



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/16565/2018
HU/16566/2018

THE IMMIGRATION ACTS

Heard at Field House
On 7 June 2019

Decision & Reasons Promulgated
On 01 July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

Y H (FIRST APPELLANT)
Z L (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr J Fraczyk, Counsel
For the Respondent: Mr S Whitwell, HOPO

DECISION AND REASONS

1. The appellants have been granted permission to appeal the decision of First-tier Tribunal Judge Just dismissing the appeals against the decision of the respondent made on 4 July 2018 to refuse them entry clearance to join the sponsor Mr Xia Ming Wong, the husband and father in the United Kingdom for settlement. The judge wrongly said in paragraph 1 that they had been refused leave to remain.

2. The appellants are mother and son and are citizens of China. The first appellant, the mother, was born on 6 December 1975. The second appellant, her son, was born on 19 December 1999.
3. The respondent refused the application because the appellants did not meet all the eligibility “relationship requirements”, because the second appellant was not under the age of 18 years when he applied. Secondly the “financial requirement” was also not satisfied. A gross income of £22,400 was needed. The respondent could not take into account potential employment. The sponsor in the UK was using income from self-employment to meet the financial requirement. The respondent said that the account statements did not show this. This was because there were inadequacies in (1) the annual assessment tax return to HMRC; (2) bank statements, the requisite twelve month period; (3) personal bank statements for the same twelve month period as the tax return showing that the income from self-employment has been paid into the account in the name of the person concerned and for the provision of audited accounts. Finally, the respondent took the view that there were no exceptional circumstances.
4. The judge found that the appellants had not discharged the burden of proof upon them. He found that the sponsor was not a credible witness. From stating that there was no design or “plan” to his wife divorcing him and then promptly remarrying him again in 2012 (not 2020 as stated by the judge) as soon as he had acquired British citizenship, to his stating that he was employed in a manner that enabled him to satisfy the financial earnings threshold, the sponsor had been lacking in credibility.
5. The judge then gave consideration to the two issues before him. He identified the two issues as, firstly, with respect to the sponsor’s financial circumstances; and secondly, with respect to the second appellant.
6. With regard to the second issue, the judge held that the second appellant’s application was made in time on 18 December 2017 when his passport was valid. The reasons for the judge’s decision are set out at paragraph 19. As the judge’s finding has not been challenged, this finding shall stand.
7. The judge however refused both appeals that is the first and second appellants’ appeals on the first ground which was in respect of the sponsor’s financial circumstances. The judge held as follows:

“18. First, with respect to the Sponsor’s financial circumstances, (which Mr Fraczyk correctly identified as one of the two main issues in this appeal) it is clear that on a balance of probabilities, he is not able to show a gross income of £22,400. The evidence shows that his business ceased functioning on 8th May 2016 (see p.136), and it is not clear what he is doing now. I am not satisfied that he is an employee of the company. There is no evidence of this. The Accounts of 4th June 2018 are not signed off by ‘Chew’, the Chartered Accountant (at p.137). At the Hearing the Sponsor was unable to explain why that was the case. Mr Fraczyk states in his well-compiled

Skeleton Argument that I should “attach weight to the witness statements, including that of Mr. Xia Wong” (Skele at para 11). He draws attention to the Self-Assessment Annual Tax Return, and the 12-months of Bank Statements both for the Business and for the Personal Accounts. He also referred to the Audited Accounts. I am not satisfied, however, that these documents can be relied upon. The Appellant’s business ceased functioning on 8th may 2016 and the Accounts that Mr Fraczyk would have me rely upon are unsigned by the Accountant. He, in the alternative, however, argues (Skele at para 12) that the appeal should be allowed ‘outside the rules’ on the basis that the financial requirements are shown to have been satisfied as a matter of fact. I am not satisfied that this is the case. In any event, the argument that because “the issue of compliance in this case is with the technical, evidential requirements of Appendix FM-SE rather than with any concern that the Sponsor is not actually earning the required amount” (Skele, para 12) does not hold because (i) compliance with the Rules is the starting point, and (ii) as a question of fact the Sponsor cannot show that he is earning what he claims to be earning. The Sponsor’s WS (at para 13.1) refers to his earnings going up as high as £27,440, but the Refusal Letter had already explained that the Bank Statements from his business account with the TSB only cover the period from 30/03/2016 to 09/12/2016 and then to 30/10/2017. The Personal Bank Statements only covers the period from 14/09/2017 to 02/02/2017”.

