



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/27094/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 26th June 2018

Decision & Reasons Promulgated
On 09th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS FARHAT IQBAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Holmes (Counsel)
For the Respondent: Mr C Bates (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Morris, promulgated on 4th September 2017, following a hearing at Manchester Piccadilly on 22nd August 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Pakistan, and was born on 15th December 1977. She appealed against the decision dated 29th November 2016 of the Respondent

Secretary of State refusing her application for leave to remain in the UK as the wife of Mr Munawar Hussain, her sponsoring husband who is a British citizen.

The Appellant's Claim

3. The basis of the Appellant's claim is that, although it is accepted by the Respondent Secretary of State that she had been in a genuine and subsisting marriage relationship with her British citizen husband, as she had accidentally ticked the "ten year box", which implied that she had met the requirements of the ten year private life route, but in fact did not do so for reasons set out in paragraph 276ADE(1)(iii), (iv), (v) and (vi) of the Immigration Rules. The Respondent had indicated that there were no exceptional circumstances to the Appellant returning back to Pakistan with her husband, if needs be, but the Appellant pointed out that it was accepted that the sponsoring husband had suffered two heart attacks and needed to be taken care of.

The Judge's Determination

4. The judge decided, having heard the Appellant's husband give evidence in English, and having seen bank statements submitted on behalf of the Appellant and her husband showing deposits and references from Euro Wines with respect to employment, that the Appellant did not meet the English language requirements; that the Appellant had ongoing medical needs; and that the originality of the financial documents was an issue that was unresolved.
5. The judge concluded by stating that a fresh application in this case would enable the Appellant to present a clear picture of the personal situation of herself and the Sponsor and how the requirements of Appendix FM could be satisfied. It was also held that, given a lack of clarity in the oral evidence of the Appellant regarding the employment of her and her husband, which was also acknowledged by her representative" a fresh application would be the right course of action (paragraph 60).
6. The appeal was dismissed.

Grounds of Application

7. The grounds of application state that although the judge had concluded that the Appellant did not meet the English language requirements this had never been in issue. The grounds also stated that the judge had gone on to refer to the Appellant's medical needs which were ongoing when there was no evidence on that point. Furthermore, the judge had also erred in questioning the originality of the financial documents which has not been in issue at the hearing.
8. On 31st January 2018, permission to appeal was granted.

Submissions

9. At the hearing before me on 26th June 2018, Mr Holmes, appearing on behalf of the Appellant, submitted that he would have to accept that at the time of the application the Rules could not be met. Indeed, this was acknowledged before the judge as well when the judge recorded "it is considered by and on behalf of the Appellant that, as at

the date of her application those requirements were not met” (paragraph 36). However, Mr Holmes submitted that the judge ought to have then considered the position outside the Immigration Rules under freestanding human rights jurisprudence. Second, he has submitted that the judge wrongly stated that “no evidence has been presented that the Appellant has met that requirement” (paragraph 41) and referring to the English language requirement. Not only was this not an issue, but Mr Holmes submitted that given that the Appellant had come as a foreign spouse to join Mr Munawar Hussain in this country, she had already satisfied the English language requirements and this was why this was not an issue. The Rules did not require ongoing proof to be provided. Yet, there was proof and this appears in the bundle at page 1. In the same way, the judge erred (at paragraph 49) when stating that as to Section 117B(2) the Appellant had shown “no evidence of having met the English language requirement” and that she had given evidence using an interpreter (paragraph 49). Mr Holmes submitted that if one takes away these errors the Appellant’s application was in compliance with the Rules and she stood to win at the appeal. Finally, it was clear following **PJ (India) [2018] EWCA Civ 1109** that if, having considered the Rules an application does not succeed, it is necessary to then go outside the Immigration Rules and consider the position under ECHR law. The judge had failed to do this.

10. For his part, Mr Bates submitted that the financial requirements were not satisfied. The English language requirement point was therefore irrelevant. What the Rules say is that an applicant must provide “original documents” and in this case the Appellant had not done so. Her employment was challenged by the Presenting Officer (see paragraph 60) and this was why the judge concluded as he did. The fact was that the burden of proof was always upon the Appellant. The judge was entitled not to be satisfied about the authenticity of the documents. If the judge was not satisfied that the Appellant had failed to make out her case then it was not disproportionate to refuse the appeal. In addition to this, Mr Bates also drew my attention to the case of **Rhuppiah [2016] EWCA Civ 803** where the Court of Appeal had stated that to be “financially independent” did not mean financial independence of the state, but had to mean, being financially independent of others, so that one is able to support oneself of one’s own accord, and thereby minimise the risk of attending to the state for support (see paragraphs 64 to 65 of **Rhuppiah**). Finally, as far as medical evidence was concerned, the Presenting Officer had at the hearing conceded (see paragraph 18)(i) that there were no health issues, and what the judge was referring to, was the fact that the Appellant and the husband were having to undergo IVF treatment so that she could conceive with a child.
11. In reply, Mr Holmes submitted that it was not true that the Appellant had failed to provide the “original” documentation. Counsel attending the hearing had the originals. Obviously, however, they could not be submitted directly to the authorities for fear that they would be misplaced. Second, the judge had treated Appendix FM-SE as determinative of the issues before the Tribunal and this was wrong as a matter of law. Third, the reference to **Rhuppiah** was misconceived by Mr Bates because it was not being suggested here that the Appellant should be “financially independent of the state”. What was being suggested was that if the Rules are Article 8 compliant

then the income of both the wife and the husband should have been looked at together and not separately. This had not been done.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
13. First, the judge has raised issues which were not in issue, and this was bound to taint the manner in which the evidence as a whole was taken into account before the Tribunal. It was not an issue, and it is a mistake of fact it would so suggest, that the Appellant's English language abilities were unproven. They were proven when she entered this country as a spouse of Mr Munawar Hussain.
14. Second, it was not an issue, and was indeed so conceded at paragraph 18(i) by the Presenting Officer, that the Appellant had "continuing medical needs" in a way that has an impact on the way in which Section 117B(iii) falls to be applied.
15. Third, the judge raised the issue that there being a failure by the Appellant to provide "original" documentation, although this was not a point taken by the Respondent at the hearing, and yet the original documents were available at the hearing. The practice before the Tribunal is for the parties to provide the judge with photocopies of documents in the case and the originals are available at the hearing if required. No request was made by the Tribunal to see the original documentation.
16. Finally, the judge failed to assess and weigh in the balance the reliability of the income from both the Appellant and her husband (see **MM (Lebanon) [2017] UKSC 10** at paragraph 90). The court here made it clear that "authorisation of the same restrictive approach outside the Rules is a different matter, and in our view it is much more difficult to justify under the HRA". This means that even if the Appellant failed on the basis of a restrictive approach under Appendix FM-SE, the same could not necessarily be said if the position had been considered outside the Rules.
17. The Supreme Court in **MM (Lebanon)** had gone on to say that taking the same restrictive approach would be

"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 judgement 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".

Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge

other than Judge Morris, pursuant to Practice Statement 7.2(a) for the reasons that I have given above.

No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Juss

Dated
3rd August 2018