



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08706/2018

THE IMMIGRATION ACTS

Heard at Field House
On 11th January 2019

Decision & Reasons Promulgated
On 24th January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MRS. ALIA SARFARAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. R. Ahmed, Instructed by JJ Law Chambers

For the Respondent: Mr. L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal (“FtT”) Judge Moore promulgated on 29th October 2018. The FtT Judge dismissed the appellant’s appeal against the respondent’s decision of 27th March 2018 refusing her application for leave to remain in the UK under Appendix FM of the Immigration Rules on the basis of her family life with her partner, Mr Sarfaraz Khan.

2. Broadly stated, the respondent gave two reasons for refusing the application for leave to remain. First, the appellant did not meet the eligibility financial requirement set out in paragraphs E-LTRP.3.11. to 3.4. of Appendix FM of the immigration rules. The appellant was required to demonstrate that she could meet the financial requirement of £18,600.00. Although the appellant claimed that the requirement was met on the basis that her sponsor has an annual income in excess of £18,600.00, no evidence had been provided to support that claim. Second, the appellant did not meet the eligibility English language requirement set out in paragraphs E-LTRP.4.1 to 4.2 of Appendix FM of the rules.
3. The appeal was dismissed by FfT Judge Moore. In the grounds of appeal, the appellant claims that the Judge erred by considering matters as at the date of decision, and not the date of hearing. Furthermore, the Judge erred in his assessment of the evidence before the Tribunal as to the income of the appellant's sponsor. The appellant claims that there was, in the various bundles relied upon by the appellant, evidence of earnings that the Judge simply had no regard to, in reaching his decision. Permission to appeal was granted by FfT Judge Chohan on 24th November 2018. The matter comes before me to consider whether or not the decision of FfT Judge Moore involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
4. At paragraph [5] of his decision, the FfT Judge sets out the evidence that was before him. It is unfortunate that the appellant's representatives felt it necessary to put before the FfT three separate bundles. The first comprising of 272 pages. The second comprising of 136 pages, and the third, a 'supplementary bundle', bizarrely comprising of pages 1 to 19 and pages 46 to 80. It is right, as Mr Ahmed accepts before me, that the evidence was put before the FfT in an incoherent fashion and the evidence was "in a mess".
5. At paragraph [7] of his decision, the Judge states that "*The burden of proof is on the appellant to show that as at the date, the Respondent's immigration decision was, on the balance of probabilities, against the weight of the evidence.*". Although it seems that the

Judge might have erroneously proceeded upon the premise that he was considering matters as they were at the date of the respondent's decision, a careful reading of the decision establishes that the Judge properly considered matters as they were at the time of the appeal. The Judge accepted that the appellant had by the time of the hearing, provided an English Language certificate and noted, at [8], that "*..as of today that requirement had been met.*". On its own, I am not persuaded that there was a material error of law in the decision of the FfT Judge by reference to what the Judge stated at paragraph [7].

6. The appellant accepts that Appendix FM requires an applicant to provide specified evidence of a gross annual income of at least £18,600. The appellant claims that the FfT Judge erred in his analysis of whether the minimum income requirement could be met because the FfT Judge failed to have regard to all the evidence before him. At the hearing before me, Mr Ahmed submitted that there was a wealth of evidence before the Judge in the form of payslips and bank statements confirming the earnings of the appellant's sponsor for the twelve month period between September 2017 and September 2018, that the FfT Judge failed to have regard to. That evidence, it was submitted, established that the appellant's sponsor had in the 12 months leading to the hearing of the appeal, earned in excess of the minimum income of £18,600 that the appellant was required to demonstrate. He submitted that if the Judge had considered that evidence, the FfT Judge would have been satisfied that the appellant met the minimum income requirement, and the appeal would have been allowed.
7. Mr Tarlow submitted that he was prepared to accept that the FfT Judge does not refer to all of the payslips and bank statements in the decision, but he would need the opportunity to consider the material, before conceding whether any failure to consider or refer to that evidence, was material to the outcome of the appeal.
8. Unfortunately, neither Mr Ahmed nor Mr Tarlow had a complete copy of the various bundles of evidence that had been filed with the FfT, on behalf of the appellant prior to the hearing of the appeal before the FfT. That is remarkable,

particularly when the appellant has been represented by the same solicitors throughout, and an employee of the firm had attended the hearing before me, to assist Mr Ahmed.

