



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06587/2016

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham
On 20th July 2018

Decision & Reasons Promulgated
On 15th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

FATIMA ELMOUSTAID-ALAOUI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Sanghera of J M Wilson Solicitors

For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of Judge Garbett (the judge) of the First-tier Tribunal (the FtT) promulgated on 9th March 2017.
2. The Appellant is a female Moroccan citizen who arrived in the UK as a Tier 4 Student on 21st January 2015. Her visa was valid until 11th February 2016. Prior to the expiry of her leave she applied, on 18th January 2016, for leave to remain as the fiancée of Gul

Rameez Butt a citizen of Pakistan who is settled in the UK, and to whom I shall refer as the Sponsor.

3. The application was refused on 19th February 2016 with reference to Appendix FM because the Appellant failed to satisfy the eligibility requirements, in particular E-LTRP.1.12 which states that an applicant's partner cannot be the applicant's fiancée unless the applicant was granted entry clearance as that person's fiancée. In this case the Appellant was granted entry clearance as a student, not the Sponsor's fiancée.
4. The FtT heard the appeal on 7th March 2017. The Appellant was unrepresented at the appeal hearing.
5. The judge heard evidence from the Appellant and Sponsor and found that the Appellant could not satisfy E-LTRP.1.12, which meant there was no requirement to go on and consider the provisions of EX.1. The judge considered paragraph 276ADE(1) in relation to the Appellant's private life and found there would be no very significant obstacles to the Appellant's integration into Morocco, noting that the Appellant had only left Morocco in January 2015. The judge found that the Appellant could return with the Sponsor.
6. The judge did not find that there were any compelling reasons to consider Article 8 outside the Immigration Rules, and the appeal was dismissed.
7. Permission to appeal was granted by Upper Tribunal Judge Reeds who found it arguable that the issue of insurmountable obstacles to family life continuing outside the UK had not been considered by the judge under the Immigration Rules, and arguably should have been considered outside the Rules. It was noted that there had been evidence before the FtT that the Sponsor received a carer's allowance, which Judge Reeds found "lends some support for the claim that not all of the factual circumstances of the couple had not been taken into account or enquiry made of them."

Error of Law

8. On 21st May 2018 I heard submissions from both parties in relation to error of law. The Respondent contended there was no material error. On behalf of the Appellant it was submitted that the judge had erred by not taking into account that the Sponsor is the carer of a relative in the UK, and had inadequately considered Article 8 outside the Immigration Rules.
9. Full details of the application for permission to appeal, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision dated 21st May 2018, promulgated on 5th June 2018. I found that the judge had erred in law, and set out below paragraphs 17-27 of my decision, which contain my conclusions and reasons for setting aside the FtT decision;
 - "17. I am persuaded that the judge erred in law, which was conceded by Mr Mills, but I find the error of law to be material for the following reasons.
 18. The judge should have taken into account the guidance given in Agyarko which was published on 22nd February 2017, and therefore had been published when the

judge made her decision. At paragraph 48 of Agyarko guidance is given that if the insurmountable obstacles test contained within the Immigration Rules is not met, but refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave would be granted outside the Immigration Rules on the basis that there are exceptional circumstances.

19. The judge was correct to find that the requirements of E-LTRP.1.12 could not be satisfied, because the Appellant had not entered the UK as the Sponsor's fiancée. Therefore EX.1 was not considered.
20. The judge should then have considered whether the family life established by the Sponsor and Appellant, and it was accepted by the Respondent that they have a genuine and subsisting relationship, could be carried on outside the UK.
21. The judge erred by not taking into account that the Sponsor is the carer of a family member. Specific reference to this is made in paragraph 6 of the Grounds of Appeal to the FtT. It was also acknowledged in the reasons for refusal letter. The documentary evidence of the carer's allowance being paid to the Sponsor is contained at pages 96-101 of the Appellant's bundle, and at page 130 of the Appellant's bundle there is a witness statement from Mr and Mrs Iqbal dated 22nd August 2016. This states "He is my nephew and carer." It is not clear from the letter whether the Sponsor is the carer for Mr or Mrs Iqbal.
22. This was however a relevant matter to be considered in deciding whether the couple could carry on family life outside the UK.
23. Although the judge considered very significant obstacles at paragraph 21 of the decision, this is in relation to the Appellant and paragraph 276ADE. Because EX.1 was not considered, the judge did not consider whether there were very significant difficulties which would be faced by the Appellant or Sponsor in continuing their family life together outside the UK.
24. I conclude that the decision of the FtT is therefore unsafe and must be set aside. There was however no challenge to the findings made by the judge that the Appellant cannot satisfy the requirements of Appendix FM, and the findings made by the judge in relation to Appendix FM are preserved.
25. It was suggested by both representatives at the hearing that if I found an error of law it would be appropriate to remit this appeal back to the FtT to be heard afresh. I do not agree. I have considered paragraph 7 of the Senior President's Practice Statements and conclude that it is not necessary to remit this appeal back to the FtT.
26. It is not the case the Appellant did not have a fair hearing before the FtT, and although there will be some judicial fact-finding to be undertaken, it is not a case which is being heard de novo. There will therefore be a further hearing before the Upper Tribunal.
27. The hearing before the Upper Tribunal will focus upon Article 8 outside the Immigration Rules, in relation to the family life of the Appellant and Sponsor and consider whether the Respondent's decision would result in unjustifiably harsh consequences."

