IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00425/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 12 January 2015	**On 20 February 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

MELISA ANN AMES

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Mahmood instructed by One Immigration (Leicester)
For the Respondent: Mr Mills, Senior Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. The appellant who is a citizen of the United States born 4 January 1966 has been granted permission to appeal the decision of First-tier Tribunal Judge Andrew. For reasons given in her determination dated 1 August 2014, the judge dismissed the appeal against the decision dated 5 December 2013 to remove the appellant as someone subject to administrative removal under s.10 of the 1999 Act.

2. That decision was in response to an application dated 23 November 2012 for leave to remain on form FLR(O) on human rights grounds. The basis of

the application was the appellant's relationship with Mr Patel whom she had been living with since 2008. An aspect the respondent was asked to consider was the regular care that Mr Patel and his brothers provide for their mother. She has schizophrenia and also has had recent physical ill-health.

3. The respondent set out her reasons for refusing the application in a letter dated 5 December 2013. The application had been considered under Appendix FM "partner" and the relationship had been accepted as genuine and subsisting; the appellant met the eligibility requirements of Appendix FM E-LTRP1.2(a) and 1.7. The case had been considered under section EX however it was not accepted that there were insurmountable obstacles preventing the parties from continuing their relationship in the United States; this was on the basis that Mr Patel's mother was in receipt of a care package provided by the local authority and there were other family members who could provide help.

4. The circumstances of the appellant were also considered under paragraph 276ADE. The respondent did not accept that the requirements had been met. The appellant had arrived in the United Kingdom in April 2006 when she was 40 and had thus spent the majority of her life in the United States where she would not be without cultural or social ties and where she had two daughters, one grandchild and other relatives.

5. The judge heard evidence from the parties but came to the same conclusion; there was nothing to show that there were insurmountable obstacles to them carrying on family life together in America. It had not been argued before her that the appellant met the requirements of paragraph 276ADE. Specifically in respect of Article 8, the judge concluded that she could not find arguably good grounds. There was nothing preventing the appellant from returning to the United States and applying to re-enter as the partner of Mr Patel. The judge did not go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules and thus dismissed the appeal.

6. Permission to appeal was granted on the basis that there were arguable grounds the judge may have erred in law, having regard to the judgment of Aikins LJ in *MM* [2014] EWCA Civ 984.

ERROR OF LAW

7. Permission was granted on the three grounds advanced and I begin with my decision on whether the judge erred in law. I start with the second ground since it is a challenge to the judge's assessment on the case under the Rules on the basis that the judge's approach to the issue of insurmountable obstacles was wrong. It is also argued that the correct approach to Article 8 in this context is that of reasonableness; the judge had imposed too high a burden and furthermore had erred in relation to the evidence. The focus of Mr Mahmood's submissions was on that latter aspect. He argued that there had been no issue of credibility and that the judge had not carried out a proper analysis. Mr Mills argued that the judge had applied the test correctly and had proper regard to all the evidence.

8. My conclusion is that although the judge did not specifically direct herself as to the way in which the test was to be approached, it is nevertheless evident from the substance of her determination that she had evaluated "...the degree of difficulty the couple face rather than the 'surmountability' of the obstacle" see *Izuazu (Article 8 – new Rules)* [2013] UKUT 45 (IAC) at [57] as approved in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192.

9. The second limb to this ground relates to the judge's assessment of those obstacles. It is accepted that the judge was correct to note that she had no evidence from Mr Patel's mother's carers but there was evidence from the appellant and Mr Patel as to the likely very serious adverse effects their absence would have.

10. The judge said this about this aspect at [11]:

> "I have read with care and noted the evidence of Mr Patel. I accept that his mother has both physical and mental health problems. However, she is supported not only by Mr Patel but also by his two brothers. In addition she has a package of care provided for her. There is nothing before me to show that any of her care has to be carried out by either the appellant or by Mr Patel. I accept that it might be desirable that some of her care is so carried out but it is not a necessity."

11. In my view there is no reason to believe that the judge had not read with care and noted the evidence of Mr Patel. His statement covers the regime of care the three brothers provide to their mother, none of whom now lives with her. Reference is also made to care workers attending their mother on a regular basis during the day. The statement is based on the expectation that if the appellant is not successful, Mr Patel would remain in the United Kingdom and the disappointment he would encounter were that so.

12. The appellant is a qualified social worker. She had worked pursuant to a permit obtained by Birmingham City Council Social Services. Her statement includes a detailed analysis of Mr Patel's mother's health difficulties. She candidly states that she is not involved in providing regular care for her.

13. The judge was entitled to note at [14] that she had nothing at all from Mr Patel's mother's health or social workers as to the effect that it would have on her should the appellant be removed and/or Mr Patel accompanies her. As I observed to Mr Mahmood, the appellant and her sponsor had a vested interest in the outcome of the appeal. Whilst the judge did not make an adverse credibility finding, it is inevitable that their views are to an extent at least informed by the appellant's immigration circumstances. It was legitimate for the judge to expect more and she was entitled to note the absence of third party evidence which would have been readily available in the light of the care package being provided.

