



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12337/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 1 February 2019**

**Decision & Reasons
Promulgated
On 25 February 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**MRS LYNITA LESLIE FISHER
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Ahmed, Solicitor Advocate, Regents and Co Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals with permission the decision of First-tier Tribunal Judge Bart-Stewart, who dismissed her appeal against the Secretary of State's refusal of her application for leave to remain on human rights grounds as the spouse of a person present and settled in the United Kingdom.

The application was originally refused on two grounds under paragraph 287(a) (v) and (vi) of the Immigration Rules for the following reasons. First, that the Home Office was not satisfied that there was adequate maintenance for the couple in the United Kingdom because their income, after deducting housing

costs, was lower than the income support level required for a couple and secondly, the English language certificate that had been submitted was not to the required standard and was not within two years preceding the date of application. Appendix FM and in particular paragraph EX.1 was considered as was paragraph 276ADE of the Immigration Rules but leave to remain was not granted on any of those bases.

The appellant appealed and the matter came before the First-tier Tribunal on 15 November 2018. The appellant had originally requested an oral hearing but had later changed that to request a determination on the papers. It appears that the hearing went ahead as an oral hearing with Counsel representing the Secretary of State and no-one appearing for the appellant and her not appearing in person.

At the oral hearing, Counsel for the respondent, as recorded in paragraph 11 of the decision, noted that the appellant appears to have met the financial conditions and has subsequently submitted an English language certificate to the required standard, albeit that it post-dated the application and decision. Submissions were also made as to whether there would be insurmountable obstacles to family life continuing abroad. There was no issue taken either in the original refusal letter or in the submissions made by Counsel for the respondent at the hearing as to the genuineness of the relationship between the appellant and her spouse.

In the decision, Judge Bart-Stewart dismissed the appeal under paragraph 287 of the Immigration Rules on a number of grounds. These included that she did not accept that there was a genuine and subsisting relationship between the couple, that there was no evidence of the appellant's current circumstances other than payslips showing that she was in employment and there was no reference to payslips or income for her husband. There was also a note that the English language certificate had been filed but this post-dated the date of application. Overall, it was not accepted that the Applicant met the requirements of paragraph 287 for these reasons. There was then a consideration of Appendix FM and paragraph 276ADE of the Immigration Rules, but the appeal was ultimately dismissed on human rights grounds on those bases as well.

The appellant seeks to appeal the decision on a number of grounds, only three of which are material in this case. The first is that the judge proceeded to find that there was no genuine and subsisting relationship without this ever having been raised as an issue by the respondent without any request for evidence on the same point. Obviously, as they did not attend the hearing the matter was not raised with them on the day by the Judge either. There was in fact documentary evidence within the bundle which showed cohabitation and no further evidence should have been required on the basis of the respondent's decision letter. The finding that there was no genuine and subsisting relationship in these circumstances is a clear error of law, particularly when it was not an issue taken by the respondent at all and the appellant had no opportunity to address the issue. It is an error for the First-tier Tribunal to find against the appellant when a matter has not been raised by anyone, including

the Judge, and where there is no clear basis for dismissing the appeal on the available evidence for that reason. The appellant has clearly not had an opportunity to address any evidence on the point and it is a matter that is expressly accepted by the respondent. In those circumstances, the Judge gave inadequate reasons for looking at the issue at all, let alone dismissing the appeal on that basis.

The second theme within the grounds of appeal is that there was evidence of the appellant's spouse's income and payslips supported by P60s and bank statements within the bundle submitted which had not been taken into account by the First-tier Tribunal. The evidence showed that the income was above what was needed for adequate maintenance without recourse to public funds for the purposes of the Immigration Rules. That again was expressly accepted on behalf of the respondent at the hearing and insufficient reasons have been given by the Judge to explain findings to the contrary. That again is a clear error of law, particularly when there is evidence in the files supporting that the requirement is satisfied.

The next ground of appeal is in relation to the English language test, the ground of appeal being that discretion should have been exercised to accept the English language test in all of the circumstances. In submissions before me today, Mr Walker had to accept it is just that this is taken into account. Although the certificate post-dated the date of application and date of decision there is an English language test certificate showing that the requirement in the Immigration Rules is met in substance.

The other grounds of appeal are that the First-tier Tribunal failed to give any proper consideration to the test of insurmountable obstacles and failed to apply the cases of **Huang** and **Razgar**. It is not necessary to consider those grounds in any detail on the basis that Mr Walker accepts before me today that as the appellant meets the requirements of the Immigration Rules in terms of maintenance and English language as well as being in a genuine and subsisting relationship, that the requirements of the Immigration Rules are in fact satisfied. These are matters which are material to the outcome of the appeal, on which there are clear errors of law in the decision of the First-tier Tribunal and which require the decision to be set aside.

In these circumstances, I set aside the decision of the First-tier Tribunal for the material errors of law I have identified and remake the decision to allow the appeal on human rights grounds. I am only permitted to allow the appeal on human rights grounds under the current system but given the Respondent's acceptance that the substantive requirements of the Immigration Rules are met, there can be no public interest in dismissing the appeal on Article 8 or human rights grounds. That is the reason why I allow it and there is no further need to consider the final three grounds of appeal as to any alternative way in which the appeal may be allowed.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and re-make it as follows:
The appeal is allowed on human rights grounds.

No anonymity direction is made.



Signed
2019

Date

21st February

Upper Tribunal Judge Jackson