IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/05463/2013

THE IMMIGRATION ACTS

Heard at Belfast	**Decision & Reasons Promulgated**
On 25 June 2015	**On 8 September 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR WALID HAMDI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P McNally Counsel instructed by Elliott-Trainor Partnership
For the Respondent: Mr M Matthews, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Tunisia born on 5 October 1983. On 6 November 2012 he made an application for a family permit as the spouse of an EEA national exercising Treaty rights. The application was refused in a decision dated 26 November 2012.

2. His appeal against that decision came before First-tier Tribunal Judge Fox on 16 June 2014 whereby the appeal was dismissed. The appeal before the First-tier Tribunal proceeded on Article 8 grounds only.

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3. Permission to appeal against that decision was granted by a Judge of the Upper Tribunal on limited grounds. Thus, the appeal comes before me.

The decision of the First-tier Tribunal

4. Having recorded the concession that the appellant was not able to succeed under Regulation 12 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") the First-tier Judge noted that no application had been made by the appellant for admission under the Immigration Rules as a spouse. There was no explanation for him as to why such an application was not or could not have been made.

5. Judge Fox noted that there was no issue as to the fact of the marriage between the appellant and the sponsor, Mrs Beattie-Hamdi (they having married on 31 December 2010).

6. Consideration was given by Judge Fox to the best interests of the sponsor's daughter, C, who was then aged 11 years. He noted that C's father no longer lives with the sponsor and although there was evidence from the sponsor that he has regular contact with her, there was no evidence of any court orders prohibiting the child's travel out of the United Kingdom. Similarly, he concluded that there was no evidence of any animosity between the child's parents that could interfere with any travel plans i.e. in terms of C travelling to Tunisia. It was noted that C had travelled to Tunisia in the past with the sponsor. C's best interests were found to be in remaining with the sponsor who appeared to be the primary carer.

7. Importantly, for the purposes of the appeal before me, he concluded that there was no evidence from C's father indicating any objection to his daughter moving to Tunisia, or elsewhere. It was concluded that there was no evidence that would suggest that there are difficulties "insurmountable or otherwise" that would prevent C returning to the UK to visit her father if she were to relocate to Tunisia with the appellant and her mother.

8. At [17] there is reference to the sponsor's health, although it was concluded that her medical conditions had not prevented her from travelling abroad, having visited the appellant in Tunisia on a number of occasions and resided with him there for reasonable periods of time. On one occasion in Tunisia she had to go to hospital and he assisted her with that. There was no evidence before the First-tier Judge to the effect that the medical facilities there would not be available to the appellant's wife should they be required. The medication that she requires, according to background information, was all available to her in Tunisia.

9. At [19] it was concluded that the appellant and C had been able to live in Tunisia on the occasion of their visits "and to get by". Reference is made to the apparent lack of effort on behalf of the appellant and the sponsor to

have considered where they would enjoy their family life, suggesting that they were happy with the *status quo* at that time.

10. There was an analysis of the extent to which C would be able to live in Tunisia, attend school there and maintain contact with friends in the UK.

11. At [21] it was found that the appellant would probably have to have recourse to public funds if he were admitted to the UK, the sponsor being in receipt of state benefits and there being no suggestion of any possibility of employment for either of them in the near future.

12. It was concluded that the respondent's decision was a proportionate response to the legitimate aim of maintaining immigration control.

The grounds and submissions

13. The grounds of appeal assert firstly that insufficient weight had been given to C's life in the UK, including the relationship with her biological father, family and friends. Similarly, it is asserted that insufficient weight had been given to the fact that C does not speak the primary language of Tunisia and has never lived in the country except for on holidays.

14. The second ground of appeal asserts that the judge had failed to take into account evidence that the child's father objected to C moving permanently to Tunisia with the sponsor. It is said that the sponsor gave oral evidence which was not refuted or challenged at the hearing, to the effect that C's father would not allow her to move to Tunisia permanently.

15. A separate part of the second ground was an alleged failure by the judge to consider the evidence from the sponsor's mother that she would support the appellant so that he does not have recourse to public funds.

16. As already indicated, permission to appeal was granted only in relation to the second of the grounds. That is to say, in terms of evidence apparently given that C's father would not allow C to leave the country. Mr McNally, although referring to his own notes of evidence at the hearing before the First-tier Tribunal and the notes taken by his instructing solicitor's representative at that hearing having also been checked, he was unable to put before me anything to establish that the evidence said to have been given by the sponsor at the hearing was in fact given. Mr Matthews did not have available to him any notes of evidence taken by the Presenting Officer at the time. The First-tier Judge's Record of Proceedings do not illuminate matters in this respect either.

17. Mr McNally submitted that regardless of the fact that no application was made under the Immigration Rules, the Article 8 ground was before the First-tier Tribunal and it needed to be considered. It was submitted that there is evidence to the effect that C's father takes his responsibilities towards her seriously, in terms of maintenance payments (reference being made to page 34 of the appellant's bundle). Not allowing the appellant to enter the UK would affect her relationship with her father. It was

conceded however, that there was no written evidence from C's father in terms of his unwillingness to let her leave the country.

18. Under the Immigration Rules, in particular Appendix FM, applying EX.1, there are insurmountable obstacles to family life between the appellant and the sponsor outside the UK. Because the sponsor is on benefits it is difficult for her to travel to Tunisia to be with the appellant. Similarly, there are difficulties for C moving to Tunisia, given her age.