14. A further aspect relied on by the appellant is Mr Patel's dyslexia. It is argued that the judge ignored the evidence of Mr Patel of the years of difficulties he has had as a consequence of this condition. For reasons given at [16], the judge accepted the condition but in my view she was

entitled to observe that there was nothing before her to show that it would involve any abnormal period of hardship as he adjusted to his new surroundings. She correctly observed: "further, there is nothing before me to show that he will be unable to obtain employment there with the same level of support that he has in his present employment for his dyslexia."

15. I can make little sense of the third aspect of this limb which argues the judge had distorted the legal test by suggesting it was a matter of choice for the sponsor as to whether he goes to the United States. It is clear from Mr Patel's evidence that he did not contemplate accompanying the appellant and it was open to the judge to examine the reasons given for that position.

16. The final point made describes as a "very casual finding" the view that Mr Patel could make frequent visits to the United Kingdom to see his mother. The judge was rationally entitled to observe that it was open to him to do so.

17. Accordingly I am not persuaded that the judge erred in respect of the second ground. I turn now to the first and third grounds, which may be taken together for reasons that follow. The first is that simply because it had been held there were no insurmountable obstacles to Mr Patel joining the appellant in the United States, it did not mean the claimant could not succeed under Article 8. The third ground argues the relevance of s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended).

18. Candidly Mr Mills accepted that the judge had erred in her approach to Article 8 in failing to undertake a proper analysis. He argued however that the error was not material as the outcome was inevitable with the factors having already been considered properly under the Rules.

19. Mr Mills was correct to make this concession. As was made clear by Upper Tribunal Judge Gill in *R (on the application of) Oludoyi & Others v SSHD (Article 8 – MM (Lebanon) and Nagre (IJR)* [2014] UKUT 539 (IAC) the authorities must not be read as seeking to qualify or fetter the assessment of Article 8 in the light of the observation by the Court of Appeal in *MM & Others* that there is no utility in imposing a further intermediate test as a preliminary consideration of an Article 8 claim. Quoting from the headnote to that case:

> "As is held in *R (Ganesabalan) v SSHD* [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold consideration."

20. The glib reference by the judge to the possibility of a holiday in the United States is unfortunate. Given the potential impact of removal a greater analysis of article 8 was required than that given by the judge. I heard extensive submissions from Mr Mahmood with regard to the factors he considered should have been considered under Article 8. I accept these factors indicated the possibility a viable case outside the Rules, particularly in the light of the factors in Part 5A of the 2002 Act.

21. Section 117A(2) requires when considering the public interest question that the Tribunal must in particular have regard –

> *"(a) in all cases, to the considerations listed in s.117B*, ...".

Section 117A(3) provides –

> "*In subsection (2), 'the public interest question' means the question of whether an interference with the person's right to respect for private and family life is justified under Article 8(2)."*

22. Section 117B is in these terms –

> "*Article 8: public interest considerations applicable in all cases:*
>
> *(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(4) Little weight should be given to –*
>
> *(a) a private life or*
>
> *(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.*
>
> *(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious*.
>
> *(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –*
>
> *(a) the person has a genuine and subsisting parental relationship with a qualifying child and,*
>
> *(b) it would not be reasonable to expect the child to leave the United Kingdom*."

23. Interpretation provided in s.117D specific to this case is that a-

> "*'Qualifying partner' means a partner who –*
>
> *(a) is a British citizen*...".

24. It is unarguable that the appellant speaks English and that she is financially independent in the sense that she is able to work here and has a history of having done so with a work permit. Her relationship was

formed with a qualifying partner whilst she was here lawfully and, furthermore, the private life that she has established was whilst she was here with such leave.

25. Mr Mills argued that the effect of the appellant coming within these criteria (or not falling foul of it) was neutral. I am not persuaded that even if he is right, the error by the judge in failing to undertake an adequate analysis was not material; there were sufficient factors that required a detailed Article 8 analysis. Accordingly, the decision of the First-tier Tribunal on Article 8 grounds is set aside.

REMAKING THE DECISION

26. As I observed to the parties there has been no compliance with directions and with no new evidence before me, I re-make the decision based on the evidence before the First-tier Tribunal taking account also the detailed submissions I had heard on error of law. Neither representative had anything to add to those submissions for the purposes of re-making.

27. In the circumstances of this case I can proceed immediately to proportionality. It is accepted that the appellant has established a family life in the United Kingdom and it is unarguable that she has also established a private life during her period of lawful residence. By the time her application was made she was without leave. It appears that difficulties arose because she failed to pay the fee when she made application for settlement after five years' employment in the United Kingdom on 26 October 2012. It appears also that her employers were only prepared to support an application for further leave to remain when she re-applied on 23 November 2012. Mr Mills accepted that what I have been told is accurate.

