Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2022-000200
UI-2022-000201
IA/12919/2021 & IA/12917/2021

THE IMMIGRATION ACTS

Heard at Field House
On 20th June 2022

Decision & Reasons Promulgated
On 1st September 2022

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YAZID EL MOURTAFI
HAFSA BOUTAHAR
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Ms J Howorth, Legal Representative from Immigration Joss, Immigration Consultants

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing on human rights grounds, the appeal of the respondents, hereinafter "the claimants", against the decision of the Secretary of State on 6 July 2021 refusing them entry clearance to the United Kingdom.

2. The First-tier Tribunal Judge allowed the appeals because, in her judgment, the claimants did satisfy the requirements of the necessary Rules, but even if

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she were wrong about that, she expressly allowed the appeal on the alternative basis that in any event the decision of the Secretary of State interfered disproportionately with the rights of the claimants under Article 8 of the European Convention on Human Rights.

3. The appellants are citizens of Morocco. The appellant in UI-2022-000200, hereinafter the “first claimant” is the infant son of the second claimant, being the claimant in appeal UI-2022-000201. The first claimant was born in January 2020 and the second claimant was born in October 1996.

4. Ms Howorth had produced a skeleton argument for the First-tier Tribunal and the Section headed “Background” is, I find particularly apt and I set out part of it below. This shows that the second claimant is the mother of the first claimant and they both applied for leave to enter the United Kingdom as the child and spouse of their sponsor, who is a person settled and living in the United Kingdom. The Secretary of State refused the applications because the financial requirements were not met and:

> “The reasons given by the [Secretary of State] are, in short:
>
> - The mandatory documentation in FM-SE has not been provided for the employment income;
>
> - The employment income in 2019-2020 cannot be counted towards the total income anyway as the Sponsor is no longer in employment. Discounting the employment income and averaging the Sponsor’s income from self-employment over two years, the Sponsor’s income is beneath the threshold.”

5. The summary then acknowledged that there were no exceptional circumstances apparent to the decision maker who also decided this was not a case where the claimants benefitted from the “evidential flexibility” Rule.

6. The skeleton argument then summarises the grounds. These contend that the Secretary of State has failed to apply her own guidelines in respect of income during the pandemic. According to the grounds the sponsor is a minicab driver, whose income has declined significantly and consequentially following the outbreak of COVID. According to the skeleton argument, the Secretary of State’s Rules headed “Changes to the Minimum Income and Adequate Maintenance Requirement” indicate that in the case of a person whose income has been diminished up to the period ending 31 October 2021:

> ”We will consider employment income for the period immediately before the loss of income, provided that the minimum income requirement was met for at least six months immediately before the date the income was lost.”

7. According to the skeleton argument, the “Respondent’s Rules” (it is unclear exactly what publication is meant) indicated how furlough would be considered and how in the case of a person who was self-employed the loss of annual income due to Coronavirus between 1 March 2020 and 31 October 2021

"will usually be disregarded, along with the impact on employment income from the same period for future applications."

8. The grounds complain that the Secretary of State did not consider these Rules, which according to the skeleton argument, should be applied to the claimant's advantage.

9. I consider now how the judge dealt with this point. The key paragraph is 18. There the judge says:

> "The sponsor's income for the tax year 2019/2020 is set out in the schedule provided in the [claimants'] bundle (pages 7 to 9), and shows that he only started working for Uber from November 2019 and his income prior to that date was salaried employment from Costco, Fast UK Parcel and Cooper Business. It is clear therefore that extrapolating his Uber income for nearly 6 months of that year (November2019 – April 2020) and taking into account his self-employed income under HMRC Support Scheme for that year, he would have exceeded the requirements of £22,400 on an annual basis. It seems to me therefore that the [claimants] through the sponsor have met the employed income requirements under E-ECP.3.1 of Appendix FM."

10. The grounds of appeal from the Secretary of State to the Upper Tribunal assert that the judge was just wrong in her approach in this paragraph. Having had an opportunity of reflecting on it, I am satisfied that, in this respect at least, the Secretary of State is right. The parties agree that the relevant Home Office document for me to consider is Family Migration: Appendix FM Section 1.7 Appendix Armed Forces Financial Requirements Version 8 published on 7 December 2021. The reference to "Armed Forces" suggests this may not be the right document, but it is.

11. The judge's approach to income from employment is clearly inconsistent with the Rules or the observations in the appendix illustrated above. It is clear that the sponsor's employment finished in November 2019 or thereabouts. The diminution in income from employment was absolutely nothing to do with COVID and was not part of the concession.

12. The adaptations to the Rules do provide relief for self-employed people in a way that is broadly similar to the relief provided for employed people but the sponsor cannot benefit from this because it applying the adaption does not produce enough money. What the judge has done, wrongly, is to amalgamate the self-employed and employed incomes, but that is not provided by the Rules.

13. From the point of view of the sponsor, who appears to be an industrious man wanting to do nothing more controversial or challenging than support his family and live with them in the United Kingdom, this must seem extraordinarily Byzantine and unwelcome. It must be remembered that the Rules were changed some years ago to give great emphasis to certainty rather than individual circumstances and that, in principle, is wholly unobjectionable in public law and has to be applied by decision maker. Changes were made in the times of national crisis following the restrictions on working and movement

that were part of the response to the Covid pandemic but the claimants cannot object in law if concessions made under an emergency creates something that might appear anomalous.

