Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001949
[HU/54541/2021]; IA/11515/2021

THE IMMIGRATION ACTS

Heard at Field House
On 8 September 2022

Decision & Reasons Promulgated
On 19 November 2022

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

NEHEMIAH JOSEPH

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr P. Turner, Counsel.

For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of St Lucia, born in 1978. On 8 June 2021 he made an application for leave to remain as a spouse. That application was refused in a decision dated 3 August 2021.

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2. The appellant appealed to the First-tier Tribunal against that decision and his appeal was dismissed after a hearing on 24 March 2022 before First-tier Tribunal Judge Eldridge ("the FtJ").

The FtJ's decision

3. The FtJ noted the background to the appeal in terms of the appellant having come to the UK as a visitor on 28 July 2020 and on three occasions was given assurances that immigration action would not be taken against him because of his inability to leave the UK as a result of the Covid-19 pandemic.

4. He accepted, as did the respondent, that the appellant and his wife were in a genuine relationship and that they married in Barbados in January 2020.

5. At paragraph 25 the FtJ said that he was "satisfied from the contract of employment provided, payslips and other documents" that the appellant's wife was employed full time as claimed with a news channel as an administrator/scheduler earning £25,000 per annum. He found that she started that employment on 13 April 2021 and she had provided payslips up to and including September 2021. He referred in the same paragraph to invoices and a letter from an 'employer' concerning self-employed work as a contractor.

6. At paragraph 27 the FtJ concluded that the appellant could not meet the requirements of Appendix FM of the immigration rules for leave to remain as a spouse because he did not meet the immigration status requirement as he was in the UK as a visitor.

7. He also concluded that the appellant did not meet the minimum income requirements either because at the date of the application the appellant's wife had been in employment for less than two months and there were no, or insufficient, savings to compensate. He added that the prior period of her unemployment could not be attributed to the pandemic because she ceased work of her own volition before they married.

8. He also found that even at the date of the hearing the appellant would not be able to meet those requirements. His immigration status remained that he entered as a visitor and had no right to reside once his visa expired, notwithstanding that he was able to rely on the exceptional assurances from the respondent previously referred to.

9. At paragraph 29 he explained why the appellant could not meet the requirement to provide specified evidence in relation to his wife's employment under Appendix FM-SE. He said as follows:

> "Additionally, whatever the position of [his] wife's continuing income at the rate of £25,000 per annum from her employment…, the documentation provided does not meet all the requirements of Appendix FM-SE."

10. He then gave examples in terms of the employer's letter which did not state the length of her employment, the gross annual salary and the period over which it has been paid. He said that payslips since September 2021 had not been provided or any evidence of payment of a salary into a relevant account in that same period. As regards self-employment, tax documents have not been provided.

11. At paragraph 30 he concluded that:

> "... at the date of application and at the date of the hearing before me, the Appellant did not meet the basic eligibility requirements of Appendix FM by the production of specified evidence in respect of the minimum income requirement of £18,600 per annum. Additionally, he has never met the immigration status requirement either."

12. Next the FtJ considered whether paragraph EX 1 of the immigration rules applied in terms of the exceptions to certain of the eligibility requirements where there are insurmountable obstacles to family life outside the UK. With reference to relevant authority he concluded that there were no such obstacles.

13. Considering the *Chikwamba* principle (*Chikwamba v SSHD* [2008] UKHL 40) he concluded that it cannot be said that the appellant "is bound to succeed" in an application from abroad, stating that "It may well be that all the relevant documentation can be shown but it has not been at this stage." He reiterated (paragraph 33) the fact that at the hearing before him there was "no documentary evidence of [the appellant's] wife's employment over the last six months".

14. In paragraph 35 he accepted that requiring the appellant to return to St Lucia now would involve a degree of hardship for them because they will be separated after two years or more of marriage but that they must have appreciated that the appellant's immigration status would have to be regularised when they entered into the relationship and got married. He concluded that there would not be very serious hardship if the appellant returned to St Lucia to make the application "that any other person would normally have to make".

15. He added that "If what they say is correct, he has good prospects of gaining entry clearance" and there would be no question of indefinite separation and that if he could not meet the financial requirements then he would be in no different a position from any other person who married a British citizen and wished to live in the UK.

16. The FtJ considered GEN. 3.1 of the immigration rules and found that there were no exceptional circumstances such as would allow the appeal to succeed, ruling out that the Covid-19 pandemic was such a circumstance.

17. He considered section 117B of the Nationality, Immigration and Asylum Act 2002 and the considerations to be found there in terms of the public interest. He concluded that it would be proportionate to expect the

appellant to return to St Lucia to make the relevant application for entry clearance as a spouse and that there would not be a breach of Article 8 of the ECHR to expect him to do so.

The grounds and submissions

18. The grounds, in summary, contend that the FtJ erred in the application of the *Chikwamba* principle in terms of the assessment of whether the appellant met the financial requirements of the Rules. It is said that he failed to take into account the information on page 140 of the appellant's bundle. This is said to confirm that the sponsor is in receipt of £25,000 per annum and that the role is permanent and commenced on 13 April 2021.

