



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12021/2018

THE IMMIGRATION ACTS

Heard at Field House
On 27 November 2018

Decision & Reasons Promulgated
On 21 December 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

NATASJA MEYER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A Jaja of Counsel instructed by UK Migration Lawyers Ltd

For the Respondent: Miss N Willocks-Briscoe

DECISION AND REASONS

1. The appellant is a citizen of South Africa born on 10 November 1984. On 7 September 2015 she entered the UK with leave as the wife of a British citizen valid until 29 April 2018. On 13 April 2018 she applied on human rights grounds for leave to remain on the basis of her family life with her husband, Mr Richardson. This application was refused on 16 May 2018. The only ground for refusing the application was because the respondent did not accept that the appellant met the financial eligibility requirements (E-LTRP.3.1 to E-LTRP.3.3) of Appendix FM.

2. The appellant appealed indicating that she wished for the case to be determined on the papers. The matter came before a First-tier Judge to be so determined on 26 July 2018. In paragraph 6 of the decision the judge noted that directions had been issued to the effect that the appellant must send any further evidence to the Tribunal by 18 July 2018. The judge recorded that the Tribunal had not received any further papers from either party and was satisfied that he could fairly determine the appeal.
3. The judge noted that the respondent had taken no issue that the appellant was in other than a genuine and subsisting relationship and the judge was satisfied accordingly, having referred to **Razgar v Secretary of State [2004] UKHL 27** that Article 8 was engaged. The judge noted that the starting point when assessing proportionality was whether the appellant met the Immigration Rules and referred to **Hesham Ali v Secretary of State [2016] UKSC 60** at paragraphs 39 to 43. The judge accordingly turned to consider whether the appellant met the requirements of the Rules and concluded his determination as follows:

- “15. The respondent noted that initially the Appellant had wished to rely on savings, but subsequently submitted further evidence and asserted that she wished the application to be considered under ‘Category A’ (salaried or non-salaried employment where the applicant and or their partner have been with their current employer for 6 months or more).
16. Under E-LTRP.3.1, the Appellant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of a gross annual income of at least £18,600. Under Appendix FM-SE, for every employment relied on, the applicant must submit wage slips and bank statements covering a period of six months prior to the date of the application. In addition, the Appellant must provide an employer’s letter.
17. The Respondent accepted that the Appellant had provided the specified documents in relation to her employment with The Oakley Court Hotel and calculated a yearly income equivalent to £8692 from his employment. The Appellant does not dispute the Respondent’s calculation.
18. As such, the Appellant is also reliant upon any income from her partner’s employment with Enagabia Engineering Company Ltd (the company). The Respondent noted that although there were payments made into the Appellant’s partner’s bank account in January and March 2018, the last payslip submitted with the application was for December 2017.
19. The Respondent also noted the contents of two letters from the company, dated 12 and 19 April 2018. In the first letter, the company stated that the Appellant’s partner “was” an employee of the company, but was made redundant at the beginning of 2018.
20. The second letter confirmed that the company was in voluntary liquidation and therefore no payslips have been issued since December 2017.
21. Accordingly, the Respondent did not accept that the Appellant’s partner was in employment at the date of the application and was eligible to apply under Category A.
22. In the grounds of appeal, the Appellant noted that they had been advised that a letter from her partners’ employer would be sufficient and that is

why they had not provided the payslips. The Appellant added that they have now provided the payslips and P60 for 2017/18. Unfortunately although the Notice of Appeal stated that the documents were attached, copies of these documents were not forwarded to the Tribunal.

23. In any event, the Appellant has not addressed whether her partner was still in employment, when she lodged the application. In these circumstances, I accept the information set out in the letters from the company. Accordingly, I find that the Appellant's partner was not an employee, when the Appellant lodged the application and he was not eligible to apply under Category A. It follows that the Appellant cannot rely on the income her partner earned from that employment.
24. On the totality of the evidence, I find that the Appellant's income does not meet the Minimum Income Threshold and therefore she does not meet the financial; eligibility requirements of Appendix FM (E-LTRP.3.1).
25. I now consider whether Ex.1 applies. The Appellant does not refer to having any dependent children. As such Ex.1(a) does not apply. In relation to Ex.1(b), the Appellant confirmed on her application form that she has friends and family in South Africa and that she has travelled to South Africa several times, since coming to the UK in 2015.
26. The Appellant has not raised any factors to suggest the couple would entail very serious hardship, such that they could not live together in South Africa.
27. On the totality of the evidence, I find that the Appellant has not demonstrated that there are insurmountable obstacles to family life with the Sponsor continuing outside the UK.
28. Accordingly, I find that the Appellant does not meet the requirements of Ex.1. I also find that the Appellant does not meet the requirements of Appendix FM.
29. However, this is not determinative of the appeal. The Supreme Court held in **R (Agyarko v SSHD; R (Ikuga) v SSHD [2017] UKSC 11** that, if an applicant failed to meet the requirements of the new Rules,

“... it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach Article 8” (para 11).
30. The respondent's decision may effectively mean that the Appellant and her partner's family unit may be divided and split between two countries.
31. However, Article 8 does not give an individual the right to choose where they can live with their family.
32. Further, in accordance with section 117A of the 2002 Act, I confirm that, when considering the public interest question, I have also had regard to the factors listed in section 117B of the Act. The Appellant was unable to demonstrate that the family income met the minimum income threshold under appendix FM. As such, the Appellant has not demonstrated that the family would be financially independent.

