



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/43010/2014

THE IMMIGRATION ACTS

Heard at Field House
On 23rd September 2015

Decision & Reasons Promulgated
On 23rd December 2015

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MRS MARYCLARE NAFULA MURAMARA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Gillard, Visa Inn
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Cheales dismissing an appeal by the Appellant against a refusal to vary leave and a decision to remove her. The appeal was dismissed under the Immigration Rules and on human rights grounds under Article 8.
2. The Appellant was born on 12th September 1968 and is a national of Kenya. She has been living in the UK since February 2006. She arrived with leave as a student and

this leave was renewed until August 2014. She then applied to remain on the grounds of private life.

3. The Appellant did not appear before the First-tier Tribunal to give evidence. On the morning of the hearing a letter from the Appellant's representatives was placed before the judge stating that the Appellant was no longer seeking an oral hearing. Nevertheless, presumably on the basis that the appeal was already listed, the hearing went ahead with the Respondent represented. Along with the letter submitted on the day of the hearing were two witness statements, a skeleton argument and photographs.
4. The position of the Appellant is that whilst studying for a postgraduate diploma she met Mr Michael Sunday Ahmadu, who is a British citizen. The couple spent every weekend together and hoped to marry. The reason they had not married so far was that they were waiting for the Appellant's passport to be returned with the grant of a visa.
5. In her decision the Judge of the First-tier Tribunal noted that the Appellant could not meet the private life requirements of paragraph 276ADE of the Immigration Rules. The judge further noted that the Appellant has two children in Kenya from a previous marriage, as well as her mother and siblings. She had come to the UK for the temporary purpose of study without expectation that she would be able to make her home here.
6. The judge then made further observations at paragraphs 12 and 13 of her decision. She pointed out that the application for variation of leave was made on the basis of private life only. No information was given on the application form with regard to a partner and the section of the form relating to this had "not applicable" written across it. The form was signed on 10th August 2014 with a declaration of truth. The judge expressed surprise that the Appellant now stated that she had been engaged to be married since January 2014. This damaged the Appellant's credibility.
7. The judge continued that no notice had been given to the Respondent that the Appellant had a partner and there was no explanation as to why she had not mentioned this in her application or at some earlier date. The judge then stated: "There is no evidence of a genuine and subsisting marriage". The judge found there was no apparent reason why the Appellant could not return to Kenya with her partner.
8. In relation to Article 8 the judge referred to the case of Nagre [2013] EWHC 720 (Admin) to support the proposition that where the Appellant did not satisfy paragraph 276ADE it was necessary to consider Article 8 only if there was "a good arguable case" for a grant of leave under Article 8. The judge concluded that there was not a good arguable case and she would therefore not be considering Article 8.
9. Permission to appeal was granted on the basis that the judge had arguably misdirected herself (a) by not considering Article 8 outside the Immigration Rules, and (b) not having regard to Section 117B of the Nationality, Immigration and Asylum Act 2002, as inserted by Immigration Act 2014.

Submissions

10. At the hearing before me, Mr Gillard acknowledged on behalf of the Appellant that the couple were unable to rely on Appendix FM because they were not married and had not been cohabiting for two years. There was sufficient evidence of a relationship and a good arguable case for consideration under Article 8 outside the Rules. In relation to Section 117B, Mr Bramble referred to the cases of AM (s117B) Malawi [2015] UKUT 0260 on when a person's immigration status was precarious and Dube (ss.117A-117D) [2015] UKUT 00090 on the regard to be given to the factors set out in Section 117B. Mr Bramble submitted that there was an error of law on the basis that having regard to the evidence of the relationship between the Appellant and her fiancé, there was a need for consideration under Article 8 and Section 117B.
11. For the Respondent, Mr Bramble submitted that the first issue was whether the judge had erred by failing to consider Article 8 on a stand alone basis. Mr Bramble referred to paragraphs 12 and 13 of the decision. He pointed out that the judge did not have the benefit of hearing the Appellant or her fiancé giving evidence. When the application for a variation was made in August 2014 the section on partners was crossed out and marked as "not applicable". Consequently the judge had concerns about credibility. It might be the case that the section of the application form for a partner was not completed because the Appellant could not succeed under Appendix FM but Mr Bramble questioned whether there was any explanation in relation to this before the judge. He pointed out that the application of August 2014 was made on the basis of private life only.
12. Mr Bramble acknowledged that at paragraph 13 of the decision the judge referred to there being no evidence of a genuine and subsisting marriage. The word "marriage" was clearly incorrect and the word should have been "relationship". No specific considerations were raised on behalf of the Appellant that had not been taken into account by the judge and there was no necessity for the judge to have considered the application under Article 8 outside the Rules.