Remaking the Decision – Upper Tribunal Hearing 20th July 2018

Preliminary Issues

10. Ms Sanghera made an application to adduce evidence that had not been before the FtT in the form of a bundle comprising 33 pages. Mrs Aboni did not object, and the bundle was therefore admitted as evidence. In addition, I had on file the Appellant's bundle comprising 138 pages which had been before the FtT. There was no Respondent's bundle, but there was on file a copy of the Respondent's refusal decision dated 19th February 2016.
11. The representatives indicated that they were ready to proceed and there was no obligation for an adjournment.

Oral Evidence

12. The Appellant gave oral evidence in English and adopted her witness statement dated 10th July 2018.
13. The Sponsor gave oral evidence in English and adopted his witness statement dated 10th July 2018.
14. The Appellant and Sponsor were not questioned by Ms Sanghera, but were cross-examined by Mrs Aboni. I recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them here. If relevant I will refer to the oral evidence when I set out my conclusions and findings.

The Oral Submissions

15. On behalf of the Respondent reliance was placed upon the reasons for refusal decision dated 19th February 2016. It was submitted that it would not be disproportionate for the Appellant to return to Morocco to make an entry clearance application. Mrs Aboni pointed out that the Sponsor when giving evidence to the FtT had said that he may be able to return to Morocco with the Appellant temporarily. Mrs Aboni stated that it was accepted that it may not be practical for the Sponsor to relocate permanently.
16. With reference to the Sponsor being the carer of his uncle, it was pointed out that there are other close family members who could provide care, or make alternative arrangements for a paid carer. It was submitted that the appeal should be dismissed.
17. Ms Sanghera submitted that Article 8 is engaged. The couple have lived together since May 2015. They met and started their relationship when the Appellant was residing lawfully in the UK. Reliance was placed upon paragraphs 51-52 of Agyarko [2017] UKSC 11. It was submitted that the Sponsor could not leave the UK because of his responsibilities as the carer for his elderly uncle.
18. It was submitted that the principles in Chikwamba applied in this case, and there was no reason why the Appellant should have to leave the UK and make an entry clearance application from abroad which would be bound to succeed. I was asked to allow the appeal.

19. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

20. The issue before me relates to Article 8 outside the Immigration Rules. The findings made by the FtT that the Appellant cannot succeed within the Immigration Rules are preserved.
21. In considering this appeal I adopt the balance sheet approach recommended at paragraph 83 of Hesham Ali [2016] UKSC 60. I also follow the guidance contained in paragraph 48 of Agyarko.
22. It is clear that Article 8 is engaged on the basis of the family life established by the Appellant and Sponsor, and also on private life grounds. I considered this appeal based on the following factual matrix.
23. The Appellant is a Moroccan citizen who entered the UK as a student on 21st May 2015. Her leave was valid until 11th February 2016. She met the Sponsor while in the UK. He has settled status in this country. They began a relationship and started living together in May 2015. They underwent an Islamic marriage on 17th August 2015. They do not have children but are trying to start a family.
24. The Sponsor works sixteen hours per week as a jeweller. He is the carer for his uncle who he describes as being over 80 years of age and who has various health issues. The Sponsor receives a carer's allowance.
25. The couple have, as is accepted by the Respondent, a genuine and subsisting relationship.
26. The above is the factual matrix I will consider when deciding this appeal. I note that in the witness statements made by the Appellant and Sponsor, both raise a new issue, alleging that the Appellant's family have threatened to kill her because of her relationship with the Sponsor. I do not accept that this is the case because if threats of this nature had been made, I find that the Appellant and Sponsor would not have waited until July 2018 to make this known. Such threats were not part of the initial application for leave to remain and therefore were never considered by the Respondent when the application was refused. I note that the Sponsor and Appellant gave evidence before the FtT and made no mention of the threats that they now allege were made. The evidence before the FtT was that the Appellant could not return to Morocco because her father had passed away in May 2014 and her mother had remarried a younger man and wanted nothing to do with the Appellant. There was no mention whatsoever of any threats to kill.
27. I therefore make it clear that I am deciding this appeal on the basis that I do not accept that any threats to kill or cause harm were made to either the Appellant or Sponsor by the Appellant's family in Morocco.
28. I apply the guidance in paragraph 31 of TZ and PG [2018] EWCA Civ 1109. This confirms that where Article 8 is in issue within the Immigration Rules there will have to be a decision as to whether there are insurmountable obstacles to the relocation of

the Appellant and Sponsor outside the UK. That involves an evaluation or value judgment based upon findings of fact. When a Tribunal goes on to consider an Article claim outside the Immigration Rules, it will need to factor into its evaluation of whether there are exceptional circumstances, an evaluation of whether or not there are insurmountable obstacles to family life continuing outside the UK, as this is a relevant factor both as a matter of policy and on the facts of the case to the question of exceptional circumstances.

