IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26012/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th April 2015	**On 14th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS KATHY LORETTA POSTELLE-RIXON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr Alim, instructed by Yaqub & Co Solicitors

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of the USA and she entered the UK on a visa dated 8th October 2011 as the fiancée of Kevin Rixon, a British citizen. She married him on 10th December 2011 and lodged an application for leave to remain in the United Kingdom as a spouse on 23rd January 2012. At the hearing before me both Ms Isherwood and Mr Alim agreed that the applicable Rule in the first instance was paragraph 287 of

the Immigration Rules as the decision came under the transitional provisions of the Immigration Rules, particularly Rule 280. Should the appellant fail to succeed under those Rules then Rule 277A under Appendix FM should apply. The respondent refused the application on 10th June 2014.

2. Under paragraph 287 the respondent found that the appellant and the sponsor did not have the funds to maintain or accommodate themselves adequately and that the appellant had failed to provide a life in the UK test. The appellant was also refused under Appendix FM paragraph R-LTRP(d)(iii) and paragraph EX.1. It was not accepted that there were insurmountable obstacles to the return to the USA. Nor was it accepted that the appellant had severed all ties including the social, cultural and family ties with the USA.

3. A previous determination by First-tier Tribunal Judge Britton which allowed the appeal was set aside following an application for permission to appeal by the respondent on the basis that it was impossible to tell from the decision whether the appeal had been allowed under the Rules or on Article 8 grounds.

4. At the hearing before me a large bundle of evidence was submitted ranging from pages 1 to 243 and a continuing bundle of 1 to 69.

5. I was also supplied with **Yarce (adequate maintenance: benefits) Colombia [2012] UKUT 425 (IAC)**, **Dube (ss.117A-117D) [2015] UKUT 90 (IAC)** and **R (on the application of Oludoyi & Ors) [2014] UKUT 539 (IAC)**.

6. Both the appellant and her husband sponsor attended and gave oral testimony and adopted their statements.

7. Ms Isherwood conceded that there was evidence that the appellant had submitted a life in the UK test. It was agreed by the representatives that I should consider the old Rules, in particular paragraph 287 which I have set out below:

> "287. (a) The requirements for indefinite leave to remain for the spouse or civil partner of a person present and settled in the United Kingdom are that:
>
> ...
>
> (iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
>
> (v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
>
> (vi) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL."

8. Further to Section 85(4) on an appeal under Section 82(1) the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision. The date of the hearing before me is the relevant date for evidence.

9. On balance I consider that a very full picture of the finances of Mr Rixon were set out in the bundle before me and this included evidence of his recently acquired job with Hays Recruiting Experts. He confirmed in his oral evidence that he had obtained work in January 2015 and earned £624.75 per week, which was the equivalent of £414.73 per week and indeed for the purposes of calculation in this appeal I conclude that the income is the equivalent of a calendar monthly income of £1,802.66. There was much discussion as to whether this income could be taken into account bearing in mind that Ms Isherwood made the point that the job was only a temporary (indeed he would not be able to comply with the strict evidential requirements in relation to the financial aspects of the Immigration rules now in force hence the reliance on EX.1). Nonetheless Mr Rixon had held the appointment for approximately three months and produced at the hearing itself a further wage slip dated 15th April showing continuing income and I accept that he is currently in employment and I accept his oral evidence which I found to be candid that all contracts issued stated that they were for the purposes of one to three months and that he had every prospect of his employment continuing. In fairness this must be the same for all those employed and self-employed. There can never be a guarantee that work will continue. That said Mr Rixon had been in continuous employment until his recent spate of unemployment and with his skills and experience I accept that, on the balance of probabilities he could continue to be engaged in gainful employment.

