant's representative for the clear presentation of the documentation which has greatly facilitated the financial assessment.

Decision

The decision of First-tier Tribunal Judge I F Taylor materially errs in law and is set aside. I remake the decision allowing the appeal on article 8 grounds.

Francis J Farrelly

Deputy Upper Tribunal Judge