



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17877/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22 May 2018

Decision & Reasons Promulgated
On 25 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

SOPHIE [M]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Halim, Counsel

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal V Fox dismissing her appeal against a decision of the respondent, dated 24 July 2016, refusing her application for leave to remain on the grounds of her family life. The appellant came to the UK in August 2005 as a visitor and overstayed. She married Mr Guy [M], a British citizen, and sought leave to remain, arguing there were insurmountable obstacles to family life continuing in her home country, Georgia. In particular, she feared her ex-partner, who had subjected her to serious abuse before she came to the UK.
2. Judge Fox found there was family life between the appellant and Mr [M] but rejected the submission that there were insurmountable obstacles to family life continuing in Georgia. He found this also led to the conclusion that the appellant

had not demonstrated exceptional circumstances permitting her to circumvent immigration control. A prominent feature of the judge's reasoning was the failure of the appellant to claim asylum notwithstanding that, in her evidence, she maintained that she was at risk from her ex-partner in Georgia and that was one of the main reasons she could not return there.

3. Permission to appeal was granted by the First-tier Tribunal. It was considered arguable the judge had erred in his assessment of the appellant's evidence and misapplied the standard and burden of proof. The decision appeared to concentrate on supposed deficiencies in the evidence without making a clear assessment of the credibility of the evidence that was adduced. It was also arguable that the judge was distracted by a preoccupation with the absence of a protection claim and an imputation that the appellant had acted in an underhand way.
4. No rule 24 response has been filed by the respondent.
5. I heard submissions from the representatives as to whether the First-tier Tribunal Judge had made an error of law in his decision. Mr Halim made five core submissions but it is only necessary to consider the first three.
6. Firstly, Mr Halim criticised the judge's consideration of the appellant's sister's evidence. The bundle contained a translation of a letter written by the appellant's sister, who resides in Tbilisi, Georgia. In the letter she confirms that the appellant suffered abuse at the hands of her ex-partner. At paragraph 84 of his decision, the judge rejected the appellant's fears for her safety in Georgia. He noted that, with the exception of her sister's evidence, all of the other witnesses relied on the appellant's account of her circumstances. Despite this, the judge did not give any reasons for rejecting the sister's evidence.
7. Mr Halim described the judge's reference in paragraph 73 of his decision to the appellant's failure to satisfy the burden on her as "curious". The judge said,

"The appellant has presented her evidence in a manner which effectively requires the Tribunal to accept her at her word. This is inappropriate considering the evidential standard she has chosen to apply to her representations."

The reference to the choice of evidential standard appears to be a reference to the decision of the appellant not to claim asylum, in which case a lower standard of proof would have been applicable.

8. Mr Halim pointed out that the judge had not taken proper account of the background evidence, which did provide external corroboration for the appellant's account of the abuse she suffered. The background evidence provided was not, as he put it, a "document dump" because a key passages index had been provided. The materials included, for example, a report from the Office of the United Nations High Commissioner for Human Rights, dated 9 June 2016, specifically confirming that the police regard domestic violence as a private

matter and not a public concern in most parts of the country. The judge's assertion that there was no reliable evidence before him to demonstrate that rape, abduction and false imprisonment were regarded as domestic issues was therefore incorrect.

