



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/29139/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 February 2015**

**Determination Promulgated
On 26 February 2015**

Before

Deputy Upper Tribunal Judge MANUELL

Between

**Ms AKOSUA TAKYIWAH MANUH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Mahmud, Counsel (instructed by Jade Law Solicitors)

For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Cruthers on 22 December 2014 against the determination of First-tier Tribunal Judge Watters who had dismissed the Appellant's appeal under Appendix FM as a spouse of a British Citizen and on human rights (Article 8 ECHR family life) grounds against her removal in a decision and reasons promulgated on 11 November 2014. The appeal was determined on the papers as the Appellant had requested.

2. The Appellant is a national of Ghana, born on 9 September 1984. The Appellant had married her British Citizen spouse while in the United Kingdom lawfully on 11 March 2014. She had then sought a variation of leave to remain as a spouse. Judge Watters found that Appendix FM was not met, in that specified evidence to support the income requirement had not been produced: see [7] of the decision. There were no compelling circumstances not sufficiently recognised under the Immigration Rules and it was not necessary to consider Article 8 ECHR.
3. Permission to appeal was granted because it was considered that it was arguable that the judge had erred when considering Appendix FM-SE, in particular section D (i.e., “evidential flexibility”) and fairness.
4. Standard directions were made by the tribunal, indicating that the appeal would be reheard immediately if a material error of law were found. A rule 24 notice dated 14 January 2015 opposing the appeal had been filed on the Respondent’s behalf.

Submissions – error of law

5. Mr Mahmud for the Appellant relied on the grounds of onwards of appeal and the grant of permission to appeal. The judge had not taken into account all of the evidence before him. Part of the specified evidence had in fact been provided and the Appellant had submitted that the evidential flexibility policy required the Secretary of State to enquire about what was missing. It was obvious that the documents whose veracity had not been challenged showed that the Appellant’s sponsor worked for a household name company. Rodriguez [2014] EWCA Civ 2 had not wholly overturned the Upper Tribunal’s determination of the same name. It was relevant in that the Secretary of State was not being asked to engage in speculative enquiries. There was a discretion which had not been exercised. The only issue was the funds available for the Appellant’s maintenance. The decision making process had been unfairly conducted.
6. Mr Wilding for the Respondent relied on the rule 24 notice. He submitted that the discretion in Appendix FM-SE, section D, was a narrow one. The reality was that the Appellant had failed to provide a number of the specified items of proof of her sponsor’s income: original payslips, proof from the employer where copy payslips only had been supplied and complete bank statements for the required period. As the appeal was not in the Points Based System, there was no bar on later provision of evidence but even then the Appellant had still not provided the letter from the sponsor’s employer verifying his income. There was no reason for the Secretary of State to have made any enquiries of the Appellant in view of those multiple failures, and

so there would have been no point in the judge's making a "not in accordance with the law" finding and returning the decision to the Secretary of State. The judge was correct in finding that Appendix FM-SE had not been met. He reached a properly reasoned decision and there was no basis for interfering with it.

7. Mr Mahmud addressed the tribunal in reply. The evidential flexibility policy was not as restrictive as Mr Wilding maintained. The Secretary of State could have provided assistance to the Appellant. There was also the Article 8 ECHR claim which the judge had failed to address adequately.
8. The tribunal indicated at the conclusion of submissions that it found no material error of law and reserved its determination which now follows.

No material error of law finding

9. The decision to opt for a "papers" only appeal to the First-tier Tribunal is frequently an unwise choice. It is more difficult for a judge to consider an appeal without any assistance from either side. The Appellant forfeits the opportunity to provide clarification and to develop submissions. Nevertheless, it is only on the rarest of occasions that judges ought to direct an oral hearing. Even then, appellants cannot be forced to attend such a hearing. There was nothing about the present appeal which suggested that the judge should have directed an oral hearing.
10. The judge's findings about compliance with the specified evidence laid down in Appendix FM-SE were plainly right. Even at the stage of the appeal hearing (on the papers), the specified evidence remained incomplete, as Mr Wilding persuasively submitted.
11. The judge was entitled to find on the evidence before him that there were no compelling, compassionate or exceptional circumstances which might have required the Secretary of State to consider the exercise of discretion outside the Immigration Rules in the Appellant's favour. On the contrary, it was obviously open to the Appellant to submit a fresh and compliant application, and it was proportionate to the legitimate objective of immigration control to expect her to do so.
12. The one issue which the judge did not address in terms was whether, on the facts, the version of the familiar "evidential flexibility" policy (found at section D of Appendix FM-SE) was applicable. This issue had been raised in clear terms at paragraph 17 of the Notice of Appeal to the First-tier Tribunal, and so should have been considered by the judge.

13. There is no express indication in the decision that this issue was considered by the judge. Even if he considered that the point took matters no further for the Appellant, it would have been useful to have said so. Nevertheless, the tribunal is unable to find that this omission amounted to a material error of law. The reason was given by Mr Wilding in his submissions. The missing document (the sponsor's employer's letter) was still not in existence as at the date of the consideration of the appeal. It was not a document which the Respondent had any reason to believe existed, in contrast, for example, to missing page(s) from a series of documents such as payslips or bank statements.
14. The discretion available under section D of Appendix FM-SE as it stood as at the date of decision has to be exercised in a reasonable manner. It did not create a positive duty on the Respondent to ensure that all applications were fully and properly documented before they were considered further. It would have been open to the Respondent in her discretion to have asked for more information, but the multiple omissions which existed as at the date of the Appellant's application meant that there was no such requirement. The Respondent proceeded to deal with the application in accordance with the Immigration Rules and there was no reason for the judge to have found that the Respondent had acted unfairly towards the Appellant.
15. As to Mr Mahmud's other submission concerning Article 8 ECHR, it is sufficient to refer to Patel v SSHD [2013] UKSC 72. Article 8 ECHR creates no general power to dispense with the requirements of the Immigration Rules. The tribunal accordingly finds that there was no material error of law in the determination and there is no basis for interfering with the judge's decision.

DECISION

The making of the previous decision did not involve the making of an error on a point of law and stands unchanged

Signed

Dated 25 February 2015

Deputy Upper Tribunal Judge Manuell