



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/06540/2016
HU/06541/2016
HU/06542/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24th January 2019

Decision & Reasons Promulgated
On 12th February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SEBINA [S]

[S S]

[M R]

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer

For the Respondents: Mr I Khan, Counsel instructed by Raiyad Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Sweet who allowed the appellant's appeal and that of her two children on human rights grounds following their refusal to be granted entry clearance for leave to remain in the UK

under the Immigration Rules, a decision made on 22nd February 2016. The claimants were refused on financial grounds.

2. The judge wrote as follows:

“At the time of the application her husband was employed by Total Food but his earnings were limited to £9,315. This was on the basis that he was working part-time, but I am now satisfied that his annual income is £21,133 for the tax year 2016/2017 and these revised full-time earnings were indeed notified to the respondent on 25th August 2016, albeit before the end of that tax year. In addition, the appellant’s husband has undertaken part-time earnings with Wormley Takeaway and his earnings for the year 2016/2017 were £8,985.

I accept that these enhanced earnings postdate the decision of the respondent of 22nd February 2016, but the occupation with Total Food is the same as at the time of the application, but is now full-time and therefore at enhanced earnings. It seems to me therefore that the appellant can meet the requirements of Appendix FM of the Immigration Rules in respect of the required earnings, being £18,600 for the first appellant, £3,800 for the first child, and £2,400 for the second child. The required earnings were £24,800 and his earnings are now approximately £30,000. For these reasons, I would allow the appeals.

In the alternative, if I had not allowed the appeals under Appendix FM, taking into account that the appellant’s husband is a British citizen and their third child, [I], was born in the UK on 23rd May 2016 and would therefore be granted British citizenship, I would have allowed the appeals outside the Immigration Rules because in my view it would be disproportionate for the appellants to make a fresh application, taking into account the time and expense of doing so”.

3. On that basis he allowed the appeal.

4. The Secretary of State sought permission to appeal on the following grounds:

“At [17] of the determination Judge of the First-tier Tribunal finds that the financial requirements of Appendix FM and FMSE are satisfied on the basis of the sponsor’s current earnings.

However, the Rules require that the evidence relied on must be evidence from the six months prior to the date of application.

It is submitted that the judge has misdirected himself on that basis.

It is accepted that the third child, born in 2016 is likely a British citizen and that the appellant will be successful outside the Rules on that basis”.

5. Permission to appeal was granted by Judge Hollingworth on 24th January 2018.

Findings and conclusions

6. At the hearing Mr Khan accepted that at the date of the application the sponsor did not earn sufficient money to reach the required financial threshold. He made the rather novel argument that since he had in fact provided pay slips covering the period of six months prior to the date of application, even though those pay slips

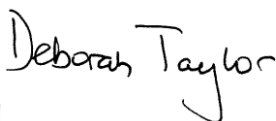
would have shown that he could not meet the threshold, that was sufficient to meet the requirements of Appendix FM/SE.

7. Mr Walker asked me to find that the judge had erred in law in respect of the Immigration Rules but accepted that the Secretary of State's position was that the appellant would succeed outside the Immigration Rules on Article 8 grounds and acknowledged that there was no challenge within the grounds to his finding in that respect.
8. The judge erred in law in respect of the Immigration Rules. The determination is somewhat unclear but it is accepted by the sponsor that he could not meet the required financial threshold at the relevant date and did not provide pay slips showing that he earned sufficient money for the period of six months prior to the date of application. However, since it is not argued by the Secretary of State that there is no error of law in the judge allowing the appeal outside the Immigration Rules on the basis that this is a British citizen child whose father now can meet the requirements of the Immigration Rules, the decision on Article 8 grounds will stand.

Notice of Decision

The original judge erred in law. His decision is set aside. It is re-made as follows. The appellant's appeal is dismissed with respect to the Immigration Rules. The appellant's appeal is allowed on Article 8 grounds. Given the very lengthy delays in this case being resolved, a period of over three years since they made the application, it is to be hoped that entry clearance can be issued as soon as practicable.

No anonymity direction is made.



Signed

Date 8 February 2019

Deputy Upper Tribunal Judge Taylor