Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03011/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 September 2017	**On 19 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MR BRANDON WILLIAM PLITT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Jones, Counsel instructed by Fisher Jones Greenwood
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1 This is an appeal against the decision of Judge of the First tier Tribunal Onoufriou dated 23.12.16 dismissing the Appellant's human rights appeal.

2 The Appellant is a national of the United States of America aged 44 at the date of the Judge's decision. He entered the UK as a visitor on or around

October 2002 to visit Ms Sandra Baker ('the Sponsor') who he had met on line in 1999. They married in the UK on 25 January 2003 when the Appellant was present as a visitor. He was removed from the United Kingdom by facilitated removal before applying for entry clearance to return to the UK as his Sponsor's spouse. He was granted entry clearance in that capacity for a period of 2 years. Although no copy of that grant of entry clearance is available, that grant would have been under paragraph 281 of the Immigration Rules.

3 No application for indefinite leave to remain (under para 287) was made. He has been an overstayer since 20 May 2005.

4 An application for leave to remain on the basis of his married life with the Sponsor was made on or around 22 December 2014 under Appendix FM but was refused without a right of appeal. On 9 June 2015 a statement of additional grounds was submitted which the Respondent treated as a human rights application, refusal of which on 10 July 2015 resulted in a right of appeal.

5 The Respondent accepted that the Appellant met the suitability requirements of Appendix FM and the eligibility requirements of R-LTRP1.1.(d)(ii), (refusal letter, para 10). This would require the Appellant additionally to met the requirements of EX1. The reason that the Appellant was not deemed to meet all of the requirements of the eligibility requirements (and hence was obliged additionally to satisfy the requirements of EX1) is not stated in the decision letter, but will have been because the Appellant did not meet the financial eligibility requirement (because he and the Sponsor did not have sufficient income) and because, as an overstayer of some 10 years, he did not meet the immigration status requirement.

5 The Respondent did not accept that the Appellant met the requirements of EX1 because she was of the view that there were not, under EX1(b), insurmountable obstacles to family life continuing outside the UK (refusal, para 15). The Appellant appealed against that decision.

6 The appeal came before the Judge on 12 December 2016. Through Counsel (Mr Jones, who also appears before me) the Appellant accepted that there were no insurmountable obstacles to family life continuing outside the UK (decision, [26] and [29]).

7 The Judge made findings at [29] that the couple would have accommodation available to them in the USA; there was no evidence that the Appellant had any health problems; there was no reason why he would not be able to be able to obtain employment in the USA; he had worked in the USA previously; there was no evidence that the Sponsor required 24 hour care; the Sponsor had type 2 diabetes, but there was no evidence of any mobility problems as asserted. The Judge concluded that

there were no insurmountable obstacles to family life continuing in the USA.

8 Additionally, the Judge held at [30] that the Appellant did not met the requirements of leave to remain on the grounds of private life under para 276ADE(1)(vi), as there were no serious obstacles to the Appellant's integration in the USA.

9 It is to be noted that there are no challenges to any of those findings.

10 The Judge proceeded to consider (paras [31]-[35]) the Appellant's right to private and family life and whether the Respondent's decision to refuse his human rights claim amounted to an unlawful breach of the Appellant's rights under Article 8 ECHR (para [35]). The Judge held that medication for the Sponsor's diabetes would be available for her in the USA; she was not immobile; they had savings and would be able to establish themselves in the USA. There was no reason why they could not continue their family life in the USA [31].

11 The Appellant's private life friendships could be continued from outside the UK; the public interest in maintaining immigration control was not outweighed; it may well be that his overstaying arose due to a mistake or misunderstanding [32], but the Judge did not accept that the Appellant was reliant on Harwich immigration [34]; although there was no guarantee that any discretion might be applied by an Entry Clearance Officers regarding the financial requirements of Appendix FM, that did not amount to exceptional circumstances [33].

11 The Judge held that the decision was not unlawful, and dismissed the appeal.

12 The Appellant's grounds of appeal to the Upper Tribunal are with respect unfocussed and fail to state succinctly what material error of law, for example as per para 9 of R (Iran) & Ors v SSHD [2005] EWCA Civ 982, the Appellant asserts is present within the Judge's decision.

13 The grounds assert in a pre-amble at paras 1-16 that the a number of matters were 'accepted' or 'uncontroversial' and were 'settled' (para 17), including that:

(i) the couple existed independent of State assistance and had done so throughout the Appellant's long residence (para 8);

(ii) the couple possessed the means to remain independent of State assistance, and that the Appellant could and would obtain employment were his status to be regularised (para 9);

(iii) the Judge accepted that there were no negative points to be derived from the application of s.117B NIAA 2002, in particular 'not

demurring' from the contention that the Appellant's relationship with the sponsor could not be characterised as one having been formed when his states was precarious (para 11);

(iv) had an application for extension of leave to remain been made with the currency of the Appellant's leave to remain from 2003 to 2005, his leave would have been extended, and settled status would have been acquired in due course (para 12);

(v) the Appellant's failure to apply for further leave to remain had arisen from his lack of knowledge or misunderstanding, that naivety being fixed around an apprehension that Harwich Immigration Service would facilitate the provision of extensions of leave, and the Judge's finding that there was absolutely no evidence to support the Appellant's contention was unsustainable, given the evidence of the Appellant and Sponsor (para 13);

(vi) the Judge accepted that the Appellant had a private life in the UK (para 15);

(vii) the Sponsor enjoyed a strong private life (para 16);

(viii) the Sponsor suffered certain chronic health conditions, and found the prospect of relocation distressing and anxiety inducing.

