



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04443/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12th September 2018

Decision & Reasons Promulgated
On 17th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MRS WAI YEE FONG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Litigant in Person, No Representative
For the Respondent: Mr L Tarlow, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Bradshaw promulgated on 3rd May 2018 dismissing her appeal on the basis of her human rights. The Appellant appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Frankish in the following terms:

“The application for permission to appeal asserts:

erroneous assessment of financial threshold (£18,600) when profit of £39,391 was demonstrated on turnover of £45,388;

lack of weight to the company being new and to the £500 per day six month contract with Schroders;

insurmountable obstacles under EX.1 erroneously assessed relative to prenatal care being required with a confinement day on 23rd August 2018.

With every single criteria being met, but for the timescale in respect of providing income statement of this new company and the baby being due within weeks, an arguable error arises in not analysing the application of insurmountable obstacles under EX.1 when this is set out in the legal summary but not addressed in the findings and conclusions.”

2. I was not provided with a Rule 24 response from the Respondent but was given the indication that the appeal was resisted.

Error of Law

3. In my view there is a material error of law in the First-tier Tribunals’ decision such that it should be set aside. My reasons for so finding are as follows.
4. In terms of the Appellant’s first Ground of Appeal the complaint in essence is that the First-tier Tribunal did not give adequate consideration to the Appellant’s husband’s CT600 for his company “I S Formula Ltd” and the facts underlying whether or not it could have been submitted with the application for leave to remain, and more importantly, the implications of it being produced before the First-tier Tribunal given that it was, and only could be, filed on 1st February 2018 after the refusal but well before the First-tier Tribunal hearing date on 17th April 2018 on the papers (including the reasons given as to why it was not possible to submit the CT600 earlier).
5. As canvassed with Mr Tarlow (who remained silent in response to my observation on this point), this remains a human rights appeal brought consequent to Section 82 of the Nationality, Immigration and Asylum Act 2002 (as amended), and pursuant to Section 85(4) and the exemptions listed under 85A of the 2002 Act (so far as as retained by legislative amendments), there is no statutory prohibition on evidence that may be considered by the First-tier Tribunal at this category of appeal hearing, as this is not (for example) a points-based system appeal whereby there are preclusions on the types of admissible evidence and evidence that can be taken into account by the First-tier Tribunal which was not before the Secretary of State for the Home Department. As this is not such an appeal and given that it is a human rights appeal brought under Section 82 of the 2002 Act there was no limit upon the material evidence which the First-tier Tribunal could have taken into account in reaching its decision as to whether or not the rules (i.e. Appendix FM) were or were not met.

6. I also take into account that, as this is an in-country human rights appeal, the judge will need to independently assess as at the date of hearing before her, whether the rules were or were not met. I note that there is an inconsistency in the judge's treatment of the specified evidence that was omitted from the application, in that the judge *did* take into account an English language exam result (IELTS) dated 23rd February 2016 which was *not* submitted with the application (and formed the second basis for the refusal under the rules) but which was filed and served by the Appellant upon the First-tier Tribunal and Secretary of State, and appears to have been taken into account by the First-tier Tribunal without any negative observations being made in respect of the evidence not being admissible and that rule not being met. I note there is no pronounced finding on this issue, but I observe that there are no findings made against the Appellant in respect of the failure to meet the English language requirement as epitomising the public interest in the Appellant's removal in the later part of the judgment, either under the rules or under the European Convention on Human Rights (in respect of the proportionality of the outcome of the Secretary of State's decision).
7. Thus, given my views as laid out above, I do find that the First-tier Tribunal should have taken the CT600 into account notwithstanding that it was not provided with the application and given that there is no contention taken as to whether or not the CT600 does now substantiate the earnings of £39,391 which surpasses the minimum financial threshold of £18,600 under Appendix FM. Consequently, I find that the judge erred in not taking this evidence into account in determining whether the Immigration Rules were met as at the date of the appeal hearing on the papers.
8. In respect of the second Ground of Appeal, Mr Tarlow merely impressed upon me that there was a public interest in removing persons who had not met the Immigration Rules. Notwithstanding my above findings regarding whether the financial thresholds were or were not met, I do notice that there is an omission in the judge's decision in that she failed to take into account the fact of the Appellant's pregnancy and the imminent birth of her child which was then due on 23rd August 2018 and the consequence that would beset her if she were to be removed and the implications that would have for her and her child upon any separation (even if short term) from her partner. Consequently, this is a further minor but nonetheless material error in the judge's decision such that it should not stand.
9. In light of the above findings I set aside paragraphs 21 to 23 of the First-tier Tribunal's decision to the extent that they reveal these discrete material errors of law.

Remaking the Decision

10. In light of my above findings I remake the decision as follows. The English language certificate and the CT600 are both admissible documents before me in the context of an in-country human rights appeal pursuant to section 82 of the 2002 Act. I thus take them into account in forming my own independent view as to whether the rules are met before me as at the date of today's hearing.

11. As already noted by the First-tier Tribunal, the Appellant has produced further evidence of her English language exam result which demonstrates that she meets the English language requirement of CEFR Level A1 or above. Thus, this element of the refusal and failure to meet the rules is now satisfied.
12. Turning to the financial requirement and the sole issue of being whether the Appellant met Appendix FM-SE at paragraph 9(b) in that she must have provided her CT600, or that of her partner; I note that the partner's CT600 for the year ending 31/01/18 (filed on 01/02/18) has been provided along with up-to-date bank account statements, personal and business and unaudited accountant reports. Consequently, in my view the provisions of Appendix FM-SE are met as at the date of the appeal hearing before me and this element of the refusal and failure to meet the rules is now satisfied.
13. Given the above findings, the Appellant has demonstrated that she meets the terms of Appendix FM and qualifies for a grant of further leave to remain as a partner.
14. In light of my findings concerning whether the Appellant meets the Immigration Rules, given that I find that she does, I do not go on to consider Article 8 ECHR or assess whether the decision strikes a fair balance or apply a proportionality approach outside the Rules there being no need to do so.

Notice of Decision

15. I allow the appeal on the basis that the Appellant meets the Immigration Rules under Appendix FM and Appendix FM-SE.
16. No anonymity direction is made.

TO THE RESPONDENT
FEE AWARD

No fee award is to be made given that the Appellant's evidence was provided at the date of the hearing before the First-tier Tribunal and not with the application.

Signed

Date 17th September 2018

Deputy Upper Tribunal Judge Saini