Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04501/2019

THE IMMIGRATION ACTS

Heard at: Field House
On: 27 September 2019

Decision and Reasons Promulgated
On 10 October 2019

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AROOSA [I]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms R Bassi, Senior Home Office Presenting Officer
For the Respondent: In Person

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mrs [I]'s appeal against the respondent's decision to refuse her human rights claim.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mrs [I] as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a national of Pakistan, born on 20 May 1988. She entered the UK on 12 July 2016 with entry clearance as a spouse valid until 22 March 2019. On 2 February 2019 she applied for leave to remain under Appendix FM on the basis of her family life with her husband, a British citizen.

4. The appellant's application was refused on 21 February 2019. Her relationship with her husband was accepted but it was considered that she failed to meet the eligibility financial requirements in paragraphs E-LTRP.3.1 to 3.4 because she had failed to demonstrate that she or her husband had an annual income of £18,600, either individually or combined. Although the appellant stated that her husband worked as an FC Associate at Amazon UK Services and earned £21,840 per annum, the gross income calculated from the 26 payslips provided for a six month period prior to the date of the application gave a total of £8,672.52 which, when doubled, equalled an annual income of £17,345.04. The respondent went on to consider paragraph EX.1 of Appendix FM but considered there to be no evidence that there were insurmountable obstacles to family life continuing in Pakistan. The requirements of Appendix FM were therefore not met. The respondent considered further that the appellant could not meet the requirements in paragraph 276ADE(1) on the basis of her private life and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

5. The appellant appealed that decision. In her grounds of appeal she stated that doubling the amount of the payslips did not give an accurate figure for her husband's income as he had earned less than usual in those six months owing to him missing work to accompany her to medical appointments, but his annual salary was over £18,600. She stated that her husband had a second job as a part-time self-employed taxi driver, details of which had not previously been included in the application, as they believed that his annual income from his employment with Amazon UK was sufficient. The appellant submitted that the respondent's decision was in breach of her Article 8 rights and she referred to receiving fertility treatment in the UK which her husband was paying for privately.

6. With her grounds of appeal the appellant produced a Statement of Earnings from Amazon UK Services Ltd dated 27 February 2019 showing earnings for her husband for the tax year 2018/19 up to that date of £17,985.77; a letter from Amazon UK confirming her husband's employment from 2 December 2012, paid on a weekly basis, at an annual salary of £21,840; a P60 for 2017/18 for employment at Amazon Services Ltd showing an annual income of £20,118,86; evidence of fertility treatment; and a letter from her husband's accountant together with his accounts for his self-employment.

7. The appellant's appeal was heard in the First-tier Tribunal on 29 April 2019 by First-tier Tribunal Judge Brewer. The evidence before the judge consisted of the respondent's appeal bundle which included a letter from Amazon UK Services Ltd dated 23 January 2019 confirming the appellant's husband's annual salary of £21,840, the appellant's husband's P60 for the tax year 2017-18 showing a gross annual income of £20,118.86 from Amazon UK Services Ltd, the appellant's husband's payslips from 13 July 2018 to 1 February 2019 and the appellant's husband's bank statements showing transactions from 3 September 2018 to 5 February 2019; the appellant's grounds of appeal; and the appellant's

appeal bundle including a downloaded HMRC list of Taxable Income together with the appellant's husband's self-assessment tax returns for April 2018/19 and a letter from his accountant together with his accounts for his self-employment.

8. Judge Brewer accepted that the documentation provided was not the specified evidence required by the Immigration Rules but he considered that currently, at the date of the hearing, he had a complete picture of the last two years' earnings showing that the appellant's husband earned £20,118.86 to 5 April 2018 and £19,686.43 to 5 April 2019. The judge considered that, on the face of it, the application met the financial eligibility requirements of the rules. He concluded that, for the purpose of Article 8, there was no legitimate aim since the appellant met the immigration rules and the decision was therefore disproportionate. He accordingly allowed the appeal.

9. The respondent sought permission to appeal to the Upper Tribunal on the grounds that the judge had made a material misdirection in law and had erred in law by allowing the appeal despite acknowledging that the HMRC print-out was not a specified document as required by the immigration rules. Permission was granted in the First-tier Tribunal.

