



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14574/2016

THE IMMIGRATION ACTS

Heard at Field House
On 16 May 2018

Decisions and Reasons Promulgated
On 30 May 2018

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

DALJIT KLAIR

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z. Raza, Counsel

For the Respondents: Mr M. Diwnyecz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India, born in 1956. She made an application on 8 April 2016 for leave to remain as a partner. That application was refused in a decision dated 23 May 2016. The respondent concluded that the appellant was unable to meet the eligibility requirements of the Article 8 Rules in terms of the financial requirements. Paragraph EX.1 of Appendix FM was not satisfied because the evidence did not demonstrate that there were insurmountable obstacles to family life between the appellant and her spouse continuing in India. There were no exceptional circumstances meriting a grant of leave outside the Article 8 Rules.
2. The appellant appealed that decision and her appeal came before First-tier Tribunal Judge Birk ("the FtJ") on 23 May 2017 who dismissed the appeal.

The grounds and submissions

3. The appellant's grounds contend, in essence, that because the relevant date for assessment of the evidence was the date of the hearing before the FtJ, she had erred in failing to take into account that as of the date of hearing the appellant was able to meet the financial requirements of the Rules in terms of her husband's ("the sponsor's") earnings.
4. Indeed, the grounds contend that even as at the date of the respondent's decision the appellant was able to meet the financial requirements of the Rules in that respect. What are said to be his earnings from his employment(s) are set out in the grounds.
5. It is also asserted in the grounds that the appellant and the sponsor would have no means of obtaining an income or being provided with financial support if returned to India. The sponsor had been living in the UK for 11 years and is now aged over sixty. He would not be able to find a job in India sufficient to provide for them both.
6. The grounds contend that the FtJ had set too high a threshold for engagement of Article 8 and had failed to apply the five-stage *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 approach.
7. In submissions, Mr Raza refined the arguments on behalf of the appellant in that it was conceded that, contrary to what is said in the written grounds, the appellant was not able to meet the requirements of the Rules as at the date of the decision because there was a failure to provide the specified evidence in accordance with the Rules. Thus, [13] of the grounds was not correct.
8. I was referred to the financial evidence in the respondent's bundle which at page 16-19 includes payslips for the sponsor going back in excess of six months, and payslips from page 20 showing gross income of £20,280 to 31 March 2017. There was also a P60 at page 33 for 2017 showing a gross income of £20,280. From page 37 there were six months' worth of bank statements to April 2017 showing deposits consistent with the sponsor's earnings.
9. Reliance was placed in particular on *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 at [51] (quoted below). The only disputed issue in the appeal before the FtJ was in terms of the financial requirements of the Rules. The appellant had previous leave as a spouse so did not need to provide further proof of English language ability, contrary to what the FtJ said. The relationship requirements and the appellant's immigration status and accommodation requirements were also met. Accordingly, as indicated in *Agyarko*, the public interest did not require the appellant's removal.
10. In his submissions, Mr Diwnyez contended that the FtJ's decision was a thorough one. It was clear from [4] of her decision that it was conceded that the appellant was unable to meet the requirements of the Article 8 Rules, and at [9] it is also clear that it was accepted that there was a shortfall in the income necessary to meet the Rules (at

the date of the decision). It was further pointed out that the FtJ was not referred to the decision in *Agyarko*.

The FtJ's decision

11. After setting out the chronology and the background to the appeal, and summarising the respondent's decision, the FtJ noted at [4] that it was conceded in submissions on behalf of the appellant that she "did not meet Article 8 under the Immigration Rules as his income fell below the requisite level of £18,600 for the relevant period".
12. She summarised the evidence given by the appellant and her husband and the parties' submissions. She noted the respondent's submission that the appellant does not meet the "financial or specified documentation requirements". His P60 for 2016 indicated a gross salary of £18,058. She noted also the submission made on behalf of the appellant that "the shortfall is minimal" and that "His P60 for 2017 is above £20K".
13. The FtJ's found that the appellant arrived in the UK less than four years ago, having lived in India prior to that. She was extremely familiar with the society, culture and language of India. She would be returning to the same circumstances she was living in before she came to the UK. She had a house to return to and there was no evidence to support the assertion that the house was in a poor condition. It had not been asserted that the house was unavailable or uninhabitable. She was living alone and had been for many years.
14. In relation to her health, the FtJ noted that there was no medical evidence in support of the contention that she would be unable to care for herself, and the only medication she took was painkillers. The financial support from her husband could continue.
15. She concluded that there was no evidence to support the claim that she would be at risk in terms of her safety on return. Prior to her entry into the UK in 2013 her emotional needs were being met in India and circumstances had not changed between then and now. She noted that the sponsor had made it clear that he would continue to remain in the UK and would not return with the appellant to India and thus he could continue his employment. Further, there was no reason that he would not be able to obtain some form of employment if he did return to India with the appellant. Prior to 2006 he had lived and supported himself there. She rejected the contention that he would not be able to adjust to the climate and lifestyle. He had lived in India 11 years ago and had visited there three times since.
16. She found that the appellant and her husband had lived separate lives before and were then still able to maintain a family life.
17. The FtJ also found that there was no evidence as to the appellant's social ties in the UK in terms of her private life. Although it was said that she has friends here, there was no evidence from them. She could in any event maintain contact with them from India, including by visits. There were no significant obstacles to her integration there.

