Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10720/2017

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 1 February 2019	**On 6 March 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

JOHN MICHAEL GRANT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UK VISA SECTION, SHEFFIELD

Respondent

Representation:
For the Appellant: The Appellant Mr Grant appeared in Person
For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Holmes who in a decision promulgated on 4 June 2018 dismissed his appeal against the decision of 10 September 2017 as he did not meet the financial eligibility requirements of paragraph EC-P.1.1(d) of Appendix FM of HC 395 with reference to paragraphs E-ECP.3.1 to E-ECP.3.4.

2. As the judge properly noted, as the application was decided after 6 April 2015 the sole permitted ground of appeal was that the decision was unlawful under section 6 of the Human Rights Act 1998.

3. In a commendably thorough diligent decision, the judge gave full consideration to the evidence and concluded that the appeal did not succeed.

4. The appellant appealed on various grounds and was granted permission with regard to the points identified by the Judge granting permission as grounds 5 and 6. The first of these is an argument that the Judge did not attach proper weight to the fact that the appellant's wife and sponsor who is a medical student, would not be able to gain experience and compete in the American healthcare system as the United States would not recognise her medical training and that this obstacle to relocation overseas could result in unjustifiably harsh consequences for the appellant and the sponsor. The other matter was in effect that the judge erred in his findings in respect of the appellant's attempt to meet the financial requirements of Appendix FM paragraph D-ECP in that he had shown an alternative form of income available and should have been considered, such as those in paragraph 21A of Appendix FM-SE and that he would be financially stable together with his sponsor, including prospective income, to meet all financial requirements.

5. The appellant appeared in person. He was of considerable assistance in identifying relevant documents and making clear arguments on the points in question.

6. After a thorough evaluation of the evidence it became clear that the claim could not succeed with regard to earnings, which was essentially one of the judge's conclusions. It seemed sufficiently clear that the evidence in this regard in some came to no more than earnings on the part of the appellant from his long distance English language teaching students of a Vietnamese and a Chinese college respectively, showing no more than the equivalent of £11,250. Though he was able to identify the earnings from the Chinese company, Da Da ABC where he identified the contract with them and payments that they had agreed to make into his wife's bank account, it appeared that the Vietnamese company, Topica Native were not prepared to make payments into her account and made payments into his account, and he had not been able to obtain a bank statement from his American bank. In addition he had not been able to provide a copy of the contract with Topica Native for the relevant dates. So at best his earnings were £11,250 to which could be added the £3,482 grant element of the sponsor's finance, but since that came to a total of under £15,000, it could not meet the requirement of the Immigration Rules of needing to show £18,600.

7. The remaining issue is that of difficulties arising from the inability of the sponsor to work in the United States because the US registration system would not allow her to practice as a doctor at least for some time and also after the passing of a number of examinations.

8. The judge noted that paragraph GEN.3.1 of Appendix FM provided that where the minimum income requirement under Appendix FM applies and is not met from the specified sources referred to there and it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of the application a breach of Article 8 because it could emphasise a result in an unjustifiably harsh consequences for the applicant, his partner or relevant child, the decisionmaker must go on to consider whether the minimum income requirement is met if other credible and reliable sources of income, financial support or funds available to the couple are taken into account. Those sources, and matters to which the decisionmaker should have regard when assessing the genuineness, credibility and reliability are set out at paragraph 21A of Appendix FM-SE. The sources that may be considered include credible prospective earnings from sustainable employment or self-employment of the applicant or their partner, and any other credible and reliable source of income or funds for the applicant or their partner which is available at the date of application or which will become available during the period of limited leave applied for.

9. The judge noted that in this regard the matters raised were first the sponsor's continuing medical training and intended career in the NHS and second the financial burden that might fall upon the appellant and the sponsor if they had to continue their family life in a long distance fashion. The judge noted that the fact that they would be living in their respective countries would not prevent him from visiting his wife or vice versa but the concern expressed was to how much that would cost and the judge took that concern into account. The judge noted that all the circumstances identified as problematic would be strictly temporary. According to the appellant, in less than twelve months the sponsor would be taking up a contract to work in the NHS at what was claimed to be a minimum rate of £23,091, which if it happened would entitle the appellant to make a fresh application for entry clearance with every prospect of satisfying the financial threshold under the Rules.

10. The judge considered that upon his findings as set out at paragraph 24 of his decision the appellant had clearly failed to demonstrate any exceptional circumstances within the meaning of GEN.3.1. It was therefore, he considered, strictly speaking unnecessary for him to consider the computations whereby the appellant had suggested that if exceptional circumstances were shown he would be able to show "other credible and reliable sources of income, financial support or funds" which would enable him to meet the income threshold. The judge pointed to the difficulties and the calculations appeared to rely on the sponsor's income of £9,044 in relation to which it was unclear what parts were loan and what parts grant and also the appellant believed the money he had made from working while in the United Kingdom as a visitor could be counted as lawful income but the judge doubted that was so, in particular as he could not see any evidence of arrangements of tax to be paid on this income.

11. Though it is now clear as I have set out above what element of the £9,044 finance is the grant element and also that the appellant has been earning his income from long

distance English teaching online, to an extent the points there are clarified, it remains unclear which tax regime would have the benefit of assessing the appellant to tax bearing in mind as he said in evidence he had done this work in the United Kingdom, Spain and the United States of America over the relevant period.

12. I consider that the judge did not err in law in his conclusion as to "exceptional circumstances" in this case. His conclusion that the circumstances identified, which he considered at paragraph 24 of his decision, are not exceptional circumstances is sound. It was open to him to find that the consequences of refusal would not be unjustifiably harsh. The fact that as noted above he may have erred in regard to the other income, cannot mar that finding upon which the other points fall away in light of its soundness.

13. Nor do I see any force to the argument in respect of Razgar on the human rights test as set out by the judge and as argued by the appellant. The judge gave full consideration to the Razgar test and in particular with regard to proportionality, and came to conclusions to which he was fully entitled. The reasoning at paragraphs 28 to 30 of the decision in this regard in particular are sound.

14. Though one can only sympathise with the appellant and his wife as to the outcome of this appeal, I hope they may be sustained by the fact that first of all it is as apparent from his attendance at the hearing, perfectly possible for the appellant to visit the United Kingdom at the current time, and also it seems clear that the sponsor will be earning above the threshold income level as of August this year. It does not appear that there are concerns as to eligibility or suitability, and there must, as the judge noted, be every prospect of a successful application being made as and when the sponsor takes up her employment in August. But as matters stand I do not consider that it has been shown that the judge erred in law in his decision, and that decision dismissing the appeal must therefore stand.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Allen