19. Mr Matthews submitted that on the basis on which permission to appeal was granted, the appeal must fail. There is no evidence to support what is said about the evidence given at the hearing about C's father not being willing to allow her to leave the country to live in Tunisia. At [15] the judge had said that there was no evidence in terms of any court orders prohibiting the child's travel out of the United Kingdom. Similarly, it was noted that there was no evidence of any animosity between C's parents that could interfere with any travel plans considered for her. On the contrary, C had been allowed to travel to Tunisia with her mother. It was again noted that there was no evidence before him from the father indicating any objection to his daughter moving to Tunisia.

Conclusions

20. I deal with the appeal before me on the basis of the grounds on which permission to appeal was granted. That is ground 2 only. This ground, as previously indicated consists of two parts, the first relating to evidence apparently to the effect that the father of C would not allow her to move to Tunisia permanently. However, the fact is that there is nothing to support that assertion made in the grounds. On behalf of the appellant I was not directed to any note of evidence taken at the hearing of the First-tier Tribunal which reveals that any such evidence was given. Certainly, there is no written evidence from C's father indicating that he would not allow her to leave the country permanently. Although Mr McNally explained that there is in fact animosity between the sponsor and her ex-husband, this is a matter that could have been the subject of evidence in the form of a witness statement, including any notes of communications between the appellant's representatives and C's father. Although I was referred to the sponsor's witness statement which suggests that she was the victim of domestic violence at the hands of C's father, and the appellant's skeleton argument at [13] suggested that C's father may try to prevent the sponsor taking her to Tunisia, there is no support for the proposition that he has or would object to such a move.

21. At [15] of the determination Judge Fox was clear in stating that there was no evidence from C's father indicating any objection to his daughter moving to Tunisia or elsewhere. There is no basis from which his finding in that respect can be undermined.

22. The other aspect of ground 2 is to the effect that the judge had failed to consider the evidence that the sponsor's mother would support the

appellant so that he would not have to have recourse to public funds. However, in my judgement the judge was entitled to conclude that with there being little prospect of any employment either for the appellant or the sponsor who is in receipt of state benefits, the probability was that he would have recourse to public funds in the absence of employment for himself or the sponsor if admitted to the UK.

23. The source of the evidence in terms of 'third party support' appears to come from a letter at page 52 of the appellant's bundle from the sponsor's mother. It states that she could provide for the appellant as she has no mortgage and her house is bought outright. It states that she works full-time and that she could help out the appellant and her daughter at any time. However, although Judge Fox did not refer to this evidence directly, it does not appear that the sponsor's mother attended to give evidence before the First-tier Tribunal. Furthermore, there is no detail as to what her income is or what her financial commitments are. In terms of evidence of her ability to provide support to the appellant and the sponsor, it could not have carried much weight at all.

24. Furthermore, under the Article 8 Immigration Rules, third party support is not permitted. Thus, in terms of the Article 8 assessment, the fact that the appellant would not in this respect be able to meet the requirements of the Immigration Rules was a relevant matter.

25. Although it was submitted before me on behalf of the appellant that in terms of paragraph EX.1 of the rules the appellant would be able to succeed, this is not a matter on which permission to appeal was sought, namely the suggestion that the appellant was able to meet the requirements of the Immigration Rules.

26. Furthermore, Section EX relates to exceptions to certain eligibility requirements for leave to remain as a partner or parent, not leave to enter. In addition, under Section EC-P.1.1.(b) a valid application for entry clearance as a partner must have been made. That was not done, a matter referred to in general terms by the First-tier Judge.

27. Although not advanced in argument on behalf of the appellant, I have considered the point made in the grant of permission in terms of whether the First-tier Judge considered whether Article 8 would be breached if the sponsor and her daughter remained in the UK. On a careful examination of the determination it seems to me that Judge Fox did consider this issue. At [19] he stated that it appears that no consideration had been given between the appellant and his wife as to where they might plan to reside. He noted that they met in September 2010 and married in December 2010 but the application under the EEA Regulations was not made until 2012. He pointed out that Article 8 does not provide a basis for choosing where to enjoy and exercise one's right to family life. He went on to state that:

> "If the Appellant and his wife had given any consideration to this aspect, the lack of endeavour to find a resolution suggests that they were happy with this situation as it existed then and presumably now."

28. At [20] he stated that there would be no compulsion for the appellant and her child to go to Tunisia. I do not consider that it could realistically be said that the First-tier Judge failed to consider the question of whether there would be a breach of Article 8 by the appellant and C remaining in the UK with the sponsor remaining in Tunisia, which is how they have conducted their relationship up until now. Whilst it is true that a fuller articulation of that aspect of Article 8 would have been beneficial, I do not consider that there is any error of law in this respect.

29. Even if it could be said that the judge erred in law in that regard, again noting however that the point was not advanced on behalf of the appellant in the grounds or in submissions before me, I am not satisfied that it is an error of law that is material to the outcome of the appeal. The judge took into account the best interests of C, which would be unaffected by her remaining in the UK because she would remain with her mother, her primary carer. The appellant is unable to meet the requirements of the Immigration Rules, in respect of which no application has been made. The judge took into account the public interest in the economic wellbeing of the country expressed through the maintenance of an effective immigration control. I cannot see that the outcome of the appeal, even accepting that there was an error of law in terms of Article 8, could have been any different.

30. Accordingly, the decision of the First-tier Tribunal to dismiss the appeal must stand.

Decision

31. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Signed Date

Upper Tribunal Judge Kopieczek