IAC-FH-AR-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34535/2014

THE IMMIGRATION ACTS

Heard at Taylor House (Field House)
On 9 October 2015
Prepared 9 October 2015

Decision & Reasons Promulgated
On 4 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS BHAVIKABAHEN VITTHALDAS PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Brocklesby-Weller, Senior Presenting Officer
For the Respondent: Mr I M Khandelwal of Singhania & Co Solicitors (Buckingham Palace Road)

DECISION AND REASONS

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent as the Claimant. The Claimant, a national of India, date of birth 14 August 1977, appealed against the Secretary of State's decision, dated 20 August 2014, to refuse to vary leave to remain and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Reasons for Refusal Letter set out at its heart the grounds with reference to Appendix FM of the Immigration Rules HC 395 why the Claimant had not submitted specified evidence as required under Appendix FM. Those principal elements required in specified evidence were:- first, the Claimant (applicant) had the necessary gross annual income in combination with specified savings. In refusing the application the Secretary of State said as follows:-

> "E-LTRP.3.1. 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; (ii) an additional £3,800 for the first child; and (iii) an additional £2,400 for each additional child; alone or in combination with
>
> (b) specified savings of-
>
> (i) £16,000; and (ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-LTRP.3.2.(a)-(f) and the total amount required under paragraph E-LTRP.3.1.(a); or (c) the requirements in paragraph E-LTRP.3.3.being met, unless paragraph EX.1. applies.
>
> In your case, you are required to demonstrate that you meet an income threshold of £18,600 per annum. You have claimed that you meet this through the salary and savings of your partner.
>
> In the first instance you have claimed in your application form that you partner has earned £11,647.17 through his employment with Asda. While you have provided wage slips for this employment for the period of the 04 May 2013 to the 08 March 2014 (a 10 month period) you have failed to provide either an employer's letter or bank statements to show these earnings being paid into his account. Appendix FM-SE paragraphs 2(b) and 2(c) make it clear that these documents are mandatory in determining whether an individual meets the income threshold. Therefore from the outset, your application falls for refusal as you have failed to provide the specified evidence to confirm your partner's earnings.
>
> However, even if this were not the case and we were to take into account the earnings as evidenced by the wage slips you have provided for your partner you would still fail to meet the required threshold of £18,600. As stated, you have3 provided wage slips for your partner covering the 10 month period prior to your application. When added together, the wages your partner received for his employment were £11,635.92 for that 10 month period. This equates to an annual salary of:-
>
> £11,635.92/10 x 12 = £13,963.10
>
> This salary is therefore significantly short of the required £18,600 income threshold you are required to meet, specifically £4,636.90. Your partner's wages are therefore below the required threshold.

You have further stated that your partner has savings in the United Kingdom and that these should be used to meet any shortfall in the required income threshold. As evidence of this however, all that has been provided is a copy of a Halifax passbook which has not been certified by the issuing bank, but by your partner himself. Therefore this document to is not acceptable as evidence of savings. However, even if your partner's savings were taken into account you would still fail to meet the aforementioned income threshold of £18,600.

As can be seen from paragraph E-LTRP.3.1.(b)(i) and (ii) you are required to demonstrate savings of £16,000 plus 2.5 times the difference between your salary and the required income. In your case the difference was £4,636.90 which would make the savings you require:-

£16,000 + (2.5 x (£18,600 - £13,963.10)

£16,000 + (2.5 x 4636.90)

£16,000 + £11,592.25 = £27,592.25

Further to this, the amount of savings you are relying upon must have been held by you for the period of 6 months prior to the application. In your case, your partner's savings show a balance as low as £15,800 as of the 18 October 2013 and therefore this is the total amount of savings your partner has demonstrated. This is again well below the required savings of £27,592.25 you would need to demonstrate to meet the income threshold of £18,600.

In view of the above the Secretary of State is not satisfied that you can meet the requirements of R-LTRP 1.1 (c), as stated above, for leave under the 5 year route to settlement and your application is refused under D-LTRP 1.3. with reference to R-LTRP 1.1. (c).

In refusing your application consideration has been given to your family life under Article 8 which from 09 July 2012 falls under Appendix FM EX.1. of the rules. The transitional provisions in paragraph A277C state that an applicant must meet all the requirements of R-LTRP 1.1 (a), (b) & (d) in order for EX.1. to apply."