19. Paragraph 9 of the grounds takes issue with the FtJ's conclusion that an application for entry clearance could not be said to be one that was bound to succeed (*Chikwamba*). The FtJ's finding that there was no documentary evidence to show that the appellant's wife was still in employment was unreasonable in that it could not be assumed because there was no evidence of her employment in the six months preceding the hearing that her employment had ceased. Up-to-date payslips were attached with the grounds of appeal but it was accepted at the hearing before me that those documents could not be relied on to establish an error of law in the decision of the FtJ.

20. The grounds point out that the appellant's wife's witness statement dated 31 December 2021 confirms that she is in the same employment. In addition, it is argued that the appellant's wife was not asked at the hearing whether she was still employed and she should have been if the FtJ was concerned about the matter.

21. In addition, it is said in the grounds that the sponsor's bank account, at page 119 of the bundle, shows deposits of about £37,000 as a part of her early pension retirement, thus adding to her ability to meet the financial requirements of the Rules. This was not a matter that was taken into account by the FtJ.

22. In oral submissions Mr Turner relied on the grounds and referred to various aspects of the FtJ's decision. It was submitted that where at paragraph 25 of his decision the FtJ said that he was satisfied that the sponsor "works for" (present tense) the news organisation, that could be shorthand for a finding that the requirements of the Rules are met in terms of providing the specified evidence, as well as having the necessary income.

23. The fact that the FtJ stated at paragraph 35 that the appellant had good prospects of success in an entry clearance application suggests that this is an application that would be bound to succeed, applying *Chikwamba*. In addition, the sponsor earns £25,000 per annum, there are no suitability

issues so far as the appellant is concerned and the English language requirement is not in issue.

24. In her submissions Ms Everett relied on the respondent's 'rule 24' response. It was submitted that there was no error of law on the part of the FtJ. The respondent's decision was that the appellant did not meet the requirements of the Rules at the date of the decision. The finding that the sponsor earns the requisite salary is a different matter from the conclusion that this is proved by the specified evidence. It was submitted that there was no inconsistency between paragraphs 25 and 29 of the decision.

25. No explanation had been offered as to why the appellant was not able to meet the requirement to provide specified evidence. The FtJ considered the issue of insurmountable obstacles and Article 8.

26. In reply, Mr Turner submitted that it was not just the employer's letter that had been provided but also the contract of employment for the sponsor. It was also submitted that the 'evidential flexibility' aspect of Appendix FM-SE (paragraph D) could have been used by the FtJ to cover aspects of the evidence which were missing.

Assessment and Conclusions

27. In order for the appellant to succeed in his application for leave to remain he needed to meet, amongst other things, the financial requirements of the Rules, including the provision of specified documents at the date of the application. The FtJ was not satisfied that the appellant had provided the specified documents at the date of the application or at the date of the hearing, quite apart from not meeting the eligibility requirement of the Rules in terms of his immigration status.

28. The FtJ could not have allowed the appeal under the Rules because, indisputably, the appellant did not and does not meet the immigration status requirement of the Rules, having come to the UK as a visitor. That is not to say that the appellant was in the UK as an overstayer. He was not, because of the Covid assurances he was given by the Home Office.

29. So far as the financial requirements of the Rules are concerned, at the date of application he had not established that the sponsor earned the requisite £18,600 for the necessary 12 month period prior to the application. The respondent's decision points out that her earnings were £3,459.95 for that period. So far as her self-employed earnings are concerned, she had been self-employed for a period much less than the 12 months required.

30. Notwithstanding what appeared to be the argument before me that the appellant did meet the financial requirements of the Rules, that is not the position that was adopted before the FtJ. That is for good reason. The appellant was not able to meet the requirements of the Rules in terms of

finances at the date of the application for the reasons given in the respondent's decision.

31. It appeared to be argued on the appellant's behalf before me that the appellant was able to meet the financial requirements of the Rules as at the date of the hearing before the FtJ, including with reference to the specified evidence required by Appendix FM-SE. However, that is not the case. The employer's letter that is at page 191 of the bundle does not state the period of time over which the sponsor was employed, as required by the Rules. The letter is dated 5 July 2021, many months before the hearing in the First-tier Tribunal. It covers a period from 13 April 2021; not even three months. There is another employer's letter at page 121, but that does not state the sponsor's salary.

32. Although it was sought on behalf of the appellant to rely on the sponsor's contract of employment (page 123) as demonstrating the sponsor's employment, the contract is not within the acceptable specified evidence under the Rules in this context.

33. Similarly, the appellant's reliance on deposits into the sponsor's account of what are said to have been early retirement pension payments (page 119) does not assist. The deposits appear to relate to December 2019 only, several months before the application for leave to remain.

34. There is no basis upon which the 'evidential flexibility' aspects of the Rules (Appendix FM-SE (paragraph D)) could have availed the appellant before the FtJ because of the plain deficiencies in the documentary evidence provided in support of the application and in those that were before the FtJ.

35. Although the FtJ said that "If what they say is correct, [the appellant] has good prospects of gaining entry clearance" (and thus there is no question of indefinite separation), that is clearly not the same as saying that the application is bound to succeed (per *Chikwamba*). There is no error of law in his conclusion that it could not be said that the appellant is bound to succeed in an application for entry clearance from St Lucia, in circumstances where the appellant had not provided the specified documents that the Rules require.

36. The FtJ undertook a detailed Article 8 assessment. The requirements of the Rules was a matter that he properly took into account in terms of the public interest.

37. I am not satisfied that there is any error of law in the decision of the First-tier Tribunal.

Decision

38. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Signed

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 6/10/2022