



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34075/2015

THE IMMIGRATION ACTS

Heard at FIELD HOUSE
On 20th June 2018

Decision and Reasons Promulgated
On 29th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MISS ULETT BEVERLEY MCLEARY
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D. Balroop (Counsel)

For the Respondent: Ms A. Everett (Home Office Presenting Officer)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The appellant appeals against the decision of the First Tier Tribunal (Judge Chohan) (FtT) promulgated on 27th October 2017 in which the appellant's application for leave to remain on human rights grounds was dismissed having found that the appellant was not in a genuine and subsisting relationship.

Background

Factual

2. The appellant is a citizen of Jamaica. She entered the UK on 17.2.2002 as a visitor and her expired in August 2002 and she was granted leave as a student until 2005 and thereafter she has remained in the UK without lawful leave. In 2003 she entered into a relationship with her partner who was a citizen from Sierra Leone and they have remained together since. The appellant's partner is now a British citizen and has three

adult children settled in the UK, and he has health issues including diabetes for which he requires treatment.

Procedural

3. There was a previous appeal in 2016 in which the Tribunal (FTJ Broe) found that the appellant was in a genuine and subsisting relationship but that there were no insurmountable obstacles to family life in Jamaica. The Upper Tribunal (DUTJ Symes) found an error in law and remitted the matter for rehearing before the FTT. Somewhat oddly no facts were preserved despite the DUTJ acknowledging that the FTT found "The appellant's relationship with Mr Kumara was plainly genuine and subsisting" [10]. Further the DUTJ clearly had in mind that the FTT failed also to take into account that the partner's child was a qualifying child at the date of hearing to apply section 117B(6) 2002 Act. He concluded that the relevant issue to be determined was insurmountable obstacles.

Grounds of appeal

3. In grounds of appeal the appellant argued that the FtT erred by failing to rely on relevant evidence and relying instead on irrelevant considerations in concluding that there was no genuine and subsisting relationship. Specifically, the FtT found inconsistency between the evidence of the appellant who said she had no family in Jamaica, and her partner who said he had visited her mother in Jamaica. It was accepted that at its highest this amounted to an embellishment on the part of the appellant. The FtT also placed weight on the fact that the appellant's partner referred to her by her surname.

Permission to appeal

4. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ Shimmin on 9.4.2018 on all grounds.

Submissions

5. At the hearing before me Mr Balroop argued that the appellant had been placed in a difficult situation by two Tribunal making contradictory decisions as to whether or not she was in a genuine and subsisting relationship. The FtT erred by placing too much weight on the fact that they were not married [10] and this finding had infected the rest of the determination. There was evidence of letters of support from family and friends. The FtT failed to take into account the difficulties for overstayers to evidence residence in finding evidence of cohabitation lacking. There was documentary evidence to show that the parties lived at the same addresses and some limited evidence for utilities in joint names. The appellant had been mother figure to the partner's children who were now adults. One child aged 19 years still remained living at home. The partner had given evidence that he had visited Jamaica to see the appellant's mother and sister which was evidence in support of the genuineness of the relationship.
6. Ms Everett acknowledged that the findings made by the first Tribunal in 2016 and as endorsed by the UT could have had an impact on the way in which the appellant had approached this hearing before the FtT, i.e focusing only the insurmountable obstacles issue. However, that said the FtT's findings were somewhat odd. In particular the FtT placed weight on the fact that the parties had not married, which it was conceded was

not a relevant consideration. Nevertheless Ms Everett took the view that the appellant had not shown that there were insurmountable obstacles.

7. Mr Balroop expanded on grounds of appeal as to the genuine and subsisting relationship points. He further contended that the appellant's partner could not go to Jamaica. He was a British citizen and originated from Sierra Leone. All his family were in the UK one of whom was aged 19 years and still lived at home.

