



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10086/2015

THE IMMIGRATION ACTS

Heard at Field House
On 11 December 2017

Decision & Reasons Promulgated
On 10 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

ENTRY CLEARANCE OFFICER - PRETORIA

Appellant

and

MISS DIANAH GIIBWA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Deller

For the Respondent: No Appearance

DECISION AND REASONS

1. The ECO appeals with permission against the decision of First-tier Tribunal Judge Traynor who in a decision promulgated on 11 March 2017 allowed the respondent's appeal against the refusal by the ECO to grant her entry clearance to the UK as the partner of a person present and settled in the United Kingdom. The ECO's decision which is dated 21 December 2015 explained that the respondent's entry clearance application had been considered in accordance with the provisions of the partner Rule as specified in Appendix FM of the Immigration Rules as set out in HC 395 (as amended). The ECO noted particularly that the respondent's application had met

the suitability and eligibility criteria required for leave to enter, but that she had not met the financial requirements. Specifically, it was considered that the respondent's evidence, and that of her sponsor, had not demonstrated that the sponsor earned an annual gross income of at least £18,600 per annum and therefore the application stood to be refused upon the basis that the provisions of paragraph EC-P.1.1(d) of Appendix FM with reference to paragraph E-ECP 3.1 could not be met.

2. The respondent had provided documents from her sponsor's employer to show that he was employed by McGinley from 5 March 2015. The judge found that the sponsor did not commence his employment with his current employer until March 2015. Therefore, by the date of application, only five months had elapsed and it was therefore incumbent upon the sponsor to provide additional evidence of earnings prior to that time that would show, for the whole of the previous year, that he had an income which exceeded the £18,600 income threshold.
3. The judge considered both the letter from McGinley Construction and the subsequent letter that the respondent had submitted from Orbital Umbrella Ltd, but neither of them contained this specified information.
4. The judge held at paragraph 26:

"It is evident to me, therefore, that not only has the sponsor failed to provide evidence of his employment demonstrating six months earnings at a gross annual salary of £18,600 but the document he has supplied with the appeal papers show that for the tax year 2014/15 his income amounted to only £11,044. Moreover, he has failed to produce the specified documents as required by the terms of Appendix FM-SE and, as such, has not demonstrated at the time of the application that he had gross earnings of at least £18,600."

5. The judge also held at paragraph 27:

"It is further significant that when the application was made the sponsor was in Uganda. He was not earning at that stage and the evidence which he supplied in support of the application represented only five months employment with that employer. I accept his explanation that for the whole of the financial year 2015/16, his earnings exceeded £22,500. That, however, is evidence of the appellant seeking to rectify her application after she has been notified by the respondent that the evidence upon which she seeks to rely was insufficient both at the time of the application and the decision in October 2016 and could not meet the £18,600 threshold."

6. The judge concluded at paragraph 28 :

"When I have considered all of the evidence available to me, I find that the appellant has not provided the documents required by Appendix FM-SE in order to illustrate that her sponsor's income meets the £18,600 threshold. In any event, such income as the sponsor has earned up to the time of the refusal of the application did not meet that threshold. It is therefore wholly justifiable that the ECO refused the application upon the basis that the evidence did not meet the requirements of the Rules."

7. I find that the judge should have stopped there because in his own analysis of the evidence the respondent could not meet the financial requirements of the Immigration Rules.
8. The judge however went on to allow the appeal under Article 8. His reasons for doing so were based on his finding that family life not only subsists but Article 8 is engaged because the refusal of the application prevents the family from living together in the UK. The judge accepted that the respondent's decision was made lawfully in accordance with the Immigration Rules and based upon the evidence available at the time of the decision. However, it was apparent to him that as these proceedings have been ongoing for some time and by the time of the first consideration of this appeal in 2016 when the papers were first placed before a judge of this Tribunal, there was ample evidence to demonstrate that the sponsor was earning an income in excess of £18,600 in the relevant financial year.
9. The judge said that he was entitled to take into account as proof of the fact that the sponsor has been earning the minimum income threshold of £18,600 per annum. He found that the evidence was sufficient to demonstrate that the ECO's decision to refuse the applicant's application was one which was incompatible with the United Kingdom's obligations under Article 8 of the 1950 Convention.
10. I find that the judge's decision to allow the respondent's appeal under Article 8 of the ECHR was flawed. Article 8 cannot be used as a substitute to allow an appeal that has failed under the Immigration Rules.
11. The judge found that there is family life so under the **Razgar** principles we can skip the rest of the questions and go to the proportionality assessment. As the ECO's grounds suggest, the judge's decision does not identify any compelling or exceptional circumstances in this case. I note that appeals of this nature can be protracted but that is not a reason for finding that this appeal ought to be allowed on Article 8 grounds. Furthermore, the relevant financial year was 2014/15. In the light of his findings at paragraphs 26, 27 and 28, the respondent's sponsor's income did not meet the £18,600 threshold in that financial year.
12. I therefore find that the judge's decision on Article 8 was wrong in law.
13. The judge's decision cannot stand. I remake the decision and find that there are no exceptional or compelling circumstances in this case. Consequently, Miss Giibwa's appeal under Article 8 is dismissed.

No anonymity direction is made.

Signed

Date: 8 January 2018

Deputy Upper Tribunal Judge Eshun