Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24725/2018

THE IMMIGRATION ACTS

Heard at Field House
On 24th February 2020

Decision & Reasons Promulgated
On 24th March 2020

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

ZOHRA GHAFARY
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Vidal of Counsel, instructed by Haris Ali Solicitors
For the Respondent: Ms R Bassi, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge M A Khan promulgated on 4 September 2019, in which the Appellant's appeal against the decision to refuse her application for entry clearance to the United Kingdom as a spouse dated 15 November 2018 was dismissed.

2. The Appellant is a US citizen, who applied for entry clearance to join her husband (the "Sponsor"), a British Citizen in the United Kingdom. She is currently resident with family in the United States of America.

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3. The Respondent refused the application on the basis that although the relationship and language requirements for entry clearance set out in Appendix FM of the Immigration Rules were met, the financial requirements were not. Specifically, specified evidence required to meet E-ECP.3.1 to 3.4 of Appendix FM was not submitted with the application for entry clearance. The Sponsor was employed in his father's company such that paragraph 9(a) of Appendix FM-SE required that further documents be submitted in addition to wage slips and bank statements. In the absence of meeting the requirements of the Immigration Rules, the Respondent considered whether there were any exceptional circumstances to warrant a grant of entry clearance, but found that there were none. An Entry Clearance Manager reviewed and maintained the decision on 15 February 2019, noting that the specified evidence had still not been provided.

4. Judge Khan dismissed the appeal in a decision promulgated on 4 September 2019 on human rights grounds. The Judge noted that the required specified evidence was still not available, although there were two reasons why unforeseen circumstances had meant that it was not possible for either the Appellant or Sponsor to obtain these documents, first, that the Sponsor's father had died suddenly; and secondly, that the company accountant had been remanded in custody on assault charges. In any event, there was no dispute that the Immigration Rules were not met. In terms of Article 8 of the European Convention on Human Rights, it was found that there were not any unjustifiably harsh consequences on either of the Appellant and Sponsor, whose relationship could continue as it had done to date through visits. The Appellant had family in the United States of America, was only at that time in the early stages of pregnancy and could make a fresh application for entry clearance almost immediately.

<u>The appeal</u>

5. The Appellant appeals on four grounds, all linked to an overall claimed error in the First-tier Tribunal's approach to the assessment under Article 8 of the European Convention on Human Rights. First, that there was a failure to take into account the lengthy separation between the Appellant and the Sponsor and the adverse impact of that on them. Secondly, that there was no challenge to the Sponsor's earnings as evidenced by his payslips and corresponding bank statements, which shows that the minimum financial requirements were in fact met. Thirdly, the Judge found that the Appellant had immediate family in the United States of America, however this was only extended family, her immediate family is the Sponsor in the United Kingdom. Finally, that the period of continued separation between the Appellant and the Sponsor was unknown as there was no evidence as to waiting times on current entry clearance applications and there were difficult circumstances meaning that the specified evidence could not necessarily be obtained immediately.

6. At the oral hearing, Ms Vidal confirmed that there was no dispute that the required specified evidence was not available due to circumstances beyond the Appellant's control, however, on the evidence that was available, the substantive requirements of the Immigration Rules were met (given that the Sponsor's payslips, P60 and bank

statements were not challenged by the Respondent) and in all the circumstances, the appeal should have been allowed on human rights grounds.

7. In relation to the specified documents and the difficulty in obtaining them, I noted that there was a significant period between the refusal of entry clearance in November 2018 and the appeal being heard in August 2019 but an apparent lack of detail as to difficulties in obtaining the required specified evidence for the duration of this period. Ms Vidal confirmed that the Sponsor's father died in May 2018 in Afghanistan, which led to practical difficulties dealing with the death. It was also submitted that prior to his death, the Sponsor's father had in fact resigned from the company. There is nothing to suggest that any of this evidence was before the First-tier Tribunal, nor was there any evidence about the accountant, such as whether he was a sole practitioner or the dates between which he had been remanded in custody.

8. Finally, it was submitted that the First-tier Tribunal had failed to take into account the evidence from the Appellant and Sponsor of the impact of separation and difficulties in continuing their relationship in the absence of entry clearance. This included reference to the Appellant's pregnancy, the cost and difficulty in maintaining a relationship through visits only and cultural problems caused by the lengthy separation including with wider family.

9. On behalf of the Respondent, Ms Bassi emphasised that it had been accepted at the hearing before the First-tier Tribunal that the Appellant could not meet the requirements of the Immigration Rules for a grant of entry clearance and there had been a significant period of time within which the required specified evidence could have been provided, or a change of circumstances, namely the Sponsor's death, could have been relied upon.

