



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19131/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 19th June 2014

Determination Promulgated
On 14th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHELLE PATRICIA AYRTON
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: No Legal Representation

DETERMINATION AND REASONS

Introduction and Background

1. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal. I will refer to her as the Claimant.

2. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Ford (the judge) promulgated on 7th February 2014.
3. The Claimant is a female citizen of Jamaica born 8th April 1975. She entered the United Kingdom as a visitor on 4th November 2011, with a visa valid between 20th October 2011 and 20th April 2012.
4. On 21st March 2012 the Claimant applied for further leave to remain outside the Immigration Rules, initially to care for her mother-in-law, and subsequently to provide care for her husband and sister-in-law.
5. The application was refused on 10th May 2013, and a decision made to refuse to vary leave to remain, and that the Claimant be removed from the United Kingdom.
6. The application was considered with reference to Appendix FM of the Immigration Rules, the Secretary of State finding that the application could not succeed because the Claimant was in the United Kingdom as a visitor, and therefore could not satisfy E-LTRP.2.1, which meant that she could not rely upon section EX.1.
7. The Claimant's private life claim was considered with reference to paragraph 276ADE, and the Secretary of State concluded that the Claimant could not satisfy any of the requirements of this paragraph as she had not lived in the United Kingdom continuously for at least twenty years, and it could not be said that she had no ties to Jamaica.
8. The Secretary of State considered whether there were any circumstances which would entitle the Claimant to be granted leave to remain outside the rules. It was noted that the Claimant's mother-in-law had sadly passed away, and that her husband, who is a British citizen, was suffering with back pain and was on a waiting list for a microdiscectomy operation but it was noted that the Claimant and her husband had previously lived in Jamaica, and it was felt that the couple could return to Jamaica with the Claimant's husband briefly returning to the United Kingdom for his operation when required. In relation to the Claimant's sister-in-law, it was not accepted that she required a full-time carer, as it was noted that she was still in full-time employment.
9. The Claimant appealed to the First-tier Tribunal, and her appeal was heard on 23rd January 2014. The Claimant appeared in person without legal representation. The judge heard evidence from the Claimant, her husband, and the Claimant's sister-in-law. The judge found the witnesses to be credible and allowed the appeal under section EX.1 of Appendix FM, and with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules.
10. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had made a material misdirection of law, and reliance was placed upon the Upper Tribunal decision Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 00063 (IAC).

11. It was contended that the judge was wrong to allow the appeal under Section EX.1, because EX.1 was not free-standing, and because the Claimant was a visitor, she was not entitled to rely upon EX.1.
12. Permission to appeal was granted by Judge of the First-tier Tribunal V A Osborne who found it arguable that the judge had erred and had not taken into account Sabir, which is authority for the proposition that EX.1 is not a “stand alone” provision of the rules but a component part of the rules to be read in conjunction with some other provision of Appendix FM.
13. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

14. The Appellant attended the hearing together with her husband and sister-in-law. She confirmed that she was not legally represented and was content to proceed without legal representation.
15. I explained to the Appellant the purpose of the hearing, in that I had to decide whether the First-tier Tribunal had made a mistake of law, and whether the determination needed to be set aside. I confirmed the independence of my role.
16. The Appellant confirmed that she had seen the application for permission to appeal, together with the grant of permission.
17. I then heard submissions from Mr McVeety who relied upon the grounds contained within the application for permission to appeal.
18. I then heard from the Appellant, who asked me to uphold the decision of the First-tier Tribunal, or in the alternative if it was found that there was an error of law, to remake the decision so that she could remain in the United Kingdom for the reasons that had been explained to the First-tier Tribunal and which are set out in that determination.
19. I decided to reserve my decision. Mr McVeety and the Appellant agreed that if it was necessary to set aside the decision of the First-tier Tribunal, the decision could be re-made without a further hearing, on the basis of the evidence that had been presented to the First-tier Tribunal.

My Conclusions and Reasons

20. The Judge erred in finding that the appeal should be allowed with reference to section EX.1 of Appendix FM. The judge did not have the benefit of the guidance given in Sabir, which was not published until 7th February 2014, and the judge prepared her decision on 31st January 2014. It is clear that the Appellant was in the United Kingdom as a visitor when she made her application for further leave to

remain. Her visa was valid until 20th April 2012, and she made her application for further leave to remain on 21st March 2012.

21. Sabir confirms that EX.1 is not a stand alone provision. The head note to Sabir is set out below;

It is plain from the architecture of the Rules as regards partners that EX.1 is “parasitic” on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free-standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule. This is now made plain by the Respondent’s guidance dated October 2013.

22. Section R-LTRP sets out the requirements for limited leave to remain as a partner and requires that an applicant must either satisfy all the requirements of E-LTRP or meet the requirements of E-LTRP.1.2-1.12 and E-LTRP.2.1 and section EX.1 must apply.
23. In this case the Appellant could not satisfy all of the requirements of E-LTRP, as this would include the financial requirements, which it is accepted could not be satisfied by the Appellant and her husband. It is also the case that the Appellant cannot satisfy E-LTRP.2.1 (which is set out below) because at the time she made her application for leave to remain she was in the United Kingdom as a visitor;

E-LTRP.2.1 The applicant must not be in the UK -

- (a) as a visitor;
- (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner; or
- (c) on temporary admission.

24. Therefore the judge materially erred in law in finding that the Respondent should have granted the Appellant’s application under EX.1, and erred in allowing the appeal on that basis. The decision of the First-tier Tribunal that the appeal succeeds under EX.1 is set aside.
25. However the judge also allowed the appeal with reference to Article 8 outside the Immigration Rules. This decision has not been challenged by the Secretary of State. The grounds contained within the application for permission contend that the judge made a material misdirection of law by allowing the appeal under the Immigration Rules. Reference is made to paragraph 50 of the determination in which the judge records that the application should have been allowed under EX.1. There is no reference in the grounds to paragraph 51 of the determination in which the judge finds that exceptional circumstances exist which warrant the application being allowed outside the Immigration Rules. In making the finding that the appeal should be allowed with reference to Article 8 outside the rules, the judge considered and set out earlier in the determination (paragraphs 14-18) the Secretary of State’s

guidance on “exceptional circumstances” and the guidance given by the Upper Tribunal in Gulshan [2013] UKUT 00640 (IAC).

26. In my view the judge correctly considered the guidance and case law and was entitled to conclude that exceptional circumstances existed in this case, and in the absence of any challenge, those findings stand.

Decision

The decision of the First-tier Tribunal to allow the appeal under the Immigration Rules was wrong in law and is set aside. I substitute a fresh decision dismissing the appeal under the Immigration Rules.

The decision of the First-tier Tribunal that the appeal is allowed on Article 8 grounds outside the Immigration Rules is not set aside and stands. The Claimant’s appeal is therefore allowed on Article 8 grounds outside the rules.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed

Date 3rd July 2014

Deputy Upper Tribunal Judge M A Hall

To the Respondent Fee Award

The appeal is dismissed under the Immigration Rules but allowed on human rights grounds. The First-tier Tribunal had the benefit of oral evidence that was not before the decision maker. There is no fee award.

Signed

Date 3rd July 2014

Deputy Upper Tribunal Judge M A Hall