33. In addition, the Appellant did not meet the immigration rules and this is a matter that weighs heavily against her.
34. In any event, the couple would have been fully aware that under the immigration rules they needed a minimum income of £18,600 and that if they did not earn enough money, the Appellant is likely to have to return to South Africa.
35. Overall and on balance, I find that the Appellant has not demonstrated that there are compelling considerations, over and above the factors covered in Appendix FM, that would justify her being granted leave to remain in the UK.
36. On the totality of the evidence, I am satisfied that, on the particular facts of the case, the interference with the Appellant and her partner's family life in the UK is necessary and proportionate. Their rights do not outweigh the Respondent's legitimate interests in ensuring economic and social order, when maintaining effective immigration control."

4. Accordingly, the judge dismissed the appeal.
5. There was an application for permission to appeal. With reference to what the judge had said in paragraph 22 of his determination, it was maintained that the documents had indeed accompanied the grounds of appeal. Permission to appeal was granted on the basis that there was proof of receipt of the documents on 29 May 2018. The documents included the sponsor's payslips and P60. It appeared that for whatever reason the documents submitted under cover of the letter had not been placed before the Tribunal. It was arguable that there had been procedural unfairness through no fault of the judge. At the hearing Counsel relied on the grounds and submitted there had been unfairness and if documents were missing an opportunity should have been given to lodge them. The application had only been refused on financial grounds. Reference was made to **MM (Lebanon) [2017] UKSC 10**.
6. Miss Willocks-Briscoe submitted that the issue was whether the appellant's husband was still in employment. The judge had found that the appellant was not in paragraph 23. The payslips took the matter no further. The letters from the company were in the respondent's bundle. The judge had found the appellant did not meet the Immigration Rules and the appellant could not succeed on the principles in **Chikwamba v Secretary of State [2008] UKHL 40**. Miss Willocks-Briscoe referred to **Chen (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 189** - the instant appeal did not involve children.
7. There was no issue of fairness since the appeal was bound to fail regardless of the missing documents. The company had gone into liquidation.
8. Counsel submitted that it was a question of justice being done and submitted that the missing documents did show that the appellant was still an employee although the company was in liquidation. The appellant's husband was still getting a salary. He was not a burden on the state. The evidence had an impact on the decision both in and outside the Rules.

9. At the end of the submissions I reserved my decision. I can of course only interfere with the judge's determination if it was flawed in law. The respondent noted that the last payslip submitted for the employment with Engabia Engineering Company Ltd was dated 31 December 2017 and a letter from the company dated 19 April 2018 confirmed the company was in voluntary liquidation and accordingly no payslips had been issued since December 2017. The respondent also took into account a letter from the company dated 12 April 2018 where it was confirmed that the appellant's husband "was" an employee of Engabia Engineering Ltd but was made redundant at the beginning of 2018. Accordingly, the appellant did not meet the relevant Rules at the time of lodging the application. The letter of 12 April 2018 from the company makes it clear that the appellant was made redundant at the beginning of 2018 as the company had gone into voluntary liquidation and the appellant had gone into a property business with the author of the letter. There was reference to two properties the income from which would be paid directly to the appellant's husband. In the letter of 19 April reference was made to paying the appellant's husband in cash and ten payslips were attached to the letter.
10. While it is regrettable that the judge did not have sight of the payslips that did not affect the outcome in this case as Miss Willocks-Briscoe submitted. The appellant could not meet the relevant requirements of the Rules because he was no longer an employee of the company. I do not find that the omission of the material from the evidence before the First-tier Judge caused unfairness in this case. The judge was not obliged to make further enquiries about the missing material. I do not find that the material had it been submitted would have had any impact on the Appellant's case which was bound to be dismissed under the Rules and I reject the submission that it might have had an impact on the consideration of the case outside the Rules.
11. I am not satisfied that the decision was materially flawed in law and this appeal is dismissed.
12. The First-tier Judge made no anonymity direction and I make none.

Fee Award

13. The First-tier Judge made no fee aware and I make none.

Signed

Date 13 December 2018

G Warr Judge of the Upper Tribunal