Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04020/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 August 2019	**On 27 August 2019**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

CHORLETTE ALISHA CROSDALE
(ANONYMITY DIRECTION NOTE MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Uddin, instructed by Samuel Louis Solicitors
For the Respondent: Mr Tarlow, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Jamaican national who was born on 2 April 1980. She appeals against a decision which was issued by Judge Blake on 28 May 2019, dismissing her appeal against the respondent's refusal of her human rights claim.

2. The appellant entered the UK as a visitor in 2002. She received grants of leave to remain (as a student) until November 2004 but subsequent

applications for leave to remain and an EEA Residence Card were refused. In June 2016, however, the appellant was granted leave to remain until 24 December 2018 in reliance on her relationship with a gentleman called Mr Rhoden.

3. On 18 December 2018, and therefore before the expiry of her leave, the appellant made an application for further leave on family life grounds. In this application, she relied on her relationship with a British citizen named Mr Myton.

4. The respondent refused the application on 14 February 2019. Under the Five Year Route in Appendix FM, there was a single ground for refusal, which was that the Minimum Income Requirement ("MIR") was not met. Under the Ten Year Route, it was not accepted that there were any insurmountable obstacles to Mr Myton relocating to Jamaica with the appellant. It was not accepted that the appellant would encounter very significant obstacles on return to Jamaica (paragraph 276ADE(1)(vi) of the Rules refers) or that there were exceptional circumstances outside the Immigration Rules which rendered the appellant's removal contrary to Article 8 ECHR.

5. The appellant appealed and her appeal was heard by Judge Blake at Taylor House on 23 April 2019. The appellant represented herself. The respondent was represented by a Presenting Officer (Mr Tear). Because the appellant was unrepresented, the documentary evidence was not presented to the judge in a bundle but it is clear that there were a number of documents relating to her employment with a bakery in Coldharbour Lane called the Bread of Life Bakery. It was the appellant's case before Judge Blake that she was personally earning more than £18,600 per annum at this bakery, both at the date of application and at the date of hearing.

6. Having set out the background, the evidence and the applicable law, Judge Blake reached his findings on the appeal at [41]-[46]. At [42], he concluded that the appellant 'had not established that she was in receipt of £18,600 per annum as required under the Rules'. He went on to consider Article 8 ECHR outside the Rules, and concluded that there were no exceptional circumstances [44] and that, if the appellant sought to submit that her income had increased after the respondent's decision, 'it would be open to her to submit this evidence with a fresh application if she was in possession of it': [45].

7. The grounds of appeal are somewhat diffuse. In granting permission to argue the grounds in full, however, Judge Kelly was particularly concerned that Judge Blake might not have given sufficient reasons for concluding, at [42], that the appellant could not meet the MIR when there appeared to be an arguable evidential basis for concluding otherwise.

8. At the outset of the hearing before me, I sought to clarify with Mr Uddin (who had not settled the grounds) how exactly the case was put. I had understood from Judge Kelly's decision and from the grounds of appeal, such as they are, that it was to be contended that the judge had failed to consider evidence which bore on the potentially determinative question of whether the appellant was able to meet the MIR, and therefore the requirements of the Five Year Route. In fact, in response to my questions, Mr Uddin accepted that he was unable to advance such an argument. He recognised that the appellant's application had been made on 18 December 2018; that the focus under Appendices FM and FM-SE of the Immigration Rules was on the appellant's financial circumstances in the preceding 6 months; and that the appellant's demonstrable annual income in that period was over £18,000 but below £18,600. In particular, Mr Uddin accepted that he was unable to rely on a £660 bonus which was paid to the appellant on 31 December because, as Mr Tarlow had noted, paragraph 18(b) of Appendix FM-SE of the Immigration Rules only permits reliance on such a bonus 'where they have been received in the relevant period… relied upon in the application'. Given that the bonus was received by the appellant on 31 December 2018, Mr Uddin was obviously constrained to accept that the appellant could not rely upon it in connection with an application which focussed on the six month period preceding 8 December 2018.

9. Instead, it was Mr Uddin's submission that the judge had erred in failing to consider the up-to-date evidence of the appellant's financial circumstances when considering the appellant's Article 8 ECHR case outside the Immigration Rules. He submitted that the conclusions at [44] and [45] were legally inadequate when the appellant had presented the judge with evidence that she was earning in excess of the MIR at the date of the hearing before the FtT.