14 The Grounds continue at [17]:

> "It was on those settled and unusual facts that the Appellant fixed his case that there were exceptional circumstances orientating against the application *(of)* immigration control in a manner which forced relocation, or at least a potential prolonged separation whilst entry clearance was again sought."

15 The grounds further argue that:

(i) the Judge erred in failing to answer the question properly, as to whether the needs of a democratic society necessitated the maintenance of strict immigration control, 'on those facts' (para 19-20);

(ii) the Judge's conclusion on that point was 'controversial' (para 20);

(iii) the Judge erred in his approach by considering whether there was any reason why family life could not be continued in the USA - this was said not to be 'the issue' (para 24);

(iv) the Judge failed to weigh the decision's impact on the Sponsor's private life interests (para 25);

(v) the Judge may have misdirected himself in law if accepting that Sultana v SSHD [2014] UKUT 000540 was authority for the proposition that an ECO can at their discretion waive the requirements of the financial eligibility requirements of Appendix FM (para 27);

(vi) the Judge failed to consider the application of Chikwamba v SSHD [2008] UKHL 40 on the assessment of proportionality.

16 In a decision dated 10.7.17, FtT Judge Page observed that much of the Appellant's grounds of appeal amounted to a mere disagreement with the Judge's decision, but granted permission to appeal generally.

17 In the appeal before me, I heard from the parties in the appeal.

Assessment

18 The Appellant's central contention, that the Judge failed to answer 'properly' the question as to whether the needs of a democratic society necessitated the maintenance of strict immigration control, and that the decision was 'controversial', is premised on the earlier contention that certain facts were accepted, uncontroversial or settled.

19 That is a false premise. Addressing the issues set out at para 13 above:

(i) Even if the Appellant has not directly received public benefits, it is not correct to assert that the couple have existed independently of State assistance, as it is clear that the Sponsor receives pension credit, and housing benefit, both in significant sums, and both being 'public funds' under para 6 of the Immigration Rules.

(ii) As regards the suggestion that it was accepted that the couple possessed the means to remain independent of State assistance, and that the Appellant could and would obtain employment were his status to be regularised, I cannot for my part see that this was accepted anywhere by the Respondent or the Judge. There is no such favourable finding.

(iii) (a) Whether or not the Appellant's family life with the Sponsor was 'precarious' is potentially relevant as to the application of s.117B NIAA 2002:

> "(4) Little weight should be given to—
> (a) a private life, or
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

(b) The relationship was formed on line in 1999 (Appellant's witness statement, para 1). The Appellant entered the UK as a visitor in August 2002 and the couple married on 25.1.03. The Appellant had lawful leave to remain in the UK at that time, but 6 months leave to enter the UK was clearly precarious leave, applying relevant principles in AM (S117B) Malawi [2015] UKUT 260 (IAC), Deelah and others (section 117B - ambit) (Rev 1) [2015] UKUT 515 (IAC). He left only after enforcement steps were take against him. He had lawful leave to enter from 2003 to 2005 when re-admitted, but has been present unlawfully since 2005.

(c) Para 26 of Deelah also provides:

> "...The suggestion that the "little weight" instruction enshrined in section 117B(4) and (5) applies only to the beginning of a person's private life or the commencement of a relationship formed with a qualifying partner and not the continuance of either results in a construction of these provisions which, in my estimation, is manifestly unsustainable to the point of absurdity. Why penalise the former and not the latter? No rational explanation or justification for this differential treatment was advanced in argument and I am unable to conceive of any."

Thus, it was arguable that the continuation of the couple's relationship from 2005 onwards, when the Appellant's presence was unlawful, also militates in favour, applying the provisions of s.117B(4)(b), of a finding that the *continuation* of the Appellant's family life in the UK from 2005 onwards should result in that family life being given little weight.

(d) The Judge does not in fact appear to have made any specific finding at para 34 as to whether s.117B(4) or (5) applied in the present matter, or whether the circumstances in which the Appellant's family life was formed or continued were such that it should be afforded little weight.

(e) However, even in the absence of such a finding, I reject the proposition, against the factual and legal background set out at 19(iii)(a)-(d) above, that the lack of any such finding should be taken to amount to the Judge 'not demurring' from the proposition that the Appellant's status was not precarious, when it clearly was.

