



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/13883/2015

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Decision & Reasons
Birmingham Promulgated
On 16th June 2017 On 26th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**NHUNG PHUONG THI NGUYEN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No legal representation

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge A M S Green of the First-tier Tribunal (the FTT) promulgated on 11th August 2016.
2. The Appellant is a female Vietnamese citizen born 24th August 1982. She entered the United Kingdom as a visitor on 17th June 2014, with a visa valid between 28th May 2014 and 28th November 2014. The purpose of the visit was for the Appellant to be assessed for her suitability to donate a kidney to her partner Roberto Perez, a British citizen, to whom I shall refer as the Sponsor.

3. The Appellant's visa was extended until 28th June 2015, but the transplant operation was delayed.
4. The Appellant became an overstayer, and on 11th August 2015 applied for further leave to remain, to enable the transplant operation to take place.
5. The application was refused on 3rd December 2015. The Respondent assessed the application as a human rights application and therefore considered Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) within the Immigration Rules.
6. The Respondent firstly considered Appendix FM in relation to family life, not accepting that the Appellant and Sponsor satisfied the definition of a partner within GEN.1.2. of Appendix FM. Also it was not accepted the Appellant and Sponsor had a genuine and subsisting relationship and therefore they did not satisfy E-LTRP.1.7. of Appendix FM.
7. The Respondent considered the Appellant's private life with reference to paragraph 276ADE(1) not accepting that the Appellant had lived continuously in the UK for at least twenty years, nor that there would be very significant obstacles to her integration into Vietnam. The Respondent pointed out the Appellant has spent the majority of her life in Vietnam before travelling to the UK.
8. The Respondent then considered whether there were any exceptional circumstances that would justify a grant of leave to remain pursuant to Article 8, outside the Immigration Rules. The Respondent contended that the Appellant had failed to provide evidence of when the kidney transplant would take place. There was no date given for an operation. The Respondent did not accept the Appellant had been assessed as suitable to donate a kidney, and submitted that if the Sponsor was still on a waiting list for an operation, the Appellant could return to Vietnam and make an entry clearance application.
9. For the above reasons the application for leave to remain was refused.
10. The Appellant appealed to the FTT and the hearing took place on 26th July 2016. The FTT was satisfied that the Appellant and Sponsor had a genuine and subsisting relationship. It was not however accepted that they could satisfy the definition of a partner within the Immigration Rules as they had not lived together as partners for a period of two years prior to the application. The FTT accepted that Article 8 was engaged on the basis of family and private life. It was not accepted that an operation had been scheduled for September 2016 as claimed by the Appellant as there was no documentary evidence from the hospital to confirm this.
11. The FTT found the Respondent's decision to be correct in that the Appellant could not satisfy Appendix FM or paragraph 276ADE(1), and there were no exceptional circumstances to justify a grant of leave to

remain pursuant to Article 8 outside the Immigration Rules. The appeal was therefore dismissed.

12. The Appellant applied for permission to appeal to the Upper Tribunal. It was submitted that the FTT had erred by not considering a letter from University Hospitals Birmingham dated 7th July 2016, from the Sponsor's consultant nephrologist which confirmed an operation was planned for September 2016. This letter had been submitted to the FTT together with the Appellant's witness statement dated 15th July 2016.
13. Permission to appeal was granted by Judge C A Parker who found it arguable that the letter from the hospital had been overlooked.
14. Following the grant of permission to appeal the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008, contending, in summary, that the FTT had not erred in law, and had made findings which were open to it on the evidence.
15. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

Error of Law

16. The Appellant attended the hearing together with the Sponsor. The Appellant confirmed that she was not legally represented, and was content to proceed without legal representation. There was no need for an interpreter and proceedings were conducted in English. The Appellant confirmed that she had seen the grant of permission to appeal, and I explained to her the procedure that would be adopted, and that initially I had to decide whether the FTT had made a mistake of law, which would have made a difference to the conclusion reached.
17. Mr Mills explained that he did not support the rule 24 response which had been drafted by a colleague who had not had sight of the file. Mr Mills accepted that the letter from University Hospitals, Birmingham dated 7th July 2016 was before the FTT and had not been taken into account and he conceded that this amounted to a material error of law.
18. I explained to the Appellant that I did not need to hear further from her on that point. I was satisfied that the FTT had materially erred in law by failing to consider material evidence and therefore the decision of the FTT was set aside. I explained that my reasons, which were given orally, would be confirmed in writing.

Re-Making the Decision

19. It was agreed by the Appellant and Mr Mills that it would be appropriate for the Upper Tribunal to re-make the decision, without the necessity of a further hearing. I found that to be an appropriate course of action.
20. The Appellant confirmed that she and the Sponsor are in a genuine relationship. She had been previously assessed as suitable to donate a kidney to him. He is still receiving dialysis. The planned operation could not take place in September 2016 because she did not have a visa. The NHS would not carry out the operation unless she had legal status in the UK.
21. She explained that the operation had been previously cancelled, once because the Sponsor was ill, and on a second occasion because she needed an operation to remove a cyst.
22. I was asked to allow the appeal so that further tests could be carried out, which would be needed because of the passage of time, to enable the operation to proceed.
23. Mr Mills did not dispute that the couple are in a genuine relationship, and did not dispute that the Sponsor was receiving dialysis and needs a kidney transplant, and it was accepted that previously, the Appellant had been found to be a suitable match.
24. Although the appeal was not conceded, Mr Mills did not argue that the appeal should be dismissed, commenting that it was a matter for the Tribunal to decide, whether the Sponsor's medical condition amounted to compelling circumstances sufficient to outweigh the public interest in maintaining effective immigration control.
25. I announced at the hearing that the appeal was allowed pursuant to Article 8 outside the Immigration Rules because I found compelling circumstances to exist, having had regard to section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). I indicated that a written decision would be issued confirming my reasons.