10. Mr Tarlow submitted initially that it had been open to the judge to conclude that there were no exceptional circumstances outside the Rules and that the appropriate course was for the appellant to make another application in the event that her financial circumstances had improved after she made the application for leave to remain. I asked Mr Tarlow whether the judge's conclusion at [44] could properly be sustained in circumstances in which there was evidence which appeared to show that the appellant was earning in excess of the MIR at the date of hearing. I had in mind, and drew to Mr Tarlow's attention, the decision of the Supreme Court in MM (Lebanon) [2017] UKSC 10; [2017] 1 WLR 771, at [99] in particular. Mr Tarlow had nothing further to add, but sought to maintain that the judge's reasoning was adequate.

11. I indicated at the hearing that I had concluded that Judge Blake had erred in law in failing to consider the appellant's income at the date of hearing, since that was a consideration which was relevant to deciding whether she

had a claim outside the Rules in reliance on Article 8 ECHR. My reasons for that conclusion are as follows.

12. Judge Blake concluded at [44] that the Immigration Rules were compliant with Article 8 ECHR and that there were no exceptional circumstances outside the Rules which warranted the grant of leave outside the Rules. In reaching that conclusion, however, Judge Blake failed to consider whether the evidence before him demonstrated that the appellant was earning in excess of the MIR at the date of hearing.

13. That it was incumbent upon the First-tier Tribunal to consider that question is clear, to my mind, from [98]-[99] of MM (Lebanon). At [98] of that decision, Lady Hale and Lord Carnwath (with whom the other Justices agreed) concluded that the strict requirements of the Immigration Rules (as to sources of funding) had not been decided on a whim and that it was not irrational for the respondent to give priority in the Rules to simplicity of operation and ease of verification. At [99], they continued as follows:

> "Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because "less intrusive" methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in *Mahad*, including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal."

14. The judge was invited to consider the up-to-date evidence of the appellant's earnings. He was not entitled to consider that evidence when considering the case with reference to the Immigration Rules, which focus on a set period preceding the date of the application, but he was not so constrained when considering the position more broadly outside the Rules. The appellant had submitted to the judge that her income had increased before the hearing and that she was able to demonstrate at that date that her income exceeded the MIR. The judge should have

considered that submission and the evidence which bore upon it. It did not suffice merely to conclude, as he did at [44], that there were no exceptional circumstances.

15. I indicated that Judge Blake's decision outside the Rules would be set aside and asked for submissions on whether I should remake the decision on the appeal myself or whether it should be remitted to the FtT for a further hearing. Both advocates urged me to remake the decision on the appeal for myself.

16. I asked Mr Uddin whether the appellant's financial circumstances were the same as they had been at the date of the hearing before Judge Blake. He indicated that there was further evidence in the form of payslips and bank statements to establish the appellant's earnings from the bakery. These had not been filed or served, however. I gave Mr Uddin time to show these documents to Mr Tarlow, and indicated that the respondent was entitled to submit that they should be filed and served in the proper way and that there should be a further hearing at which any difficulties with those documents could be considered.

17. On resuming the hearing, Mr Tarlow helpfully indicated that he had considered the payslips and bank statements in the appellant's name and that he was 'entirely satisfied' that the appellant's financial circumstances were as claimed. Mr Uddin indicated that the appellant was shown to be earning £1576.32 gross per month and an annual bonus of £660, which amounted to £19,515.84 per annum. At my request, Mr Tarlow confirmed that he was satisfied that the appellant was earning that sum at today's date. I asked him whether, in those circumstances, the Secretary of State sought to submit that the appeal should be dismissed, whether on the basis that the appellant should make a fresh application for leave or otherwise. He indicated that he did not seek to make such a submission, as a result of which I was able to indicate that the appeal would be allowed on Article 8 ECHR grounds.

18. As I have already stated, the only basis upon which the appellant was unsuccessful under the Five Year Route was that she was not shown to be earning above the MIR in the period preceding the application. That remains the position but it is clear from MM (Lebanon) that the Tribunal is not confined by the evidential strictures of Appendices FM and FM-SE when considering whether an individual will represent a financial burden on the state. Where, as here, the evidence is accepted to show that the appellant currently earns more than the MIR, it is difficult to see why it could be said to be proportionate to require her to make another application to the Secretary of State in reliance upon that greater income. In fairness to Mr Tarlow, he did not seek to make that submission. Nor, pragmatically, did he seek to submit that the respondent was able to show

that her decision was proportionate on any other basis, whether by reference to Part 5A NIAA 2002 or otherwise.

19. In the circumstances, I am satisfied that the appellant demonstrably meets the requirements of the Immigration Rules as at today's date; that she would be certain to be granted leave to remain on that basis if she made a further application; and that it would be disproportionate under Article 8 ECHR to expect her to make such an application, or to remove her from the United Kingdom.

Notice of Decision

The decision of the FtT(IAC) was materially erroneous in law and is set aside to the extent set out above. I remake the decision on the appeal and allow the appeal on Article 8 ECHR grounds.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

23 October 2019