



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14157/2016

THE IMMIGRATION ACTS

Heard at Field House
Oral determination given following hearing
On 27 July 2018

Decision & Reasons Promulgated
On 19 September 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MRS NUENGRUETHAI BAMFORD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation, but the sponsor Mr Bamford was allowed to address the Tribunal
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Thailand who was born on 28 February 1983. She entered the UK in July 2013 with entry clearance as a spouse. Thereafter on 12 March 2016 she

applied for leave to remain as a spouse but this application was refused on 19 May 2016.

2. The basis of the refusal was that the respondent considered that she had not satisfied the financial requirements in accordance with Appendix FM of the Immigration Rules. Within the Rules, not only were the couple required to show that they have between them a joint income of £18,600, but they also had to provide evidence establishing this in a specified form. The respondent considered that certain documents were absent and they were not provided before the decision was made even though the respondent had written to the appellant requesting the necessary financial information in the specified form.
3. The appellant appealed against this decision and her appeal was heard at Birmingham before First-tier Tribunal Judge Asjad on 23 June 2017. In a Decision and Reasons promulgated on 17 July 2017 Judge Asjad dismissed the appeal.
4. The appellant was given permission to appeal against this decision by Designated First-tier Tribunal Judge McClure on 9 January 2018 and the appeal accordingly came before me on 6 April 2018 when I found that the decision of Judge Asjad had contained a material error of law such that it had to be remade. Because the issue was a narrow one, relating essentially to what the income of the parties was and also as to whether or not it would be proportionate to require the appellant to return to Thailand to make another application from that country, I retained the appeal in this Tribunal and I gave directions for the resumed hearing.
5. I gave my reasons orally in an extemporaneous decision immediately following the hearing, which was then sent to the parties some three weeks or so after the date of the hearing. I will be repeating some of the matters set out within that decision.
6. When making my finding that there had been a material error of law in Judge Asjad's decision I noted that because there was no longer a right to appeal against the decision made under the Rules the appeal had to be considered under Article 8.
7. I noted that the judge's assessment of Article 8 was very brief indeed and was set out within seven lines only at paragraph 10 of that decision and was made on the basis that because the appellant could not succeed under the Rules, effectively it followed that it was proportionate for her to be removed because "immigration control is a strong public interest factor that is against the appellant in this case". Although it was said that "the balance sheet approach advocated by the Supreme Court" had been adopted, the judge did not in fact set out the factors for and against. In particular at paragraph 9 the judge had stated that "the appellant has not submitted all of [the relevant financial information] and although she refers to her own income this cannot be taken into account in assessing the financial threshold".
8. As I noted in my Error of Law Decision it would appear that this income was left out of account completely. During the hearing before Judge Asjad the appellant had stated that she had herself earned a little over £18,000 per annum and that this was income which should be taken into account in addition to the income of her husband. The

threshold as is well-known is £18,600. I note that it is recorded at paragraph 4 of Judge Asjad's decision that "the appellant relies on the fact that when she completed her application form she made a mistake by not including evidence of her own employment in the UK and also by not including her husband's tax return for 2015/16". He goes on to say that "you state that she is still working and earns £18,027.70 gross per annum" and that "her husband is self-employed as a sales representative and he has been earning more than the required £18,600 since 2014". He records the assertion that the appellant's husband's accountant had made mistakes by submitting incorrect figures on his tax return.

9. Whatever the true financial position might be, it is clear as I found and as accepted by Ms Kiss (who had been representing the respondent at the error of law hearing) that the judge was not correct when finding that the appellant's own income "cannot be taken into account in assessing the financial threshold". At the error of law hearing, Miss Ks had stated as follows:

"I accept that the Article 8 consideration may have been skewed by the judge's failure to consider the appellant's income in 2016/17 and to that extent it would have to be remade to consider all the facts which would be greatly assisted by the production of proper returns in accordance with the Rules".

10. It is clear that for the purposes of the decision, as noted by Judge McClure when granting permission to appeal, it is provided within Appendix FM, paragraph E-LTR.1 P.3.2(b), that in applications for leave to remain as a partner consideration **can** be given to the income of the applicant from specified employment for self-employment "unless they are working illegally" which in this case this appellant was not. There had been no suggestion made at any time that her presence in this country has been anything other than legal, and so clearly Judge Asjad's statement that he could not take into account any income of the appellant was as a matter of law wrong. As this might have been a material factor the decision would have to be remade so that the appellant would have an opportunity of having whatever income she had earned taken into account as well.
11. Accordingly at the error of law hearing which was as long ago as 6 April I gave directions as to the rehearing. I gave those directions orally at the time and the directions I gave included as follows:

"...