(iv) There was no evidence before the Judge as to what the Appellant and Sponsor's financial circumstances were in 2005, when the Appellant might have made an application for indefinite leave to remain, and therefore no evidence as to whether he would have met the relevant requirements for ILR as a spouse; in particular, there was no evidence before the Judge as to whether the maintenance requirements were satisfied at that time. I am unable to find reference to any concession by the Respondent, or finding of fact by the Judge, that the requirements for ILR would have been met at any time. It is thus unsustainable for the Appellant to make the bare assertion that the Appellant would have met, but for his ignorance or mistake as to procedure, the requirements for ILR, and to assert that this was accepted, uncontroversial, and settled.

(v) The Judge does appear to accept at [28] that the Appellant's failure to apply for further leave to remain appears to have been due to a lack of knowledge or a misunderstanding, or at [32] that his overstaying may well have arisen due to a misunderstanding or a mistake, but there was no finding by the Judge that his naivety was fixed around an apprehension that Harwich Immigration Service would facilitate the provision of extensions of leave. Indeed, the Judge specifically rejects (and in no way can be said to have equivocated on the issue (Grounds, para 14) at line 3-4, para [34] that the Appellant had been reliant of Harwich Immigration. The suggestion in the grounds that such finding was unsustainable, given the evidence of the Appellant and Sponsor, is ill founded; there is nothing within the Appellant's evidence, even taken at face value, that Harwich immigration had done or said anything to make the Appellant believe that he had made an application or that they were in the process of considering an such application. The Judge also held at [28] that the Appellant had had every opportunity to make an application but had failed to do so.

(vi) The Judge did accept at [32] that the Appellant had a private life in the UK, and 'will have built up friendships here' (although there was no evidence of any such friendships before the Judge), but held that such friendships can be continued from abroad by modern means of communication. There is no challenge to that finding.

(vii) The assertion that it was uncontroversial that the Sponsor had a strong private life is itself a controversial one, given that Mr Jones drew to my attention, as the evidence before the Judge of what that private life comprised, only a tenancy agreement, and a short letter dated 17 June 2015 from 'Signpost' Colchester, stating that the Sponsor had volunteered there since 25 April 2014.

(viii) Similarly, the suggestion that it was uncontroversial that the Sponsor suffered from certain chronic health conditions (pleural) is

unsustainable; the Judge accepted that the Sponsor had type 2 diabetes (for which, the Judge held, there was adequate medication available in the USA), but held at [29] that there was no evidence that she required 24 hour care or had mobility problems. There is no discreet challenge to the Judge's findings on the Sponsor's state of health, for instance, that he failed to have adequate regard to specific evidence.

20 Thus, most of alleged accepted, uncontroversial or settled facts of the case are nothing of the sort.

21 The Appellant's central contention, therefore, referred to at para 18 above, is therefore unfounded.

22 The suggestion at para 20 of the grounds that any particular conclusion of the Judge was 'controversial' discloses no error of law.

23 The Judge did not limit himself to considering only whether family life could be continued in the USA, and did not treat this as 'the issue' in the appeal; he directed himself appropriately in law at [31] and considered all relevant matters.

24 Before me, Mr Jones did not pursue, following the judgment in Agyarko paras 61-68, any argument that the refusal of the Appellant's human rights claim would 'force' the Sponsor to leave the United Kingdom, contrary to her rights as an EU national to reside within the EU. I find that the Judge was well aware of the Sponsor's British nationality and that she had lived in the UK her whole life, but, as noted above at para 19(vii) above, evidence of her private life in the UK was limited. Any argument that the Judge failed to take into account matters relating to the Sponsor's private life which are only established by way of inference fails to establish that the Judge erred in law.

25 Insofar as the Respondent submitted before the Judge that Sultana was authority for the proposition that ECOs had discretion to entirely waive the financial eligibility requirements of Appendix FM, there is nothing in the Judge's decision which suggests that he adopted and was misdirected by such submission; indeed, the Judge determined the appeal on the assumed basis that any discretion that the ECO had may not be exercised.

26 The Judge clearly did consider the prospect of the Appellant leaving the United Kingdom to make an application for entry clearance; para 33. This was not a case where, applying SSHD v Hayat (Pakistan) [2012] EWCA Civ, there was no 'sensible reason' for the Respondent's insistence on the Appellant performing the procedural task of departing the UK to make an application for entry clearance from abroad which was bound to succeed; there were considerable doubts that the Appellant met the financial eligibility requirements. There was no requirement for the Judge to have

considered the protect of the Appellant departing to make an application for entry clearance any more than he did at para 33, or to make direct reference to Chikwamba.

27 Overall, the Judge appropriately directed himself in law, took all relevant matters into account, and made no error of law in the decision.

28 I observe (although such observation forms no part of the reasons for my decision) that if the Sponsor's alleged disabilities were such that she became entitled to attendance allowance (she now being 65) then the financial eligibility requirements of Appendix FM might possibly be more readily satisfied. These are matters for the Appellant and Sponsor to consider.

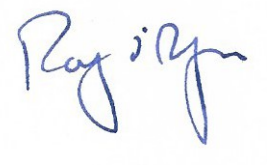
Decision

The making of the decision did not involve the making of any error of law.

The Judge's decision is upheld.

The Appellant's appeal is dismissed

Signed Date: 17.1.18



Deputy Upper Tribunal Judge O'Ryan