10. I also take into account the fact that the appellant herself is a piano teacher and that she had been told by her previous solicitors that she was not allowed to work after she submitted her application for further leave to remain. She had subsequently been told by her current solicitors that she was indeed able to work and she had now lined up students that she could take to teach piano. She maintained that she would earn a living of approximately £500 per week but even if I did not take into account her income at all I accept the evidence that the couple do have an income of approximately £1,800 per month. As **Yarce** confirmed it was important that the resources available would meet or exceed the relevant income support level by the United Kingdom government following **KA (Pakistan) [2006] UKAIT 00065**.

11. **Yarce** really referred to maintenance benefits and as Mr Rixon confirmed he had not claimed any benefits for his wife since he had lost his job in August 2013 with the Ford Motor Company. It was from that redundancy that the problems of this couple stemmed.

12. I note that the appellant carries the legal burden of proof in that she meets the relevant requirements of the Immigration Rules and I understand Ms Isherwood's argument that the availability of a credit card facility should not be taken into account, in particular that there needed to be an application made for the facility to be used and it was not a voluntary payment. That said, as it states in **Yarce**, much depends on the credibility of the appellant's sponsor and third party generally and as to the specifics of the actual payments. I hold the credit card facility to be neutral. This is because evidence was given that there were still credit card debts outstanding to the sponsor in the sum of approximately £11,000 but the schedule drawn up by Mr

Rixon and which could be cross referenced and counter-checked by the bank statements showed that he had paid a level of £71,000 since 2012 against his credit card facilities and no doubt with the assistance of his income and savings. I accept that this shows Mr Rixon is able to maintain a certain financial discipline and was able to meet the level of his commitments to the five different credit card companies but it is not a requirement of **KA** that I take into account those particular debts. That said, the level of his savings is now in the region of £3,000. To support his financial contentions Mr Rixon produced, what appeared to be a completed set of bank statements from the Nationwide from February 2012 to January 2015.

13. In the circumstances of this particular couple I accept that they have been able to live together since Mrs Rixon came to the UK in 2011 and they have claimed no benefits for the appellant herself and have managed to pay a considerable amount of their credit card repayments.

14. On this basis I accept that the appellants have sufficient income with which to pay their rent which is £750 per month and their council tax £125 per month with income to cover the income benefit that they would receive as a couple over the age of 18 which was assessed at being £497.68 per month at the 2014 to 2015 rate. Mr Rixon confirmed in evidence that the amount superfluous to that would easily cover any payments required on his credit card. He did not use the cards to live on and the overall outstanding debt was reducing.

15. As such I conclude the appellant is able to cover the rent and therefore there is satisfactory accommodation. As the appellant has been accommodated since her arrival to the UK and Mr Rixon confirmed that he had only ever claimed single housing benefit, which I understand he was not doing at present, I find that the housing requirement is fulfilled.

16. Even if this were not the case I conclude that under paragraph 277 the appellants would be considered under the new Appendix FM Rules. Essentially it was argued that the appellant failed to meet the requirements of Appendix FM and in particular R-LTRP.1.1, and the requirements of EX.1(d). In these circumstances insurmountable obstacles means there are very significant difficulties which would be faced by the applicant or their partner in continuing their family life outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

17. The couple married on 10th December 2011 and the appellant was granted leave to remain until 23rd January 2014. Her husband was employed full time until his contract with Ford came to an end when the plant closed down. The appellant has a son, Jake, born on 26th February 1991 in Sacramento, USA, who does not plan to live in the United Kingdom but the appellant gave evidence that she had no relatives in the USA that she could rely on. She confirmed in oral evidence, which I accept owing to her candour, that her relatives in the USA were not wealthy but when asked whether she and her husband could not relocate to the USA she stated that her husband would have difficulty in finding a job but more tellingly confirmed that his

health insurance would be also an issue. She gave evidence as did Mr Rixon that the couple had consulted the US Embassy and there were strict entry requirements to the USA not least that there would be a requirement of health insurance without which there are heavy fines. Mr Rixon gave evidence that he suffered from type 2 diabetes and high blood pressure as a result of stress, but which is currently treated under the NHS, and I accept that the couple would have great difficulty in accessing healthcare to which Mr Rixon is entitled as a British citizen. I conclude that this would be an insurmountable obstacle to him leaving the UK for the USA and enabling the parties to set up home together. As Mr Rixon stated there would also be financial entry requirements. The fact is that the couple have to date made their life in the UK and have complied substantially with the Immigration Rules.