8. The judge then considered the Article 8 claims of the appellants and considered whether there are exceptional circumstances to both appellants’ claim. The judge said that if the sponsor does not have the requisite earnings in a manner that complies with the Immigration Rules, then the appellants obviously do not succeed inside the Rules.
9. The judge questioned whether they could succeed outside the Rules. The judge was not satisfied on a balance of probabilities that the appellant has been able to show that when everything else is taken into account, the documents within the bundle demonstrate that the sponsor was in fact earning an amount that is comfortably in excess of what is required. The judge found that there were no exceptional circumstances, relying on the decision in **Agyarko [2017] UKSC 1**. The judge was not satisfied that the appellants have discharged the burden of proof upon them because it would not be unjustifiably harsh to expect them to apply again. The judge was not satisfied that there was any disproportionality to this course of action if the sponsor has not been able to show the requisite earnings. Section 117B expresses the public interest in immigration control and the judge was not satisfied that it should not be given the weight as a consideration that is intended for it. Accordingly, he dismissed the appeal.
10. Mr Fraczyk submitted that the relevant financial year was 1 April 2016 to 31 March 2017. He relied on his ground 1 which argued that the judge’s approach at paragraph 17 in assessing credibility was an error of law. He submitted that the judge said the sponsor was not credible, from stating that there was no design or “plan” to his wife divorcing him and then promptly remarrying him again as soon as

he had acquired British citizenship, to his stating that he was employed in a manner that enabled him to satisfy the financial earnings threshold. Mr Fraczyk argued that he could not see how this finding was sustainable in the absence of a link between the sponsor's marital design or plan and his financial circumstances. Mr Fraczyk submitted that the oral evidence indicated that the appellant met the minimum requirement.

11. The evidence that led the judge to link the two issues is to be found at paragraph 13. The judge recorded that in cross-examination the sponsor was asked why he was using a different identity in the UK to what he had in China. He replied that he was attempting to avoid being persecuted by the Chinese authorities. He confirmed that he had returned to China four times and had never been arrested. He was asked about his wife divorcing him in 2012, but then went on to remarry him promptly again in 2012, once he had procured British citizenship. He was asked whether this was a plan "between the two of them" and he said it was not, despite being asked the same question twice.
12. Mr Whitwell submitted that the issue about the sponsor's divorce and the evidence on this point was not disputed. The appellant divorced the sponsor and then remarried him which was what the judge commented on.
13. I accept that the judge commented on the account of the sponsor's marriage to the appellant. It was not clear from paragraph 17 whether the judge was stating that the sponsor was not credible in his assertion that there was no design or plan to his wife divorcing him and then promptly remarrying him again in 2012 as soon as he had acquired British citizenship. If the judge was separating this issue out and making an adverse credibility finding on it, he failed to give reasons for the adverse credibility finding if that was what he intended to do. In the absence of a clear finding on this matter, I accept Mr Fraczyk's submission that there was no link between the sponsor's marital circumstances and his ability to satisfy the financial earnings threshold. The design or plan to his wife divorcing him and then remarrying him again bore no relevance to the sponsor's financial circumstances and his ability to meet the financial earnings threshold for the relevant tax year of 1 April 2016 to 31 March 2017.
14. Turning now to the sponsor's ability to satisfy the financial earnings threshold, Mr Fraczyk submitted that the appeal can be allowed on matters of fact even if he does not comply with the strict minimum requirement.
15. Mr Fraczyk submitted that the only reasons the judge gave for rejecting the documents were at paragraph 18. The judge held that the evidence shows that the sponsor's business ceased functioning on 8 May 2016. Mr Fraczyk said this was incorrect because at page 136 of the appellant's bundle was a director's report from the appellant's chartered accountant which said the sponsor's company ceased trading on 8 May 2017. Mr Fraczyk said this was material because May 2017 takes us beyond the tax year that is being considered.

16. Mr Fraczyk accepted the judge's finding that the accounts of 4 June 2018 were not signed off by "Chew", the Chartered Accountant. Mr Fraczyk submitted that Appendix FM-SE 7(h) does not expressly state that the accounts should be signed.
17. Mr Fraczyk submitted that the judge was wrong to find that the self-assessment annual tax return, and the twelve months of bank statements both for the business and for the personal accounts and the audited accounts could not be relied upon. Mr Fraczyk said that he accepted that from the point of view of the Immigration Rules that would be a starting point but not the end point.
18. Mr Fraczyk said the judge was then left with the bank statements. Within the appellant's appeal statement, he indicated that the bank account covered the whole of the financial year.
19. Mr Fraczyk relied on the grant of permission which said that there was no suggestion that the documents were not genuine. Mr Fraczyk referred to the tax returns in the appellant's bundle of documents at pages 266 to 269. At page 268 was the tax return for the tax year 2016-2017. The total income on which tax was due was £27,440. Mr Fraczyk submitted that even if Appendix FM-SE is not satisfied because the accounts were not signed, the appeal can still be allowed because the appellants meet the minimum income requirement. Mr Fraczyk submitted that if the judge had taken this evidence into account he would have found that the minimum income requirement was satisfied in any event.
20. Mr Whitwell took issue with the sponsor's claim that he meets the minimum income requirement. Mr Whitwell referred to Phelan page 1325, Appendix FM-SE 7(h)(i)(bb) which states that the appellant must submit, if the business is not required to produce audited accounts for the last full financial year, an Accountant's Certificate of Confirmation, from an accountant who is a member of a UK recognised supervisory body. Mr Whitwell submitted that the accounts were not signed and therefore there was no certification of confirmation from the accountant. He submitted that failure to sign the accounts means that the appellants cannot succeed under Appendix FMSE which is why Mr Fraczyk needed to take the court through the accounts to say that the sponsor met it in terms of the amount. Mr Whitwell submitted that the respondent's position is that there is no signed certificate. The appellants' position seems to be that even if the accounts are not signed, it does not mean that the accounts are not genuine.
21. Mr Whitwell submitted that the self-assessment tax calculations at pages 266 to 269 were printed on the same day and at the same time. There was no evidence that the sponsor has paid the tax stated in the tax return. He added that the judge held further that he did not know what the sponsor was doing now.
22. Mr Fraczyk in his reply said there was no reasoning why the judge was not satisfied that the sponsor did not meet the financial threshold. He submitted that the