3. In addition the Secretary of State went on to consider the requirements that might arise under Appendix FM: EX1 and EX2 but also private life considerations with reference to paragraph 276ADE of the immigration rules and a general consideration of whether there were exceptional circumstances that warranted a consideration of this matter either within the rules or without the rules.

4. The appeal against that decision came before First-tier Tribunal Judge Majid who on 1 May 2015 allowed the appeal under the Immigration Rules and it would seem he intended although he does not say so to have allowed the appeal with reference to Appendix FM.

5. Mr Khandelwal points to a number of paragraphs, which have the appearance to me of being standard paragraphs, in which the judge asserted he has considered the

Rules, the law, the application of the Rules and reached the decision that he did, presumably with reference to those matters.

6. Unfortunately, the judge's analysis fails to address a very important point, namely that in terms of the application the financial picture needed to be presented to relate to a period of not more than six months before the date of the application. In this case the date of application was 21 March 2014 and thus the relevant period goes back to September 2013. The requirements related both to the provision of the pay slips and the evidence of savings under Appendix FM-SE.

7. The judge did not address that issue but rather took a pragmatic stance by reference to financial information then in being at the date of the judge's decision. It is plain that additional evidence was provided that showed after the date of application and after the date of decision that the Claimant's Sponsor or the Claimant had sufficient funds in order to meet the general requirements for maintenance and savings. However the material error the judge made was to relate that later information back to the application. The judge forgot apparently to consider the matter as required under Appendix FM. There is no argument that later information provided informed on the Sponsor's savings. It is not suggested that the Sponsor was acting in bad faith nor indeed was the Claimant. Rather what appears to have happened was that the information was not in being as needed at the date of application. The after arising material showed that later the Claimant, possibly after the date of decision, was in a stronger financial position than previously.

8. Regrettably the analysis at paragraphs 15 to 17 of the judge's decision simply did not get to grips with the required evidence to be produced. It may be that the consequences of the rules may be harsh. I do not make any adverse criticism of the Sponsor or the Claimant but the fact was the required evidence was not there in the form required. In these circumstances I do not find there was any sustainable basis for the judge allowing the appeal under the Immigration Rules which I understand, on a broad reading of paragraph 17 of the decision, was the judge's intention.

9. Mr Khandelwal has helpfully addressed me on what were factual matters, either at the date of the Secretary of State's decision or at the date of the judge's decision but for the afore going reasons however sympathetic one may be with the Sponsor and his wife, the fact is that there was no purpose served in trying to avoid at this stage the specific requirements of the Rules which self-evidently had not been met.

10. Accordingly I was minded to find that the Original Tribunal's decision in dealing with this matter and under Appendix FM could not stand and the matter would have to be remade.

11. In addition the Sponsor raised the issue of his wife and their life together in the UK. It is not suggested that they are not in a genuine relationship. I do not venture into the area as to whether or not Article 8 would be engaged but the fact of the matter is the judge never dealt with that issue and made no findings on the relationship or

whether it could be conducted in the home country. There were no findings of fact that bear on Article 8 ECHR as an issue.

12. In the circumstances again bearing in mind the Secretary of State did consider the issue of private life considerations and whether there were exceptional circumstances to look at the matter outside of the Rules, it seemed to me that were this matter to be reconsidered that would be an issue which should also be addressed.

13. After I had indicated I was minded to find errors of law by the judge, Mr Khandelwal took instructions and his client's wish was that a fresh application should be made. Therefore he wished to withdraw their appeal against the Respondent's original decision and to make a fresh application with the appropriate financial information.

14. The Claimant's decision to withdraw her appeal must in the context of an appeal to the Upper Tribunal by the Secretary of State be construed as a decision to make no further resistance to the Secretary of State's appeal which is accordingly allowed and the decision of the Original Tribunal is set aside.

15. Plainly if pursuing that matter at a later date the Claimant and her husband wish to press again the issue of Article 8 of the ECHR then it will be open to them to do so.

16. In remaking the decision, the Claimant's concession to withdraw her appeal is an indication that she no longer seeks to challenge the original decision, dated 20 August 2014, of the Secretary of State. The Claimant's appeal is accordingly dismissed and no fee award is appropriate.

17. No anonymity order was sought nor is one required.

Signed Date 2 November 2015

Deputy Upper Tribunal Judge Davey