IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32940/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th January 2016	**On 29th January 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MRS HABIBA RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Hyder, Simon Noble Solicitors
For the Respondent: Ms S Sreeraman, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born on 2nd June 1982. Her appeal against the decision to refuse leave to remain as a spouse under Appendix FM was dismissed by First-tier Tribunal Judge Pears in a decision dated 7th July 2015 and promulgated on 9th July 2015.

2. The Appellant appealed on the ground that the judge had failed to consider the Section 120 notice and permission to appeal was granted by Designated First-tier Tribunal Judge Zucker on 28th October 2015 on that basis. The Section 120 notice

states in summary: "My spouse now satisfies the income threshold requirement from his employment. We have attached his last six months' payslips, employment letter and bank statement to support that. Therefore, my application and appeal should be granted."

The Judge's Decision

3. At paragraph 6 the judge stated:

> "At the beginning of the hearing the Appellant's representative and I had a discussion and I pointed out that as far as the Appellant meeting the income requirement, the crucial document was at page 25 in the Appellant's first bundle saying that her husband only started the relevant job that met the income requirement on 17th March 2014 which whilst it was before the date of the application on 26th April 2014 (and there was no doubt on the material produced in the original and supplemental bundle that the income threshold had been met since 17th March 2014) the Rules required by paragraph 2 of Appendix FM-SE that the requirements were met for a period of six months prior to the date of application. I lent Mr Hyder my copy of the Rules and rose for ten minutes."

4. At paragraph 7 the judge goes on to state:

> "On my return he accepted with reluctance that he could not meet the income requirements and also that because 2,500,000 BDT was received into the bank account with Bank Asia Ltd on 3rd February 2014 and therefore there were not enough savings for a six month period to meet the requirements of E-LTRP.3.1."

The judge found that the Appellant could not satisfy E-LTRP.3.1.(b)(i) and there was no challenge to his conclusions at paragraph 8.

5. The judge then considered Article 8 outside the Immigration Rules and concluded that the Respondent had considered all relevant factors when refusing to exercise her discretion outside the Immigration Rules. In any event, the refusal of leave was proportionate.

Submissions

6. Mr Hyder submitted that the Respondent had failed to consider the Section 120 notice and had she done so at the date of hearing then the Appellant would have succeeded in her application. The judge had erred in law in failing to remit the matter to the Secretary of State or adjourning the matter to allow for a response from the Secretary of State. In the circumstances, it was unfair for the Respondent not to deal with the Section 120 notice.

7. Ms Sreeraman relied on the Rule 24 response which stated at paragraph 3:

> "It is clear that the Section 120 notice dated 29th December 2014 appears to suggest that the Appellant now meets the income threshold and associated requirements under FM-SE. There was no material error of law given the concession by the representative that the income requirements could not be met (paragraph 7). Furthermore the Immigration Judge gave full reasons at paragraph 8 for rejecting the alternative submissions given by the representative at the hearing. Given the concession by the representative, asserting that the matter should have been remitted to the Respondent in the first place is pointless."

8. Ms Sreeraman submitted that the Section 120 notice sets out a change in the circumstances. However, even if the Respondent had regard to the changed position the financial requirements could not be satisfied at the date of application and therefore the Appellant could not succeed. The Respondent's failure to respond to the Section 120 notice was therefore irrelevant and the outcome would have been the same. The Appellant could not meet the requirements of the Immigration Rules.

9. Ms Sreeraman relied on paragraphs 55 to 57 of Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387. Ms Sreeraman further submitted that this did not support the exercise of discretion outside the Rules and Article 8 could not be used as a general dispensing power. The Appellant's remedy was to make a new application because there was no error of law in the decision of the First-tier Tribunal.

Relevant Immigration Rules

10. E-LTRP.3.1. states:

> "The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of -
>
> (a) a specified gross annual income of at least –
>
> (i) £18,600;
>
> …",

11. Appendix FM-SE states:

> "2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:
>
> (a) Payslips covering:
>
> (i) a period of six months prior to the date of application if the person has been employed by their current employer for at least six months (and where paragraph 13(b) of this Appendix does not apply); …
>
> 4. In respect of a job offer in the UK (for an applicant's partner or parent's partner returning to salaried employment in the UK at paragraphs E-ECP.3.2.(a) and E-ECC.2.2.(a) of Appendix FM) a letter from the employer must be provided:
>
> (a) confirming the job offer, the gross annual salary and the starting date of the employment which must be within three months of the applicant's partner's return to the UK."

