



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10021/2017

THE IMMIGRATION ACTS

Heard at Field House
On 11 April 2019

Decision & Reasons Promulgated
On 1 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MEENABEN VIJAY ODEDARA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Amin of Counsel instructed by Bhavsar Patel

For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Somal promulgated on 5 April 2018 dismissing an appeal against a decision of the Respondent dated 23 August 2017 refusing leave to remain, on human rights grounds.
2. The Appellant is a citizen of India born on 9 February 1993. She entered the United Kingdom pursuant to entry clearance as a spouse granted from 27 January 2014

conferring leave until 26 October 2016. Entry clearance was granted on the basis of her marriage to Mr Vijay Keshav Odedara.

3. The Appellant made an application for further leave to remain on the same basis on 24 October 2016. That application was put on pause by the Respondent pending consideration of the case of **MM (Lebanon) and Others v Secretary of State for the Home Department [2017] UKSC 10**. In due course the application was refused on 23 August 2017 for reasons set out in a 'reasons for refusal' letter ('RFRL') of that date.
4. In the RFRL it was indicated that the Respondent was satisfied in respect of the requirements of the Immigration Rules save for the 'eligibility financial requirements': the Respondent was satisfied on 'suitability', 'relationship', 'immigration status', and English language requirements.
5. The RFRL noted the financial requirement threshold income level of £18,600, and then stated:

"You have failed to demonstrate that you or your partner have an annual income of £18,600, either separately or with combined earnings. You therefore fail to fulfil E-LTRP.3.1 to E-LTRP.3.3 of Appendix FM of the Immigration Rules".
6. The RFRL went on to consider paragraph EX.1 of Appendix FM in the alternative, but concluded that there would be no *"very significant difficulties which would be faced by [the Appellant] or [her] partner in continuing [their] family life together outside the UK in India, and which could not be overcome or would entail very serious hardship"*.
7. Private life was also considered pursuant to paragraph 276ADE(1), but in circumstances where the Appellant had not been present in the United Kingdom for a significant length of time and continued to have family ties in her country of origin, it was considered that the Rules were not satisfied.
8. The RFRL then sets out consideration of 'exceptional circumstances'; the decision-maker concluded none were evident.
9. The Appellant appealed to the IAC.
10. The appeal was dismissed for reasons set out in the decision of Judge Somal promulgated on 5 April 2018.

11. The Appellant applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge S H Smith on 13 July 2018.
12. In dismissing the appeal the First-tier Tribunal Judge found that the Appellant did not meet the requirement of the Immigration Rules and moreover any interference in her Article 8 family and/or private life in consequence of the decision was essentially proportionate.
13. In considering the Immigration Rules the Judge had particular regard to materials relating to the income of both the Appellant and her husband. It is apparent that most of the materials referred to are materials that post-date the date of the application, and as such were not part of the application. In this context it is to be recalled that there was a period of approximately 10 months between the date of application and the date of the Respondent's decision – at least in part because of the Respondent's policy to 'suspend' consideration of such applications pending consideration of **MM (Lebanon)** by the Supreme Court. During this period the Appellant's husband received a P60 for the year ending 5 April 2017 that showed that his earnings for that tax year did indeed just overcome the £18,600 hurdle, being £18,753; whilst this document was relied upon on appeal it was necessarily not included in the original application, and seemingly not forwarded to the Respondent prior to the decision.
14. The Decision of the First-tier Tribunal includes discussion of the requirements of Appendix FM-SE - the 'specified evidence' requirements. The discussion encompasses in particular a letter from the Appellant's husband's employer Window Warehouse, (see paragraphs 9, 13 and in particular 14).
15. The Judge made findings to the effect that both at the date of the Respondent's decision and currently the Appellant could demonstrate that combined earnings were in excess of the required threshold under the Rules: see for example at paragraph 20:

"It is clear that at the date of the decision and date of hearing the Appellant does meet the minimum financial requirement of the Rules. It is also clear that their combined income for the tax year to 5 April 2016 was £25,232 although they failed to provide specified evidence of it as required under the Rules. Since then they have continued to earn over the minimum required of £18,600. I find there are exceptional circumstances in this case which justify that I consider Article 8 outside the Immigration Rules".

