Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/15856/2017

THE IMMIGRATION ACTS

Heard at Field House
On the 1st August 2019

Decision & Reasons Promulgated
On the 16th August 2019

Before:

DISTRICT JUDGE MCGINTY

SITTING AS A DEPUTY UPPER TRIBUNAL JUDGE

Between:

MRS ADEBOLA OLUFUNMILAYO FABIAN

(Anonymity Direction not made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Brissett (Legal Representative)

For the Respondent: Mr Melvin (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Carroll promulgated on the 28th February 2019, in which she dismissed the Appellant's appeal against the Respondent's decision to refuse her entry clearance on Human Rights grounds.

2. The Appellant Mrs Fabian is a Nigerian citizen. Her sponsor, Mr [SF], is a British citizen. On the 5th December 2016, the Appellant sought entry clearance to the United Kingdom as Mr [F]'s spouse. That application was refused by the Respondent in a decision letter dated the 12th October 2017, on the grounds that the Respondent was not satisfied that the Appellant and her sponsor were in a genuine and subsisting relationship or that they intended to live permanently together in the United Kingdom. The Respondent also was not satisfied that the sponsor met the minimum income requirements of the Immigration Rules. It was said that the Appellant had not submitted any sponsor finance documentation and had not completed an Appendix II. The Respondent was further not satisfied that the sponsor would be adequately accommodated in the UK without recourse to public funds.

3. That decision was appealed to the First-tier Tribunal, and that appeal was heard by First-tier Tribunal Judge Carroll at Taylor House on the 15th February 2019, who although being satisfied regarding the genuineness and subsisting nature of the relationship and the accommodation and the English language requirements, was not satisfied, when considering the Article 8 claim initially through the lens of the Immigration Rules that the Appellant had demonstrated that the financial requirements of Appendix FM were met. The Judge went on to find that there were no exceptional or compelling circumstances to mean that the decision was disproportionate for the purposes of Article 8 outside of the Rules, such as to amount to a breach of the Appellant's Human Rights. The First-tier Tribunal Judge found that:

> "The sponsor is in a salaried employment and must demonstrate an income of a minimum of £18,600. The material period for documentation relating to his employment is six months prior to the date of application in December 2016. In his oral evidence the sponsor said that all of the documentation had been submitted with the Visa Application Form. I have no way of verifying this. However, the employment documentation relating to the sponsor which appears at page 12 and following of the principal bundle does not cover the relevant period. There is one letter of the 1st July 2016 on the headed paper of Barratt London in which it is said that the sponsor's salary with effect from the 1st July 2016 will be £20,910 per annum. There are also two offers of employment; one of these is dated the 16th October 2017 and there is also a contract of employment dated the 13th October 2018 (page 12). The bundle also contains a P60 for the sponsor but this is for the tax year to the 5th April 2015. There are also a number of payslips but none for the period July to December 2016. I note also that a large number of the payslips submitted (for 2017) do not show the sponsor's name.
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> 6. In the light of this very limited evidence, the Appellant does not satisfy the financial requirement provisions of Appendix FM (E-ECP.3.1)".

4. Within the Grounds of Appeal it is argued that the Learned Judge failed to place adequate or sufficient weight on the documents placed before her, especially a document dated the 1st July 2016 at page 17 of the bundle from Barratt London, which i stated that the sponsor's salary had been reviewed with effect from the 1st July 2016 and would be £20,910 per annum representing a 2% increase. This is said to show that the sponsor met the £18,600 threshold before the date of the application in December 2016. It is argued that the Judge's failure to take account of that letter resulted in a material error of law and that further the sponsor's 2016 payslips showed that he met the financial threshold. It is argued that all of the required information including letters from employers, payslips and Tax Returns were provided before making the application. It is argued that

the Judge failed to consider payslips from Barratt for the period between the 24th June 2016 to December 2016. It was further argued that the Judge failed to consider the payslips from the 24th June 2016 to October 2017 and the salary increase. It was further argued that the Judge failed to consider all the Halifax bank statements from May 2016 evidencing the sponsor's salary. It is argued that the decision is wrong, unfair and unreasonable in the "Wednesbury sense" and that the Appellant should have been given the benefit of the doubt. It was further argued that the Judge failed to strike a fair balance for the purposes of Article 8.