- (2) The appellant is given leave to adduce further evidence, which should include the signed and submitted accounts proving the income of both the appellant and her husband, the sponsor, from 2014/15 onwards, and also evidence as to whether and if so why there would be any very serious obstacles preventing the appellant from returning to Thailand in order to make a fresh application for entry clearance from there.
- (3) It is recorded that the Tribunal expects both the appellant and her husband to give evidence, including within that evidence assertions that the financial

information which they will have provided is accurate, and they must also provide witness statements capable of standing as evidence-in-chief.

(4) This evidence (including the witness statements) must be served on the respondent and filed by the Tribunal by no later than 31 May 2018”.

12. The reasons I gave directions in the terms I did (and I made it clear to both the appellant and her husband Mr Bamford at the time of that hearing precisely what it was that was required) was to enable the appellant to be able to collect the necessary evidence and put it before the Tribunal in a case in which they had been representing themselves because they could not apparently afford to continue instructing legal representatives. The Tribunal wished them to have an opportunity to prosecute their appeal properly.
13. The appellant did not comply with these directions and the Tribunal heard nothing more from either her or her husband until 11 June 2018, which was some two days before this case had been listed for hearing (that date having been agreed with the parties at the date of the error of law decision) when a letter was received from the sponsor asking that the appeal be adjourned because he required further time to advise his solicitors (none of whom were apparently going to represent him in any event) as to the information which was required so that they could prepare for the appeal.
14. This adjournment request was refused by another Upper Tribunal Judge who noted that the Tribunal had no record of the appellant being legally represented. It was noted that Mondair Solicitors had come off the record as long ago as 22 March and they had confirmed that they no longer acted for the appellant by way of a further letter dated 7 June 2018. It was noted that the appellant had been aware of the upcoming hearing since April and had had ample time to obtain and prepare the necessary documentation for the hearing. In these circumstances, this Tribunal, (and as I have noted another Upper Tribunal Judge) concluded that the interests of justice were not served by acceding to the request for an adjournment.
15. The appeal then came before me again on 13 June 2018 when fortuitously for the appellant, by reason of other cases which were in the list on that day, the case had to be adjourned in any event for lack of court time. The appellant was again unrepresented but again I made it very clear to the appellant during the hearing precisely what it was that she was required to do.
16. I noted at paragraph 2 of my note of hearing (which again was given orally immediately following the hearing on 13 June 2018) that “the decision [this is as to the further direction] was noted by the appellant and her husband immediately following the hearing so they knew precisely what the directions were and it was sent to them in written form on 30 April 2018”. In other words what I had said had to be done was noted by them. I have already set out above the directions which I gave. I noted again that it was stated very clearly in the presence of the appellant and her husband what it was that the appellant had been told to do and as I again remarked

“It was also stated within the further directions both the appellant and her husband were expected to give evidence and what that evidence should contain, and that all the evidence including witness statements must be served on the respondent and filed with the Tribunal by no later than 31 May 2018”.

17. Again I then recorded at paragraph 3 that

“The reason advanced [for the appellant failing to comply with the directions given] was that the appellant had instructed solicitors but had not had a response to an e-mail which he had sent which apparently had not been received and therefore the appellant needed more time in which to provide the information which she had been directed to provide”.

18. As I then pointed out, (at paragraph 4)

“Even if it was the case that the appellant and her husband had not heard back from their solicitors it was incumbent on them to contact the solicitors in good time to find out why they had not heard back. They were fully aware of their obligation to provide the evidence, including their witness statements, by the date set out within the directions which had been given and they had failed to do so. It is simply not acceptable and nor is it in the interests of justice for a party to decide they cannot comply with directions, not tell the court until a couple of days before a hearing that they are not ready to proceed and then just assume the Tribunal will adjourn the proceedings”.

19. I then noted that in the event the hearing had had to be adjourned for lack of court time and that accordingly even though an application for an adjournment would not have succeeded (and I pointed out in terms that “it is likely that the appellant, who had not adduced the evidence she needs, would for this reason have lost her appeal”), it would be necessary to adjourn the hearing, the fortuitous consequence of which so far as this appellant was concerned was that she would be given another opportunity to provide the information which should have been provided earlier in accordance with the earlier directions of this Tribunal.

20. I then stated as follows, in terms, in the presence of both the appellant and her husband:

“I make it plain however that it is extremely unlikely that any further adjournment would be granted and the onus is now on the appellant and her husband if they want her to have any chance of succeeding in her appeal to comply with the further directions which I shall now give, which shall mirror the directions given earlier, save that the time for compliance has been extended”.

21. I also noted as follows:

“The appellant and her husband understand and indicated during the course of the hearing that they understood that it was imperative that the directions are now complied with and what the consequences are likely to be if they are not”.

