IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32871/2014

THE IMMIGRATION ACTS

Heard at Taylor House (Field House)	**Decision & Reasons Promulgated**
On 7 October 2015	**On 19 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS AMARJEET KAUR DHILLON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B K Sharma, Legal Representative
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals to the Upper Tribunal with permission from Judge of the Upper Tribunal P King given on 29 June 2015.

2. The appellant is a citizen of India who was born on 23 September 1989. The appellant made an application for leave to remain in the UK on the basis of family life on 11 September 2013, having first come to the UK on 16 October 2010 as a

student. On 7 August 2014 the respondent decided to refuse to vary her leave and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed that refusal by notice of appeal dated 19 August 2014.

3. The appeal came before Judge of the First-tier Tribunal Barker (the Immigration Judge). Having considered the documents produced and the oral evidence of the appellant and her sponsor, Mr Harjinder Singh Panu (the sponsor) and having considered the requirements of E-LTRP of the Immigration Rules including EX1 the appellant had failed to satisfy the Immigration Judge that she met the requirements of the Immigration Rules so as to be required to be given leave to remain as a partner of the sponsor, her husband. Accordingly, the Immigration Judge dismissed the appeal under the Immigration Rules but also dismissed it on "human rights grounds" because the interference with her rights to a family and private life would be proportionate in the light of the need to have effective immigration control. The Immigration Judge referred in his determination to the best interests of the child, a son born on 21 September 2014 to the appellant and the sponsor. The Immigration Judge had regard to the young age of the child and considered that the best interests of the child would be met by remaining with the parents or with one of the parents. Nevertheless, the refusal did not breach the appellant's human rights.

The Appeal to the Upper Tribunal

4. By a notice of appeal dated 8 April 2015 the appellant appealed to the Upper Tribunal, asserting that she was the wife of a British citizen domiciled in the UK who was the mother of a British child. She had married her husband on 30 July 2013 and they were in a genuine and subsisting relationship with one another. Their child had been born on 21 September 2014. The appellant had come to the UK as a student, with limited leave, she had been lawfully resident in the UK since her Tier 4 (General) leave expired on 31 July 2013. On 11 September 2013 she had sought further leave to remain as a spouse.

5. The determination of the Immigration Judge promulgated on 23 July 2015 was criticised for dismissing the appeal both under the Immigration Rules and on human rights grounds. It was said that the Immigration Judge had materially erred in his application of the law under the Immigration Rules at Appendix FM-SE, the appellant in fact met the requirements of EX1 as there were insurmountable obstacles to her returning with her husband to continue family life abroad and it was unreasonable to expect her child to relocate.

6. Judge of the Upper Tribunal P King considered the grounds to be at least arguable given that the appellant's husband may, by the time of the hearing, have qualified under Appendix FM-SE paragraph 5(b) (ii). Therefore, carrying out a proportionality assessment and having regard to the provisions of Section 117B, it was arguably not reasonable to expect the appellant and her qualifying child to leave the UK. The interests of the appellant's husband had to be considered as well as those of her

child. The Immigration Judge had appeared to focus more on the appellant's situation than that of the sponsor.

7. At the hearing both parties were represented. Mr Sharma, the appellant's legal representative, explained that there was a "new bundle" which demonstrated that the appellant's husband earned £5,425 between 1 October 2012 and 28 October 2013. The documents also demonstrated that he earned £13,325 between 11 October 2012 and 28 October 2013. Between 28 October 2013 and 28 November 2013 he earned a further £1,290. Therefore, the total earnings up to 28 October 2013 were £18,750. Mr Sharma gave me some further figures for the period from 11 October 2012 until 28 October 2013, stating that it was £20,040 that was earned. He explained that his client had a baby on the previous Sunday and could not attend the hearing. It had been accepted before the FtT that the marriage was a genuine and subsisting one. It was pointed out that at the date of the application (10 September 2013) the sponsor was in employment with a housing body. He worked until 28 October 2013. Therefore, it was claimed that, his earnings exceeded the threshold of £18,600 required by the Immigration Rules.

8. It was pointed out by the respondent's representative, Mr Duffy, that the sponsor had accepted at the FtT hearing that he did not meet the earnings requirements of the Rules . Even if this was not accepted, he had not earned the correct sum as at the date of the application and thus did not fulfil the requirements of those rules. In particular, the pay slips provided had to cover the period March to August 2013 in order to cover the relevant period required by the Immigration Rules. The documents supplied, including pay slips for a six month period ending on the date of the application, had to pertain to the circumstances at the date of the application. It was unclear how Mr Sharma had calculated his sums. Clearly he was not able to include any jobseeker's allowance in his figures. It was not clear that this and any other benefits had been excluded. It was also pointed out by Mr Duffy that Appendix FM-SE specified the types of documents that could be produced in support of an application. In any event the evidence here post-dated the hearing in the FTT. In the absence of any application to adduce fresh evidence, with an explanation for the late production of that evidence, it could not be admitted for the first time before the Upper Tribunal. There were no pay slips for the full period, a letter from an employer if the salaried employment had not lasted for six months and personal bank statements had to be supplied. There was no employer's letter and the documents did not satisfy these requirements.

9. Mr Duffy also explained that in addition to the child who had been living with the sponsor and his wife the appellant had recently given birth to a second child. It was submitted that she could return to India with her two children. It would be open to the sponsor to join them in India if he wished to continue his family life with them there.

