



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/00209/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice

On 6 August 2018

Decision & Reasons Promulgated

On 20 August 2018

Before

UPPER TRIBUNAL JUDGE FINCH

Between

RUBINA AFTAB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Eaton of counsel, instructed by Shah Jalal Solicitors

For the Respondent: Mr. T. Melvin, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Bangladesh. On 10 October 2016 she applied for entry clearance in order to join her husband in the United Kingdom. Her application was refused on 5 December 2016 and she appealed against this decision.
2. On 6 November 2017 First-tier Tribunal Judge Wilsher dismissed her appeal on human rights grounds. The Appellant sought permission to appeal and Upper Tribunal Judge Plimmer granted her permission to appeal on 21 June 2018.

ERROR OF LAW HEARING

3. Counsel for the Appellant and the Home Office Presenting Officer both made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

4. In his decision First-tier Tribunal Judge Wilsher found that the Appellant and her husband were in a genuine and subsisting relationship and that they intended to live together as husband and wife if she were granted entry clearance. There is no cross-appeal in relation to this finding.

5. However, First-tier Tribunal Judge Wilsher found that the Appellant could not meet the financial requirements of Appendix FM to the Immigration Rules as in the relevant period her sponsor had only earned £17,000. He based this on a P60 and a letter from HMRC which were before him.

6. Paragraph E-ECP.3.1. of Appendix FM states that:

“The applicant must provide specified evidence, from sources listed in paragraph E-ECP.3.2. of-

- (a) a specified gross annual income of at least-
 - (i) £18,600...”

7. Paragraph E-ECP.3.2. also states that:

“When determining the financial requirement in paragraph E-ECP.3.1. is met only the following sources will be taken into account-

- (a) income of the partner from specified employment...”

8. However, Appendix FM addresses the evidence needed to show compliance with Appendix FM and paragraph A1. of Appendix FM-SE states that:

“To meet the financial requirement under paragraph E-ECP.3.1.... the applicant must meet:

- (a) the level of financial requirement applicable to the application under Appendix FM and
- (b) The requirements specified in Appendix FM and this Appendix as to:

- (i) the permitted sources of income and savings;
- (ii) the time periods and permitted combinations of sources applicable to each permitted source relied upon; and
- (iii) the evidence required of each permitted source relied upon”.

...

2. In respect of salaried employment in the UK... all of the following evidence must be provided:

- (a) payslips covering:
 - (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months...
- (b) a letter from the employer who issued the payslips at paragraph 2(a) confirming:
 - (i) the person’s employment and gross annual salary;
 - (ii) the length of their employment;
 - (iii) the period over which they have been or were paid the level of salary relied upon in the application; and
 - (iv) the type of employment (permanent, fixed-term contract or agency).
- (c) Personal bank statements corresponding to the same period as the payslips at paragraph 2(a) showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly

9. Paragraph 13 of Appendix FM-SE is entitled **Calculating Gross Annual Income under Appendix FM** and states that:

“Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual income under paragraph E-ECP.3.1... will be calculated in the following ways:

(a) Where the person is in salaried employment in the UK at the date of the application...has been employed by their current employer for at least 6 months and had been paid throughout the period of 6 months prior to the date of the application at a level of gross annual salary which equals or exceeds the level relied upon in paragraph 13(a)(i)...

(i) the level of gross annual salary relied upon in the application”

10. The annual gross salary relied upon in the application was £19,500 and it is arguable that paragraph 13 suggests that, when calculating gross income, the Applicant was entitled to rely on the fact that at the date of her application the evidence indicated that her husband’s gross annual salary would be £19,500. In my view, this is the plain and ordinary interpretation of the provisions it would not be possible for the Appellant to provide the necessary evidence for the six months after her application and the Rules do not require her to provide evidence for the 12 months before her application.
11. Therefore, the fact that her husband subsequently took one month’s unpaid leave after the period for which she provided evidence did not mean that she could not meet the requirements of the Immigration Rules.
12. In addition, there was no requirement in the Rules for the Appellant to produce any document from HMRC to confirm her sponsor’s income. It was also the case that the Appellant was relying on income that derived from two different tax years.
13. This misinterpretation of the Immigration Rules was fatal to the human rights decision reached by the First-tier Tribunal Judge, as it deprived the Appellant of the positive value of having met the Immigration Rules for the purpose of the proportionality assessment under Article 8.2 of the ECHR.
14. As a consequence, there were errors of law in First-tier Tribunal Judge Wilsher’s decision. Therefore, I set aside his decision but retain his findings of fact in relation to the Appellant’s relationship with her husband.

15. I also retain the appeal in the Upper Tribunal and go on to re-make the decision on her appeal against the Respondent's decision.
16. In terms of Article 8.1 of the ECHR, I find for the reasons given by First-tier Tribunal that the Appellant has a genuine and subsisting family relationship with her husband.
17. For the purposes of Article 8.2, I find, as explained above, that the Appellant had provided sufficient evidence to show that she could meet the necessary financial requirements in the Immigration Rules.
18. First-tier Tribunal Judge Wilsher had not addressed the other issues in relation to the evidence referred to by the Entry Clearance Officer in his decision. I have considered the evidence provided by the Appellant and note that there is no discrepancy between the sums paid to her sponsor, as recorded in his relevant payslips, and the sums paid into his bank account. In particular, there were no discrepancies relating to the payment of his salary in April 2016. This was in the sum of £1,362.32. He was paid on 30 April 2016 and this sum was credited to his HSBC account on that same day.
19. In addition, sums of £1,362.32 were regularly paid into the sponsor's bank account from Smart Cleaners Ltd and the fact that these were recorded as credits and the payslips referred to a BACS payment is a difference without any significance as BACS is short for Bankers Automated Clearing Service and is a service the employers can use to pay their employees' salaries. The letter from his employer, Smart Cleaners, dated 26 September 2017, also confirmed that he was paid via BACS.
20. The Entry Clearance Officer also asserted that open source checks had indicated that Smart Cleaners Ltd had a net worth of £113. However, there was no evidence to show that this was the case and the bank statements and the use of BACS suggested that the company was solvent. In the addition, the letter from Smart Cleaners, dated 26 September 2017, noted that the value of a company can fluctuate at any time but the employers were being paid on time.
21. As a consequence, there were no other issues which cast doubt on the level of the Appellant's sponsor's income for the required period. Therefore, she met the requirement of the Immigration Rules and therefore it could not be said for the purposes of Article 8.2 that it was

in accordance with the law or proportionate to refuse her leave and therefore breach her right to enjoy a family life with her sponsor.

Decision

- (1) The appeal is allowed.
- (2) The decision of First-tier Tribunal Judge Wilsher is set aside but his findings in relation to the Appellant's relationship with her sponsor are retained.
- (3) The appeal is retained in the Upper Tribunal and, having reviewed the evidence, I allow the Appellant's appeal against the Respondent's initial decision.

Nadine Finch

Signed

Date 6 August 2018

Upper Tribunal Judge Finch