Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10586/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 March 2019	**On 11 March 2019**

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr BRIAN [P]
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp, Counsel (Pro Bono)
For the Respondent: Ms A Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal was granted by First-tier Tribunal Gibb on 27 November 2018 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by First-tier Tribunal Judge Graham in a decision and reasons promulgated on 5 September 2018.

2. The Appellant is a national of the United States of America, married to Mr Benjamin [P] ("Mr [P]"), a British Citizen. The Appellant had entered the United Kingdom as a visitor on 14 November 2014. He had applied for leave to remain on human rights grounds on 5 May 2015. His appeal against the Secretary of State for the Home Department's refusal was dismissed on 25 January 2016 and the Appellant became appeal rights exhausted on 13 August 2016. The Appellant's subsequent human rights application was refused by the Respondent on 7 September 2017.

3. The Secretary of State for the Home Department accepted that the Appellant's marital relationship was genuine and subsisting, however the Eligibility requirement of Appendix FM was not met because the Appellant had no leave at the date of his application. As to whether paragraph EX.1 of Appendix FM applied, the Secretary of State was not satisfied that there were no insurmountable obstacles to the continuation of the couple's family life in the United Kingdom or for the Appellant to return to the USA to seek entry clearance to the United Kingdom from there. There were no compelling reasons to grant the Article 8 ECHR application.

4. Judge Graham considered that paragraph EX.1 of Appendix FM of the Immigration Rules was not satisfied. The judge considered that there would be ways around the 10 year travel ban imposed by the USA on Mr [P] because Mr [P] had overstayed his visa there. The judge considered that the evidence of the Appellant's depression (which she accepted) might assist in overturning the ban. This would mean that family life could be continued in the USA. It might also be possible for family life to be lived in a third country, e.g., Canada. Or the Appellant could return to the USA and seek entry clearance to the United Kingdom. The judge considered that temporary separation would not have serious effects, in part because Mr [P] was able to work full time. Mr [P]'s earnings were sufficient to meet the financial requirements of Appendix FM. The fact that the Appellant was caring for Mr [P]'s father was not shown to be an exceptional circumstance, as he was living alone.

5. The Appellant had previously not been represented so Judge Gibb examined the Article 8 ECHR decision with particular care. Judge Gibb considered that it was arguable that the Article 8 ECHR proportionality evaluation had not been conducted adequately outside the Immigration Rules as there was no balancing exercise, the "insurmountable obstacles" test had not been adequately conducted and

there had been consideration of irrelevant factors, the "Canada" point.

6. A rule 24 notice had been filed by the Respondent, opposing the appeal, but Ms Holmes reviewed that in the light of the comprehensive skeleton argument served by Mr Fripp who had agreed to appear for the Appellant *pro bono*. Ms Holmes indicated that it was now accepted that the arguable errors of law identified by Judge Gibb existed and were material, of which the most significant was the inadequate consideration of paragraph EX.1 of Appendix FM of the Immigration Rules. The reality was that the 10 year travel ban was an insurmountable obstacle for the continuation of family life in the USA, before the position of Mr [P]'s father was considered.

7. It was accordingly agreed by the consent of both parties that the decision and reasons had be set aside for material error of law. It was further agreed that the appeal could be redecided immediately by the Upper Tribunal, as there had been no credibility issues as such and no challenge to the essential findings of fact.

8. The submissions took the form of a dialogue with the tribunal. Mr Fripp had submitted a comprehensive skeleton argument in which he indicated that a summary rehearing was appropriate.

9. It is not clear why the judge made any reference to Canada or some other third country as a possible place for the continuation of family life, either on an interim basis or permanently. There was simply no evidence to show that this was possible or viable, and there was no consideration of any of the somewhat obvious practical difficulties which such an upheaval would involve for a couple currently dependant on the income of one partner. This no doubt inadvertent reference had the effect of throwing other elements of the judge's approach into doubt.

10. As Judge Gibb identified when granting permission to appeal, the test of "insurmountable obstacles" in paragraph EX.1 of Appendix FM of the Immigration Rules is one of fact. The reality at the date of the appeal hearing was that Mr [P] was the subject of a 10 year travel ban to the USA. There was no evidence that it had arisen from more than an overstay which had resulted from a misunderstanding by Mr [P] of the terms of his visa, not from any deliberate act. The evidence before the tribunal was that setting aside the ban *might* be possible, but that it would be costly. By necessary implication, the process

would take time, and like all litigation, a successful outcome could not be guaranteed. Ms Holmes accepted that the ban amounted to very significant difficulties to the continuation of family life in the USA, before the question of the care of Mr [P]'s father arose. Thus paragraph EX.1 was met and the tribunal so finds.

11. On its face the Appellant could return to the USA to seek entry clearance to the United Kingdom, but that is not required where paragraph EX.1 is met, because EX.1 indicates the United Kingdom's margin of appreciation for Article 8 ECHR purposes, and indicates that a refusal in those circumstances would be disproportionate and thus a breach of section 6 of the Human Rights Act 1998.

12. As the financial requirements of Appendix FM were found by the judge to have been met, there is in any event no appreciable public interest in requiring the Appellant to leave the United Kingdom merely to seek entry clearance, particularly as he has made every effort to regularise his stay. Perhaps equally if not more importantly, the Appellant has been diagnosed with depression (accepted by the judge) and the impact of an unknown period of separation from his partner is a further reason not to expect such a separation, as it would be disproportionate.

13. Thus it was accepted that there could only be one outcome following the summary rehearing, i.e., that the appeal must be allowed. This the tribunal stated at the hearing.

DECISION

The onwards appeal to the Upper Tribunal is allowed.

There were material errors of law in the First-tier Tribunal's decision and reasons, which is accordingly set aside.

Following a summary rehearing, the original decision was remade.

The original appeal is allowed.

Signed **Dated** 5 March 2019

Deputy Upper Tribunal Judge Manuell