10. At the conclusion of the hearing I reserved my decision as to whether or not there was an error of law and if there was such an error what steps should be taken to rectify that.

Discussion

11. The key dates so far as the present case is concerned are:

- 10 September 2013 – the appellant applied for leave to remain as the spouse of a British citizen claiming that her husband, the sponsor, earned £18,750.40.
- 28 October 2013 – the sponsor ceased to work for his former employers.
- 7 August 2014 – the respondent refused the application for leave to remain as the spouse of a British citizen, relying on the fact that the financial requirements under the Immigration Rules were not met but considering that there were no exceptional circumstances for considering the application outside the Rules.
- 24 September 2014 – the appellant's son was born. I have not been given her son's name in the papers supplied.
- 19 December 2014 – the hearing before the FtT took place. The appellant and her husband gave evidence, the documents were considered following the hearing.
- 23 January 2015 – the decision of the FtT was promulgated.
- 29 June 2015 – Judge King granted permission to appeal to the Upper Tribunal because he considered it arguable that the overall assessment of proportionality should be affected by the fact that the sponsor's income appeared to have increased since 6 October 2014 to £20,800 and that a more generous assessment under Section 117B of the Nationality, Immigration and Asylum Act 2002 could, arguably, have been made. These facts justified reconsideration by the Upper Tribunal.

12. The submissions before the Upper Tribunal were directed at the extent to which the appellant satisfied the requirements of the Immigration Rules. However, regrettably, Mr Sharma appeared to "skate over" many of those requirements. Although they are technical in nature and his client may have come close to satisfying them, they plainly were not met in this case for the reasons given by the FTT which I will reiterate. I should add that it has been the intention of Parliament to adopt a strict approach to applications for leave to remain in the UK on the basis of family life. According to the Immigration Judge, private life was not effectively pursued before the FtT.

13. According to Appendix FM-SE the documents supporting an application under that Appendix must be supported by the evidence specified in the numerous paragraphs which form that Appendix. Paragraph D (a) specifies that only documents supplied with the application, subject to some exceptions, for example, where the documents form part of a sequence which is missing, or where there is a valid reason for not supplying the documents, must be supplied with the application. Furthermore, the level of gross income (£18,600) which must be met by the sponsor needs to be calculated on earnings from employment based on certain specified documents. These include pay slips for six months and personal bank statements of a specified

type corresponding with that period (see paragraph E-ECP.3.1 and E-LTRP.3.1 and E-LCRC.2.2).

14. It is plain that the appellant did not meet these requirements. The earnings specified were only £15,937 for the year ended October 2013 and clear findings were made by the Immigration Judge, for example, at paragraph 19 that the sponsor did not meet these requirements and therefore the appellant did not fall within Appendix FM.

15. In my view the Immigration Judge also fully considered family life more generally but noted that the relationship was of short duration, having been formed since the appellant came to the UK in October 2010. At the time the appellant applied for leave to remain (on 10 September 2013) she had no children with the sponsor. Her status in the UK could only be described as "precarious", the parties having only met on 25 June 2013 (see her application for leave to remain at paragraph 6.2). The Immigration Judge took account of Section 117B and gave detailed reasons for rejecting the claim that it was not reasonable to expect the appellant to leave the UK with her child. The Immigration Judge also considered the welfare rights of that child as he was bound to do.

16. Judge King appears to have been of the view that it was at least arguable that this case fell within an exceptional category which needed to be considered outside the Immigration Rules. That is not the way that the case was argued before me. Nevertheless, out of completeness I should consider this argument. The assertion that the sponsor now achieves the necessary income criteria for an application for a family member to come to the UK amounts to arguing that this is "a near miss case". In my view it is not a case where the circumstances are in any way exceptional and the fact that the original application may have succeeded if it were made for the first time at the date of the hearing before the Upper Tribunal is not, I find, a valid reason for interfering with the decision of the FTT.

17. As to the welfare of the child and the extent to which the appellant's family life would be interfered with by her removal, the appellant's child is only 1 year old and it is unlikely to have a significant effect on his welfare if he returns to India with her. It would be reasonable to expect her to return to that country given the proportionality factors set out in the FTT's decision.

18. The judge carefully considered whether the appellant satisfied either the "parent route" or the "partner route" to settlement under EX1 of the Immigration Rules but he was not satisfied that the requirements of Appendix FM were satisfied. These conclusions were also open to him in my view.

19. The appellant did not argue before the FTT that she fulfilled the requirements of paragraph 276ADE of the Immigration Rules.

Conclusions

20. The focus of the attack on the FtT's decision before the Upper Tribunal has been that the Immigration Judge failed to consider whether in fact the requirements of the

Immigration Rules were satisfied. I have concluded that they plainly were not satisfied at the date of the application, as was required. Furthermore, having considered the Immigration Judge's analysis of the case outside the Immigration Rules I can find no error of law in his approach. Therefore, the decision of the FtT ought to be allowed to stand.

Notice of Decision

21. The appeal against the decision of the FtT is dismissed. The decision by the respondent to refuse leave to remain stands.

22. No anonymity direction was made by the FtT.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and there was no fee award by the FtT.

Signed Date

Deputy Upper Tribunal Judge Hanbury