9. Secondly, there was a misdirection in paragraph 75 of the decision because the judge had treated the failure of the appellant to demonstrate that there were insurmountable obstacles to her return to Georgia as dispositive of the question of whether there were exceptional circumstances. The judge had erred by failing to consider whether there were exceptional circumstances.
10. Thirdly, the judge had repeatedly referred to the failure of the appellant to claim asylum and had held this against her. The failure of the appellant to claim asylum should not have foreclosed consideration of whether she had established insurmountable obstacles to return.
11. In reply, Mr Melvin argued the letter from the appellant's sister lacked meaningful detail, as the judge had noted at paragraph 54 of his decision. He pointed out the relationship between the appellant and her ex-partner had ended in 1995 and she had been in the UK for 12 or 13 years. The judge did not have to consider each and every piece of evidence and it was not clear the objective evidence now relied on had been pointed out the judge.
12. On the question of insurmountable obstacles, the judge considered and rejected the account. There was a lack of medical evidence and the judge was entitled to conclude there was no risk to the appellant such that it followed there were no insurmountable obstacles or exceptional circumstances.
13. Mr Halim responded by saying that a single sentence about the sister's evidence was insufficient. Counsel's skeleton argument had directed the judge's attention to the relevant passages from the background evidence.
14. Having carefully read the decision and considered the arguments put forward by the representatives I have concluded that the decision of the First-tier Tribunal does contain material errors of law such that it must be set aside. The appeal is therefore allowed. My reasons are as follows.
15. It is clear that the key issue in the appeal was whether the appellant could successfully show there were insurmountable obstacles to the continuation of her family life with her British husband in Georgia.
16. The correct approach to article 8 in cases of precarious family life has been the subject of definitive guidance in the judgment of Lord Reed in *R (Agyarko) v SSHD* [2017] UKSC 11. His Lordship explained that the test of insurmountable obstacles, as used in paragraph EX.1 of Appendix FM of the rules and later defined in paragraph EX.2, was taken from the jurisprudence of the ECtHR. The test should be understood in a practical and realistic sense, rather than as

referring solely to obstacles which make it literally impossible for the family to live together in the country of origin. However, it is a stringent test.

17. It is clear that the arguments put forward by the appellant, if accepted, could potentially amount to insurmountable obstacles. I make no finding about that because the matter will have to be reconsidered by another tribunal. I merely make the point to show that any error by the judge in his assessment was material to the outcome of the appeal.
18. The matters put forward by the appellant, comprising the fears she holds of her ex-partner and the possibility of further harm at his hands coupled with the absence of effective protection, are matters which might conceivably form the basis of a claim for international protection. The appellant has never made any such claim. Clearly, her failure to do so was a matter that struck the judge as undermining the reliability of her account. That approach might have been one which it was open to the judge to take. However, the argument made with some force by Mr Halim amounted to saying that the judge effectively foreclosed consideration of insurmountable obstacles as a result of the appellant's failure to claim asylum.
19. I do not find it necessary to decide whether that was in reality the case. That is because I find there is a clear error in paragraph 75 the judge's decision in which he stated that the failure of the appellant to demonstrate that there were insurmountable obstacles to her return showed that it followed that she had also failed to demonstrate that exceptional circumstances existed to "permit her circumvention of immigration control". It is clear that it might be possible for the appellant to demonstrate that there are exceptional circumstances entitling her to succeed on article 8 grounds even if she could not establish insurmountable obstacles.
20. In the recent case of *TZ (Pakistan) and PG (India) v SSHD* [2018] EWCA Civ 1109, the Senior President of Tribunals emphasised the importance of tribunals following the approach described by the Supreme Court. At paragraph 22 of its judgment, the court explained that in appeals of this kind there will usually have to be consideration under the relevant provisions of the rules and, if the appellant does not qualify under the rules, outside the rules to determine whether removal would amount to a breach of article 8.
21. I understand that the appellant's case was heavily loaded onto the question of insurmountable obstacles. However, in the circumstances that as a matter of law the outcome of this assessment does not provide a complete answer in all cases to the test of exceptional circumstances, the failure of the judge to recognise that there is a two-stage test must mean that his consideration was incomplete and therefore erroneous.
22. None of Mr Halim's other submissions contain the same force but, taken cumulatively, I would also conclude that there was a discernible lack of care in

the judge's consideration of the evidence which is best illustrated by his failure to have regard to the important passages in the background evidence to which his attention was drawn by counsel and his failure to give adequate reasons for rejecting the evidence of the appellant's sister.

23. In the circumstances, none of the judge's findings can be preserved, save for his finding that family life exists. The appeal must be heard again by another judge to consider the claim both within and outside the rules. Further fact-finding is required. It is therefore appropriate that the appeal should be remitted to the First-tier Tribunal for a fresh hearing. Having considered the Senior President's Practice Direction of 15 September 2012, I make an order under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

24. No additional directions are required.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The appeal is remitted to the First-tier Tribunal for a hearing de novo.

No anonymity direction is made.

Signed

Date 23 May 2018

Deputy Upper Tribunal Judge Froom