



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20124/2016

THE IMMIGRATION ACTS

Heard at Field House
On 26th July 2018

Decision & Reasons Promulgated
On 02nd August 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MRS AL HEONG WONG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pinder, Counsel, instructed by Concept Care Solutions Ltd
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Malaysian national who sought leave to remain on the basis of long residence and private and family life. That application was refused by the respondent on 10th August 2016.
2. Although it was accepted that the appellant had a genuine and subsisting relationship with her husband it was considered that she did not gain the benefit of Section EX.1 of Appendix FM as there were no insurmountable obstacles preventing the appellant and sponsor continuing their family life in Malaysia. Similarly, under paragraph 276ADE (1) it was considered there were no very significant obstacles to her returning to Malaysia.

3. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Green on 18th December 2017. The appellant was duly represented although the respondent was not.
4. In the determination dated 22nd December 2017 the appeal was dismissed.
5. Complaint is made in the grounds of challenge to that decision that the Judge had focused upon the returnability of the appellant and not upon whether there were insurmountable obstacles to her and her husband's family life continuing abroad. On that basis leave to appeal to the Upper Tribunal was granted.
6. Thus the matter comes before me to determine the issue as to whether there was a material error of law.
7. The Judge at paragraph 6 notes the witness statement of the sponsor. He was born in Hong Kong in 1967. His family came to the United Kingdom in 1979 when he was 11. Although he was granted the status of a British Dependent Territory Citizen (BDTC) he did not seek to obtain British nationality and although he has indefinite leave to remain in the United Kingdom his nationality remains unclear, indeed, it was suggested that he was stateless.
8. The sponsor's mother, brother and sister live in Manchester. They are all British citizens. He has two children and two grandchildren from his first marriage. They are also British citizens. He runs his own business in Edinburgh.
9. The Judge at paragraph 10 of his determination helpfully sets out the test to be applied in relation to "insurmountable obstacles". At paragraph 11 the Judge, however, focuses upon whether the appellant would face insurmountable obstacles in returning to Malaysia and concludes that she would not.
10. Complaint is made that the Judge did not, however, focus on the question whether family life could be continued in Malaysia and made little comment or findings upon the situation and circumstances as advanced by and on behalf of the sponsor.
11. Apart from commenting understandably as to the uncertainty of the sponsor's nationality, little is set out as to whether the difficulties which have been advanced by him are such as to entail very serious hardship for him were family life to be lived in Malaysia or elsewhere. This would be particularly so, given the length of his residence in the United Kingdom and his family connections thereto.
12. In fairness to the Judge, it is to be noted that, notwithstanding the nature of the terms of the refusal decision, little had been done to address those concerns in the statements of the appellant and sponsor and indeed in the skeleton argument as prepared on their behalf by their representative.
13. Nevertheless, it is right to note that such matters, which were raised as being obstacles to family life being enjoyed outside of the United Kingdom, were given very little specific consideration. It is in that context that the focus upon the appellant rather than

upon both, may well have failed to give the balanced consideration that was so important in determining that particular issue.

14. It is important in these matters that justice not only be done but seen to be done.
15. In the circumstances I find that the failure to evaluate the concerns as expressed by the sponsor amounted in the circumstances to a material error of law. In those circumstances the decision is set aside to be remade.
16. Following the nature and terms of the Senior President's Practice Direction a rehearing, involving, as it does, significant fact-finding, should be made in the First-tier Tribunal.
17. It will, however, be the responsibility of the appellant and the sponsor to address with clarity the issue of insurmountable obstacles, given the high threshold which that necessarily imports.
18. In those circumstances some evidence would be expected as to whether or not the sponsor could enter Hong Kong or Malaysia, if so, upon what basis of citizenship or nationality or status. If insurmountable obstacles are to be advanced in relation to the sponsor living elsewhere than in the United Kingdom, clear evidence needs to be set out as to what such circumstances would be.
19. Although the hearing had initially been conducted in Scotland it is the application of the appellants that it be dealt with in London as their representatives are there. They are content to make the journey to the hearing from Scotland. In those circumstances I indicated that the matter should be relisted before the First-tier Tribunal sitting in Taylor House. Other than that direction any further directions as to the future conduct of the case shall be a matter for the First-tier Tribunal.

Decision

This appeal before the Upper Tribunal succeeds to the extent that the First-tier Tribunal decision is set aside to be remade in the First-tier Tribunal in a de novo hearing.

No anonymity direction is made.

Signed



Date 30 July 2018

Upper Tribunal Judge King TD