10. In relation to the assessment under Article 8 of the European Convention on Human Rights, Ms Bassi submitted that the reasoning of the First-tier Tribunal was sufficient and in accordance with the decision of the Supreme Court in Agyarko v Secretary of State for the Home Department [2017] UKSC 11. It was further submitted that is not a case in which entry clearance was certain to be granted, given that required specified evidence had still not, to date, been submitted by the Appellant. The focus had to be on whether there were unjustifiably harsh consequences resulting from the refusal of entry clearance and all relevant matters were considered by the First-tier Tribunal and the conclusion open to it on the evidence, that there were none and that there would be no breach of Article 8 of the European Convention on Human Rights. This is a case in which it was submitted to be clearly open to the Appellant to make a fresh application for entry clearance with the required documents.

Findings and reasons

11. The first ground of appeal is that the First-tier Tribunal failed to take into account the lengthy separation between the Appellant and the Sponsor and the adverse impact on them of this within the proportionality exercise for Article 8. The First-tier Tribunal decision refers to the Judge having taken into account all of the written and

oral evidence and he summarises the five key points relied upon by the Appellant for the purposes of the balancing exercise for Article 8. These include the disruption to family life and ongoing cost and time consumption for the Appellant and Sponsor to continue their relationship through visits. The evidence before the First-tier Tribunal as to the impact on the Appellant and Sponsor for a further period of separation was relatively thin, but included evidence of a number of visits to each other to maintain the relationship and anticipation that further separation would not be lengthy as a new application for entry clearance could be made immediately.

12. The First-tier Tribunal has taken into account the impact of continued separation on the Appellant and Sponsor and the level of detail in the decision is commensurate with the lack of detailed evidence on this point before the First-tier Tribunal. This links to the final ground of appeal that there was no evidence before the First-tier Tribunal as to waiting times on current entry clearance applications nor consideration that specified evidence could not necessarily be obtained immediately. As to waiting times, this is a matter upon which the Appellant could have given evidence and in any event, there is no reason to suggest that these would be significantly different to when the application was made previously on 15 August 2018 which resulted in a decision on 15 November 2018, some three months. As above, there was a lack of any detailed evidence about the specified documents or why they were still not available over a year after the initial application was made and over 9 months since the refusal of entry clearance. There was no evidence at all that the required documents could not now be obtained, nor was there any consideration of the self-evident point that paragraph 9 of Appendix FM-SE may no longer be applicable in any event because of the Sponsor's father's death (although it may apply for a different reason), it would no longer apply for the same reason as when the application was made as the Sponsor is no longer an employee of his father's business.

13. For these reasons I find no error of law on the first or last grounds of appeal. The First-tier Tribunal properly considered and attached appropriate weight to the evidence before it on the duration and impact of separation and the likely availability of a further application for entry clearance. The evidence before the First-tier Tribunal did not arguably demonstrate that there were unjustifiably harsh consequences of a continued and likely short continuing separation.

14. I return to the second ground of appeal. In the Appellant's application for entry clearance, she relied on the Sponsor's earnings in the United Kingdom to meet the financial requirement in E-ECP.3.1 to 3.4 of Appendix FM, evidenced by payslips and corresponding bank statements, and P60. However, because the Sponsor was, at the time of the application, employed by his father, paragraph 9 of Appendix FM-SE applied to the application such that additional specified evidence was required. Paragraph 9 provides, so far as relevant, as follows:

> '*9. In respect of income from employment and/or shares in a limited company based in the UK of a type specified in paragraph 9(a), the requirements of paragraph 9(b)-(e) shall apply in place of the requirements of paragraphs 2 and 10(b).*

(a) *The specified type of limited company is one in which:*

(i) *the person is either a director or employee of the company, or both, or of another company within the same group; and*

(ii) *shares are held (directly or indirectly) by the person, their partner or the following family members of the person or their partner: parent …; and*

(iii) *any remaining shares are held (directly or indirectly) by fewer than five other persons.*

(b) *All of the following must be provided:*

(i) *Company Tax Return CT600 (a copy or print-out) for the last full financial year and evidence this has been filed with HMRC, such as electronic or written acknowledgment from HMRC.*

(ii) *Evidence of registration with the Registrar of Companies at Companies House.*

(iii) *If the company is required to produce annual audited accounts, such accounts for the last full financial year.*

(iv) *If the company is not required to produce annual audited accounts, unaudited accounts for the last full financial year and an accountant's certificate of confirmation, from an accountant who is a member of a UK Recognized Supervisory Body (as defined in the Companies Act 2006) or who is a member of the Institute of Financial Accountants.*