28. The appellant was dismissed from her employment on 10 December 2012. This was because she did not have the right to work and in addition, the decision related to performance issues. The evidence demonstrates that the latter aspect is not something that the Council has subsequently wished to pursue further. In any event it is clear that the period of time the appellant was without leave before she re-applied was quite short in contrast to the lengthy period of lawful leave.

29. I accept Mr Mills' submissions that the scales are preloaded with the public interest consideration of the maintenance of effective immigration control. Section 117B (1) makes that clear. This is less than the heavy weighting where there has been criminal behaviour. I do not accept his argument that the effect of the appellant meeting the 117B (2) and (3) criteria is neutral. As Parliament has decided that is in the public interest that persons who seek to enter or remain are able to speak English and that they are financially independent, these aspects, if positively met, are factors that have application in the balancing of protected rights against the public interest in maintaining immigration control. They have the potential to enhance the weight be given to the competing family and private life interests that are in play. This does not mean that if the criteria are met the scales automatically tip in an applicant's favour; there

will always be residual weight in the maintenance of effective immigration controls. It is a matter of assessing the proportionality of the interference with the protected rights against the competing public interest.

30. Private and/or family life established whilst someone had, but no longer has, lawful leave is unlikely to be decisive of the proportionality exercise but is capable of considerable weight. As observed by Sales LJ in *SSHD v AJ (Angola)* [2014] EWCA Civ 1636, the Secretary of State, "retains a general discretion outside the Rules in exercise of which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in *Huang* and *R (Nagre) v SSHD* [2013] EWHC 720 (Admin).

31. In *R (Nagre)* Sales J characterised the enquiry at [29] of his judgment as one of considering "whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave".

32. The decision of the House of Lords in *Huang v SSHD* [2007] 2WLR 581 remains the correct approach to Article 8 considerations. As observed by Lord Bingham at [20] –

> "In an Article 8 case where this question is reached, the ultimate question for the Appellate Immigration Authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8."

33. There is no doubt about the strength of the relationship between the appellant and Mr Patel reflected in the amount of time that they have been together. That relationship was formed and developed during several years of lawful leave whilst the appellant undertook a responsible job in the healthcare sector. Even though the circumstances of Mr Patel's mother are not an insurmountable obstacle to the family life being continued elsewhere, her ill health and the role that Mr Patel plays in her life has some relevance in the balancing exercise.

34. The appellant has demonstrated a considerable degree of integration in the United Kingdom through her studies and lawful employment and I have no doubt that she would be able to obtain further employment were she granted permission to remain, particularly as it appears the disciplinary matter against her was dropped.

35. The appellant explains that she did not seek to vary the basis of her leave to remain whilst employed based her relationship; she had two years remaining on her work permit when they could have applied after two years together in 2010 and she wanted the satisfaction of obtaining leave to remain independently. The evidence shows that the parties would have met the financial criteria of the Rules certainly pre-July 2012 and probably thereafter. Matters went awry for the appellant but not through any deliberate mischief on her part. She did not go to ground but promptly

sought to regularise matters with the November application. It appears that were she to apply from abroad there now may well be a problem meeting the financial criteria as the couple can no longer rely on a joint income and Mr Patel's income, although now higher, does not reach the criterion in the Rules.

36. The couple do not have the right to dictate where they spent their life together. Whilst there are no insurmountable obstacles to Mr Patel travelling to the U.S., the indication that he will not do so has been rationally explained. The evidence shows that removal is likely to result in a prolonged separation which having regard to the strength of the relationship would be very distressing. I have no doubt that if granted leave, the appellant would be able to resume employment and an income of the kind she had before.

37. The compelling factor in this case is the maturity of the relationship that has flourished since 2008 and importantly has grown in a setting of extended lawful presence. The rules do not make provision for the state of affairs such as in this case. The reality is that the relationship is dependant on the parties remaining together in this country for it to continue. If that is made possible, there will be no charge on the public purse. On the particular facts of this case and having regard to all the factors that weigh in favour of the appellant, I consider that the force of the private and family rights in play is sufficiently strong and compelling to outweigh the public interest. Accordingly I am satisfied that interference with the rights of the appellant and the other parties engaged under Article 8 would be unjustified and disproportionate.

38. By way of summary the decision of the First-tier Tribunal is set aside insofar as it relates to Article 8 of the Human Rights Convention. I re-make the decision on that ground and allow the appeal. By way of postscript, subsequent to the hearing of this appeal I have received an application for an anonymity order to protect the identity Mr Patel's mother. She has not been named.

Signed Date 16 February 2015

Upper Tribunal Judge Dawson