16. The Judge went on to consider Article 8, but reached a conclusion adverse to the Appellant. In this regard the Judge appropriately directed herself to the five stage **Razgar** test and the public interest considerations: see paragraphs 21 and 22. The Judge was satisfied in respect of the first four **Razgar** questions (paragraphs 22 and 23).

17. In respect of the fifth **Razgar** question, proportionality the Judge observed:

“There is no doubt that the interest of a private or family life would not usually prevail over the interest of immigration control. Article 8 does not entail a general obligation for a state to respect an immigrant’s choice of the country of residence in its territory. The inability to meet the Rules is a weighty factor to be considered. The inability of the Appellant to meet the Rules is a weighty factor and the maintenance of effective immigration controls is in the public interest codified in section 117 of the 2002 Act” (paragraph 24).

18. The Judge went on to consider questions of social ties and relationships at paragraph 25. In this context the Judge noted that the Appellant had established her private life and family life in the United Kingdom at a time when she would have known that it was not certain that she would be able to continue to live in the United Kingdom - bearing in mind that she was essentially on a period of ‘probationary leave’ as a spouse, and it would be necessary to satisfy the Rules at the end of that period of leave in order to secure further leave to remain as a spouse. In the context of the Appellant not having met the requirements of the Rules, the Judge commented:

“There is nothing to prevent the sponsor [the Appellant’s husband] visiting India to see the Appellant and [the Appellant] making a fresh application with the specified evidence”.

19. At paragraph 26 the Judge went on to reiterate that *“The Appellant does not meet the requirement of the Rules”*, before adding that *“the public policy in requiring her to apply from abroad is not the only a matter weighing in the Respondent’s side of the balance”*. Paragraph 26 continues:

“Return to India to make an application for entry clearance is proportionate as there are no circumstances that show such a course of action would be unreasonable or unduly harsh. There has been no evidence before me that could lead to a conclusion that her removal to India from where she would make an application for entry clearance to return as a spouse in her right to respect for her family and private life as a woman married to a man with indefinite leave to remain in the UK and working in the UK is anything other than proportionate to the competing public interest issues. I’m not satisfied on the facts of this case that there are any exceptional circumstances at all to justify granting leave to remain outside the rules stop the removal of the appellant

would not be unduly harsh. The decision is proportionate. In those circumstances the public interest does require the removal of the appellant."

20. The challenge to the decision of the First-tier Tribunal very much focuses on the findings to the effect that the Appellant's financial circumstances at the date of the Respondent's decision - and continuing to date - were sufficient to meet the threshold under the Immigration Rules.
21. However, as Ms Amin very fairly acknowledged, the difficulty encountered by such a line of argument is not limited to the issue of 'specified evidence'. The starting point under the Rules is not the situation at the date of the decision made by the Respondent, but the date of the Appellant's application.
22. The materials submitted with the application comprised an application form and three different sets of documents, which are reproduced in the Respondent's bundle at Annexes A, B and C. Annex A contains pay slips, both in respect of the Appellant and her husband; Annex B contains bank statements in respect of the Appellant and also joint bank statements for the Appellant and her husband; and Annex C is a letter dated 19 October 2016 from the Appellant's husband's employer Windows Warehouse.
23. The application form contains an assertion that the Appellant's husband's earnings at the date of the application amounted to £20,016 per annum. Reference is made in the application form to past employment of the Appellant, but in this context it is indicated that she had recently lost her job; as such, at the date of the application the Appellant was not earning at all and in this regard nothing specific further was cited in the relevant section as to her level of earnings as something to be taken into account in meeting the specific financial requirement.
24. The difficulty that becomes manifest upon consideration of the pay slips that were submitted with the application in respect of the Appellant's husband is that they quite simply do not add up to a level of earnings commensurate with that claimed in the application form. Nor do they even add up to a level of gross earnings that meets the threshold in respect of the Rules. Pay slips were submitted for the 12 month period covering October 2015 to September 2016. Two such pay slips for the months of June and July 2016 were missing; however it is possible to see those pay slips in documents submitted with the Notice of Appeal to the First-tier Tribunal, and it is also apparent from the bank statements that monies were received by the Appellant's husband in those months from his employer commensurate with the pay slips subsequently submitted. Even putting aside the omission from the sequence of documents (which if there were any merit in the application was a matter that could

