



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/09500/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 30 July 2019**

**Decision & Reasons Promulgated
On 7 August 2019**

Before

**UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE A M BLACK**

Between

**MRS YASMIN AKHTER
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mustafa, Counsel
For the Respondent: Mr Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh. She applied for entry clearance as the spouse of a British citizen. Her application was refused by the respondent on 2 April 2018. Her appeal was dismissed by First-tier Tribunal Judge Geraint Jones QC (“the FTTJ”) in a decision promulgated on 15 January 2019.
2. No anonymity direction was made in the First-tier Tribunal and none is required.

Background

3. The appellant's application was refused by the respondent on one sole ground: she had not provided all the required documentary evidence, as specified in Appendix FM-SE of the Immigration Rules, to demonstrate her spouse earned in excess of £18,600 per annum. The application was refused by reference to paragraph E-ECP.3.1 of Appendix FM of the Immigration Rules.
4. In her application, and at the hearing before the FTTJ, the appellant conceded that she had not provided all the specified documentary evidence required by Appendix FM-SE. However, she asserted that a reasonable explanation had been provided for the absence of the three documents in question and that alternative documentary evidence had been provided in their stead.
5. The FTTJ dismissed the appeal on the grounds that the appellant had not provided the specified evidence to demonstrate the sponsor earned in excess of the financial earnings threshold. The appellant was granted permission to appeal to this Tribunal. Hence the matter came before us to decide whether the decision of the FTTJ contains a material error of law.

Submissions

6. Mr Mustafa, for the appellant, reiterated that three particular documents had been missing from the appellant's application and that these related to the sponsor's earnings outside the UK; these missing documents (and the reasons for their absence) had been explained in the covering letter sent to the respondent with the appellant's application for entry clearance. Mr Mustafa referred to the respondent's Immigration Directorate Instruction which contained guidance on the application of Appendix FM-SE, specifically paragraph 3.4.3 which related to evidential flexibility: "There is also discretion for decision-makers where evidence cannot be supplied because it is not issued in a particular country or has been permanently lost." He observed that this guidance had been cited in the grounds of appeal to the First-tier Tribunal yet the FTTJ had failed to address the claimed failure of the respondent to exercise his discretion.
7. Mr Bramble, for the respondent, had not been provided with appellant's bundle which had been before the FTTJ. That bundle included a copy of the covering letter, dated 6 March 2018, which accompanied the appellant's application form and set out the reasons for the absence of the three documents in support of the application. Having considered the appellant's bundle, including the covering letter, Mr Bramble accepted the respondent had had a discretion which could have been taken into account. He accepted also that the appellant had provided evidence of the sponsor's employment at the Doha Academy and that his earnings from that source equated to £2,172.94. He also accepted the sponsor had adduced evidence (albeit not in the format specified in Appendix FM-SE) of earnings from his employment by Dasman Bilingual School equivalent to £17,102. He accepted that the evidence demonstrated the sponsor had earned the equivalent of £19,274 and that this exceeded the financial threshold of £18,600. He conceded that, taking into account the availability of a discretion under paragraph D(e) of Appendix FM-SE, the appellant had demonstrated, at the date of decision, she met the maintenance requirements in the Immigration Rules. He observed that this was the sole reason for refusal and that the application should have been allowed.

Discussion

8. We are grateful to Mr Bramble for the clarity of his submissions. We accept them and find that the decision of the FTTJ contained a material error of law in that he failed to take into account, when considering the documentary evidence before him, the existence of the respondent's discretionary power. We set aside the decision of the FTTJ in its entirety.
9. We remake the FTTJ's decision and find that the appellant demonstrated, at the date of decision, that she met the maintenance criteria in Appendix FM. This was the sole reason for the refusal of her application.
10. This is a human rights appeal; given that the appellant met the criteria in the Rules for the grant of leave to remain, and there being no other issues of concern to the respondent, it is not arguable that the public interest in the maintenance of effective immigration control outweighs the degree of interference in this couple's and their child's protected rights to a family life together (**OA & Ors (human rights; "new matter"; s120) Nigeria [2019] UKUT 65**).

Decision

11. The making of the decision of the First-tier Tribunal did involve a material error of law, as set out above.
12. We set aside that decision.
13. We remake the decision in the appeal by allowing it on human rights grounds.

Signed A M Black
Deputy Upper Tribunal Judge A M Black

Date 31 July 2019

Fee Award

The FTTJ did not make a fee award. As the appeal has been allowed, we have considered making such an award and make a full fee award because the respondent failed to consider exercising his discretion under the evidential flexibility provisions in the respondent's guidance. Had he done so, or reviewed his decision appropriately, this matter would not have proceeded to appeal.

Signed A M Black
Deputy Upper Tribunal Judge A M Black

Date 31 July 2019