9. I therefore adjourned the hearing for a short period, and provided Mr Rashid and Mr Tarlow with the bundles in the Tribunal file. When the parties returned, Mr Tarlow accepted, having had the opportunity to consider the wage slips and bank statements that were in the evidence before the *FtT* Judge, that the failure to refer to that evidence, did indeed amount to a material error of law. He accepted that the payslips before the Tribunal, the genuineness of which was not in issue, established that in the 12 months before the hearing of the appeal, the appellant's sponsor had indeed received an income in excess of the £18,600 requirement and the income shown on the payslips, was corroborated by payments into the sponsor's bank account. He conceded that the appellant was therefore able to establish that the financial requirement under the rules was in fact met by the appellant, and the Judge erred in law in his finding to the contrary.
10. Mr Tarlow conceded that the decision of the *FtT* Judge is infected by a material error of law, and must be set aside.

Re-making the decision

11. The only ground of appeal available to the appellant is that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. As to the Article 8 claim, the burden of proof is upon the appellant to show, on the balance of probabilities, that she has established a family life with her husband, and that her removal from the UK as a result of the respondent's decision, would interfere with that right. It is then for the respondent to justify any interference caused. The respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances. If Article 8 is engaged, the Tribunal may need to look at the extent to which an appellant is said to have failed

to meet the requirements of the rules, because that may inform the proportionality balancing exercise that must follow.

12. As to the human rights claim on Article 8 grounds, I adopt the approach set out by Lord Bingham in **Razgar [2014] UKHL 27**. I must first determine whether Article 8 of the ECHR is engaged at all. If Article 8 is engaged, I should go on to consider the remaining four stages identified in **Razgar**.
13. The respondent did not claim that the appellant is not married to, or in a genuine and subsisting relationship with her partner, who is settled in the UK. It is uncontroversial that the appellant enjoys a family life with her husband. I also find that the decision to refuse the appellant leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the economic well-being of the country.
14. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. In **Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC)**, the Upper Tribunal held that the claimant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.
15. The respondent was not satisfied that the appellant met the minimum income requirements set out in Appendix FM. It is now accepted by Mr Tarlow that the evidence that was before the FtT Judge and before me, establishes that the appellant's sponsor has a gross salary exceeding the required £18,600 per annum.
16. I remind myself that section 117A of the Nationality, Immigration and Asylum Act 2002 requires that in considering the public interest question, I must (in particular) have regard to the considerations listed in section 117B. I acknowledge that the

maintenance of effective immigration controls is in the public interest. On the evidence before me, and in light of the unchallenged findings made by the FtT Judge, I am satisfied that the appellant is able to meet the substantive part of the rules. There is nothing in my judgment that weighs against the appellant in a proportionality assessment.

17. Having considered the evidence before me and taking all the relevant factors into account including those in S117B of the 2002 Act, I am satisfied, on the facts here as now accepted by the respondent, that the decision to refuse the appellant leave to remain in the UK as a partner, is disproportionate to the legitimate aim of immigration control. Accordingly, I am satisfied that the decision to refuse the appellant leave to remain would be in breach of Article 8.
18. It follows that I set aside the decision of the FtT Judge, and the appeal is allowed on Article 8 grounds.

Notice of Decision

19. The decision of the FtT Judge involved the making of an error of law such that it is set aside.
20. I re-make the decision and allow the appeal on Article 8 grounds.
21. No anonymity direction is made.

Signed

Date

11th January 2019

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

Although I have allowed the appeal on Article 8 grounds, I decline to make a fee award in favour of the appellant. The appeal has been allowed based on the evidence before the FtT Judge, and now before me, that was not before the respondent at the time of the decision appealed.

Signed

Date

11th January 2019

Deputy Upper Tribunal Judge Mandalia