readily have been remedied by the Respondent's decision-maker invoking the evidential flexibility provisions of Appendix FM-SE), the total for the 6 months up to the date of application comes to £7,914.96; for the 12 months up to the application the total comes to £14,674.79. As I say, although the Appellant had indicated that she had been earning she acknowledged that she was not earning at the date of the application; she did not otherwise provide supporting evidence of her earnings with the application; accordingly there was no further income shown in the application to combine with her husband's earnings.

25. The bank statements essentially confirmed the net levels of income shown on Appellant's husband's pay slips. The employer's letter at Annex C was not compliant with the requirements of Appendix FM-SE - as was noted by the First-tier Tribunal Judge. Whilst if the level of earnings had been adequate to meet the threshold it might have been open to invoke the evidential flexibility provisions to disregard the defect in the employer's letter, the reality was that the level of earnings shown on the pay slips submitted with the application was not sufficient to meet the requirement of the Rules.
26. In all such circumstances the - albeit brief - conclusion stated in the 'reasons for refusal' letter as regards the financial requirements is adequately clear and adequately reasoned.
27. Once it is acknowledged that the application could not have succeeded on the basis on which it was made to the Respondent, the Appellant's appeal to this Tribunal runs into significant difficulties. Albeit that the focus of the exploration of the facts before the First-tier Tribunal was on earnings that could be demonstrated by evidence that post-dated the application, the reality was - as the Judge in substance found - the application failed under the Rules.
28. That leaves, then, a consideration of the Judge's approach to proportionality. In my judgement in circumstances where the application could not succeed under the Rules, and where - absent particular circumstances - the Rules are generally compliant with the obligation to respect Article 8 rights, it was open to the Judge to conclude as he did on proportionality. Indeed in this regard, once the income level demonstrated by the documents submitted with the application had been calculated and shown to be deficient (notwithstanding the findings of the First-tier Tribunal Judge based on later documents and a later date of calculation), Ms Amin did not pursue the appeal with any vigour.
29. Article 8 is not a panacea for a deficient application; remedy for a deficient application will ordinarily appropriately be made by making a new application, and

it will not generally be disproportionate to expect an applicant to pursue such a course rather than embarking on an appeal

30. Indeed the Judge observed that it was open to the Appellant to reapply. The Appellant may want to take some comfort from the positive findings as to income levels expressed in the decision of the First-tier Tribunal.
31. Further, it is clear from Appendix FM that the immigration status requirements of the Rules need not defeat an application made by the Appellant subsequent to these proceedings - providing that application is made in good time. The immigration status requirements are such that whilst an applicant must not be in the UK in breach of immigration laws, any period of overstaying will be disregarded if it is encompassed by paragraph 39E of the Rules. This effectively gives the Appellant a degree of leeway to make an application subsequent to the termination of the statutorily extended leave that she enjoys by virtue of this appeal.
32. Be that as it may, and although the Judge has made positive findings as to actual income levels, nonetheless it is likely that the Appellant will still have to demonstrate to the Secretary of State that she has specified evidence that complies with the requirements of Appendix FM-SE. However, in due course and as appropriate, no doubt the Secretary of State will have regard to the fact that a Judge of the Tribunal was sufficiently persuaded having heard from both the Appellant and her husband that they were genuine as to their evidence with regard to levels of earnings.
33. However, for the reasons given, it was open to the Judge to conclude that the proportionate response to the failure to meet the Rules was to expect the Appellant to reapply with the appropriate documentation to demonstrate that she could meet the Rules; 'proportionality' did not require that the appeal be allowed on Article 8 grounds. There was no error of law.

Notice of Decision

34. The decision of the First-tier Tribunal contains no error of law, and accordingly stands.
35. The appeal remains dismissed.
36. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reason given at the conclusion of the hearing.

Signed:

Date: 26 April 2019

Deputy Upper Tribunal Judge I A Lewis