Discussion and conclusion

8. I decided that the FtT decision could not stand as there were material errors in law. The FtT placed weight on matters that were not relevant such as the fact that the parties were not married and that Mr Kamara referred to the appellant by her surname. The FtT further found the lack of reference to Mr Kamara in any of the correspondence as a relevant factor [12]. This finding is not correct as reference is made to him in the earlier correspondence from family members. I accept Mr Balroop's submission that the finding of inconsistencies about the existence of family in Jamaica taken together with the FtT's findings on irrelevant matters, were not capable of sustaining the conclusion that the parties were not in a genuine and subsisting relationship, when considered in the round together with all of the evidence that was available to the FtT.
9. There is a material error of law in the decision which shall be set aside. I considered whether to remit the appeal for yet another hearing before the FTT and decided that having regard to the overriding interest it was fair and just to proceed to remake the decision having regard to the evidence before me. I found there was sufficient evidence to show a genuine and subsisting relationship. I heard submissions from the representatives on the issue of insurmountable obstacles.
10. I find that there was evidence before the FtT that the appellant is in a genuine and subsisting relationship with Mr Kamara. Both gave oral evidence to that effect with out major inconsistency or discrepancy. I am prepared to accept that the appellant may well have sought to minimise any family relations in Jamaica but that does not cause me to make any adverse credibility finding as to all of her evidence. The evidence from Mr Kamara was that he had visited her mother in Jamaica and can be taken as additional confirmation of their genuine and subsisting relationship. There are letters dated 27.3.2012 and 26.9.17 from Mr Kamara's children confirming that the appellant was a mother figure to them and her close involvement with the family, and documentary evidence that shows that the parties lived at the same addresses covering a period from 2008 -2012 and more recent years, together with photographs showing different occasions. Also of relevance in my view is the failure on the part of the respondent to give any reasons in the refusal letter in support of the decision that there was no genuine relationship. I conclude that having regard to the burden of proof, the appellant has established that she is in a genuine and subsisting relationship.

Re making

10. I heard submissions on the issue of insurmountable obstacles to family life continuing in Jamaica. I consider the evidence of what amounts to very significant difficulties and very serious hardship for the appellant and her partner. I conclude that the appellant had met that threshold for the following reasons. The appellant's partner is a British

Citizen after naturalisation following his grant of refugee status. The appellant has lived in the UK for 16 years albeit unlawfully for the main and during that time she has established family life with her partner and his four children, all of whom are now adults and one is 19 years of age and she remains living at home. I place weight on the length of residence and strength of family relationship. The appellant became mother to the children just after they had moved to the UK from Sierra Leone in 2009 and they were granted entry clearance under family reunion and which has strengthened the relationships formed. I find that the appellant has taken on a role to care for and provide emotional support for the extended family including her grandchildren. The appellant who is coming up to 60 years of age and her partner are not of an age where they would be able to easily re-establish and resettle in a new country. Mr Kamara has significant health issues for which he is entitled to receive treatment in the UK as a British citizen. He has stated that he would not leave the UK and so the relationship would come to an end. The appellant and Mr Kamara would be separated from each other and their whole family and the difficulties in finding accommodation, employment in a new country for Mr Kamara would amount to insurmountable obstacles to family life (EX1). Mr Kamara is a British citizen who owns his property and works as a mental health nurse and has supported his children financially. His citizenship is a factor that carries great weight together with the length of residence in the UK and his present need for medical treatment (MA (Pakistan) & ors [2016]EWCA Civ 705). At the time the appellant made this application there was very strong evidence of insurmountable obstacles in that she was mother to two minor children settled in the UK, although I accept that now both children are adults.

11. I have concluded that the Immigration Rules are met, and I go on to consider Article 8 and conclude that family and private lives are engaged and for the same reasons as found, there are compelling reasons to justify the consideration of Article 8 outside of the rules. I take into account the delay in the proceedings as a relevant factor and which has impacted on the appellant negatively. At the first hearing the FTT erred in failing to consider that the child, with whom it was accepted the appellant had a parental relationship, was a qualifying child and section 117B(6) was applicable. The respondent failed to provide any reason for why she found there was no genuine and subsisting family life in the original refusal letter. I do take into account that the relationships were formed at a time when the appellant's position was precarious. The appellant has had no recourse to public funds and she speaks English. However, having regard to all the circumstances and the public interest under section 117B I am satisfied that the interests of the appellant and her partner and family outweigh the public interest.

Decision

12. I allow the appeal.

Signed

Date 25.6.2018

GA Black

Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER
NO FEE AWARD

Signed

Date 25.6.2018

GA Black
Deputy Judge of the Upper Tribunal