



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA104002015

THE IMMIGRATION ACTS

Heard at Stoke

On 11 March 2016

**Decision &
Promulgated
On 23 May 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

**Mr MOHAMED MAHMOUD FARAG MOHAMED SULTAN
(Anonymity Direction Not Made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson, Counsel. No5 Chambers (Instructed on a Public Access Basis)

For the Respondent: Mr Harrison, Senior Presenting Officer

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by Designated First-tier Tribunal Judge McCarthy dated 11 November 2015. The appeal relates to a decision and reasons of First-tier Tribunal

Alis promulgated on 6 July 2015. The Judge had dismissed the appeal based on the Immigration Rules and on Article 8 of the European Convention on Human Rights.

2. The background the appeal is that the Appellant is married to Mrs Susan Collins. They had met online and then later married in 2010 in Egypt. They have no children together but Mrs Collins has an adult daughter who lives with the couple.
3. The Appellant's grounds of appeal against the Judge's decision had contended:
 - (1) There was an error of law in respect of the insurmountable obstacles test relating to EX.1 and EX.2 of the Immigration Rules.
 - (2) The wrong question was asked/there was a failure to apply the law relating to insurmountable obstacles. The Judge had to ask himself whether Mrs Collins was afraid of being killed and whether that fear itself constituted an insurmountable obstacle; and
 - (3) The Article 8 case outside of the Rules was not properly assessed.
4. When granting permission to appeal Designated First-tier Tribunal Judge McCarthy observed that the grounds were of some length but that there was merit in the central premise that the Judge may have erred in his understanding of the meaning of "insurmountable obstacles". The references to the case law from the Article 8 cases was used instead of the specific provision in paragraph EX.2 of Appendix FM regarding how that phrase is to be interpreted as used in paragraph EX.1.
5. At the hearing before me Mr Nicholson explained his grounds of appeal in further detail. In reality the submission comes to this, when one looks to section EX to Appendix FM of the Immigration Rules and when accepting that this is a case in which the Appellant is in a genuine and subsisting relationship with a British partner in the United Kingdom, then insurmountable obstacles test has to be considered in accordance with EX 1 and EX.2. That provides,

EX.1. This paragraph applies if

(a).....

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could

not be overcome or would entail very serious hardship for the applicant or their partner.

6. It is asserted that one has to take into account the difficulties which would be faced by the Appellant or his wife. In particular the Appellant's wife's fear of going to Egypt because of what she has seen happen in Tunisia, Egypt and other places as identified in the Government's travel advice and indeed what she has seen in the up-to-date travel advice about staying away from such places. Mr Nicholson says that the simple point was that this was capable of amounting to insurmountable obstacles. He said that the Respondent's own guidance as referred to at paragraph 31(5) of the Judge's decision and highlighted at paragraphs 16 and 17 of his grounds showed this was so. The test was 'harsh' but there were limitations to it. He said that Mrs Collins believes she will die if she goes to Egypt. That was therefore an insurmountable obstacle.
7. Mr Nicholson submitted that this was very different compared to the many people who go on holiday each year to Egypt behind gated communities whereas Mrs Collins would have to live in the community there. She has a real fear of doing so. That was "very real hardship" for her which ought to have been properly taken into account with the definition set out in EX.2.
8. Finally Mr Nicholson said that permission had also been granted on the basis of there being inadequate reasoning regarding the Appellant's witness statement at paragraph 40. The Judge had referred to a range of cases but did not set out why that evidence was not accepted.
9. Mr Harrison in his submissions said that he relied on the Rule 24 Reply and that specifically stated why the Respondent opposed the appeal. Mr Harrison said that at paragraph 39 the Judge said that there was a choice to be made as to whether Mrs Collins stayed in the United Kingdom or went to Egypt. It was clear that the Judge had identified and was cognisant that there were other remedies regarding Mrs Collins going to Egypt. It was not clear if she had ever been there. Hundreds of thousands go on holiday to Egypt each year. They don't just go for a visit. They go for a holiday. The FCO says that there is no danger in the coastal areas.
10. I heard from Mr Nicholson in reply who said that paragraph 39 of the decision was the point picked up by Judge McCarthy when he had granted permission. In respect of holidaymakers, there were guards outside gated communities so that was not an answer. This case was fact specific. Mr Nicholson then took me through more of the case law. I was urged to allow the appeal. There were issues since the hearing before the Judge in respect of Mrs Collins' health.
11. I had reserved my decision.

12. I conclude that despite the careful and detailed decision and reasons of the experienced Judge, there is a material error of law. I have come to this decision with some hesitation because I had initially thought that there was no material error of law. Mr Nicholson has persuaded me that there is.
13. EX.2. does indeed make it clear that the “very significant difficulties” is assessed by reference to the Appellant but also by reference to the effect on Mrs Collins. I accept the Appellant’s argument that there is a difference in going on a holiday to one of the coastal areas in Egypt which has armed guards and the like, compared with living in the community in a different area. The risk is very different. Although it is possible that at least a part of what Mrs Collins’ fears might not be objectively well founded, the fact is that it appears she has a genuine subjective fear of going to Egypt. In my judgment, the fear has to have some objective basis, just as it does in a protection claim (absent some exceptional expert evidence explaining the reasons why the subjective fear would cause harm) and Mr Nicholson is correct that there does seem to be such fear in this case, albeit the fear Mrs Collins has is a heightened fear over and beyond what some holidaymakers might feel.
14. Therefore, I conclude that Judge McCarthy when he granted permission correctly and appropriately identified the material error of law. Namely that the Judge erred by dismissing the appeal and not applying EX.2 in assessing whether family life could continue overseas. The answer may well have been different if that test and question had been applied in the particular context of this case. This appears to be a relatively unusual case.
15. As a consequence and despite Mr Harrison’s helpful submissions with his reliance on the Rule 24 Reply, I conclude that there is a material error of law.
16. Having considered the grounds of appeal as a whole and the submissions made in respect of the findings there will be a complete rehearing at the First-tier Tribunal.

Notice of Decision

The decision of the First tier Tribunal Judge involved the making of a material error of law.

The Appellant’s appeal is remitted to be reheard at the First Tier Tribunal.

An anonymity direction is not made.

Signed

Date: 11 April 2016

Deputy Upper Tribunal Judge Mahmood