Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07633/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 October 2018	**On 6 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MANFRED AYUK-ETANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms N Willocks-Briscoe of the Specialist Appeals Team
For the Respondent: Mr G Lee of Counsel instructed by Rashid & Rashid, solicitors

ERROR OF LAW DECISION AND REASONS

The Respondent

1. The Respondent, Manfred Ayuk-Etang (the Applicant) is a citizen of Cameroon whose date of birth is given as 25 December 1987. In January 2012 he entered with leave as a visitor which expired on 28 June 2012. In July 2017 the Applicant registered his marriage with Ruth Margaret Cant, a British citizen by birth on 6 January 1977. They met at the church where

she is employed as a Children's Minister and with which she has been associated since November 2012.

2. The Applicant did not seek to regularise his immigration status until his application of 19 January 2018 for leave to remain based on his private and family life with his wife.

The SSHD's Original Decision

3. On 12 March 2018 the Appellant (the SSHD) refused the Applicant further leave. He did not meet the eligibility requirements of Appendix FM of the Immigration Rules because he was an over-stayer. There were no insurmountable obstacles as referred to in Section EX.1(b) of Appendix FM to the continuation of his private and family life in Cameroon, even if any difficulties which his wife might experience on relocation there were taken into account.

4. The Applicant did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and there were no very significant obstacles to his re-integration into Cameroon where he had lived for some twenty-four years and received a university education before coming to the United Kingdom. There were no exceptional circumstances to warrant the grant of leave under Article 8 of the European Convention outside the Immigration Rules.

Proceedings in the First-tier Tribunal

5. On 26 March 2018 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are generic referring to the Applicant's private and family life in the United Kingdom and asserting that he no longer has any connection with Cameroon where on return he would be destitute. The grounds also assert that the SSHD failed to give adequate consideration to various aspects of his application.

6. By a decision promulgated on 01 August 2018 Judge of the First-tier Tribunal Freer allowed the appeal.

7. On 6 September 2018 Judge of the First-tier Tribunal Ford granted the SSHD permission to appeal on the grounds it was arguable the Judge had erred by:

   - misdirecting himself
   - failing to give adequate reasons to support finding it would be unduly harsh to remove the Applicant
   - finding that there were no insurmountable obstacles to the Applicant returning to Cameroon and his wife joining him (para. 51 of his decision) and also finding that the SSHD's decision was disproportionate (paras.61-66).

Proceedings in the Upper Tribunal

8. The Appellant together with his wife and his parents-in-law attended the hearing. I explained the purpose and procedure to be followed and the Applicant confirmed his address but otherwise neither he nor his wife took any active part in the proceedings.

Submissions for the SSHD

9. Ms Willocks-Briscoe submitted that at paras. 53ff of his decision the Judge had found that Applicant had not shown that he met the requirements of the Immigration Rules and had not adequately or at all explained what made his return with or without his wife unjustifiably harsh. The only exceptional circumstances which the Judge had identified were in para. 64 in which he had referred to the wife's work in and for the church and noted that other than the fact of her work there was little documentary evidence in support.

10. The Applicant had developed his private and family life only at a time when he had been an over-stayer and consequently his status in the United Kingdom had throughout been precarious. The Judge had made a finding para.37 that the Applicant and his wife had not been in a durable relationship for a period of at least 2 years prior to the application leading to the SSHD's decision.

11. The Judge at para.51 had made a clear and unqualified finding that the relationship between the Applicant and his wife had been "rather brief" and it would not "encounter demonstrably insurmountable obstacles" in Cameroon. He had not explained why the public interest in maintaining proper immigration control was displaced or outweighed. The decision was not safe and should be set aside.

Submissions for the Applicant

12. Mr Lee submitted there was no inconsistency between a finding that there were no insurmountable obstacles to the return of the Applicant and a finding that it was not appropriate to insist he return, if only to make an application for entry clearance as a spouse.

13. Throughout the operative parts of the decision the Judge had made findings both for and against the Applicant. He had considered all the relevant factors. He had found the income threshold of Appendix FM had been met; that the Applicant and his wife had a strong and subsisting relationship; that his wife and her work were of benefit to the community and that it would be unduly harsh to remove the Applicant: see paras. 61-66 of the decision.

