IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002646

FtT No: HU/53473/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 2nd of November 2023

Before

UT JUDGE MACLEMAN & DEPUTY UT JUDGE FARRELLY

Between

GREGORY JOSEPH YANICK
(no anonymity order)

Appellant

and

S S H D

Respondent

Heard at Edinburgh on 18 October 2023

For the Appellant: Mr J Ritchie of Burness Paull, Solicitors
For the Respondent: Miss Z Young, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of FtT Judge Rea dated 3 March 2022. His grounds are incorporated into and expanded upon in the skeleton argument provided by his representatives:

   1. The decision of First-tier Tribunal Judge Rea (FtTJ Rea) is vitiated by the following errors of law:

   a. Failure to properly assess the proportionality of the appellant's removal from the UK with the public interest, contrary to *Agyarko v SSHD* [2017] UKSC 11.

   b. Failure to take into account the very significant obstacles when considering the ability for the Appellant and their spouse to enter the USA, contrary to *Lal v SSHD* [2020] 1 WLR 858, 36.

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c. Failure to adequately address the Article 8 ECHR rights of the Appellant’s spouse and her children.

2. The Upper Tribunal is invited to set FtTJ Rea’s decision aside and remit to be made afresh.

Proportionality

3. FtTJ Rea failed to adequately consider material evidence and based a finding on a supposition for which there was no basis in evidence. FtTJ Rea appears to accept that the sponsor was refused entry to the United States in 2007 or 2008 (paragraph 16 (iv)). FtTJ Rea stated that it is a matter of choice for the Appellant and his wife whether she returns to the US with him while he applies for entry clearance (paragraph 17 (iii)).

4. FtTJ Rea failed to consider that the sponsor has previously been refused entry to the USA and there was no evidence to support the finding that the sponsor will be able to enter the USA with the appellant if she were so to choose. The evidence led and accepted rather showed that it was not a matter of choice for the appellant and the sponsor to enter the USA together.

5. The sponsor's likely inability to enter the USA with the Appellant means that the Appellant's separation from his wife would be for an indeterminate period of time. The FtT accepts that it is not certain that an application for entry clearance would be successful (paragraph 18) and therefore the interference with the Appellant's and sponsor's Article 8 rights is significantly increased. The balance of this heightened impact on the Appellant's private and family life has to be considered against the public interest in terms of *Agyarko v SSHD* [2017] UKSC 11.

Very Significant Obstacles

6. FtTJ Rea ought to have employed the approach of the Court of Appeal as laid down in *Lal v SSHD* [2020] 1 WLR 858, 36: considering if the obstacle (of the sponsor being unable to enter the USA) amounts to a very significant difficulty, then whether this difficulty is one which would make it impossible for the Appellant and the sponsor to continue family life together outside the UK, and whether or not the Appellant and sponsor could mitigate against this difficulty.

7. Had this approach been taken in light of the evidence of the sponsor's refusal of entry to the USA, the First-tier Tribunal ought to have found that insurmountable obstacles existed for the Appellant and the sponsor in terms of paragraph EX1(b) of Appendix FM. The sponsor's ability or inability to enter the USA is not within their control and is not a difficulty which they can mitigate against.

Article 8

8. FtTJ Rea fails to adequately address the Article 8 ECHR rights of the sponsor and her children. At paragraph 17 (i), the Ftt accepts that the Appellant's family 'intimately rely on each other for emotional support'.

> 9. The level of emotional support provided by the Appellant and the sponsor to the Appellant's step-daughter is reiterated at point (iii) of paragraph 17.
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> 10. Whereupon the FtT then finds that the sponsor can choose between her daughter and her husband in deciding to return to the USA with the Appellant. As above, it is not accepted that this would be a matter of choice for the sponsor.
>
> 11. *Esto* if it was a matter of choice for the sponsor to return to the USA, as FtTJ Rea accepted the 'intimate reliance' on the Appellant and sponsor, it must therefore be accepted that the sponsor leaving the UK as the only way to remain with her husband would thereby cause significant disruption to the family and private life between the sponsor and the Appellant's step-daughter.

2. The skeleton argument concludes by again inviting the UT to set aside and to remit to the FtT.

3. The submissions for the appellant followed the above lines.

4. Mr Ritchie told us that the sponsor’s circumstances have deteriorated since the time of the FtT hearing, and would now more strongly support the appellant’s case; but as he acknowledged, that is irrelevant to whether the FtT erred in law in resolving the case which was before it.

5. Mr Ritchie further submitted that the requirements of the immigration law of the USA for entry of partners of nationals are at least as stringent as the corresponding requirements of UK law, and that the sponsor would be in difficulty in establishing that she might obtain employment to support herself, or would be able to obtain health insurance; but as we pointed out, those are not matters within the knowledge of the FtT or the UT. They would require, if and when they became relevant, to be established by evidence.

6. The SSSHD responded to the grounds, under rule 24, thus: …

> 3. The Appellant evidently states that his wife’s refusal of entry clearance was as a visitor, and not for the purpose of entry to the United States for the purpose of residence as a spouse. The Appellant provided no evidence as to why she was refused entry, and it of course may well be that the US authorities considered she may be trying to stay as his partner.
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> 4. It is also respectfully submitted that the grounds of appeal and grant of permission fail to consider that at the time of the alleged refusal of entry clearance the Appellant was not in fact married, as this did not take place until 2009. The obvious change in the Appellant’s circumstances, that he is now married might well have a material impact on the US authorities willingness to allow his spouse to enter the USA and as such the Appellant’s claim that it is likely she would be refused entry to the USA is purely speculative and was utterly unsupported by any evidence.

> 5. The Respondent submits that the remainder of the Appellant's grounds amount to nothing more than disagreement …

7. That reply, and the submissions of Miss Young, deftly identify the fundamental weakness of the grounds. The appellant founded, above all, on the alleged inability of his wife to move with him to the USA, but that was his case to make. He provided only vague written and oral assertions, with no documentary support. The FtT does appear to have accepted that his partner, now wife, failed to secure longer term entry to the USA in 2007 or 2008 (she does seem to have been there for a period) but that was long ago and under obscure, and different, circumstances.

8. While it is not for us to say how the appellant should have made his case, we can identify obvious gaps in his evidence. He might, for example, have shown that his wife had recently been unsuccessful in her best efforts, in good faith, to obtain entry to the USA; or he might have led expert evidence of how difficult that might be. No doubt, many practitioners offer advice of that nature. Such evidence (although not necessarily decisive) was one of the essential elements for success in the case he tried to make. Its absence disposes of grounds (a) and (b).

9. Ground (c) covers a claim which it might always have been a challenge to establish, a right to reside, despite the immigration history and inability to meet the rules, based on family life among the appellant, the sponsor, his adult step-children and a step-grandchild. We agree that Judge Rea should have been more specific about the extent to which family life, not in the sense of extended family, but in the sense qualifying for core article 8 protection, was proved. His ultimate conclusion, however, about the proportionality of the outcome, is clear. We see nothing in the decision, the grounds, or in such evidence as we were referred to, which might realistically have supported the contrary conclusion.

10. The appeal to the UT is dismissed. The decision of the FtT stands.

Hugh Macleman
Judge of the Upper Tribunal, Immigration and Asylum Chamber
19 October 2023