



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/22021/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 27th June 2017

Promulgated

On 28th June 2017

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

B M

(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Direct Access Barrister, Imperium Chambers
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Uganda born in July 1976. He arrived in the UK on 15th October 2009 with a visit visa, and overstayed. He was encountered working illegally in October 2013 and made an Article 8 ECHR application on 1st November 2013. On 4th January 2014 he married Mrs L M, a British citizen, and on 19th December 2014 applied to remain as the spouse of a settled person. On 27th May 2015 this application was refused by the respondent. His appeal against this

decision was dismissed on all grounds by First-tier Tribunal Judge Turquet in a determination promulgated on the 14th November 2016.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Page in a decision dated 8th May 2017 on the basis that it was arguable that the First-tier judge had erred in law in requiring corroboration of documents where this was not required and in holding against the appellant matters which had not been drawn to his attention either in the refusal decision or by the First-tier Tribunal in relation to discrepancies relating to his former marriage.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions - Error of Law

4. In the grounds of appeal Mr Turner argues at paragraph 34 of the decision that the First-tier Tribunal relies upon a contention that the appellant had submitted false information by not giving details of his former marriage on the application form, and that this finding was not in line with the case of AA (Nigeria) v SSHD [2010] EWCA Civ 773 or the respondent's guidance in the IDI of July 2009 on paragraph 322(1A) of the Immigration Rules as these Rules are not designed to catch those who make innocent mistakes on application forms. The forms had been completed by the appellant's previous solicitors; the box that he or his spouse had been previously married had been ticked and the details of his previous marriage simply not entered. The appellant's previous spouse had died sometime previously so there was no possibility that that marriage was subsisting. This previous marriage had been disclosed in the previous application to the respondent so there was no attempt to conceal it.
5. It is further argued that the First-tier Tribunal errs in law by requiring at paragraph 34 of the decision corroboration of documentation in the form of the identity documents for his late wife, however he is not in a position to have these documents, and so this is not lawful, see TK (Burundi) v SSHD [2009] EWCA Civ 40.
6. In addition, the First-tier Tribunal failed to put these issues relating to the appellant's former marriage to him at the hearing so that the hearing was procedurally unfair, and also failed to complete the reasoning for the decision at paragraph 35 in which a sentence reads: "The appellant did not provide any documentation to identify that the".
7. There was also a failure to have regard to material evidence about administrative errors which explained the difference in age on the marriage certificate for the appellant at paragraph 37 of the decision. Further if it was contended this was a false marriage certificate (which is not accepted) then it would not be necessary to have shown the marriage was at an end in any case.

8. Further it was perverse to find at paragraph 41 of the decision that the appellant and his wife had deliberately misinterpreted the immigration law given that neither the appellant nor his wife are lawyers, and that finding did not pay regard to the appellant's wife's oral evidence on this issue.
9. At paragraph 43 it is argued that the decision the First-tier Tribunal failed to have regard to relevant information that the appellant's wife had promoted the rights of transsexuals through a musical play which was crucial evidence in the case. In oral submissions Mr Turner identified evidence regarding this issue was before the First-tier Tribunal. Mrs LM had put details about being the writer and director of a musical play about being the wife of a transsexual in her statement, and further there were copies of material from the internet which promoted this play and included interviews with the appellant's wife, and there was witness evidence that it had been seen by people in the Uganda community. The respondent's Operational Guidance Note for Uganda dated 8th December 2013 was also before the First-tier Tribunal which featured at paragraph 3.18.9 details about a British theatre producer, David Edwards Cecil, staging a play which it was contended by the Ugandan authorities promoted homosexuality which led to him being arrested, charged and then deported to the UK as an undesirable person. Mr Turner argued that this was therefore an important issue that the First-tier Tribunal had failed to place in the balance when considering whether there would be insurmountable obstacles to family life in Uganda.
10. At paragraphs 44 to 45 it is said the decision of the First-tier Tribunal failed to consider that there were special circumstances which mean that appeal should have been considered outside of the Immigration Rules.
11. In a Rule 24 notice the respondent argues that the judge made a comprehensive assessment of the evidence. The application made by the appellant had failed to disclose his previous marriage and documents later presented to show the appellant was single had significant discrepancies. The appellant was aware of all issues from the refusal letter, he prepared a witness statement and was represented at the hearing. The judge properly resolved the key conflicts of fact.
12. In oral submissions Mr Nath accepted that the issue of the play had not been dealt with but argued that otherwise it was a good decision which dealt fairly and lawfully with all issues.
13. I told the parties that I found that the First-tier Tribunal had erred by failing to look at the issue of the play and the problems for family life which might arise in Uganda due to Mrs LM's play, for the reasons set out below. Mr Turner wanted the matter remitted to the First-tier Tribunal for remaking, and said he was not ready to proceed with remaking as he intended to obtain further evidence regarding the applicant's wife's ill-health, the issue of the play, and possibly the

