Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15681/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons promulgated**
On 16 January 2019	**On 18 February 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ORANOS NISHAT
(Anonymity direction not made)

Appellant

and

ENTRY CLEARANCE OFFICER (Sheffield/452523)

Respondent

Representation:
For the Appellant: Mr A Barri of Chapeltown Citizens Advice.
For the Respondent: Mr Diwnycz Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Cox who in a determination promulgated on 23 August 2018 dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a citizen of Afghanistan born on 11 November 1998 who, on 13 April 2017, applied for a Visa to enable her to join her husband, her sponsor, in the United Kingdom. Having considered the evidence the Judge sets out findings of fact from [15] of the decision under challenge.
3. The Judge found in the appellant's favour in relation to one aspect of concern to the Entry Clearance Officer (ECO) where at [26] it was found the Judge was satisfied the appellant and sponsor are in a genuine and subsisting relationship and that there is potential family life between them that ought to be respected.
4. The issue of concern related to the availability of funds available to this family unit. The Judge sets out relevant findings between [32 – 37] in the following terms:

> "32. Under E-ECP.3.1, the Appellant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2, of a specified gross annual income of at least £18,600 (the Minimum Income Threshold, MIT). Under the rules, and Appellant is required to provide the specified evidence of the claimed income for 6 month period preceding the date of application.
>
> 33. The Appellant claimed that the Sponsor earned £15,935 per year as a Barista with Task Master Resources Ltd. The Sponsor accepts that this was not sufficient to meet the MIT and sought to rely on additional earnings of £2,796 from his part-time employment with Patisserie Holdings Ltd.
>
> 34. The ECO noted that the Sponsor was employed with Patisserie Holdings Ltd from 23/3/2015 to 20/8/2016. The ECO stated it was unclear at what point the additional £2,796 was earned or whether this was the Sponsor's cumulative earnings from his time at Patisserie Ltd.
>
> 35. Attached to the grounds of appeal, there is a letter from HMRC, dated 23 June 2017. The letter sets out the Sponsors earnings from Patisserie Ltd and shows that between 23/03/2015 and 28/8/2016 he earned £2,554 and between 5/11/2016 and 2/12/2016 he earned a further £241. However, this does not assist the Appellant, as it suggests that for the relevant 6 month period he only earned £241, which would not be sufficient to meet the shortfall in the MIT.
>
> 36. The Sponsor has now provided his annual tax summary for the year 2016 – 17, which showed that he earned £18,626.41 during that year. However, the Sponsor has not provided his payslips for Patisserie Ltd, which would have demonstrated the months he earned the additional income.
>
> 37. Overall, the Appellant has failed to demonstrate that she provided all the specified documents and, more importantly, that the Sponsors earnings with Patisserie Ltd for the 6 months preceding the application met the shortfall in the sponsors earnings from his main employment. On the totality of the evidence, I find that the Appellant does not meet financial eligibility requirements of Appendix FM."

5. Thereafter the Judge went on to consider the merits of the appeal by reference article 8, considering section 117 of the 2002 Act, in relation to which the financial issues were further considered at [43] in the following terms:

> "43. The Sponsor provided his tax summary for the year 2016/17, which is the tax year covering the relevant period. The summary showed that his income for the year was £18,626.41 which is above the MIT. However, as noted above the document does not show, what he earned during the 6 months preceding the application. In my view, there are good policy reasons why the Secretary of State requires an applicant to demonstrate a sufficient income for the 6 months immediately preceding the application. For example, he would want to be satisfied that a sponsor is still earning a sufficient income. In the circumstances, I have attached limited weight to the fact that the Sponsor earned more than the MIT in the year preceding the application."

6. The appellant sought permission to appeal which was granted by another judge of the First-Tier Tribunal on 18 October 2018; the relevant part of the grant being in the following terms:

> "2. The grounds state that the First-Tier Tribunal Judge erred in his assessment of the evidence regarding the financial requirements. The grounds state that the First-Tier Tribunal Judge misunderstood the evidence before him. The grounds state that the letter from HMRC did not state that the sponsor earned £2,795 from Patisserie Ltd from 23 March 2015 until 20 August 2016 but rather that he commenced employment on 23 March 2016 and ceased employment on 20 August 2016 and that in the tax year April 2016 – April 2017, he earned £2,795. The grounds further assert that the First-Tier Tribunal Judge erred in finding that the appellant did not supply the specified evidence with the application.
>
> 3. At Paragraph 35 of the decision, the First-Tier Tribunal Judge refers to the letter from HMRC and states that this showed the sponsors earning from Patisserie Ltd between 23 March 2015 and 20 August 2016. In fact, the letter states, 'For the tax year 2016 to 2017 my records show' and 'sources of income for the tax year ending 5 April 2017'. It is arguable therefore that the letter from HMRC has been misconstrued and that it related to the tax year 2016/2017 and not to income received between the start date and the end date of the employment. The First-Tier Tribunal Judge also noted that the appellant had not provided payslips for his employment at Patisserie Ltd. The appellant states that these were provided with the application. However, the respondent's bundle does not include them and they were not re-submitted by the appellant (if they were ever submitted with the application). Nonetheless, it is arguable that the misconception regarding the information provided in the HMRC letter may have an impact on the First-Tier Tribunal Judges subsequent proportionality assessment including his assessment of whether there was cogent evidence to show that the appellant met the financial requirements even if it was not the specified evidence."

Error of law

7. For the purpose of the hearing before the Upper Tribunal the appellant has provided a substantial bundle of documents which includes the HMRC letter, various photographs, bank statements, copy wage slips and copies of communications that have occurred between the appellant and the sponsor.
8. It was accepted by Mr Diwnycz that the appellant had made out his case that the Judge has made a material error of law by misunderstanding the information recorded on the HMRC letter in the grounds.
9. The decision of the Judge is set aside. The findings in relation to the appellant and sponsor being in a genuine and subsisting relationship are preserved findings as are those relating to the sources of the sponsors income from employment.
10. It was accepted by all parties that the Judge was right to find the appellant could not satisfy the requirements of the Immigration Rules as it was not shown that the appellant provided proof of the income in the form of the documents specified in Appendix FM – SE for the relevant period.
11. It was accepted, however that the evidence provided clearly demonstrated that the sponsor was earning more than the MIT. It was accepted that in light of the fact the two issues relied upon by the ECO, relationship and level of funding, had been decided in the appellant's favour that the refusal will amount to a disproportionate interference with the right to family life of the appellant and sponsor - section 117 of the 2002 Act considered.
12. Article 8 ECHR has no requirement for evidence to be proved in accordance with Appendix FM – SE. The material provided establishes on the balance of probabilities that the appellant does, the assistance of a sponsor, satisfy the income requirement.

Decision

13. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed pursuant to Article 8 ECHR.**

Anonymity.

14. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 16th January 2019