



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06259/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12 April 2019 & 24 May 2019

Decision & Reasons Promulgated
On 21 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

GALINA [H]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Stanley Richards Solicitors

For the Respondent: Mr D Clarke & Mr I Jarvis (Senior Presenting Officers)

DECISION AND REASONS

1. This is the appeal of Galina [H], a citizen of Ukraine born 12 October 1980, against the decision of the First-tier Tribunal (Judge Watson) of 19 December 2018 dismissing her appeal on human rights grounds, itself brought against the refusal of her human rights claim of 6 February 2018.
2. This appeal was listed for a case management hearing on 12 April 2019 but in order to ensure effective use of the Tribunal's resources it was expedient,

with the agreement of the parties, to treat the listed hearing as the occasion to determine the question of error of law.

3. The Appellant and Sponsor, [WH], married in Ukraine in June 2016 and the former applied for entry clearance as a spouse on 7 November 2017. The relationship is plainly a genuine one, as accepted by the Secretary of State and First-tier Tribunal. The application was refused only because of a failure to meet the financial requirements. In particular, there were missing bank statements within the necessary 12 month period, and the evidence required to show the business's viability were not available, there being no unaudited accounts or an accountant's certificate
4. The First-tier Tribunal assessed the evidence for itself, and found that the specified evidence required to meet the financial requirements were not all provided. The First-tier Tribunal decided that there was no requirement to apply principles of evidential flexibility in this situation to request missing documents.
5. As the Rules were not met, the First-tier Tribunal went on to assess the case outside the Rules. It concluded that whilst the Appellant's inability to meet the Rules was minor, the policy objective they enshrined was not in fact met, as the quantum of earnings was insufficient: it was thought necessary to evince the required level of support for a spouse and her son, being £22,400. However the net profit established by the HMRC documents was £21,517. Accordingly the refusal of entry clearance was proportionate.
6. Granting permission to appeal, the First-tier Tribunal on 25 January 2019 noted that the Appellant's son from a previous relationship had not applied for entry clearance and so was not part of the family unit for whom financial support was required. Accordingly the benchmark figure for maintenance used to assess the claim's viability outside the Rules was wrong. This was a material error of law. Judge Blundell in this permission grant noted that the Secretary of State might wish to consider whether the matter warranted a hearing in the First-tier Tribunal.
7. On 14 February 2019 Judge Rintoul for the Upper Tribunal wrote to the parties stating that his provisional view was that there was a material error of law and that the appeal might fall to be allowed without a further hearing subject to the parties submissions; the Secretary of State might find himself vulnerable to an adverse costs order if the appeal was unjustifiably opposed.
8. On 20 February 2019 the Secretary of State wrote stating that the contention that an error of law was established was not opposed; however the appropriate disposal of the appeal was for a continuance hearing.

Findings and reasons

9. The Immigration Rules state:

“Financial requirements

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.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-ECP.3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1.(a); or
- (c) the requirements in paragraph E-ECP.3.3. being met.

In this paragraph “child” means a dependent child of the applicant or the applicant’s partner who is-

- (a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;
- (b) applying for entry clearance as a dependant of the applicant or the applicant’s partner, or is in the UK with leave as their dependant;
- (c) not a British Citizen or settled in the UK

...

Family Members - Specified Evidence

D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State (“the decision-maker”) will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b), (e) or (f) applies.

- (b) If the applicant:
 - (i) Has submitted:
 - (aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);
 - (bb) A document in the wrong format (for example, if a letter is not on letterhead paper as specified); or
 - (cc) DELETED

(dd) A document which does not contain all of the specified information; or

(ii) Has not submitted a specified document, the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

...

7. In respect of self-employment in the UK as a partner, as a sole trader or in a franchise all of the following must be provided:

...

(h) One of the following documents must also be submitted:

(i) (aa) If the business is required to produce annual audited accounts, such accounts for the last full financial year; or

(bb) If the business is not required to produce annual audited accounts, **unaudited accounts for the last full financial year and an accountant's certificate of confirmation**, from an accountant who is a member of a UK Recognised Supervisory Body (as defined in the Companies Act 2006) or who is a member of the Institute of Financial Accountants;”

10. It is accordingly clear that, as already noted by Judge Blundell, the relevant financial benchmark was £18,600. The failure of the First-tier Tribunal to appreciate this undermined its decision, given that it accordingly misappraised the extent to which the public policy position comprised in the financial requirements was met. This was a serious and material error of law.
11. It was also an error to fail to appreciate that the Immigration Rules expressly provide a discretion to request missing specified documents, such as the unaudited accounts. However, it became apparent at the first hearing before me that there were no unaudited accounts extant at the relevant period, and so to that extent the failure to seek them was not material, for had their absence been identified as a matter that could be condoned via the exercise of discretion, they would not foreseeably have been forthcoming within the limited period provided for by the *Missing document* Rule.
12. The hope for some pragmatic resolution of the appeal expressed in the grant of permission to appeal and the directions of Judge Rintoul was a perfectly reasonable one. However, Mr Clarke was entitled to resist the appeal as things stood at the April 2019 hearing, given that it remained the case at that date that a specified document had not been provided.

13. It was accordingly agreed that the appeal should proceed to a continuation hearing in the Upper Tribunal subject to its sensible resolution by agreement between the parties via the provision and acceptance of suitably audited accounts establishing earnings at the relevant level. If the Appellant could meet the Rules, then so long as he had established family life (which given the relationship is accepted as genuine is self-evidently the case), his appeal would inevitably succeed: see *TZ (Pakistan)* [2018] EWCA Civ 1109 §35.
14. I expressed my hope at the April 2019 hearing that such an agreement could be reached without a further full hearing. Happily that state of affairs has come to pass, Mr Clarke having written to the Tribunal prior to the May 2019 hearing confirming that the Secretary of State was now satisfied that the Rules were met so no longer resisted the appeal. As I am assured that the relevant unaudited accounts do indeed satisfy the Rules, I find that the refusal of entry clearance is now shown as inconsistent with the couple's Article 8 rights, as the policy imperative of protecting public funds is not threatened by the grant of entry clearance. Accordingly the appeal is allowed.

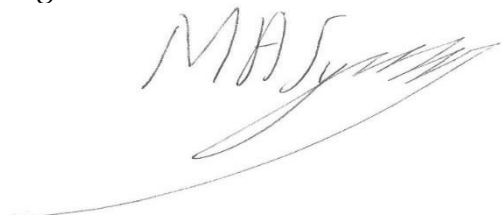
Decision

The appeal is allowed.

I do not make a costs order in the Appellant's favour as the appeal succeeded on post decision evidence.

Signed

Date 17 June 2019

A handwritten signature in black ink, appearing to read 'M.A. Symes', with a long horizontal flourish extending to the left.

Deputy Upper Tribunal Judge Symes