



IAC-AH-DN-V1

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

Appeal Number: OA/10391/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2nd October 2015**

**Decision & Reasons Promulgated
On 4th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MRS THAUENTHINY PIRATHEEPAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr S Kandola (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Chapman, promulgated on 7th April 2015, following a hearing at Birmingham on 19th March 2015. In the determination, the judge dismissed the appeal of Mrs Thauenthiny Piratheepan. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Sri Lanka who was born on 20th March 1983, and she is married to the Sponsor, Mr Ganeshan Piratheepan, who arrived in the United Kingdom in 1999, and has subsequently become a British citizen. They were married in Sri Lanka on 1st February 2012. They lived in Sri Lanka together until 3rd April 2012. At that time the Sponsor returned to the UK and this is the last time that they have seen each other. The marriage is a genuine and subsisting one and there is no question about that.

The Appellant's Claim

3. The Appellant's claim is for entry clearance to come to the UK as a partner under Appendix FM of the Immigration Rules, but this claim has been rejected by the Respondent Secretary of State on the basis that the Appellant cannot show that the Sponsor satisfied the Rules which required him to be earning over £18,600 from his two employments. These employments are with Omniserve, where his income is £16,093.25 and from Sher E Punjab Market Ltd, where his income is £16,000 per annum.

The Judge's Findings

4. The judge observed that it was agreed that the issues in this appeal were "Fairly narrow, and much of the evidence supporting the appeal was documentary, and unchallenged". The Presenting Officer at the hearing "Did not seek to challenge the evidence of the Sponsor, and I found him to be a truthful and credible witness" (paragraph 24). It was accepted before the judge that the Appellant earned £16,093.25 from Omniserve. However, he also maintained that he had a salary from Beacon where he was paid in cash until November 2013 and that the bank statements show that he started having a salary paid into his account one month earlier in October 2013. The judge observed that "The Sponsor can demonstrate payments from Beacon into his bank account from October 2013 onwards" (paragraph 28). However, the Appellant could not show that he had the requisite salary payments, payslips, and corresponding bank entries for a six month period prior to the application, which was made in June 2013 (paragraph 29). Accordingly, the appeal was dismissed under the Immigration Rules.
5. The judge then went on to consider the Article 8 aspect of the claim in relation to family life, the judge observed that "The decision under appeal would have an impact of sufficient gravity to interfere with that family life in a way to potentially engage Article 8" (paragraph 35). However, the decision was in accordance with the law (paragraph 36). The **Razgar** principles were applied and followed (paragraph 37). The income in this case amounted to over £22,000 per annum, and the judge observed that, "If accepted, then the Appellant does not fall foul of any provisions of Section 117B" (paragraph 39).
6. The judge took into account the fact that there had been substantial delay in dealing with the Appellant's application of nearly twelve months. He noted that,

“It is most unfortunate that the Appellant’s application was delayed by the legal challenge for the income threshold, and this was not usually a factor that would weigh heavily with me. However, in the circumstances of this case, and combined with other factors, it is something to which I have given additional, although not significant weight” (paragraph 45).

7. Other factors are also taken into account in relation to Appendix FM-SE (see paragraph 46). The judge gave due consideration to the competing interests on each side of the proportionality exercise. He observed that there is a need to be fair and consistent given the requirement of protective immigration control. However, there was also the obligation, which was a positive obligation, to promote family life (paragraph 48). Taking everything into account (see paragraph 48), the judge dismissed the appeal under the Immigration Rules, but allowed it under human rights grounds (see paragraph 50).

The Grounds of Application

8. In the grounds of application, the Respondent Entry Clearance Officer alleged that the judge, having found that the Appellant could not meet the requirements of the Immigration Rules, was wrong to have allowed the appeal under Article 8 grounds. This was a material misdirection in law.
9. On 3rd July 2015, permission to appeal was granted.

Submissions

10. At the hearing before me on 2nd October 2015, Mr Kandola, appearing on behalf of the Respondent Entry Clearance Officer, submitted that the appeal on her behalf was being withdrawn because the Entry Clearance Officer was not satisfied that the Sponsors’ income was not evidenced in the bank statements, being evidence only in the cash payments and not in the bank. However, there was a P60 here. This was a leave to enter case. It was not a leave to remain case. It could be argued that in these circumstances a fresh application should be made.
11. If a fresh application were to be made, then the fresh evidence would plainly confirm the fact that the Appellant was indeed able to meet the financial requirement threshold in that the income did reach £22,000 and the appeal could be allowed under the Immigration Rules. However, given that the Entry Clearance Officer had only rejected this application on the basis of the proper failure to evidence the financial situation through the bank statements, with no doubt being cast on whether the relationship was a genuine and subsisting one, it should be possible to say that the basis of the refusal has been removed.
12. The sole issue here was one of employment. Although the Appellant had not submitted evidence to show that her sponsoring husband was being paid through the bank, there was a P60 which was also sent, and this is a matter of record, and this would have confirmed that the earnings were actually evidenced through an official

source in the manner alleged. On this basis, and on balance, this was a case where the appeal should be withdrawn.

13. There was no-one present on behalf of the Appellant and no legal representation.

No Error of Law

14. I am satisfied that the making of the decision did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. This was a case where a judge had dismissed the appeal under the Immigration Rules on the basis that the Appellant's earnings were not submitted and evidenced through bank statements. There was, as Mr Kandola has very fairly pointed out, a P60 included in the Appellant's bundle, which was not referred to by the judge, and this would have enabled the judge to conclude that the appeal would succeed under the Immigration Rules.
15. Nevertheless, the judge did proceed to allow the appeal under the Human Rights Act given Article 8 and his reasons for doing so are properly and comprehensively set out. The essential issues were the error here is a material one, and given that the appeal was allowed, and given that the application by the Respondent Entry Clearance Officer has now been withdrawn before me, I have no hesitation in concluding that the judge was correct in allowing the appeal. There is no perversity or irrationality in his conclusion. The decision must stand.

Decision

There is no true error of law in the judge's decision. The determination shall stand.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

2nd November 2015