14. With respect to the First-tier Tribunal Judge, her conclusion that the claimants do satisfy the Rules is just wrong and cannot be sustained.

15. Before me, Ms Howorth, understandably, tried to give a more elevated interpretation to the Rules and reminded me that the government had indicated that no-one would suffer or be penalised as a consequence of COVID but that is too general. The Rules have to be applied and the Rules do not assist the claimants.

16. I now consider the judge's finding that the appeal should be allowed generally under Article 8 of the European Convention on Human Rights.

17. I noted that the sponsor and second claimant married in May 2018. The second claimant was then living in Morocco and the sponsor was based in the United Kingdom. Their child was born in Morocco in January 2020 and the sponsor visited when he could, although his attempts to visit were confounded by cancellation because of the impact of COVID. The judge says:

> "In my view it is a breach of their Article 8 ECHR rights for the family not to be living together. The alternative would be for the [claimants] to make a fresh application after the conclusion of the current tax year, but that would involve in a further delay in their making such an application (which, based on the current financial prognosis, is likely to meet the financial threshold by some margin). It would be wholly disproportionate for the family to be kept separated for an even longer period."

18. It is perfectly clear what the judge has done here. She has decided that there is strong family life. Given that this appears to be an entirely genuine marriage and involves the welfare of a small child, that finding is wholly uncontroversial. The judge has also decided that refusing the application or dismissing the appeal against refusal would interfere with their private and family life. That again, I find uncontroversial.

19. I have read the Secretary of State's grounds suggesting that this approach is wrong because the parties to the marriage knew they were living in different countries when they made the decision to marry and had their child. They should not just assume that immigration controls would be relaxed for their convenience. That is an argument that may very well go to proportionality but it does not go to the primary point of interference. Generally, married couples want to be together because, generally, that is why they get married and, generally, children do better when they are living with both of their parents. This is a very far way from saying that any interference on that general position is disproportionate but I cannot agree with the Secretary of State that there is any error in the finding that refusing the application is an interference with the "private and family life" of the claimants and their sponsor.

20. The judge has decided, again uncontroversially and with the benefit of clear evidence, that if the application were made now it would almost certainly succeed. There is every reason to believe that the family would be supported as required by the Rules and it was the judge's conclusion that the general human rights imperative of uniting families outweighed the need to respect the policy decisions of the Secretary of State about how applications may be made and how applications can be presented when the point of contention, maintenance, was satisfied in substance, albeit not in detail.

21. I have to ask myself if this is permissible. I cannot accept that the First-tier Tribunal's to allow the appeal on Article 8 ground was lawful. There is little sign of an analysis under part 5(a) of the Nationality, Immigration and Asylum Act 2002. There is no recognition of the public interest lying in the maintenance of effective immigration controls. There is certainly no indication of any particularly compelling or exceptional circumstances that would throw things in a different light.

22. Whilst at one level I can understand the judge's concern for this family, I cannot accept that her decision was lawful. The analysis and reasons were completely inadequate and I set it aside.

23. The facts are not in dispute. There is a no need for a further hearing. I have looked at the sponsor's witness statement entitled "Witness Statement of Sponsor" dated 17 December 2021. I take this statement at face value. There is nothing there that is indicative of exaggeration or dishonesty. It all makes sense in accordance with the First-tier Tribunal's findings. Clearly there were some concerns about how the appellants were managing in Morocco but that has been addressed by removing to live with the claimant's mother and grandmother. Contact is continued by frequent telephone calls and no doubt other means on occasions. As I have indicated above, the decision clearly interferes with the private and family lives of the claimants because it keeps them away from the husband and father when they want to be together.

24. Although it is clear that the financial requirements of the Rules would be met now, I do not give this point much weight. There is no particular reason for them to be together. They just want to live together, which is very ordinary and human, but there is no reason why they cannot make a proper application, which properly presented, could be expected to succeed.

25. I do not find Section 117B of the 2002 Act particularly helpful in any way. It does remind me that the maintenance of effective immigration control is in the public interest and that is important. I accept that the family would be maintained properly. I do not know about their English speaking ability, but there is no reason to think that they would not take advantage of opportunities of learning the language and I do not see much in this at all.

26. I give little weight to the private life established when the immigration status is "precarious" or more realistically non-existent, but it is the family life that concerns me. Nevertheless, there is nothing here which would enable me to conclude responsibly that the claimants have a human right to be in the

United Kingdom notwithstanding their failure to meet the requirements of immigration control. The argument just does not run.

27. Their circumstances are not hopeless. There is every reason to believe that an application made now would succeed. The difficulty they are in is not the result of oppressive government or bad decision making by the Secretary of State but by their decision to make an application which was not going to succeed because the requirements of the Rules were not met. It is now likely to succeed and they should make it if they wish to be in the United Kingdom.

28. I have considered Ms Howorth's contribution. As I have indicated above, her background analysis was impressive. I can find nothing which would justify a decision to allow the claimants' appeals on human rights grounds.

Notice of Decision

29. For all these reasons I find that the First-tier Tribunal erred in law. I set aside its decision and I substitute a decision dismissing the appeals.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 1 September 2022