My Conclusions and Reasons

26. Dealing firstly with my reasons for finding an error of law, I find that the FTT erred by failing to consider material evidence. The FTT at paragraph 23(iv) made a finding that no documentary evidence had been provided from the hospital to confirm that a kidney transplant operation had been scheduled for September 2016, and consequently found that no operation had been scheduled for that date. This was an error in that a letter from University Hospitals, Birmingham, NHS Trust dated 7th July 2016 was submitted to the FTT. This confirmed that the operation was due to take place in September 2016 as additional medical and gynaecological investigations which had been necessary, had been settled. The letter requested a visa extension for a further six months.

27. The failure to consider this evidence meant that the FTT carried out a flawed proportionality assessment.
28. I make the following findings of fact when remaking the decision. As found by the FTT, the Appellant and Sponsor are in a genuine and subsisting relationship although they do not satisfy the definition of a partner contained within Appendix FM, because they did not cohabit for a period of two years prior to the application for leave to remain being made.
29. I find the Sponsor to be a British citizen, and accept that medical evidence has been provided to show that he is receiving dialysis, and needs a kidney transplant. The medical evidence confirms that the Sponsor was assessed to be a suitable match for a kidney transplant, and that the operation previously had to be delayed, caused firstly by the Sponsor's illness, and secondly by the Appellant needing a gynaecological operation. I make the following findings based upon my findings of fact.
30. This is an appeal against refusal of a human rights claim. The only Ground of Appeal open to the Appellant is that the Respondent's decision is unlawful under section 6 of the Human Rights Act 1998. Reliance is placed upon Article 8 of the 1950 Convention.
31. In deciding this appeal I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali v SSHD [2016] UKSC 60, and in so doing have regard to the guidance as to the functions of the Tribunal given by Lord Reid at paragraphs 39 to 53.
32. The burden of proof lies on the Appellant to establish her personal circumstances in this country, and why the decision to refuse her human rights claim will interfere disproportionately in her private and family life rights. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probability throughout.
33. As found by the FTT, I find that Article 8 is engaged on the basis of family and private life.
34. I find that the appeal cannot succeed by reliance upon the Immigration Rules in relation to family life, those rules being Appendix FM, or private life, those rules being paragraph 276ADE(1).
35. This is a case where the Appellant relies upon Article 8 outside the Immigration Rules. I am satisfied that her intention in coming to the UK and remaining here, is to donate a kidney to the Sponsor, her partner. I accept the Appellant's evidence that she has no desire to remain in the UK on a long-term basis.
36. Because the appeal cannot succeed with reference to the Immigration Rules, I find that there must be compelling circumstances in order to justify allowing this appeal outside the Immigration Rules.

37. I have regard to section 117A and 117B of the 2002 Act. When considering the public interest question I must have regard to the considerations listed in section 117B. The public interest question means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
38. Section 117B confirms that the maintenance of effective immigration controls is in the public interest.
39. It is in the public interest that persons seeking to remain in the UK can speak English and are financially independent. The Appellant can speak English, but this can only be regarded as a neutral factor when assessing public interest and proportionality. The Appellant is not financially independent. She is dependent upon the Sponsor who is currently not working.
40. Little weight should be given to a private life established by a person in the United Kingdom with a precarious immigration status or unlawfully. The Appellant was initially in the UK with a precarious immigration status as she only had limited leave to remain. She has subsequently remained without leave. I must therefore attach little weight to her private life.
41. Little weight should be given to a relationship formed with a qualifying partner (the Sponsor is a qualifying partner because he is a British citizen) established by a person when the person is in the UK unlawfully. I do not find that this applies in this case, as the couple had formed their relationship prior to the Appellant remaining in the UK without leave.
42. I find that compelling circumstances exist in this case, those being that the Appellant only wishes to remain in the UK for a limited period of time, to enable her to donate a kidney to the Sponsor. The circumstances are unusual, and in my view it would be disproportionate to refuse the Appellant further leave to remain. The explanation for the delay in the operation being carried out has been explained in letters from the NHS, and in particular there is a letter dated 18th August 2016 confirming medical reasons for delay, also confirming that the Appellant is a suitable match, and that an operation date was set for 29th September 2016 pending visa approval.
43. The position now, is that, because of the passage of time, further tests will need to be carried out on both the Appellant and Sponsor. The length of discretionary leave to be granted is a matter for the Respondent. The Sponsor made the point that if only three months leave was granted this would be insufficient for the tests to be carried out, and the operation scheduled.
44. It is difficult to be exact regarding a timescale, but in my view the length of leave that would be needed, taking into account that the Appellant would need six weeks after donation of a kidney in which to recuperate,

would be a minimum of six months, and the Respondent might find that a grant of nine months leave would be the most appropriate option.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. I re-make the decision and allow the Appellant's appeal pursuant to Article 8 of the 1950 Convention.

Anonymity

The FTT made no anonymity direction. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity order.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

16th June 2017

TO THE RESPONDENT FEE AWARD

As I have allowed the appeal I have considered whether to make a fee award. I find it is not appropriate, as the appeal has been allowed because of evidence provided after the respondent's decision dated 3rd December 2015

Signed

Date

Deputy Upper Tribunal Judge M A Hall

16th June 2017