



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06670/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 5th September 2019

Decision & Reasons Promulgated
On 13th September 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ALIKHALIL ABADI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr E Mynott of Lattitude Law

For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Mark Davies (the judge) of the First-tier Tribunal (the FTT) promulgated following a hearing on 10th June 2019.
2. The Appellant is a citizen of Sierra Leone who applied for leave to remain in the UK on the basis of his relationship with a British citizen.
3. The application was refused on 26th March 2019. In refusing the application the Respondent considered EX.1 of Appendix FM, not accepting that there would be insurmountable obstacles to family life continuing outside the UK.

4. The Respondent considered paragraph 276ADE(1)(vi) of the Immigration Rules, not accepting that there would be very significant obstacles to the Appellant's integration into Sierra Leone. The Respondent then considered whether there were any exceptional circumstances which would justify granting leave to remain with reference to Article 8 outside the Immigration Rules and found there were no such exceptional circumstances.
5. The Appellant appealed to the FTT and having heard evidence from the Appellant and his partner, the judge dismissed the appeal on Article 8 grounds.

The Application for Permission to Appeal

6. The grounds are briefly summarised below.
7. Firstly, it was submitted the judge had applied the wrong legal test in considering whether the Appellant should return to Sierra Leone to seek entry clearance. The judge at paragraph 40 found that if it would take six months for the application for entry clearance to be processed that would not lead to undue hardship. It was submitted that the appropriate test was not whether this would cause undue hardship and the judge should have considered whether it would be reasonable for the Appellant to leave the UK and seek entry clearance.
8. Secondly, it was submitted that the judge had erred in law by failing to take into account witness and other evidence that was before him. At paragraph 40 the judge recorded that no evidence had been put before him as to why the Appellant, who is fit and healthy, could not return to Sierra Leone on a short-term basis to make an entry clearance application. The judge had failed to take into account the submissions made on the Appellant's behalf at paragraph 34 that it would be unreasonable for him to return to Sierra Leone to make a visa application, as he had been in the UK for fifteen and a half years, which is the majority of his life. It was submitted that he had no home, family or friends in Sierra Leone, and he supported his partner in the UK who suffers back problems.
9. Thirdly, it was submitted that the judge materially erred in law by failing to consider the Appellant's private life claim with reference to paragraph 276ADE of the Immigration Rules. The Appellant had lived in the UK for in excess of fifteen years and had a strong private life claim which the judge had failed to consider.

The Grant of Permission to Appeal

10. Permission to appeal was granted by Judge Pooler in the following terms:

"It is arguable that the judge failed to consider the Article 8 appeal first by reference to, or through the prism of, the Immigration Rules and so failed to direct himself to consider whether the Appellant met the requirements of Appendix FM or paragraph 276ADE, which would have entailed consideration of whether there would be insurmountable obstacles to the continuation of family life abroad, or very significant obstacles to the Appellant's integration into Sierra Leone.

All grounds may be argued."

Following the grant of permission to appeal directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

11. Mr Tan indicated at the commencement of the hearing that it was accepted that the judge had materially erred in law by failing to consider paragraph 276ADE. It was however contended that the judge had made adequate findings in relation to family life and while the decision would need to be remade in relation to private life, the findings in relation to family life could be preserved.
12. Dr Mynott relied upon the grounds contained within the application for permission to appeal, and the grant of permission by Judge Pooler.

My Findings and Conclusions

13. The concession made on behalf of the Respondent that the failure to consider paragraph 276ADE amounts to a material error of law was rightly made. The grounds of appeal and the skeleton argument before the FTT make specific reference to paragraph 276ADE, and the judge should have analysed this aspect of the appeal, and made findings upon it.
14. I am persuaded that the judge adopted an incorrect approach when considering this appeal. The correct approach is referred to by Judge Pooler in that there should have been reference to, or the appeal should have been considered through the prism of the Immigration Rules.
15. Both the grounds of appeal to the FTT and the skeleton argument, made reference to EX.1 and insurmountable obstacles. This had specifically been considered by the Respondent in refusing the application. The judge, in my view, does not consider EX.1.(b) and does not adequately consider whether there were insurmountable obstacles to family life continuing in Sierra Leone.
16. There are some mistakes in the decision. At paragraph 7 it would seem that reference to the Appellant arriving in the UK in December 2013 should read December 2003. At paragraph 39 the reference to 2014 should be 2004, and at paragraph 45 the reference to the Appellant suffering from a back condition should be a reference to the Sponsor suffering from that condition.
17. Mr Tan submitted that paragraph 45 dealt adequately with insurmountable obstacles. I am afraid that I disagree. The judge makes a finding that "no evidence has been put before me that she could not live with the Appellant in Sierra Leone." This is a reference to the Sponsor. It is not accurate to say that no evidence was submitted. There was evidence, and if the judge found the evidence to be inadequate, he should have said so, and provided reasons for that finding.
18. In my view the correct approach when considering this appeal would have been to consider firstly EX.1, and whether insurmountable obstacles to family life continuing

outside the UK existed, taking into account the definition of insurmountable obstacles contained in EX.2. Thereafter there should have been consideration of paragraph 276ADE(1)(vi), and if it was found that the Appellant was unsuccessful in relation to the Immigration Rules, there should have been consideration as to whether there were any exceptional circumstances which would lead to unjustifiably harsh consequences.

19. I am persuaded that the decision is unsafe and therefore must be set aside. Both representatives agreed that if the decision was set aside in its entirety, it would be appropriate to remit the appeal back to the FTT to be heard again.
20. Having considered paragraph 7.2 of the Senior President's Practice Statements I find myself in agreement. This is because there is substantial judicial fact-finding that needs to be made.
21. The appeal is therefore remitted to the FTT to be heard afresh with no findings preserved. The appeal is to be heard by an FTT Judge other than Judge Mark Davies.

Notice of Decision

The decision of the FTT disclosed a material error of law and is set aside. The appeal is allowed to the extent that it is remitted to the FTT to be heard afresh with no findings preserved.

Anonymity

There has been no application for anonymity and I see no need to make an anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

5th September 2019

TO THE RESPONDENT FEE AWARD

I make no fee award. The issue of any fee award will need to be considered by the FTT.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

5th September 2019