Relevant case law

12. Paragraph 57 of SS (Congo) states:

> "In certain of the appeals before us, the Respondents said that improvements in the position of their Sponsors were on the horizon, so that there appeared to be a reasonable prospect that within a period of weeks or months they would in fact be able to satisfy the requirements of the Rules. They maintained that the Secretary of State should have taken this into account when deciding whether to grant LTE outside the

> Rules. In our judgment, however, this affords very weak support for a claim for grant of LTE outside the Rules. The Secretary of State remains entitled to enforce the Rules in the usual way, to say that the Rules have not been satisfied and that the applicant should apply again when the circumstances have indeed changed. This reflects a fair balance between the interests of the individual and the public interest. The Secretary of State is not required to take a speculative risk as to whether the requirements in the Rules will in fact be satisfied in the future when deciding what to do. Generally, it is fair that the applicant should wait until the circumstances have changed and the requirements in the Rules are satisfied and then apply, rather than attempting to jump the queue by asking for preferential treatment outside the Rules in advance."

Discussion and Conclusions

13. It is clear from reading the relevant paragraphs of the Immigration Rules that the Appellant had to show that the financial requirements were met for a period of six months prior to the date of application. The Appellant's husband commenced employment on 17th March 2014 and the application for leave was made on 26th April 2014. The Appellant could not satisfy the financial requirements set out in paragraph E-LTRP.3.1.(a) and paragraph 2 of Appendix FM-SE.

14. There was no error of law in the judge's application of the Immigration Rules and the point was properly conceded by the Appellant's representative at the hearing before the First-tier Tribunal.

15. The Appellant could not succeed under the alternative point argued in relation to paragraph 4 of Appendix FM-SE because her partner was not returning to the UK. There was no error of law in the judge's conclusion at paragraph 8 that paragraph 4 of Appendix FM-SE did not apply in the Appellant's case.

16. It was argued before me today by Mr Hyder that it was unfair for the Respondent not to consider the Section 120 notice as at the date of hearing and that the judge should have either remitted the matter to the Respondent or adjourned the matter. However, there was no application for an adjournment and the judge has no power to remit the decision to the Respondent to reconsider her decision.

17. The judge could allow the appeal insofar as the decision was not in accordance with the law, but given that the Section 120 notice was not before the Respondent at the time she made her decision refusing the application for leave it cannot be argued that her decision to refuse leave was unlawful.

18. There was no unfairness on the part of the Respondent and the judge clearly considered the Section 120 notice at paragraphs 6 and 7 of the decision. I therefore prefer the argument of Ms Sreeraman that it would not have made any difference to the Appellant if the Respondent had indeed responded to the Section 120 notice and the failure to do so did not amount to an error of law on the part of the First-tier Tribunal Judge.

19. In relation to Article 8, there was insufficient evidence before the First-tier Tribunal setting out exceptional circumstances or unjustifiable hardship and the judge correctly concluded that the Respondent had acted lawfully in refusing to exercise her discretion to grant leave to remain outside the Rules.

20. It is argued in the grounds that the refusal of the application and dismissal of the appeal would result in a simple procedural requirement to make a fresh application which would be an unnecessary abuse of time and money for the Appellant from which she should be protected by law. Unfortunately, on the basis of what is quoted above at paragraph 57 of SS (Congo) that is exactly what she has to do. The Appellant's circumstances do not warrant preferential treatment outside of the Rules.

21. The judge properly applied Section 117B of the 2002 Act in his conclusion that, given the absence of any exceptional features, the public interest in maintaining immigration control outweighed the Appellant's right to family life. On the facts asserted before the First-tier Tribunal and following SS (Congo) the refusal of leave was proportionate.

22. Accordingly, I find that there was no error of law in the decision of the First-tier Tribunal dated 7th July 2015 and the Appellant's appeal is dismissed.

Notice of Decision

Appeal dismissed.

No anonymity direction is made.

J Frances

Signed Date: 28th January 2016

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 28th January 2016

Upper Tribunal Judge Frances