appellant adopted his witness statement at the hearing below. There was no Record of Proceedings on the appellant's file. At paragraph 13 of the sponsor's witness statement, he identified the financial documents which he had submitted to show that he satisfied the minimum income requirement. He accepted that the accounts were not signed but submitted that this was the starting point and should not have been the end point of the judge's analysis. As to the documents being printed on the same day, Mr Fraczyk said the sponsor was not asked about it. It was just an observation by Mr Whitwell. It would be a matter of oral evidence. He further submitted that the typographical errors in the judge's decision did not change the fundamental point that the sponsor's business was trading in the relevant financial year. Mr Fraczyk submitted that the appeal can be allowed outside the Immigration Rules if the material is looked at properly.

23. I find that the judge's errors, namely, (1) that the respondent's decision was a refusal to grant leave to remain; (2) the sponsor's wife remarried him again in 2020 instead of 2012; (3) the sponsor's business ceased functioning on 8 May 2016 when in fact it ceased trading in 2017, do not materially affect the judge's decision.
24. I also find that Mr Whitwell's submission that the financial documents were printed on the same day and at the same time was not something that I could consider since it was a matter that required oral evidence and the proceedings today would not have been the suitable venue to look at this submission which appeared to be an observation by Mr Whitwell.
25. The issue before me is whether the sponsor satisfied the minimum income requirement for the financial year 1 April 2016 to 31 March 2017. On the evidence drawn to my attention by Mr Fraczyk I accept that the tax return for that year does show that the sponsor had an income of £27,400 which was in excess of the £22,400 and satisfied the minimum income requirement. I find that had the judge considered the documents properly he would have found that the minimum income requirement was satisfied.
26. However, that was not the end point. Appendix FM-SE 7(h)(i)(bb) states that the sponsor/appellant must "produce an accountant's certificate of confirmation". The judge rightly noted that the accounts had not been signed by the sponsor's accountants. Mr Fraczyk also accepted this. In arguing that the appeal can be allowed outside the Rules indicated to me that Mr Fraczyk was accepting that the appellant's appeal could not succeed under the Immigration Rules because of a failure to produce a signed certificate of confirmation of the accounts by his accountant.
27. Mr Fraczyk however submitted that the appeal could be allowed outside of the Immigration Rules because the minimum income requirement was satisfied. I find that I do not have a discretion to allow the appeal on the basis suggested by Mr. Fraczyk.

28. I accept the argument by Mr Fraczyk in his grounds of appeal that the judge was undoubtedly correct in concluding that the starting point of any consideration of Article 8 outside the Rules was compliance with the Immigration Rules. However, I also accept Mr. Fraczyk's argument that the judge fell into error in that he also treated this as the end point of his assessment. I find that the judge's finding that there were no exceptional circumstances was based on the inability of the appellants to meet the Rules (paragraph 20) as was his finding that it would not be unjustifiably harsh to expect them to apply again as there is no disproportionality to this course of action if the sponsor has not been able to show the requisite earnings (paragraph 22).
29. I find nevertheless that the error is not material. The appellants do not comply with the Immigration Rules in the absence of an Accountant's Certificate of Confirmation. The sponsor's company ceased trading on 8 May 2017. The judge held that it was not clear what he was doing now. The judge was not satisfied that the sponsor was an employee of the company in the absence of evidence of this. I accept that the first appellant and the sponsor re-married in 2012. They have a son who is an adult. I find that the facts in this case do not disclose any exceptional circumstances. Relying on **Agyarko [2017] UKSC 1**, I find that maintaining the respondent's decision would not lead to unjustifiably harsh consequences for the appellants.
30. Accordingly, I uphold the judge's decision.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 27 June 2019

Deputy Upper Tribunal Judge Eshun