



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/05092/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 21st May 2014

Determination Promulgated
On 30th May 2014
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ISA ONER

Respondent

Representation:

For the Appellant: Mrs R Pettersen, Home Office Presenting Officer
For the Respondent: Miss R Pickering, Counsel

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Dickson made following a hearing at Bradford on 30th January 2014.

Background

2. The Claimant is a citizen of Turkey. He married the Sponsor on 28th July 2010 and subsequently applied for entry clearance to come to the UK as a spouse, but was refused. They have a son, Ilyas, born on 30th April 2011.
3. The sole issue in this appeal is whether the Claimant was in a position to meet the maintenance requirements of the Rules.
4. There is in fact an error in the judge's decision in that he appears to believe that the level of income required is £18,600, plus £3,800 for the child, but in fact there is no additional amount in respect of the child since he is in the UK.
5. At the time of the application the Sponsor earned an annual income of £16,224 which has subsequently slightly reduced because she now works fewer hours.
6. The judge purported to allow the appeal under the Immigration Rules with respect to EX1 of Appendix FM but Miss Pickering conceded that he was wrong to do so since EX1 is not a standalone provision and does not apply in entry clearance cases.
7. He also allowed the appeal on the basis of the decision in MM & Others [2013] EWCA 1900 (Admin) which concerns the minimum income provisions of the maintenance Rules when applied to Sponsors who are British citizens. Mr Justice Blake held that they could be a disproportionate interference with the right to respect to family life under Article 8.

The Grounds of Application

8. The Secretary of State sought permission to appeal both on the grounds that the judge had erred in law in respect of his decision under the Immigration Rules and in respect of MM. The grounds make no submissions that this case is distinguishable from MM but are a direct challenge to that authority which, it is submitted, is unsafe and a usurpation of the democratically accountable decision maker in the formation of policy.
9. Permission to appeal was granted by Judge Blandy for the reasons stated in the grounds on 27th February 2014.
10. On 13th March 2014 the Claimant served a response arguing that this is simply an attempt by the Secretary of State to reargue her case. MM has not been successfully challenged by the Secretary of State and the FTT could not be criticised for applying case law relevant to the matters in issue which has not been overturned.

Submissions

11. Mrs Pettersen accepted that MM was persuasive authority but submitted that the original refusal was proportionate because the Sponsor was in a position to meet the income threshold in the future; there was nothing compelling about her

circumstances which required a decision on Article 8 grounds to be made in her favour.

12. Miss Pickering submitted that this case was entirely consistent with the decision in MM and the Secretary of State's challenge was effectively a backdoor challenge to that decision and not appropriate in this forum.

Findings and Conclusions

13. So far as the Immigration Rules is concerned, the judge erred in law in applying paragraph EX1. The Claimant cannot meet the maintenance requirements of the Rules and on that basis his appeal should have been dismissed. To that extent the judge's decision is set aside.
14. With respect to the decision in Article 8, in MM, Mr Justice Blake wrote as follows:

"Although there may be sound reasons in favour of the sum of the individual requirements taken in isolation, I conclude that when applied to either recognised refugees or British citizens the combination of more than one of the following five features of the Rules to be so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship. In particular that it is likely to be the case where the minimum income requirement is combined with one or more than one of the other requirements discussed below. The consequences are so excessive in impact as to be beyond a reasonable means of giving effect to the legitimate aim.

The five features are:

- (i) The setting of the minimum income level to be provided by the Sponsor at above the £13,400 level identified by the Migration Advisory Committee as the lowest maintenance threshold under the benefits and net fiscal approach (conclusion 5.3). Such a level would be close to the adult minimum wage for a 40 hour week. Further the Claimants have shown by their experts that of the 422 occupations listed in the 2011 UK earnings index only 301 were above the £18,600 threshold.
- (ii) The requirement of £16,000 before savings can be said to contribute to rectify an income shortfall.
- (iii) The use of a 30 month period for forward income projection as opposed to a twelve month period that could be applied in a borderline case of ability to maintain.
- (iv) The disregard of even credible and reliable evidence of undertakings of third party support effected by deed and supported by evidence of ability to fund.

(v) The disregard of the spouse's own earning capacity during the 30 month period of initial entry."

15. In this case the Sponsor, a British citizen, earns well above the £13,400 level identified by the Migration Advisory Committee and cited by Mr Justice Blake. She also has over £16,000 worth of savings.
16. There is nothing distinguishable in her circumstances from those in the Appellants in MM. The judge was entitled to rely on the authority of the High Court and to allow the appeal on that basis.

Decision

17. The decision with respect to the Immigration Rules is set aside. It is remade as follows. The appeal is dismissed.
18. The decision with respect to Article 8 stands.

Signed

Date

Upper Tribunal Judge Taylor