18. In terms of whether there were compelling circumstances meriting consideration of Article 8 outside the Rules, the FtJ said that it might be argued that such a reason is that she is married to a British Citizen, but no specific reasons were put before her to consider.
19. As to proportionality, she stated that she placed significant weight on the appellant having failed to meet the Article 8 Rules in relation to family or private life. In terms of s.117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), she found that the appellant had completed basic English certificates in 2013 but there was no evidence that she spoke English now. She was not dependent on the state for assistance. The appellant's husband could return to India with her. She found that the decision was proportionate and thus there would be no breach of Article 8.

Assessment and Conclusions

20. Mr Raza accepted in submissions that the grounds were in error in suggesting that the appellant met the requirements of the Rules at the date of the decision. She did not, because of the requirement to provide specified evidence. That in my view is a significant matter because the specified evidence requirements are obviously designed to provide a clear framework of evidence within which a claim to have a certain level of earnings (or savings) can be verified in a robust way.
21. I also suggested to Mr Raza that it could not actually be said that as at the date of the hearing before the FtJ the appellant met the financial requirements of the Rules. That is because the specified evidence needed to have been provided at the time of the application (see Appendix FM-SE para D(a)). That is part of the Rules and because of the specified timeline it is not a Rule that could be met at the date of the hearing; the time had passed for compliance with that aspect of the Rules. That was also conceded.
22. The FtJ said that no specific compelling circumstances were put before her, although she thought that perhaps the appellant's relationship with a British Citizen might be argued as such. In any event, as Mr Aziz rightly pointed out, the FtJ did go on to consider Article 8 outside the Rules.
23. In the assessment of Article 8 in its wider context, it was surely relevant to consider the extent to which the appellant at the date of hearing demonstrated that she was able to meet the financial requirements of the Rules in terms of level of income with reference to the specified evidence mandated by the Rules. The need to have established the required level of income at the time of the application was also relevant, but that does not mean that the income that the appellant could demonstrate at the time of the hearing was irrelevant; on the contrary.
24. That conclusion does not contradict what was said in *AM (S 117B) Malawi* [2015] UKUT 0260 (IAC) on the relevance of financial resources in a proportionality assessment because the distinction can be drawn between demonstrating compliance

with the rigorous financial requirements of the Rules and mere assertion, or even assertion supported by some evidence, that a person is financially independent.

25. In failing to take into account in the proportionality assessment the evidence before her as to the *extent to which* at the date of hearing the appellant met the financial requirements of the Rules, I am satisfied that the FtJ erred in law. That error of law is such as to require her decision to be set aside. I proceed to re-make the decision on the basis of the evidence that was before the First-tier Tribunal, that being accepted on behalf of the appellant as being an appropriate course should I find myself in the position of re-making the decision. The contrary view was not advanced on behalf of the respondent.
26. It is not disputed on behalf of the respondent, or at least was not before me, that if the application for further leave to remain was made now the appellant would be able to meet the requirements of the Rules. The only issue in the respondent's decision was in relation to the financial requirements and that was itself substantially a question of the failure to provide specified evidence. The contention that the specified evidence has now been provided, or would be considered as such if the application were decided now, again was not the subject of any dispute before me.
27. The re-making of the decision does not require further consideration of anything other than proportionality under Article 8, since that is where the error on the part of the FtJ lay and no other aspect of her decision needing to be revisited.
28. It seems to me that Mr Raza's reliance on [51] of *Agyarko* is apposite. There the Supreme Court said as follows:

"Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

29. Mr Raza accepted that the Court was not there specifically referring to the financial requirements of the Rules, but contended that the principle is nevertheless applicable. It was not suggested on behalf of the appellant before me that there was any error of law in the FtJ's distinct conclusion that there were no insurmountable obstacles to their continuing their family life in India. The FtJ did not say that exactly in that way, but that is the effect of her decision. Her conclusions in that respect are part of the proportionality assessment therefore.
30. However, the issue really does boil down to what is in the public interest. The maintenance of an effective immigration control is a matter that is significant in the

public interest. The fact that the appellant failed to meet the requirements of the Article 8 Rules is also significant in that context.

31. However, the extent of that failure is also pertinent. It is the case that were the matter assessed today (including with reference to specified evidence), and indeed were it assessed at the date of the hearing before the FtJ, it would be found that the appellant did indeed meet those requirements and, I accept in the light of Mr Aziz's unchallenged submissions, all the other requirements of the Article 8 Rules for leave to remain as a spouse.
32. In those circumstances, I am not satisfied that the respondent has established that the decision to refuse further leave to remain is a proportionate response to the legitimate aim pursued, and taking into account what was said in the passage of *Agyarko* to which I have referred.
33. Accordingly, I re-make the decision by allowing the appeal.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and I re-make the decision by allowing the appeal on Article 8 grounds.