



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09722/2017

THE IMMIGRATION ACTS

Heard at Field House
On 15th October 2018

Decision & Reasons Promulgated
On 24th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELIF KANISIRIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss K Pal, Senior Home Office Presenting Officer

For the Respondent: Mr R Singer of Counsel instructed by Ivy Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Oxlade (the judge) of the First-tier Tribunal (the FtT) promulgated on 20th July 2018.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to her as the Claimant. She is a national of Turkey born 20th October 1990. She entered the UK on 21st October 2015 as the spouse of Mustafa Kanisirin (the

Sponsor), a person present and settled in the UK. The Sponsor has indefinite leave to remain. The Claimant had leave to remain until 29th June 2017.

3. On 19th June 2017 she applied for further leave to remain by submitting form FLR(M). This application was refused on 23rd August 2017. The Respondent was not satisfied that the Claimant satisfied the financial requirements of Appendix FM of the Immigration Rules, and was not satisfied that she satisfied the English language requirements.
4. The appeal was heard on 10th July 2018. The judge found that at the date of application the Claimant could not satisfy the English language requirements or financial requirements.
5. The judge found that at the date of hearing the Claimant and Sponsor had a combined income of £21,400 which is in excess of the minimum annual income requirement of £18,600. The English language requirement was still not satisfied at the date of hearing. The judge found that the Claimant did not have the correct level of English qualification in that she had CEFR A1 but not A2. The English language requirement had changed since the Claimant was granted entry clearance. The judge found that the Claimant was unable to take a further English language test because the Secretary of State would not return her passport. Without that, the Claimant was unable to take a further English language test.
6. The judge considered EX.1, and found no insurmountable obstacles to the Claimant and Sponsor continuing family life in Turkey. The judge then went on to consider Article 8 outside the Immigration Rules and found that refusal of the application would cause unjustifiably harsh consequences, and therefore the appeal was allowed with reference to Article 8 outside the Immigration Rules.
7. The Secretary of State applied for permission to appeal. The grounds are lengthy but in summary contend that the consideration by the judge of the financial requirement was flawed. It was submitted that the judge had carried out insufficient analysis and given insufficient reasons for findings.
8. It was submitted that the judge had erred by not providing adequate reasons for finding unjustifiably harsh consequences would arise if the Claimant was not allowed to remain in the UK. It was submitted that the judge had not properly considered whether the Claimant could return to Turkey and apply for entry clearance, leaving the Sponsor in the UK, and the judge could not have concluded that entry clearance was bound to be granted.
9. Permission to appeal was granted by Judge Robertson of the FtT on 16th August 2018.
10. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

11. Miss Pal relied upon the grounds contained within the application for permission to appeal. It was submitted that the judge had failed to make adequate findings

regarding the evidence as to finance submitted by the Claimant, and had failed to provide adequate reasons for the conclusion that the financial requirements were satisfied at the date of hearing.

12. It was submitted that having found there were no insurmountable obstacles to family life continuing in Turkey, the judge had erred by not considering whether the Claimant could return to Turkey to make an application for entry clearance, without the Sponsor. It was submitted that the judge had failed to adequately explain why the appeal was allowed with reference to Article 8 outside the Immigration Rules.
13. Mr Singer in making oral submissions relied upon a rule 24 response dated 15th October 2018. I was asked to accept that the judge had not erred in finding that the financial requirements of the Immigration Rules were not satisfied at the date of application, but was entitled to find that at the date of hearing, which was relevant when considering an Article 8 appeal, the Claimant and Sponsor had a combined income of £21,400, which is in excess of the £18,600 per annum required by the Immigration Rules. I was asked to note there was no challenge to the finding that the combined income was £21,400 at the date of hearing.
14. Mr Singer submitted that the judge was entitled to take into account paragraph 76 of MM (Lebanon) [2017] UKSC 10 which Mr Singer submitted indicated that some aspects of the Immigration Rules might be considered more important than others. For example it was important that an applicant be financially independent, and therefore it was important that the minimum annual financial requirement of £18,600 was met, whereas it might not be so important if some of the specified evidence to prove that income was not submitted with the application.
15. I was asked to take into account that the Claimant had not realised that the English language requirements had altered since she was granted entry clearance. When she did appreciate this, she wished to undertake the required English language test but could not do so because the Secretary of State would not return her passport, which meant that she could not enrol upon an English language course or take the English language test without that passport to prove her identity.
16. Mr Singer submitted that the judge had taken all relevant factors into account and conducted a balancing exercise. The judge had found at paragraph 27 that if the Claimant was required to leave and make an entry clearance application, then the financial requirements of the rules could not be satisfied, because the minimum income requirement could only be met if the combined income of the Claimant and Sponsor were taken into account.
17. Mr Singer submitted that the judge had made findings open to her on the evidence and the decision could not be said to be perverse. Mr Singer conceded that the decision might be regarded as generous, and there would be other judges who may not have made the same decision. Mr Singer made the point that this was not the appropriate test, and the grounds submitted by the Secretary of State did not disclose a material error of law, but disclosed a disagreement with the conclusion reached by the judge.

18. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

19. The judge did not err in law at paragraph 38 in recording that it was conceded on behalf of the Claimant, that the English language and financial requirements were not satisfied at the date of application.
20. The judge at paragraph 39 explains why the financial requirements were not satisfied at the date of application. It is not suggested that the judge erred in law in so doing.
21. The judge at paragraph 40 found that the Claimant satisfied the minimum annual income requirement of £18,600 at the date of hearing. I do not find that the judge erred in law in making that finding. There is ample documentary evidence contained within the Claimant's bundle to prove that the Claimant and Sponsor at the date of hearing had a gross combined income of £21,400.
22. The judge recorded at paragraph 41 that it was conceded that the English language requirement contained within the Immigration Rules was still not met at the date of hearing. The judge explained and clarified this at paragraphs 42 – 43, accepting the Claimant's explanation that she did not realise that the English language requirements had changed after her arrival in the UK and before the date of her further application. Documentary evidence shows that the Claimant's solicitors and MP sought a return of her passport to enable her to undertake the required English language test, but these requests were not granted. I find no error of law disclosed at paragraph 44 in which the judge finds that at the date of hearing the Claimant did not meet the Rules solely in relation to the English language requirement, and that the Secretary of State had effectively prevented the Claimant from the possibility of curing the defect.
23. It is not contended that the judge erred at paragraph 45 in finding no insurmountable obstacles to family life continuing in Turkey and therefore the Claimant could not succeed by relying on EX.1.
24. The judge did not err at paragraph 46 in referring to Agyarko [2017] UKSC 11, and recognising that if the application for leave to remain could not succeed by satisfying the Immigration Rules, exceptional circumstances needed to be demonstrated, which would mean showing that refusal of the application would result in unjustifiably harsh consequences so that it would be disproportionate.
25. The judge goes on to consider proportionality and records at paragraph 48 "the maintenance of immigration control is clearly in the public interest." At paragraphs 48 – 50 the judge conducts a balancing exercise, taking into account section 117B of the Nationality, Immigration and Asylum Act 2002. The judge found that the Claimant spoke English sufficiently to meet CEFR A1 and found that the evidence indicated that the Claimant was a committed student who achieved good grades, and that she had employment in the UK, and paid tax, was in a committed relationship with her husband, and had no previous convictions. The judge was entitled to place some weight upon the fact that the Claimant had demonstrated that

she wished to undertake CEFR A2, but was unable to do so because the Secretary of State would not return her passport.

26. My initial reaction upon reading the judge's decision was that it was a decision that could be described as being generous towards the Claimant. That is still my view. I find myself in agreement with Mr Singer's submissions in which he conceded that the decision could be described as generous, and that there would be judges who would not have made the same decision. I agree with Mr Singer, in that although that is undoubtedly true, that is not the appropriate test to be considered.
27. I do not find that the decision by the judge is perverse. The judge has adopted a correct legal approach by firstly considering whether the Immigration Rules can be satisfied, and in finding that they cannot, by considering whether the Secretary of State's decision would result in unjustifiably harsh consequences.
28. It is the finding that there are unjustifiably harsh consequences which is the primary reason for the Secretary of State challenging this decision. In my view the judge has provided adequate reasons to explain why she found unjustifiably harsh consequences so that the Secretary of State's decision is disproportionate. That is that at the date of hearing the only aspect of the Immigration Rules not satisfied was the English language test, which the Claimant had indicated that she would take if the Secretary of State would return her passport. If the Claimant left the UK the Sponsor's income alone would not satisfy the financial requirements. The judge in the circumstances was entitled to find that this amounted to unjustifiably harsh consequences and would be disproportionate.
29. I therefore conclude that the judge did not err in law, has made findings open to her on the evidence, and provided adequate reasons for those findings, so that it is apparent to a reader of the decision, why the decision was made.

Notice of Decision

The decision of the FtT does not disclose a material error of law. I do not set aside the decision. The appeal of the Secretary of State is dismissed.

There was no application for anonymity and I see no need to make an anonymity direction.

Signed

Date 15th October 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

As the decision of the FtT stands so does the decision not to make a fee award.

Signed

Date 15th October 2018

Deputy Upper Tribunal Judge M A Hall