22. In order to provide every opportunity for the appellant to be able to argue her case in person, or with the assistance of her legal representative, because it was clear that even though she understood English sufficiently to be able to comply with the English speaking requirements under the Rules, she would be more comfortable giving her evidence in Thai, I directed that an interpreter should be provided. An interpreter was indeed ready to assist the appellant during the hearing had she been able to give evidence, but this of course depended on her first having served a witness statement in compliance with the directions.
23. I then made the following directions, which again I set out because this makes it abundantly clear that at all times it was made clear to both the appellant and her husband what it was that they were required to do:
- “(1) This appeal is adjourned by reason of lack of court time for rehearing *before UTJ Craig* on 27 July 2018.
 - (2) The appellant is given leave to adduce further evidence, which should include signed and submitted accounts proving the income of both the appellant and her husband, the sponsor, from 2014-15 onwards, and also evidence as to whether, and if so, why there would be any very serious obstacles preventing the appellant from returning to Thailand in order to make a fresh application for entry clearance from there.
 - (3) It is recorded (again) that the Tribunal expects both the appellant and her husband to give evidence, including within that evidence assertions that the financial information which they will have provided is accurate, and they must also provide witness statements capable of serving as evidence-in-chief.
 - (4) This evidence (including the witness statements) must be served on the respondent and filed with the Tribunal by no later than Friday, 6 July 2018.
 - (5) An interpreter – Thai – should be provided ...”.
24. This document was signed after these directions were received back from the Tribunal typing service. They were signed by me on 25 June 2018 and according to the sponsor they were served on him on 2 July this year which was some four days before he was required to provide the evidence which should have been provided by the end of May in any event.
25. On 5 July 2018 a bundle was sent to the Tribunal under cover of a letter (**not** a witness statement) which was signed by both the sponsor and the appellant in which some financial information was provided. Curiously the first paragraph says that

“At the hearing, the judge informed that he was setting a further hearing on 27 June next [I presume that that should have been 27 July] and that I should supply some documents to the court prior to 6 July. The judge stated that he

would send out a notice of hearing to me at my solicitors but to date we have heard nothing” .

26. I note in passing first that (as he had stated during the course of this hearing) the sponsor had received that document at the very latest by 2 July, that is three days before this letter was sent and secondly that I had not said I would send out a notice of hearing to his solicitors, because within the terms of that note of hearing it is stated that there were no solicitors on the record. The letter then went on to attach certain documents. Included were some unaudited accounts and also a P60 for the appellant which seems to show an income of just under £4,000 which contrasts rather poorly with what apparently she had informed the First-tier Tribunal she had earned in that year which was some £18,000 or so.
27. At the hearing today it became apparent that not only had the appellant not complied with the direction to file witness statements which she had been directed twice needed to be submitted and had failed also to submit the financial information in the terms required, but the bundle had not even been served on the respondent. Again the sponsor claimed that this had been the fault of his solicitors and that it was those solicitors who had drafted the letter which had been sent out in his name. He claimed that he did not understand what was required because he is not a lawyer and therefore just relies on his solicitors, (even though he had on the previous occasion indicated that he had understood the directions which the Tribunal had made). One of the reasons his solicitors had not served any documents on anybody was apparently because although he had paid them a sum of money they had been instructed not to instruct Counsel to attend and therefore did not know whether they were still acting or not.
28. The fact is that yet again the appellant has not complied with directions and has not supplied witness statements as she was required to do in circumstances where the appellant and her husband had been told in terms that absent very good reason indeed it was extremely unlikely that any further adjournment would be granted.
29. I have to have in mind the overriding objective which includes doing justice to all the parties who come before this Tribunal and this appellant has had more than sufficient opportunity to put her case properly if she is able to do so. It is simply not appropriate to grant any further time in this case because the appellant and her husband have known for a very long time indeed what is required of them and no further indulgence properly can be granted to them.
30. The consequence is that the Tribunal has no evidence before it to enable it to conclude that it would not be proportionate for this appellant to be required to return to Thailand. Satisfactory evidence has not been put before the court in an appropriate form supported by witness statements to the effect that the financial requirements under the Rules have been satisfied (such as might make an Article 8 claim arguable) and indeed as I noted earlier such financial evidence as has been put before the Tribunal now casts doubt upon the evidence which the appellant had given before the First-tier Tribunal as to her earnings. Moreover, even without this latter point there

simply is not any proper financial evidence properly put before the Tribunal such as could lead to a conclusion that the financial requirements have been complied with.

31. I note also with regard to the proportionality of requiring the appellant to return to Thailand to make such further application as she might be advised to make or choose to make from that country, that both the appellant and her husband separately have children within Thailand; the appellant has a daughter and her husband separately has a son (the sponsor's son is a British National who can come and go to and from this country as he chooses). Accordingly this is not a case where the appellant would be required to return to a country where she is without friends or family.
32. It follows that as there is no basis upon which this appeal could possibly succeed the appeal must again be dismissed and I so order.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Asjad as containing a material error of law and the following decision is substituted:

This appeal is dismissed.

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read 'Ken Craig', is written over a light blue rectangular stamp.

Upper Tribunal Judge Craig

Dated: 9 September 2018