10. The matter then came before me. The appellant and her husband appeared before me, accompanied by their neighbour and friend Mr Bracken who acted as a McKenzie Friend. I had before me three further documents received by the Upper Tribunal on 11 September and submitted under Rule 15(2A) consisting of the appellant's husband's P60 for 2018/19 showing a gross annual income of £19,686.43, an HMRC tax calculation for 2018/19 and a letter from HMRC dated 17 April 2019 enclosing the tax calculation.

11. Ms Bassi submitted that the judge had erred by finding that the requirements of the rules had been met, despite accepting that the documents submitted were not specified documents. The appellant's husband's gross income had been calculated in accordance with paragraph 13(a) of Appendix FM-SE and on the basis of the evidence produced, fell below the income threshold. The judge erred by relying upon the HMRC print-out and that infected all his findings. She relied on the case of Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 in submitting that the judge had given no reason for accepting the downloaded HMRC Taxable Income at face value and on the case of TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 in submitting that the judge failed to follow the structured approach to consideration of Article 8 and did not consider the question of "insurmountable obstacles".

12. Mr Bracken advised me that the further HMRC documents were received the day after the hearing in the First-tier Tribunal and Judge Brewer was aware that they had been requested from the HMRC and accepted the downloaded list of Taxable Income instead.

Consideration and Findings

13. Judge Brewer allowed the appellant's appeal on Article 8 grounds on the basis that there could be no legitimate aim or public interest in requiring a person to leave to leave the UK who was able to meet the requirements of the immigration rules. However the appellant was plainly not able to meet those requirements on the evidence submitted.

14. As Ms Bassi submitted, the respondent had calculated the appellant's gross annual income on the basis of the payslips produced for the six months prior to the application in line with paragraph 13 of Appendix FM-SE and on the basis of that calculation, and pursuant to paragraph A1(2)(a) of Appendix FM-SE, found that the income threshold of £18,600 had not been met. That was accepted by the judge. However, Judge Brewer went on to find that the financial eligibility requirements of the rules had been met, on the face of it, on the basis of the HMRC print-out of Taxable Income showing a total of £19,686.43 for the tax year 6 April 2018 to 5 April 2019, despite acknowledging at [16] that that was not specified evidence as required by the immigration rules. In so doing he appears to have concluded that an apparent ability, on the face of it, to meet the financial eligibility requirements was sufficient to establish that the immigration rules had been met, despite the fact that the requirements of Appendix FM-SE had not been met. However paragraph E-LTRP.3.1 of Appendix FM, setting out the level of specified gross annual income, specifically requires that that income must be evidenced by specified evidence. Accordingly the judge plainly erred in law in that respect.

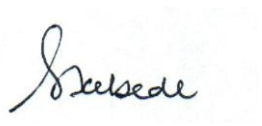
15. As Ms Bassi submitted, that error then infected the rest of the judge's Article 8 assessment, as it was on the basis of his finding, at [28], that the appellant was able to meet the requirements of the immigration rules, that he then concluded that the respondent had failed to show the legitimate aim being pursued and that the decision was disproportionate. The judge accordingly erred by summarily allowing the appeal on the basis that he did. He failed to go on to consider paragraph EX.1 of Appendix FM and paragraph 276ADE(1) of the immigration rules and failed to go on to conduct a full and proper proportionality assessment outside the immigration rules. Accordingly the judge's decision on the appellant's Article 8 claim is simply unsustainable and has to be set aside.

16. In view of the fact that there has been no effective Article 8 assessment it seems to me that the appropriate course would be for the matter to be remitted to the First-tier Tribunal. The appellant will then have the opportunity to ensure that all the required specified evidence is properly collated and presented to the Tribunal so that a full and proper assessment may be made of her claim, both within and outside the immigration rules. The appellant may find it beneficial to take legal advice in preparation for that appeal.

DECISION

17. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside.

18. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Brewer.

Signed: 

Upper Tribunal Judge Kebede Dated: 3 October 2019