



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19070/2016

THE IMMIGRATION ACTS

Heard at Field House
On 5th June 2018

Decision & Reasons Promulgated
On 21st June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MS PREMSHEELA ANTHONYSWAMY CHETTY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Ms S Anzani, Counsel, instructed by Nag Law Solicitors

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of India, appealed to the First-tier Tribunal against a decision made by the Entry Clearance Officer (ECO) on 20th July 2016 refusing her application for entry clearance as the partner of Mr Selvakumar Anthony Peris (the Sponsor). First-tier Tribunal Judge M A Khan dismissed the appeal in a decision promulgated on 21st August 2017. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge M Robertson on 21st February 2018.
2. The background to this appeal is that the Appellant applied for entry clearance to join the Sponsor in the UK. The decision of the Entry Clearance Officer notes that the

Sponsor is not exempt from the financial requirements as defined by paragraph E-ECP.3.3 of Appendix FM of the Immigration Rules and therefore in order to meet the financial requirements the Sponsor needs a gross income of at least £18,600. In the decision the ECO considered the Sponsor's employment for Hamar Property Services Limited. The ECO acknowledged that the Appellant had submitted a letter of employment, payslips and bank statements but noted that, although the gross income varied over different months during the period, the net income remained static at £2,000 per month. Further, the ECO noted that there was no evidence of any National Insurance contributions for April and May 2016. The ECO considered it not credible, given the fluctuations in income, that the Sponsor's net monthly pay would remain constant at £2,000. The ECO also said that a check of the Companies House website shows the profit declared by the company in 2015 was £12,698 and considered it unclear how the Sponsor can maintain a salary of £30,048.75. In the circumstances the ECO concluded that the Sponsor's income "has been contrived for the purpose of the application" and refused the application under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules.

3. The First-tier Tribunal heard oral evidence from the Sponsor and from Mr Sheikh, the director of Hamar Property Limited, the Sponsor's employer. The judge concluded that the evidence of Mr Sheikh and the Sponsor was "extremely vague and evasive" [26]. The judge considered that Mr Sheikh's credibility was damaged by the fact that he did not know how much the Appellant was paid. The judge also noted that the Sponsor, who had been a director of Hamar Properties between March 2015 and April 2016, did not know anything about the pension scheme. The judge also concluded at paragraph 28 that the Sponsor could not explain various sums of £800 and loans of up to £2,200 going into his account and found that large sums of money going into the Sponsor's account had not been explained. The judge concluded at paragraph 29 that the Sponsor had contrived his claimed income, which had not been explained and large sums of loans and transfers going into his account had not been explained.

Error of law

4. It is noted in the grounds of appeal that it is not in dispute between the parties that, if the Sponsor's employment were genuine, the financial requirements of the Appendix FM were met. The sole issue was therefore whether the Sponsor genuinely worked for Hamar Property Services.
5. Two grounds are put forward in the Grounds of Appeal. The first ground contends that the judge erred in relation to the burden of proof. It is contended that the Presenting Officer who attended the hearing in the First-tier Tribunal conceded that, where the Respondent essentially alleged deception (that is that the Sponsor's claimed employment had been contrived) the burden of proof lay on the Respondent to prove that allegation to the requisite standard. It is contended that the First-tier Tribunal Judge failed to acknowledge or properly apply his mind to the burden and standard of proof in this instance and that he misstated the burden and standard of proof at paragraph 7. It is contended that the Respondent adduced no evidence to discharge the burden of establishing that the Appellant or the Sponsor engaged in deception and that submissions to that effect advanced at the hearing were not recorded.