5. Within the Appellant's Skeleton Argument it is further argued that the issue is the financial requirements of Appendix FM and whether or not the financial criteria had been satisfied by the Appellant and her sponsor. It is further argued the Appellant and her sponsor's Article 8 rights will need to be considered. It is argued that the Appellant and sponsor have undergone emotional anguish through the appeals process. It is said that the First-tier Judge was not assisted at the hearing as there was no Respondent's bundle before her and the Secretary of State was not represented at the hearing. It is argued that the Appellant and her sponsor have fully complied with legal requirements and that she should be allowed to enjoy her Article 8 rights with her sponsor and that the failure of the Home Office to furnish a bundle or a representative should not be blamed on the Appellant. The Upper Tribunal was invited to substitute its decision in place of the one made by Judge Carroll and to allow the appeal.

6. Although permission to appeal was initially refused, it was subsequently granted by Upper Tribunal Judge Reeds on the 20th June 2019, who found that the grounds asserted that the Judge erred in her approach to the assessment of the sponsor's financial circumstances by failing to take into account evidence relevant to the requisite period under Appendix FM-SE and also later evidence that had been provided. She granted permission on the basis that it was unclear

what material had been before the Judge and whether in the circumstances there had been an error of approach on assessing the evidence, which might have had a material bearing on the outcome. It was stated that the Appellant's representative would be required to demonstrate what had been before the Judge at the hearing date. It was only on that basis that permission to appeal was granted.

7. I am most grateful to Mr Melvin for having provided a Rule 24 Reply dated the 31st July 2019. It is therein stated that due to operational difficulties the Respondent did not attend the First-tier Tribunal hearing. It was acknowledged by the Respondent that if it could be shown that there was cogent evidence before the First-tier Tribunal that the financial requirements of Appendix FM-SE were met in the six months prior to the application (July-December 2016) as asserted in the Grounds of Appeal then the appeal should succeed, given all of the other areas appeared satisfied. However the Respondent opposed the appeal and submitted that the Judge directed herself appropriately.

8. In addition to the Grounds of Appeal and the Skeleton Argument and the Rule 24 Reply, I also heard oral submissions from Mr Brissett on behalf of the Appellant and Mr Melvin, Senior Home Office Presenting Officer on behalf of the Secretary of State. Mr Brissett argued that all of the required information had been submitted to the Home Office with the application and that the Appellant should not suffer as a result of the Respondent having failed to produce a bundle or to attend at the First-tier Tribunal hearing. He further argued that the First-tier Tribunal Judge had the sponsor's contract of employment showing his level of employment prior to the application and that the Judge failed to give sufficient weight to it. He argued that the decision was both irrational and unfair.

9. He said that there was no criticism of Judge Carroll in not having a full bundle, and conceded that the payslips contained within the Appellant's bundle as stated

by Judge Carroll appeared to have the name of the employee missing at the top, but he argued that that was simply an error in photocopying, and that only part of the wage slips had been photocopied rather than the entire wage slips. He stated the back of the wage slips also had not been photocopied. He said that he had checked the employee reference number, which he said related to the sponsor. He asked me to allow the appeal, submitting that the court ought to carry out a proportionality exercise for the purposes of Article 8.

10. Mr Melvin submitted that the grant of permission to appeal had been specific in nature and that it was for the Appellant to show what documentation was before the First-tier Tribunal and submitted that the Judge could only decide the appeal on the basis of the evidence that she had before her.

My Findings on Error of Law and Materiality

11. Although the Appellant has now sought to submit further bundles, following the decision of First-tier Tribunal Judge Carroll including a 54-page bundle sent to the Tribunal on the 21st May 2019 and a further 93-page bundle sent to the Tribunal on the 26th July 2019, which contain payslips, P60 and bank statements. However, these bundles were not before First-tier Tribunal Judge Carroll when she made her decision. The only bundle of evidence before Judge Carroll when she made her decision was the original Appellant's bundle running to 190 pages. As she correctly stated in her decision the sponsor had said that all the documentation had been submitted with the visa application form, but she had no way of verifying that.