Discussion

13. I have sympathy for the position of the judge. Only on the day of the hearing was she notified that the parties were no longer seeking an oral hearing and would not be attending the hearing before her. Clearly as the appeal was already listed and the Respondent had been notified of the hearing and was represented, the proper course was for the hearing to proceed. Nevertheless, the task for the judge was not made any easier by this last minute notification by the Appellant that she would not be attending.
14. Furthermore, the hearing before the First-tier Tribunal was in February 2015 and the judge therefore did not have the benefit of the decision of the Court of Appeal in SS (Congo) [2015] EWCA Civ 387. This case makes it clear, in accordance with MM (Lebanon) [2014] EWCA Civ 985 that there is no intermediate test to be satisfied as to whether the Appellant has a good arguable case before an appeal can be considered outside the Rules. In order to succeed outside the Rules the Appellant would have to

show compelling circumstances existed which were not sufficiently recognised under the Rules.

15. Mr Bramble's submission was that even if the Judge of the First-tier Tribunal had misdirected herself on this point, there were no compelling circumstances which were not considered by the judge and which could have led to the appeal being allowed under Article 8. On the face of it this is a strong argument. I am, however, troubled by the statement of the judge at paragraph 13 of the decision that there was "no evidence of a genuine and subsisting marriage". As Mr Bramble pointed out, the word marriage is clearly an error and the judge should have used the word "relationship". I do not think this in itself is necessarily a material error. I am more concerned about the use of the phrase "no evidence". In fact the judge did have quite a considerable amount of evidence before her about the relationship between the Appellant and her fiancé. This comprised witness statements from each of them and photographs. What the judge may have intended to say was not that there was "no evidence" but that she did not accept this evidence as credible. This is, however, a different matter.
16. I note that at paragraph 12 the judge referred to the Appellant's credibility as being damaged because the Appellant had not put in her application form that she had a partner. She had crossed this section out and written "not applicable" across it. For the Respondent, Mr Bramble very fairly acknowledged that there was a possibility that this was done because the Appellant was aware that she could not succeed under the provisions of Appendix FM relating to partners. He pointed out, however, that this possible explanation was not before the judge.
17. Nevertheless it seems that on the basis of the Appellant having crossed out the section in the application form relating to partners the judge rejected entirely all the evidence before her in respect of the Appellant and her fiancé, and, indeed, the relationship the Appellant claimed to have with her fiancé's children. The only meaning which can be attributed to the use by the judge of the words "no evidence of a genuine and subsisting marriage" in paragraph 13 of the decision is that the judge did not believe at all that the Appellant and her fiancé were in any relationship.
18. I am not satisfied that the judge has given adequate reasons for making a finding to this effect. The judge has rejected in its entirety all of the Appellant's evidence about her relationship with her fiancé and has done so on the basis of how the application form was completed, which as Mr Bramble very properly acknowledged, was capable of bearing an explanation which would not damage the Appellant's credibility.
19. As I have already indicated, I have sympathy with the position in which the judge found herself on the day of the hearing but at the same time she did not give adequate reasons for rejecting the credibility of the Appellant's evidence about her relationship with her fiancé. I am satisfied this amounts to an error of law.
20. I accept that this is not the error of law which was argued before me by Mr Gillard. There is a connection, however, with the arguments which Mr Gillard put to me. If

the judge had made a proper finding to the effect that there was no relationship between the Appellant and her fiancé then, indeed, the judge would not have been required to consider Article 8 outside the Rules. There would have been an insufficient evidential basis to show that an assessment under Article 8 was required. Where, however, the judge made a finding that there was no relationship but did not give adequate reasons for this, then in consequence her finding that there was no need to consider Article 8 outside the Rules must also be mistaken as it was based on the earlier error as to whether there was evidence of a relationship. Had the judge properly approached the question of the existence of a relationship between the Appellant and her fiancé, and found that there was a relationship, then it would have been proper to proceed to consider Article 8 outside the Rules.

21. In view of the judge's error the proper course is to set aside her decision and remit the appeal for hearing before a differently constituted First-tier Tribunal. It does not follow from this that the Appellant will succeed, either under the Immigration Rules or under Article 8, but proper findings should be made as a basis for any decision on the extent of the Appellant's Article 8 rights.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remit the appeal to the First-tier Tribunal to be heard afresh before a judge other than Judge Cheales.

Anonymity

The First-tier Tribunal did not make an order for anonymity. I have not been asked to make such an order and I see no reasons of substance for doing so.

Signed

Date

Upper Tribunal Judge Deans