6. The second ground contends that the judge reached unreasonable conclusions. It is contended that the three reasons for rejecting the Sponsor's employment at paragraphs 26, 27 and 28 were not reasonable in light of the evidence produced. It is contended that the Respondent failed to counter or challenge any of the documentary evidence submitted. It is argued that the Sponsor had demonstrated on the evidence provided that he was genuinely employed by Hamar Property Services Limited.
7. In my view it has been established that the judge made a material error of law. Although he contended that there was no material error in light of the findings made by the judge, Mr Lindsay accepted that the burden of establishing that the sponsor's income was contrived was on the Entry Clearance Officer. However, the judge failed to acknowledge this in the decision. In fact, at paragraph 7, the judge said that it was for the Appellant to establish on the balance of probabilities that she met the requirements of the Immigration Rules. This error may not have been material had the judge undertaken an analysis of the significant documentary evidence before him. However he failed to do so.
8. The documentary evidence before the judge and contained in the Appellant's bundle was summarised at paragraphs 13 and 14 of the grounds. The judge undertook no analysis of these documents at all and instead concentrated on three aspects of the oral evidence at paragraphs 26, 27 and 28. In circumstances where the initial burden of proof was on the ECO it fell to the judge to consider the evidence put forward by the ECO and to conduct some sort of analysis of the documentary evidence in order to consider whether the burden had been discharged and whether the requirements of the Immigration Rules had been met.
9. Further, the judge's comments at paragraph 28 are unclear. The judge said:

"The Sponsor could not explain various sums of £800 and loans od [sic] up to £2,200 going into his account. Between July 2016 and April 2017 over £23,000 in transfers, loans or money loaned by the Sponsor went into his HSBC account. The Sponsor provided his NatWest account details for the Appellant's application which does not show any large amount of loaned money. These large sums of money going into the Sponsor's account have not been explained."
10. The reasoning there is not clear. The judge looked at amounts of money going into the Sponsor's account. This refers back to the Sponsor's oral evidence recorded at paragraph 21 where he referred to two loans from his brother in October and December of 2016 and a further loan in November 2016. It is not clear from reading paragraph 28 what the findings are or what conclusions the judge has reached from these findings. Further, Ms Anzani submitted that any allegation of unexplained money in or out of his account was not put to the Sponsor at the hearing to give him an opportunity to deal with it. I find that the reasoning at paragraph 28 is not clear and not sufficient. If this part of the reasoning is taken away then the remaining reasoning at paragraphs 27 and 28 relates to one aspect of each of the witnesses' evidence. In the absence of an analysis of the documentary evidence these reasons are not adequate.
11. I conclude that there is a material error of law in the judge's decision in that he misunderstood the burden of proof and the reasons for the conclusions are inadequate.

Further, the judge failed to engage with or make findings in relation to the documentary evidence. In these circumstances I set aside the decision of the First-tier Tribunal.

Remaking the Decision

12. I went on to hear oral evidence from the Sponsor in relation to remaking the decision and submissions from Mr Lindsay and Ms Anzani.
13. Ms Anzani pointed out that there has been a material change of circumstances. The Sponsor has been naturalised as a British citizen and the Appellant has given birth to the couple's first child, who has made an application for a British passport.
14. In his oral evidence the Sponsor adopted his witness statement of 31st July 2017. In cross-examination he said that he sends money to his wife every month according to her need, sending about half of his wages and all of his savings to her. He said that he sends her several thousand pounds a year. He said that between 2011 and 2014 he was self-employed and that when he joined Hamar Property he told them that he wanted a salary of £2,000 net per month. They agreed to this and this is the amount he is paid every month. He said that he is paid from the profits made by Hamar Properties and that their profits have been increasing. He said that he was appointed as a director of Hamar Properties when he joined in 2015 but that he no longer wanted the responsibility of being a director because he had been going to see his wife in India and that he is now a business development manager. He said that his responsibilities are bringing in new landlords, sorting out tenant issues and collecting rent if tenants do not pay. He said that he works full-time, usually from 9am to 6pm but it can be later and can be at weekends if required.
15. In his submissions Mr Lindsay relied on the decision of the ECO and the Entry Clearance Manager and invited me to uphold that decision.
16. In her submissions Ms Anzani submitted that the ECO had not discharged the burden upon him to substantiate the allegation that the evidence in relation to the Sponsor's employment was contrived. In her submission there was no evidence of deception but just a suspicion on the part of the ECO and this was not sufficient. She went through the documentary evidence and submitted that it was sufficient to show that the Sponsor was genuinely employed. In her submission the Appellant meets the requirements of the Rules. In considering under Article 8 she also referred to the fact that the child is British. She pointed out that the Appellant and Sponsor have been separated for a lengthy period, since the application in June 2016. She submitted that the appeal should be allowed.