14. At para.51 of the sole judgment in *R (Agyarko) v SSHD [2017] UKSC 11* Lord Reed found:-

> "… 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 …"

There was a spectrum of situations. There was little or no public interest in requiring the Applicant to return to Cameroon for the purpose of obtaining entry clearance. The Applicant should be allowed to stay in the United Kingdom and given leave not because there were no insurmountable obstacles to his return to Cameroon but because of the reasoning in *R (Agyarko)*.

15. The two parts of the Judge's decision were not incompatible with each other and the SSHD's appeal should be dismissed.

Response for the SSHD

16. Ms Willocks-Briscoe said the Judge had not given adequate reasons to support his finding the appeal should be allowed outside the Immigration Rules. Article 8 of the European Convention is not a dispensation for the circumvention of the Rules. She referred to paras.36 and 39 of the judgment in *R (Hiahong Chen) v SSHD IJR [2015] UKUT 00189 (IAC)*:-

> "(it was suggested) that there must be a "*sensible reason*" to require an individual to make an application for entry clearance abroad. I reject the submission. I do not accept that, in using the phrase "*sensible reason*", Elias LJ was setting out the test for applying the guidance in *Chikwamba*, nor that he reversed the burden of proof. The burden remains upon the applicant to place before the Secretary of State all material that he or she relies upon to suggest that removal pursuant to the refusal of leave would breach Article 8 …
>
> … If it is shown by an individual … that an application for entry clearance from abroad would be granted *and* that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced… In cases involving children…it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was "precarious". … It all depends on the facts."

The burden was on the Applicant, the Judge had found his return would be merely inconvenient, not that it would cross the threshold of being unreasonable. He had not adequately dealt with the issue of the public interest in the light of his findings that relationship at the date of

application did not meet the minimum threshold of 2 years' duration and that the Applicant was an over-stayer throughout and there were no insurmountable obstacles to his return to Cameroon.

17. The Judge's findings did not show that the Applicant crossed the significant threshold necessary to engage the State's obligations under Article 8 and had not identified the evidence to support his reasoning that the decision did amount to so substantial an interference as to engage Article 8.

Findings and consideration

18. I enquired if there was any evidence to show the Applicant's wife had complied with the obligations under para. 3.38 of her tenancy agreement in the Applicant's bundle at p.198. Mr Lee took instructions and advised me that it was not in the bundle or otherwise before the Upper Tribunal.

19. Mr Lee's submission that there is no inconsistency between finding that there are no insurmountable obstacles to return and finding that it was disproportionate to insist the Applicant return to seek entry clearance had some attraction.

20. The difficulty with the Judge's decision is that the Judge has not sought to address clearly the apparent inconsistency so that the SSHD as the losing party is able to understand why he reached the conclusion he did. The decision does not adequately identify the nature of the public interest. The balancing exercise at para.63 of the decision is questionable because it does not take into account both the clear finding at para.51 that there are no insurmountable obstacles to the relationship of the Applicant and his wife if the Applicant has to return to seek entry clearance and the extent to which the Applicant fails to meet the requirements of the Immigration Rules and Appendix FM. Further, the Judge did not consider the position if the wife relocated to Cameroon.

21. Ms Willocks-Briscoe urged me to re-make the decision at the hearing. Mr Lee argued for the appeal being remitted for hearing afresh in the First-tier Tribunal, in part because of the deficiencies in the documentary evidence which the Judge had himself identified at para.52 of his decision.

22. I find that the part of the decision setting out findings of credibility and fact at paras. 25-51 of the decision is not satisfactory. There appears to be a mixing of recording evidence and making findings of fact. This was demonstrated at the hearing before me when the parties discussed the apparent differences between paras.33 and 37 relating the date the Applicant and his wife entered into a durable relationship. I also note that while the Judge has set out correctly the burden of proof, he has not mentioned at all the requisite standard of proof.

23. In this light, I consider it appropriate for the judge hearing the remitted appeal to be able to make relevant findings of fact which may be based on

additional documentary and oral evidence. In these circumstances I have decided, relying on the powers conferred by s.12(2) Tribunals, Court and Enforcement Act 2007 and Practice Statement 7.2(b) issued by the Senior President, to remit the appeal for hearing afresh in the First-tier Tribunal with no findings of fact preserved.

Anonymity

24. There was no request for an anonymity direction and having considered the appeal I find none is warranted.

SUMMARY OF DECISION

The decision of the First-tier Tribunal did not contain an error of law and is set aside. The appeal is remitted for a hearing afresh in First-tier Tribunal.
No anonymity direction is made.

Signed/Official Crest Date 26. x. 2018

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal