



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16030/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 June 2018

Decision & Reasons Promulgated
On 19 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIA [N]
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Miss J. Isherwood, Senior Home Office Presenting Officer

For the Respondent/Claimant: In person

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Boyes sitting at Newport on 1 August 2017) allowing the appeal of the claimant, a citizen of Brazil, against the decision made on 10 June 2016 to refuse to grant her ILR, or further leave to remain, on the ground of ten years' continuous lawful residence or on the ground of family life established with her British national spouse since December 2007. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

The Reason for the Grant for Permission to Appeal

2. On 30 January 2018 First-tier Tribunal Judge Ransley granted the Secretary of State permission to appeal as it was arguable that Judge Boyes had failed to give adequate reasons for his findings on the material issues in the appeal; that he had failed to engage with the clear reasons for refusal; and that he had also failed to give adequate reasons for allowing the appeal.

The Error of Law Hearing on 26 April 2018

3. At the hearing before me to determine whether an error of law was made out, the claimant was in attendance. Miss Isherwood developed the case advanced in the grounds of appeal. [AK], the claimant's spouse and sponsor, responded on her behalf. He gave me an account of the hearing before Judge Boyes and he answered questions from me for clarification purposes arising from the limited documentary evidence in the file, which included a communication from him to the Home Office in April 2016 confirming that he was not pressing charges against his wife for - as he confirmed orally - an alleged offence of domestic violence committed by her against him, which led to the police being called and, at his request, his wife being taken away into police custody.
4. I ruled that an error of law was made out such that the decision of the First-tier Tribunal should be set aside, and I indicated my reasons for so finding in short form. My written reasons are set out below. After a further discussion, it was agreed that the second stage (the remaking of the decision) should be adjourned to a further hearing before me on 15 June 2016 at Field House so as to enable the sponsor to assemble and serve beforehand the specified evidence in Appendix FM-SE to prove that he is in stable and permanent employment, earning an annual salary which matches or exceeds the Minimum Income Requirement ("MIR") of £18,600 per annum. I also directed the claimant and the sponsor to serve signed witness statements testifying to the fact that their marriage is genuine and subsisting, as no such evidence had been provided to Judge Boyes.

Reasons for finding an Error of Law

5. Judge Boyes' very short decision failed to fulfil the essential function of explaining to the losing party why they had lost. He also appears to have proceeded on the erroneous basis that the claimant qualified for ILR under the Rules as she had accrued over ten years' continuous lawful residence. While it was true that she had been lawfully resident in the UK from 7 January 2005 (when she was granted limited leave to remain as a student) through a combination of successive grants of leave and - latterly - Section 3C leave, he failed to appreciate that her two grants of DL as the spouse of the sponsor from 22 June 2010 to 23 July 2016 did not count towards lawful residence for the purposes of compliance with Rule 276.
6. For the above reason, the claimant was always only potentially eligible for a grant of further limited leave to remain. As the sponsor agreed in discussion with me, it is reasonable to infer that the requests for the couple to attend a marriage interview made

on 17 April 2016 and again on 25 May 2016 – which the Home Office say were sent by post to the couple’s address and by email to the sponsor - were triggered by legitimate concerns about the subsistence of the marriage following an apparent tip off from the police to the Home Office about the claimant being arrested and held overnight for an offence of domestic violence.

7. Against this background, to which the Judge made no reference at all (even though it was signposted in the Home Office bundle), the Judge did not give adequate reasons for accepting that the reason for the couple not responding to either request was because they had never received them; or for finding that the marriage was genuine and subsisting.
8. Moreover, while it was open to the Judge to find that the marriage was genuine and subsisting (provided he gave adequate reasons for doing so), the Judge also needed to engage with other relevant requirements in Appendix FM in order to explain why he was allowing the claimant’s human rights claim. It was not the claimant’s case that EX.1 was in play, and so to qualify for further limited leave to remain under the Rules she needed to satisfy the financial requirements of Appendix FM. But the Judge made no finding on whether she was likely to meet the MIR.
9. The upshot is that the Judge did not give adequate reasons for allowing the claimant’s appeal, and so his decision is vitiated by a material error of law such that it must be set aside in its entirety.

The Resumed Hearing on 15 June 2018

10. At the outset of the resumed hearing to remake the decision it was apparent that there had been only partial compliance with my directions. The sponsor had served some of the specified evidence in Appendix FM-SE, but there were still gaps, such as an absence of a run of bank statements covering the same period as the payslips. Also, neither he nor his wife had made witness statements testifying to the status of their marital relationship. However, this was less of a problem as they were available to be cross-examined.
11. I arranged to have copied an email which each of them had sent to Miss Isherwood confirming that they were still happily married, and also an email dated 11 June 2018 from [NW], Senior Site Manager at [] in Ealing, London, who said that he had known [AK] (the sponsor) for over 15 years; that he had attended [AK] and Maria’s wedding 10 years ago; that he still played golf with [AK] every Sunday “*where I get a wave off Maria before we leave*”; and that he had been to their house on several occasions and they were a “*perfectly normal loving couple*”.
12. The claimant gave evidence first, in the sponsor’s absence. She was cross-examined about their daily routine, and about how they had celebrated their last wedding anniversary and her last Birthday. When the sponsor gave evidence, the same questions were addressed to him. Both of them were also asked about the incident which had led to the sponsor calling the police, and the claimant being taken away to spend a night in a police cell. The sponsor said that to his knowledge there was not an

outstanding criminal prosecution as he did not bring charges and he told the police when they took his wife away that he did not want to press charges. He had just wanted her to spend a night in a police cell in order to teach her a lesson.

Discussion and Findings on Remaking

13. The couple gave credible evidence about the incident which led to the claimant's arrest. Both of them had been drinking, and they had a blazing row. The claimant said she smashed various items of kitchen crockery. She was not pressed as to whether she admitted assaulting the sponsor, but the fact that the police took her away to spend a night in a police cell implies that they took her husband's word for it that she was the aggressor, and he was the victim.
14. The claimant said that this was an isolated incident, whereas the sponsor said they argued quite often "*mostly about her being late*". Miss Isherwood submitted that this discrepancy cast doubt on the true status of the relationship. But I consider that there was no real discrepancy in their evidence. It was apparent to me that the claimant was saying that this was an isolated major incident. She did not in terms say that this was the only time that they had ever quarrelled. Equally, it was apparent from what the sponsor said that he was referring to them having fairly frequent minor arguments, mainly over his wife being late.
15. In every other respect, the account which the couple gave of their shared life together was fully congruent, as Miss Isherwood acknowledged.
16. So, having had the benefit of receiving oral evidence from the claimant and the sponsor which was tested in cross-examination, I am persuaded on the balance of probabilities that their marriage is genuine and subsisting.
17. Miss Isherwood did not cross-examine the sponsor on his explanation for him and his wife not attending a marriage interview as requested, which was that they had never received the first request; and that the second request had arrived after the application had been refused. Having assessed the evidence in the round, I find that the sponsor's explanation is probably true, and hence that the couple were not at fault in failing to respond to a request to attend a marriage interview to assess the status of their marriage which, hitherto, had been accepted to be genuine and subsisting - as is reflected in the fact that the claimant had previously been granted DL twice.
18. As noted previously, it is not the claimant's case that there are insurmountable obstacles to family life being carried on Brazil, which the couple have apparently visited three times together. Although her parents are deceased, she told me that she has a number of siblings living there, including one who is a judge and another who is a lawyer.
19. As the claimant cannot rely on EX.1, she must show that her sponsor is earning at least £18,600 per annum. The evidence produced by the sponsor includes his P60 for the year to April 2018 issued by his employer, United Living (South) Ltd. It shows that he earned £51,858.01 gross in the last tax year. The sponsor also produced a letter from

his employer dated 11 June 2018 in which it was confirmed that his basic salary was going to be increased to £49,277 per annum.

20. However, the following specified evidence in paragraph 2 of Appendix FM-SE is missing:
 - (a) A letter from the employer who issued the payslips confirming the sponsor's employment and gross annual salary; the length of his employment: the period over which he has been paid the level of salary "*relied upon in the application*"; and the type of employment;
 - (b) Personal banks statements corresponding to the same period as the payslips, showing that the salary has been paid into an account in the sponsor's name.
21. As to (b) the sponsor produced a mini-statement from his account with Santander showing that he was paid £3,273.92 on 31 May 2018.
22. Miss Isherwood acknowledged that the sponsor was probably earning the salary disclosed in the P60 and that the MIR was thus met, but she submitted that as the claimant had not proved this by producing all the mandatory pieces of evidence stipulated in paragraph 2 of the Appendix FM-SE, her appeal could not be allowed and it was reasonable to require her to return to Brazil to apply for entry clearance. This submission prompted an explosion of anger from the sponsor, and tears from the claimant.
23. I remind myself that the factual inquiry which I directed at the previous hearing was whether the claimant was likely to meet the MIR, not whether she actually did so. I did not direct the claimant to produce the specified evidence to show her husband's level of earnings in the six months preceding her application made on 27 October 2015, which – under the Rules – is the only relevant period for the assessment of whether the MIR is met.
24. A further relevant consideration is that in her application the claimant declared that her husband was earning an annual salary well in excess of the MIR, and this was not disputed in the reasons for refusal.
25. In **MM (Lebanon) [2017] UKSC 10**, the Supreme Court concluded that the challenge to the acceptability in principle of the minimum income requirement (MIR) must fail, but went on to make some further observations which are pertinent to the assessment of the matter which is in contention between the parties.
 - "98. It is apparent from the MAC report, and the evidence of Mr Peckover, the reasons for adopting a stricter approach in the new Rules were met as a practicality rather than wider policy, reflecting what the MAC acknowledged to be the relative uncertainty and difficult of verification of such sources. That did not make it unreasonable or irrational for the Secretary of State to take this into account in formulating the Rules. The MAC recognised the strength of the case for taking account of other sources, but did not in terms advise against the approach ultimately adopted by the