(v) *Corporate/business bank statements covering the same 12-month period as the Company Tax Return CT600.*

(vi) *A current Appointment Report from Companies House.*

(vii) *One of the following documents must also be provided:*

(1) *A certificate of VAT registration and the VAT return for the last full financial year (a copy or print-out) confirming the VAT registration number, if turnover is in excess of £79,000 or was in excess of the threshold which applied during the last full financial year.*

(2) *Proof of ownership or lease of business premises.*

(3) *Proof of registration with HMRC as an employer for the purposes of PAYE and National Insurance, proof of PAYE reference number and Accounts Office reference number. This evidence may be in the form of a certified copy of the documentation issued by HMRC.'*

15. As can readily be seen from the above, there is a fairly lengthy list of additional specified evidence required for an application for entry clearance in the Appellant's circumstances. This was not a case in which a single document or piece of information was missing and for that reason alone, the rules on evidential flexibility could not have applied to assist the Appellant.

16. The submissions on behalf of the Appellant at the First-tier Tribunal, as recorded in paragraph 20 of the decision, included that the specified evidence was not provided

for reasons beyond the Appellant or Sponsor's control and that this was in essence a near miss case because if the Sponsor had been employed other than in his father's company, the documents that had been submitted would have been sufficient to show that the income requirement was met. There is nothing to suggest that any more detailed argument was made as to the importance, relatively or otherwise of specified evidence and no reliance placed on the Supreme Court's decision in MM (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10 at paragraph 76 in particular. Similarly, despite this being expressly referred to by First-tier Tribunal Judge Povey in the grant of permission, Counsel for the Appellant made no specific submissions on this point before me either, again only broadly submitting that the financial requirements for entry clearance had been met, despite conceding before the First-tier Tribunal that the requirements of the Immigration Rules had not been met.

17. Paragraph 76 of MM (Lebanon) held as follows:

> *"76. As Lord Reed explains (Agyarko, para 47), this approach is consistent with the margin of appreciation permitted by the Strasbourg court on an "intensely political" issue, such as immigration control. However, this important principle should not be taken too far. Not everything in the rules need be treated as high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight. The tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases. The former naturally include issues such as the seriousness of levels of offending sufficient to require deportation in the public interest (Hesham Ali, para 46). Similar considerations would apply to rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise."*

18. Although in an appeal such as the present one, the last part of paragraph 76 could arguably have some potential application, as to whether the requirement for specified evidence beyond payslips, corresponding bank statements and a P60, is a matter of practicality rather than principle such that a Tribunal may more readily draw on its own experience and expertise, it is not a point that was relied upon before either the First-tier Tribunal, nor in the grounds of appeal or oral submissions before the Upper Tribunal. I do not consider that this is a Robinson obvious point that the First-tier Tribunal should have considered of its own motion, nor that it was an error of law not to do so.

19. This is particularly so in the circumstances where there were significant gaps in the evidence of the Appellant and Sponsor to explain why, even despite the two unforeseen circumstances relied upon (about which there was little detail at all as to

relevant dates and relevance to the unavailability of any of the specified documents), the specified documents in paragraph 9 of Appendix FM-SE were not originally submitted with the application, nor in the intervening 9 months between the date of refusal and the hearing before the First-tier Tribunal. In these circumstances, even if the First-tier Tribunal Judge had considered the issue in paragraph 76 of MM (Lebanon), there were still a number of points adverse to the Appellant, including the volume of missing documentation and lack of evidence about it and the reasons why none was available.

20. For these reasons, there is no error of law on the second ground of appeal. The First-tier Tribunal were entitled to attach weight to the accepted position that the Appellant did not meet the requirements of the Immigration Rules for a grant of entry clearance to the United Kingdom.

21. Finally, the third ground of appeal is a minor point which could have no material bearing on the outcome of the appeal and in any event is not an error of law. The First-tier Tribunal referred to the Appellant's immediate family being in the United States as opposed to recognising that her immediate family was the Sponsor in the United Kingdom. Of course both may be true, immediate family is not limited to one person or just a person's spouse and the evidence was that the Appellant lived with her parents in the United States who in those circumstances could be fairly described as immediate family even though she is a married adult.

22. Overall, the First-tier Tribunal properly considered all of the evidence before it and came to a conclusion that was open to it on that evidence and which was in accordance with the Supreme Court's decision in Agyarko v Secretary of State for the Home Department [2017] UKSC 11.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed Date 23rd March 2020

Upper Tribunal Judge Jackson