



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03381/2016

THE IMMIGRATION ACTS

Heard at Manchester
On 1 June 2018

Decision & Reasons Promulgated
On 20 June 2018

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MRS SAFA MOHAMED ATIM KERK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Reyaz (Solicitor), Rasools Law
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DECISION AND REASONS


1. The decision under challenge is that of Judge Mensah of the First-tier Tribunal. On 28 July 2017 the judge sent a decision dismissing the appeal of the appellant against a decision made by the respondent on 13 January 2016 refusing entry clearance as a spouse.
2. The grounds are 3-pronged, it being argued that the judge erred in-law in (1) failing to weigh in the proportionality assessment that the Immigration Rule requirements were met; (2) failing to attach weight to post-decision evidence; and (3) failing to recognise that as the child in the case would be a British citizen by descent the minimum financial threshold remained unchanged.

3. I see no arguable merit in ground (1). Contrary to the way it is put in the grounds, the judge did not find that the appellant met the requirements of the Rules and indeed correctly noted at para 15 that “the sponsor accepts that he failed to provide a letter from his employer that met the specified requirements under Appendix FM”. The relevant provisions of the Immigration Rules require the specified documents to be submitted at the date of application. The grounds refer to evidential flexibility provision D “enshrined in Appendix FM-SE” but by para D(c) “the decision-maker will not request documents where he or she does not anticipate that addressing the error or omission ... will lead to a grant because the application will be refused for other reasons”. The ECO’s decision also refused the appellant’s application for other reasons. Further, para D(a) only permits documents to be submitted after the application in limited circumstances, none of which applied in the appellant’s case.
4. What I have just said as regards ground (1) also serves to explain why I consider that ground (2) cannot avail the appellant. Because the appellant failed to meet the requirements of the Rules, she was not entitled to have counted in her favour in the Article 8 proportionality assessment that she met the requirements of the Rules.
5. In the context of the Article 8 assessment the judge was able to, and did, take account of the post-decision evidence, but was not obliged to consider that this showed that the Immigration Rules were in fact met at the date of decision.
6. In relation to Article 8, the judge accepted that the couple were in a genuine and subsisting relationship, doing so in part in the light of post-decision evidence, but concluded that that on its own was not sufficient to show that there were compelling circumstances outside the Rules warranting a grant of entry clearance, notwithstanding the failure to meet the requirements of the Rules in full.
7. As regards ground (3), I would accept that the judge may have erred at para 13 in considering that because there was now a child of the relationship the post-decision evidence regarding the sponsor’s gross annual salary “does not assist the appellant as it rather suggests that there may be public fund concern in relation to the ability of the sponsor to meet the minimum financial threshold as of the date of hearing, which is the important date for my consideration of human rights”, but (a) the judge made no actual finding on this issue, confining herself to saying “there may be public funds concerns”; (b) at the date of hearing the appellant’s child had not yet been born (the child was not born until 3 August 2017) and in any event was born in Sudan, not in the UK; and (c) the judge’s essential reason for dismissing the Article 8 aspect was not to do with public funds but rather his finding that “there is no evidence family life cannot be reasonably enjoyed in Sudan” (see para 13) and that “the sponsor made the decision to travel to Sudan and marry a Sudanese national who had no right to enter the UK They had to meet the Immigration Rules.” The latter finding is important because the appellant’s grounds raised no challenge to it.
8. Accordingly I am not persuaded that the grounds are made out.

9. I would however make the following observations in case the appellant proceeds to make a further EC application. First, the issue of whether the couple could reasonably enjoy family life in Sudan is not a requirement of the Immigration Rules applicable in entry clearance cases and now there has been a judicial finding that the couple are in a genuine and subsisting relationship. Second, the appellant has since the ECO decision being able to produce an employer's letter specifying the gross salary, (although it is not clear to me that the appellant has yet produced all documents needed to satisfy other requirements of Appendix FM-SE as set out in paras 2 and 2A).
10. Third the ECO would also need to be satisfied as regards the English language requirements set out in E-ECP.4.1 of Appendix FM.
11. For the above reasons, I conclude that the judge did not materially err in law and accordingly the judge's decision shall stand.
12. No anonymity direction is made.

Signed:

Date: 18 June 2018

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a long, sweeping tail on the final 'y'.

Dr H Storey
Judge of the Upper Tribunal