18. Should Mrs Postelle-Rixon, the appellant, be required to return to the USA and make an application outside the Rules now she would be subject to the much more stringent financial requirements which were not in place when she initially came to the UK and made her previous application.

19. I therefore find that the appellants can succeed both under the old paragraph 287 and therefore in fact the application of the new Immigration Rules under Appendix FM is not appropriate. That said, even if they were I find that the appellant can succeed under those new Rules.

20. Further to the judgment in **Singh v SSHD [2015] EWCA Civ 74** there are factors which have not been taken into account by the Secretary of State, not least the health of Mr Rixon.

21. I therefore have made an assessment by applying the five stage test in **Razgar**. It is clear that the appellants have established a family life together and have done so since 2011. Mrs Rixon has been in the UK now for nearly four years, having married in 2011. She has established both a family life and a private life and the threshold for the engagement of that life is low. I find that the refusal is not in accordance with the law because Mrs Rixon has met the requirements of the Immigration Rules.

22. On the face of it, the Immigration Rules have a legitimate aim in themselves in that the decision is necessary for the protection of the economic wellbeing of the country and for the protection of the rights and freedoms of others through the maintenance of immigration control. However, the key question for the Court is whether the measure is necessary in a democratic society and proportionate to the legitimate aim pursued. I have given weight to the position of the secretary of State as expressed through the Immigraiton Rules **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC) and take note that **R(MM (Lebanon)) v SSHD** [2014] EWCA Civ 985 confirmed the validity of the financial requirements of the Immigration Rules in spousal cases.

23. I come to an assessment of proportionality and here I must have regard to Section 117B. In considering the public interest question, which is whether the interference

with the right to respect for someone's private of family life is justified, I must have regard to the following:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

24. It is clear that Mrs Rixon speaks English as she is a USA national and her first language is English. This in turn will allow her to develop her piano tuition lessons in order that she is not a burden on taxpayers. She has shown that she has integrated into society. I have found above that she is not financially dependent on the state and is not and has never been a financial burden on the state. She does not appear to have had significant health issues or NHS intervention. When she lawfully entered the UK, under immigration control and regulation she (through her sponsor) was assessed as being able to maintain herself financially at the time and in the future.

25. Mr Rixon has demonstrated that he has provided adequately for the maintenance and accommodation of Mrs Rixon throughout her stay in the UK and has shown that in the four years that she has been here that she has been financially independent of the state. **EB (Kosovo)** [2008] UKHL 41 detailed the principles enunciated in **Huang** which included that member states of the Convention have a duty not only to refrain from unjustified interference in protected Article 8 rights but a positive duty to show respect for it. It was recognised that human beings are social animals and that they depend heavily socially emotionally and financially on their family. **EB Kosovo** espoused 'that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of

removal' but that what was needed was a 'careful and informed evaluation of the facts of the particular case'. I have undertaken such an evaluation in this case and consider that should the appellant be returned to the USA there would be serious prejudice to the fundamental Article 8 rights of the both the appellant and her husband **Beoku-Betts v SSHD** [2008] UKHL 39. In particular bearing in mind the loss of the protection of the health treatment to which the sponsor would be entitled to by virtue of his citizenship of this country I find that it would not be reasonable to expect the sponsor to relocate. I also take into account that the sponsor has lived all his life in the United Kingdom, that the appellant does not fall foul of any of the suitability criteria in the Immigration Rules.

26. As stated in **Huang** 'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.

Decision

The appeal is allowed under the Immigration Rules

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed Date 11th May 2015

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because of the extent of the evidence produced and the complexity of the case.

Signed Date 11th May 2015

Deputy Upper Tribunal Judge Rimington