My Findings

17. The only document submitted by the Entry Clearance Officer to support the decision to refuse entry clearance is the printout from Companies House in relation to Hamar Property Services Limited. Attached to that printout are abbreviated accounts of 31st December 2015 which gives shareholders' funds for 2015 as £12,718. This also indicates that there is a profit of £12,698. This is the evidence put forward to show that the Appellant's employment is contrived. These documents do not set out the

turnover, and are therefore not an accurate reflection of the company's salary payments and other expenses.

18. I have considered all of the documentary evidence. There is a letter from ERAA Consulting Limited Accountants dated 26th July 2016 which deals with Hamar Property Services Limited's profitability, pointing out that the figure of £12,698 reflected in the employer's accounts referred to by the Entry Clearance Officer relates to the distributions to the owners of the company as dividends and is what is left after the payment of employee salaries, expenses, taxes and other outlays. The letter points out that the employer's turnover during 2015 was £79,833. It is pointed out that it is self-evident that the employer can maintain the Sponsor's pay, which is the key expense of the business as he has been the key member of the management team. The letter points out that the points raised by the Entry Clearance Officer's decision are not valid. On the basis of this evidence I am satisfied that the Companies House printout provided by the ECO does not discharge the burden of proof upon the ECO in relation to this matter.
19. In any event I have considered all of the documentary evidence in relation to the Sponsor's employment. The letter from ERAA states that Hamar Property Services Limited agreed with the Sponsor that his net pay would remain at £2,000 which meant that any fluctuation in PAYE and national insurance contributions would be added to his gross pay in order to ensure that the net pay remained at £2,000. The letter points out that HMRC apply special rules to directors' pay and under this method the national insurance contributions are worked out from annual earnings. This means that in this case the net pay has not varied but the gross pay fluctuated. I take into account the Written Statement of Terms and Conditions and the guaranteed net pay arrangement of 1st March 2015 whereby it is agreed between the company and the employee (the Sponsor) that he would receive a net pay of £2,000 per month. I take into account the detailed income statement of the company, which reflects salaries. I take into account the Sponsor's P60s, which are consistent with the salary claimed. The company has also provided a VAT certificate. I take into account the Appellant's payslips, which are consistent with the agreement between the employer and employee. I also note the email correspondence between the Sponsor and some clients. I take into account the NatWest and HSBC bank statements, which show the deposit each month of a £2,000 salary into the Sponsor's bank accounts. There are various payments in and out of those accounts but Mr Lindsay had an opportunity to look at bank statements provided by the Sponsor and did not raise any issue as to the movement of money in his submissions. I note the evidence in relation to Hamar Property Services including the documentary evidence showing that it is registered with Companies House and HMRC and the VAT return in relation to the company.
20. I take into account also the Sponsor's oral evidence in relation to his employment, in which he gave a consistent account of his previous role as director and his current role as a business development manager. His oral evidence is consistent with the documentary evidence before me. In light of all of this evidence I am satisfied that, at the time of application, the decision and currently, the Sponsor earns the amount claimed. I am satisfied that his earnings meet the requirements of Appendix FM of the Immigration Rules.

21. As there are no other issues in dispute the Appellant therefore meets the requirements of Appendix FM of the Immigration Rules.
22. I follow the guidance given in **TZ (Pakistan) and PG (India) v Secretary of State for the Home Department [2018]** EWCA Civ 1109 where Sir Ernest Ryder, Senior President, said [34]:

“... where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.”
23. There is no dispute that there is family life in this case. In these circumstances, given that the Appellant meets the requirements of the Immigration Rules, I find that this is determinative of the Article 8 appeal in that the decision to refuse entry clearance is disproportionate.

Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

I remake the decision by allowing the Appellant's appeal.

No anonymity direction is made.

Signed

Date: 18th June 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT **FEE AWARD**

I make a fee award of any fee paid or payable in light of the fact that the ECO failed to discharge the burden of establishing that the documentary evidence submitted in connection with the application was fraudulent or contrived.

Signed

Date: 18th June 2018

Deputy Upper Tribunal Judge Grimes