Secretary of State. In considering the legality of that approach, for the reasons already discussed (para. 59 above) it is necessary to distinguish between two aspects: first, the rationality of this aspect of the Rules or instructions under common law principles, and secondly the compatibility with the HRA of similar restrictions as part of a consideration outside the Rules. As for the first, while the application of these restrictions may seem harsh and even capricious in some cases, the matter was given careful consideration by both the MAC and the Secretary of State. As Aikens LJ said (para 154), the decision was “not take on a whim”. In argue, it was not irrational in the common law sense for the Secretary of State to give priority in the Rules to the simplicity of operation and the ease of verification.

99. Operation of the same restrictive approach outside the Rules is a different matter, in our view is much more difficult to justify under the HRA. This is not because “less intrusive” methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. *As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the Article. But that judgment cannot properly be constrained by a rigid restriction in the Rules. Certainly, nothing that is said in the instructions to Case Officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State (my emphasis).* There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it.”

26. On the premise that I am unable to allow the appeal under the Rules, I answer questions 1 and 2 of the **Razgar** test in the claimant’s favour. Questions 3 and 4 of the **Razgar** test must be answered in favour of the Secretary of State. On the issue of proportionality, I must take into account the relevant public interest considerations arising under section 117B of the 2002 Act.

27. In **Dube (SS.117A-117B) [2015] UKUT 90 (IAC)**, a decision of Nicol J and UTJ Storey, the panel said at [32]:

“Another difficulty is that being a non-exhaustive specification of certain Article 8 considerations, ss.117A-117B do not disinvest a judge of the need to apply established principles of case law dealing with considerations not covered. As Mr Melvin correctly observed, both UK and Strasbourg case law in Article 8 identifies the issue of whether ties with other persons have been formed at a time when an applicant is aware that his or her immigration status is precarious as a relevant factor in respect of *both* family life and private life. As stated in the recent Grand Chamber judgment in **Jeunesse -v- Netherlands Application no. 12738/10**, 2 Oct 2014:

“108. Another important consideration is whether family life is created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court’s well-established case law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of a non-national family member will constitute a violation of Article 8...”

Whether or not by reference to S.117B or to establish case law, the First-tier Tribunal Judge is required to have regard to this criterion. Any decision on the “public interest question” as defined by S.117A(3) would have incomplete without it.”

28. In **Rhuppiah v SSHD [2016] EWCA Civ 803**, the Court held that a person’s ability to speak English is a neutral factor, as is the fact that a person is financially independent. The claimant is not in any event financially independent, as she is a homemaker and so she is dependent financially on her husband.

29. Of assistance to the claimant is the **Chikwamba** line of authority, including the following passages from **Agyarko -v- SSHD [2017] UKSC 11**:

“36. ... So far as *Chikwamba* was concerned, the House of Lords found that there would be a violation of Article 8 if the applicant for leave to remain in that case were removed from the UK and forced to make an out of country application for leave to enter which would clearly be successful, in circumstances where the interference with their family life could not be said to serve any good purpose.

...

51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily ... the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal would generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba -v- Secretary of State for the Home Department*.”

30. In the light of my earlier findings of fact, and my observations at paragraphs [23] and [24] above, I do not consider that the interference with family life consequential upon the maintenance of the refusal decision could be said to serve any good purpose. Despite the gaps in the specified evidence, the overwhelming probability (having regard *inter alia* to the latest P60 and the recent letter awarding him an increase in his basic salary) is that the sponsor is telling the truth when he says that he is a long-standing employee of the building company which issued his P60 for the year to April 2018: and that he has been earning well in excess of the MIR for a considerable number of years. In addition, if properly directed, I have no doubt that the sponsor could produce the mandatory specified evidence in Appendix FM-SE to show that the MIR is met for the purposes of an application by his wife for entry clearance. Thus, the application would be certain to succeed, and there is little or no public interest in the claimant’s removal - as her removal is totally unnecessary for the purpose of protecting this country’s economic well-being. So my conclusion is that the maintenance of the refusal decision is disproportionate, and I allow the claimant’s appeal on this ground.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and so the decision is set aside and the following decision substituted: this appeal is allowed on human rights (Article 8 ECHR) grounds.

I make no anonymity direction.

Signed

Date 16 June 2018

Judge Monson
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal on remaking, I have given consideration as to whether to make a fee award, and I have decided to make no fee award as the claimant needed to bring forward further evidence in order to be successful in her appeal.

Signed

Date 16 June 2018

Judge Monson
Deputy Upper Tribunal Judge