validity of documentation regarding the appellant's first marriage and death of his first wife. He said the papers had previously be poorly prepared and he wanted to put them in good order and make sure they were up to date on all issues relevant to Article 8 ECHR. Mr Nath was happy to adjourn the remaking in light of this new evidence but argued that the matter could remain in the Upper Tribunal. In the light of the extent of the factual remaking required however I decided that it would be appropriate for the matter to return to the First-tier Tribunal.

Conclusions - Error of Law

14. The appellant was undoubtedly on notice that the respondent considered the marriage certificate and death certificates submitted by the appellant relating to his first marriage were false as the dates on the documents did not tally and because the appellant did not mention his first marriage on his application and because he said he was single on his current marriage certificate, and as a result the respondent found he could not meet the suitability rules at S-LTR 2.2. It was open to the appellant to produce any argument or evidence to meet this contention before the First-tier Tribunal. There is no procedural unfairness in the decision of the First-tier Tribunal.
15. The appellant might have met these allegations by obtaining an opinion from a Ugandan lawyer or other official with standing as to the validity of the documentation some of which undoubtedly has inconsistent ages, and also exhibited oddities such as two customary marriage certificates issued on the same day with different ages for the parties. On the material before the First-tier Tribunal the judge was entitled to conclude on the balance of probabilities that the documents were forgeries and further that he was not convinced that the appellant's previous relationship had broken down permanently, as is needed by E-LTRP 1.9, and that therefore the appellant could not meet the requirements of the Immigration Rules at Appendix FM.
16. Consideration of the appeal outside of the Immigration Rules undoubtedly takes place in the decision at paragraph 40 where there is a discussion of "insurmountable obstacles "as a factor to take into account in "a wider Article 8 assessment outside of the Immigration Rules", and this is reiterated again at paragraphs 45 to 50 in a Razgar analysis. It is accepted that the appellant has family life with his wife at paragraph 45 of the decision. Consideration is given to the history that the couple believed the appellant could remain lawfully in the UK under EU law but reasons, which are not irrational, are given as to why this is not found credible at paragraph 41. The history of the appellant's current wife's ex-partner's transsexuality is considered along with her language skills, her employment and family in the UK but this is not found to be mean that his removal is disproportionate given that family life was established whilst the appellant was unlawful present in the UK. Regard is also had to all of the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002.

17. However, I find that the proportionality analysis under Article 8 ECHR was flawed by a failure to consider important and material evidence before the First-tier Tribunal regarding the appellant's wife writing and directing a play about being the wife of a transgender person, and consideration that this play had been seen by people in the Uganda community in the UK and that material about the play including interviews with the appellant's wife existed on the internet. This history combined with what is set out in country of origin materials, including the respondent's Operational Guidance Note, about societal intolerance and legal action against people who write drama about such issues, means that this factor could well cause difficulties for the appellant's wife in Uganda and thus ought to have been considered by the First-tier Tribunal in connection with whether the appellant would face insurmountable obstacles to family life in Uganda. This, I find, was therefore a material error of law.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision in its entirety.
3. I remit the hearing to the First-tier Tribunal for remaking de novo.

Anonymity

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant or his wife or their families.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 27th June 2017