Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04322/2016

THE IMMIGRATION ACTS

Listed at Field House
On 4th September 2018

Decision and Reasons Promulgated
On 9th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR. O E L
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr R Amarashina, Counsel instructed by Samuel Louis, Solicitors.

For the respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Jamaica. He married his sponsor, Mrs Marvalyn Sonia Logan, née Platt, in 2014. She is a British national originally from Jamaica. She has a 15-year-old son from a previous relationship. She works as a care worker.

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2. On 9 October 2015 he applied for entry clearance to join his wife. His application was refused on 26 January 2016. It was considered under Appendix FM and refused on suitability and financial grounds.

3. On 10 November 2007 he had been convicted of selling drugs in America, sentenced to one year's imprisonment, and thereafter deported to Jamaica. The effect of this is was a 10-year prohibition from the date his sentence was served.

4. His sponsor indicated she earned £23,886 per annum and so met the financial threshold. However, the evidence she provided was dated August 2015 and so not within the 28 days to the date of application as specified in the rules.

The First tier Tribunal

5. The appellant's appeal was heard by First-tier Tribunal Judge PS Aujla on 12 June 2017 and in a decision promulgated on 15 June 2017 was dismissed. The judge concluded that the respondent properly applied the suitability requirements. Regarding the finances, this was not a situation involving the exercise of evidential flexibility. Rather, the evidence was not in accordance with the requirements of the rules and again the judge did not fault the respondent's refusal on this basis. The judge did not find any other compelling circumstances. At paragraph 30 the judge stated:

   `whilst I accept that it may not be reasonable to expect the sponsor to relocate to Jamaica, it is clear that she knew what she was letting herself into. She made a deliberate decision to enter into a relationship and marry a person who would not qualify for entry clearance to come to the United Kingdom on account of suitability. '

6. The judge made the point that it was open to the appellant to reapply once the 10-year period elapsed. In the absence of any evidence of him being in custody before sentence or of a remission program in the United States the judge calculated his sentence would be served on its anniversary.

7. Permission to appeal was granted on the basis it was arguable that the judge, having accepted it was not reasonable to expect his sponsor to relocate to Jamaica erred in law in concluding compelling circumstances did not exist when carrying out the proportionality exercise.

The Upper Tribunal

8. The appellant's representative pointed out that the judge had accepted the relationship between the appellant and his sponsor was genuine and his sponsor had a dependent child.

9. In response, the presenting officer referred me to paragraphs 82 and 89 of SSHD –v- SS Congo et al [2015]EWCA Civ 387.Paragraph 82 refers to family

life commencing when the ability for it to continue in the United Kingdom was precarious and Article 8 does not oblige a State to accommodate the preference of individuals. In that case the issue was the minimum income requirement: the court found no compelling circumstances outside the rules, and that the proper course was to reapply with the necessary documentation. Para 82 states:

> This is a case in which the sponsor, a British citizen, wished to be joined by his foreign national wife to take up family life in the United Kingdom, rather than continuing it in her home country. It appears that the family life was commenced in circumstances where it was known to be precarious, if the couple wished it to be carried on in the United Kingdom. Moreover, there was nothing to prevent the husband from going to Pakistan to continue their family life there. Article 8 does not give rise to an obligation on the state to accommodate a preference to pursue family life in the United Kingdom rather than overseas. At the time of the refusal of LTE, the minimum income requirements in the Rules in respect of the sponsor were not satisfied. There were no compelling circumstances to require the grant of LTE outside the Rules. If the sponsor expected to be able to satisfy the minimum income and evidence requirements in the near future, the appropriate course was to wait and submit a properly supported application for LTE when the requirements in the Rules could be satisfied. There was nothing disproportionate in the Secretary of State applying the Rules according to their terms in this case.

10. Paragraph 89 provides:

> The FTT also erred in saying that it would not be proportionate to expect FA to make a further application. Since FA's application failed to comply with the Immigration Rules and no compelling circumstances were identified why those Rules should not be applied in her case in the usual way, there was nothing disproportionate in applying the Rules in accordance with their terms, with the effect that FA's application failed and she would have to make a new one. The Entry Clearance Officer (and the FTT) was not required to waive the operation of the Rules as some sort of goodwill gesture because of the way in which FA's previous application had been dealt with.

11. Mr Tufan said the decision had to be read with MM (Lebanon) [2014] EWCA Civ 985 which repeated that Article 8 did not impose a general obligation on a member State to facilitate the choice made by a married couple to reside in it. In R (on the application of Agyarko) (Appellant) *v* Secretary of State for the Home Department (Respondent) [2017] UKSC 11 the Supreme Court found the rules compatible with Article 8 given the ability to grant leave where exceptional circumstances were established resulting in unjustifiably harsh consequences .The test was of proportionality - the reference to exceptional circumstances in the European case law means that in cases involving

precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test.

12. The appellant's bundle contains a statement from the appellant. He makes the point that the drugs offence occurred in 2003 albeit his conviction was not until 2007. He says he was deported from America in 2012. He said that when he made his application he told the respondent of his convictions. He said he is now rehabilitated. He referred to an updated letter from his wife's employer confirming she had been in employment since 2006. He also provided various P 60s.

13. There is also a statement from his sponsor. She said she met her husband in Jamaica and they began a relationship before he went to live in America. She then came to the United Kingdom from Jamaica. In 2009 they re-establish contact and their relationship began in 2012 when he moved back to Jamaica. They were married in Jamaica in 2014.

14. She states that whilst the employer's letter submitted was dated August 2015 her income is well over the required threshold. She says she worked for three agencies as a care worker. She explained the difficulties she had in obtaining documentation from her employer. She also refers to the public interest factors set out in section 117 B. There is also a letter from her dated 2 September 2015 to the British High Commission.

15. There is a letter from her employer dated 18 April 2017, Care Outlook, stating she started work on 20 March 2006. There is also a letter from My Home Care dated 27 April 2017 confirming she began working for them on 15 March 2006. There is also letter stating the appellant has been a full-time health care assistant from 2014.

Consideration

16. I remind myself that the issue in this appeal is whether there is a material error of law in the judge's decision. The issue is not whether I or another judge might have decided matters differently. It was accepted that the immigration rules were not met on two counts, the suitability and the financial evidence.

17. The judge noted that the appeal was a deemed human rights appeal and was not an appeal under the rules. It is trite to say article 8 is not a general dispensing power and the rules are the prism through which the proportionality of the decision is to be considered.

18. The judge set out the factual background which was undisputed. The competing arguments are set out. At para 29 the judge pondered whether there were compelling circumstances. The judge took into account the sponsor had a teenage son who was in contact with his father.

19. The judge concluded it was not reasonable in the circumstance to expect the sponsor to go to Jamaica. Against this, the judge pointed out when she chose to marry in full awareness of the appellant's background and the immigration difficulties this presented. The judge did not find compelling circumstances and pointed out there remained the option of a fresh application. Consequently, the judge found the decision was proportionate.

20. It was for the judge to consider the circumstances and to decide if the outcome was unjustifiably harsh. The judge's approach was correct and I do not find any material error of law established.

Decision.

No material error of law has been established in the decision of First-tier Tribunal Judge Aujla.Consequently that decision dismissing the appeal shall stand.

Francis J Farrelly

Deputy Upper Tribunal

Dated 01 October 2018