12. Having read her decision it is clear that the judge did take account of the letter of the 1st July 2016 saying that the sponsor's salary with effect from the 1st July 2016 would be £20,910, and took account of the employment letter dated the 16th October 2017 and the contract of employment dated the 13th October 2018, together with the contract of employment with HML Concierge, in respect of the

sponsor's employment from the 13th October 2018. The Judge also noted quite correctly that the bundle contained a P60 for the sponsor for the tax year ending the 5th April 2016 and that within the bundle that she had before her, there were no payslips relating to the period for the six months prior to the application between July to December 2016 and that a large number of the payslips submitted in 2017 did not show the sponsor's name. That is now agreed by the Appellant, who says that that was a photocopying error. However, although Mr Brissett says that he had checked the employee number and that relates to the sponsor, there was no evidence before First-tier Tribunal Judge Carroll to show to whom those payslips for 2017 related. There is no way that she would have known if that employee reference related to the sponsor.

13. Judge Carroll correctly found that she did not have wage slips for July to December 2016. Therefore, when initially considering the Article 8 claim through the lens of the Immigration Rules, First-tier Tribunal Judge Carroll quite correctly found that the Appellant did not satisfy the financial provisions of Appendix FM in that regard as the specified evidence in Appendix FM-SE had not been provided. Although clearly being a Human Rights claim, the court was considering the application as at the date of the hearing, when initially considering the application through the lens of the Immigration Rules, the court did have to consider what evidence there was and whether or not the specified evidence was available to establish the level of the sponsor's income. The First-tier Tribunal Judge did not have sufficient evidence to show that the provisions of the Immigration Rules were met. She was also entitled to find that although a subsequent employment of contract had been provided, the payslips from 2017 did not show to whom they related.

14. It is for the Appellant to prove her case on the balance of probabilities, it was not for the Respondent to disprove it. The Appellant was represented at the appeal hearing, and seemingly no request was made for any adjournment in order to be

able to provide further documentation, or to be able to obtain clarification as to what documentation was submitted with the application to the Respondent. I was told by Mr Brissett that the Appellant asked for the appeal to go ahead before Judge Carroll despite the non-attendance of any representative on behalf of the Secretary of State and the lack of the Respondent's bundle, and in such circumstances the Judge could only decide the case on the evidence presented before her.

15. The existence of simply the employer's letter from the 1st July 2016, would be insufficient to establish that the financial requirement of Appendix FM-SE were met, without evidence of the requisite wage slips and proof of payments into the bank account. The decision of First-tier Tribunal Judge Carroll does not disclose any material error of law, and the Judge made findings which were perfectly open to her on the evidence presented to her.

16. Although Mr Brissett asked me to take account of the further bundle submitted, in which full copies of the wage slips were provided, together with wage slips for the requisite period, as stated above, there was no evidence that these documents were actually before the First-tier Tribunal Judge, therefore I have no jurisdiction to consider those, whilst initially considering whether or not the First-tier Tribunal Judge had materially erred. Until the Upper Tribunal considers that the First-tier Tribunal Judge has made a material error of law, it is not in a position to consider further evidence, such as to undertake a re-hearing.

17. It is clearly open to the Appellant and her sponsor to make a further application for entry clearance, submitting fresh evidence to show the rules are met now. However, in the absence of any evidence to show that the First-tier Tribunal Judge made a material error of law, the Upper Tribunal has no discretion simply to substitute its own assessment based on the new evidence submitted.

Notice of Decision

The decision of First-tier Tribunal Judge Carroll does not disclose any material error of law and is maintained.

I make no Order in respect of anonymity, no such Order having been sought before the First-tier Tribunal Judge or before me.

Signed

DJ McGinty

District Judge McGinty
sitting as a Deputy Upper Tribunal Judge Dated 1st August 2019