IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33815/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd October 2015	**On 4th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

ND
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Fielden (Counsel)
For the Respondent: Mr S Kandola (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge M Symes, promulgated on 22nd April 2015, following a hearing at Richmond on 13th March 2015. In the determination, the judge allowed the appeal of ND. The Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Brazil, who was born on 2nd May 1973. He appeals against the decision of the Secretary of State to refuse further leave to remain and issue directions against him under Section 47 of the IANA 2006 in a decision made on 21st August 2014.

The Appellant's Claim

3. The Appellant's claim is that the Appellant had married his former fiancée, AH, a British citizen by birth. She was in full-time work with a garden centre group. She earned £14,000 as a sales assistant and waitress per annum. She had savings of £41,350. She owned a flat. Yet, the application had been refused for his right to remain in the UK on the basis that, although he had a genuine and subsisting relationship with AH, he could not show that his sponsoring wife earned an income above £18,600, as required by the Immigration Rules.

The Judge's Findings

4. The judge heard evidence from SH, the sponsoring wife's mother, who had said that she had encouraged them to resolve the Appellant's immigration status by leaving the country and returning with entry clearance. The sponsoring wife herself gave evidence to say that she would face hardship in Brazil because she could not speak the language there. She did not want to leave the UK for a long period because she was working here and she had always worked. She would also find it very difficult to be separated from her mother because her mother drank heavily and had a problem with alcoholism. She had a sister but her sister suffered from bipolar disorder for which she was thus receiving treatment and she was in no position to look after the ailing mother (see paragraphs 13 to 14).

5. The judge observed that it had become apparent that the Appellant could not satisfy the financial requirements of the Immigration Rules, although all other aspects of the Rules were satisfied, because the sponsoring wife's admissible earnings were only £3,000, and because additional rental income of £650 monthly could not make good the shortfall, even taken with her savings, which had been slightly diminished by her giving her mother over £5,000 to invest in an ISA for her (see paragraph 20). The appeal would also fail under the five year route (see paragraph 21).

6. Therefore, what the judge was left with was a consideration of the case outside the Rules. He gave consideration to whether there were "exceptional circumstances" and whether there were "compelling" circumstances such as to produce "unjustifiably harsh consequences" which would outweigh the public interest. He gave consideration to the leading authorities on this matter (see paragraph 22). The judge went on to hold that, "It is perfectly clear that family life is established in this case. The Appellant and his Sponsor are in a genuine and subsisting relationship. This relationship was of several years' duration". He concluded that it

> "Has already endured through a period where both lived abroad whilst he sought entry clearance. It is clear that the Sponsor's family life with her vulnerable mother

> would be compromised if she left the country: the fact that she has done so previously hardly diminishes the strain that will be put on her mother and sister. If anything it worsens it" (paragraph 23).

7. Looking at the situation outside the Rules, the judge went on to observe that the application had failed for reasons that were

> "Essentially technical: not because the Sponsor *in fact* lacked the relevant income, but because their earnings could not be evidenced via the strict requirements under Appendix FM-SE, for technical rather than substantive reasons" (paragraph 26).

8. Curiously, however, the judge then concluded that, "The appeal against refusal to vary leave to remain is allowed under the Immigration Rules" (see page 7).

Grounds of Application

9. The grounds of the application state that the judge found that there were no insurmountable obstacles to the Appellant continuing family life outside the UK. However, the Rules remain substantially unsatisfied.

10. On 15th June 2015, permission to appeal was granted.

Submissions

11. At the hearing before me, Mr Kandola, appearing on behalf of the Respondent Secretary of State, stated that he would place reliance upon paragraphs 20 to 21 of the determination because these make it quite clear that the Appellant could not satisfy the financial requirements and could also not succeed under the five year route. However, the judge had not been able to show why the Appellant succeeded under the human rights grounds either.

12. For her part, Ms Fielden submitted that the judge plainly intended to allow the appeal outside the Immigration Rules because, having concluded at paragraphs 20 and 21 that the Appellant could not succeed under the Immigration Rules, he then went on at paragraph 22 to say that, "That leaves the case outside the Rules". Consideration was then given to the position outside the Rules with references to "exceptional circumstances", and to "unjustifiably harsh consequences". He said that these outweighed the public interest in this case. The fact was that the mother had a problem with alcoholism. She was seriously dependent on the sponsoring daughter. The other daughter had medical problems and was in no position to assist.

13. Moreover, at paragraph 23, the judge sets out the considerations as to why the appeal succeeds outside the Immigration Rules given that there is a genuine and subsisting relationship and, given that the relationship has endured through a period of life lived abroad, with now added strains to having to envisage that situation again were the Appellant and his sponsoring wife to leave to go to Brazil once more.

14. In reply, Mr Kandola submitted that the fact was that Appendix FM and EX.1 were not satisfied. There were no insurmountable obstacles. This is because the Appellant

and his sponsoring wife had already lived in Brazil. Secondly, under Section 117B, the public interest considerations were such that the Appellants were not financially independent.

15. At the end of the submissions, I asked both representatives to indicate what remedy they were seeking of this Tribunal. Both agreed that given the confusion in the manner in which the appeal had been allowed, the appropriate course of action was for this Tribunal to remit the matter back to the First-tier Tribunal, to be heard by a judge other than Judge Symes.

Error of Law

16. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. In what is otherwise a comprehensive and thorough determination, with detailed consideration being given to the leading authorities on the financial requirements attests, and the principle of "exceptional circumstances", and of "unjustifiably harsh consequences", the judge nevertheless, causes confusion at the end in allowing the appeal under the Immigration Rules. Yet, the judge had earlier concluded that, "It became apparent that the Appellant could not satisfy the financial requirements of the Immigration Rules ..." (paragraph 20).

Remaking the Decision

17. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal only to the extent that it is remitted back to a Judge of the First-tier Tribunal, other than Judge Symes. My reasons are as follows.

18. Whereas it is clear that the judge makes clear that the judge makes important findings of fact, namely that this is a genuine and subsisting relationship, and also observes that the Appellant could not meet the technical requirements of the Rules, although funds did exist, and whilst the judge is absolutely right in noting Lord Bingham's oft forgotten statement in **EB (Kosovo) [2008] UKHL 41** (at paragraph 12) that,

> "It will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal", (see paragraph 28 of the determination),

the fact is that these matters must now be considered in the context of the Court of Appeal's judgment in **Agyarko [2015] EWCA Civ 440**, which defines how "insurmountable obstacles" must be approached as a matter of law. I am perfectly aware, that the judge was of the view that,

> "It is clear that the Sponsor's family life with her vulnerable mother would be compromised if she left the country: the fact that she has done so previously hardly diminishes a strain that it will put on her mother and sister. If anything it worsens it" (paragraph 23).

Nevertheless, regard must be given to **Agyarko** in any subsequent determination of the issues. Accordingly, whereas I direct that this matter go before another judge in the First-tier Tribunal, all favourable findings of fact are to be preserved in favour of the Appellant.

Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted to the First-tier Tribunal to be heard by a judge other than Judge Symes with all favourable findings to be preserved. The Appellant's Counsel is to provide a skeleton argument; and any new evidence is to be submitted two weeks before the hearing, the financial evidence is to be updated; there are to be four witnesses, and the matter is to be set down for three hours. The hearing centre is to be Hatton Cross.

~~No anonymity direction is made.~~

Signed Date

Deputy Upper Tribunal Judge Juss 2nd November 2015