29. This means, that when considering Article 8 outside the Immigration Rules, there must be a consideration of whether insurmountable obstacles to family life continuing outside the UK exists.
30. Insurmountable obstacles means the very significant difficulties which would be faced by an applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.
31. I have already made it clear I do not find that if the Appellant and Sponsor went to Morocco that they would be at risk. The fact that the Sponsor is settled in the UK and does not speak Arabic does not without more amount to insurmountable obstacles. I note that insurmountable obstacles was not in fact considered by the Respondent in the refusal decision. It was conceded by Mrs Aboni, that it may not be practical for the Sponsor to permanently relocate to Morocco.
32. What was not considered by the FtT is the fact that the Sponsor is the carer of his elderly uncle. I accept that he cares for his uncle on a daily basis. Documentary evidence has been provided to prove that he receives a carer's allowance.
33. Oral evidence was given that the uncle does have three adult sons, and an adult daughter, although it was explained that his children could not provide care for him because they are married and have families of their own, and one has health difficulties.
34. If the Sponsor left the UK to carry on his family life with the Appellant in Morocco, his uncle would be left without his carer. I do not however, on balance, consider that this would cause very significant difficulties to the Appellant or Sponsor. There would be some difficulty to family in the UK in arranging another carer, or having to find a carer who would be paid to care for the Sponsor's uncle. There is no medical evidence to detail the amount of care that is required.
35. Although this would cause some difficulty, I do not find that it amounts to insurmountable obstacles to the Sponsor and Appellant continuing their family life in Morocco.
36. In considering proportionality and the public interest I have regard to the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. Sub-section (1) confirms that the maintenance of effective immigration controls is in the public interest. I place significant weight upon the fact that the Appellant cannot satisfy the requirements of the Immigration Rules.

37. Sub-section (2) confirms that it is in the public interest that a person seeking leave to remain in the UK can speak English, and sub-section (3) confirms that it is in the public interest that a person seeking to remain is financially independent. I am satisfied that the Appellant can speak and understand English and that she and the Sponsor are financially independent. I conclude that these are neutral factors when considering proportionality in the public interest.
38. Sub-section (4) confirms that little weight should be given to a private life or a relationship formed with a qualifying partner established by a person when the person is in the UK unlawfully. The Sponsor is a qualifying partner because he has settled status in the UK. It is not the case that the relationship between the Appellant and Sponsor was established when the Appellant was in the UK unlawfully. She had leave to remain until February 2016, and they commenced living together in May 2015 and underwent an Islamic marriage on 17th August 2015.
39. Sub-section (5) confirms that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. This does apply to the Appellant. I find that I must apply little weight to her private life, because this has been established when she was in the UK with a precarious immigration status as she only had limited leave to remain. However the main point in this appeal is not the Appellant's private life, but her family life with the Sponsor.
40. Sub-section (6) is not applicable in this appeal, as the Appellant and Sponsor do not have children.
41. I take into account that family life between the Appellant and Sponsor was established when both knew that the Appellant only had limited leave to remain in the UK.
42. I also accept that if the Appellant had to leave the UK and apply for entry clearance as the partner of the Sponsor, from Morocco, then the financial requirements of Appendix FM would be satisfied. The Sponsor would not need to prove that he earns £18,600 per year, because he receives a carer's allowance. I find that paragraph 51 of Agyarko is relevant, which is set out below:

"51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

In my view, if the appellant left the UK and returned to Morocco, without the Sponsor, to apply for entry clearance, her application would succeed. The Respondent accepts there is a genuine relationship. The Appellant can speak English. The financial requirements of Appendix FM would be satisfied. I therefore conclude that there is in

fact no public interest in the Appellant's removal. I find that the guidance in Chikwamba assists the Appellant in this case.

43. I therefore conclude that this is a case where there are exceptional circumstances, in that the Respondent's decision to remove would result in unjustifiably harsh consequences, and is disproportionate, as there is no public interest in the Appellant's removal.

Notice of Decision

The decision of the FtT involved a material error of law and was set aside.

I remake the decision and the appeal is allowed pursuant to Article 8 of the 1950 Convention.

Anonymity

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

Signed
Deputy Upper Tribunal Judge M A Hall

Date 29th July 2018

TO THE RESPONDENT FEE AWARD

Although the appeal has been allowed I make no fee award. The appeal has been allowed because of evidence presented to the Upper Tribunal which was not before the original decision-maker.

Signed
Deputy Upper Tribunal Judge M A Hall

Date 29 July 2018