



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/03653/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 10 March 2016**

**Decision &
Promulgated
On 19 April 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**MADEEHA MINTY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr I Graham, Counsel instructed by UK Immigration SVS

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Thanki) allowing an appeal by the applicant against a decision made on 12 January 2015 refusing her further leave to remain on

the basis of her relationship with her partner. The appeal was allowed both under the immigration rules and under article 8.

Background

2. The appellant is a citizen of South Africa born on 17 May 1992. She left South Africa when she was 2 years old with her parents and sister and moved to Dubai where she continued to live until coming to the UK as a student on 10 September 2011 with valid leave to remain until 7 November 2014. She began her studies at Kingston University where she met her current partner, a British national. On 7 November 2014 she applied for further leave to remain on the basis of that relationship. In the decision letter dated 12 January 2015 the respondent accepted that there was a genuine and subsisting relationship but she was not satisfied that the appellant was able to meet the requirements of para EX.1 of Appendix FM as there was no evidence to suggest there were any insurmountable obstacles preventing her from continuing her relationship in South Africa. As the respondent was not satisfied that para EX.1 applied she did not meet the requirements of R-LTRP1.1(d). The application was refused accordingly.
3. In the grounds of appeal it is argued that the respondent's decision did not take into account the full circumstances of the appellant. She had moved from South Africa to Dubai when she was 2 years old and with or without her British partner she would face insurmountable obstacles integrating into life there. She was an atheist and her parents were practising Muslims. They would not accept her relationship with her British partner and she would not be able to return to Dubai.

The Hearing before the First-tier Tribunal

4. At the hearing before the First-tier Tribunal the judge heard oral evidence from the appellant, her partner and her partner's mother. The judge clearly accepted that there was a genuine relationship between the appellant and her partner and indeed this was not in dispute. He commented that as to Appendix FM the respondent had found that there were no insurmountable obstacles for the appellant and her partner relocating to South Africa, the country of the appellant's nationality, but he said that this was clearly not appropriate in the particular circumstances of this appeal as the appellant was for all intents and purposes one who belonged to Dubai where she had lived almost all her life [52]. The judge went on to say:

“53. Under Appendix FM and paragraph 276ADE the sole issue is whether there are significant obstacles for the appellant and her [partner] to live abroad. I have no evidence before me as to any difficulties in South Africa except the appellant's statement explains that she has no contact with South Africa and the only family she is aware of is her father's family with who she has sparse contact. I find that the appellant if returned to South Africa would do so as a complete

stranger. She speaks English and Arabic and no other language. She has spent almost all her life in a modern City State and is used to the life in Dubai. I accept that there would be difficulties for her to relocate to South Africa.”

5. The judge went on to consider the position in Dubai taking note in particular of the fact that the appellant said that she was an atheist and her non-belief in Islam was a source of major conflict with her father. The judge said that he formed the impression that the appellant was a modern westernised young woman and that it was more likely than not that she had renounced her religion and that this had placed her in conflict with her father. He accepted her evidence that when her father visited in 2014 he was deeply upset about his daughter cohabiting with a man without being married. In summary, the judge accepted that the appellant and her partner would face insurmountable obstacles if they were to be residents in Dubai. He then went on to consider the position under article 8 and, when assessing proportionality, said that it was clear to him that the appellant and her partner would have significant difficulties settling in Dubai where they would not have parental love, affection or support and as single people living together would not be tolerated. Accordingly the appeal was allowed on both immigration and article 8 grounds.
6. In the grounds the respondent argued that the judge erred by failing to consider whether the appellant could return to her country of origin. The appellant would be able to return to South Africa but the judge had failed to consider this matter fully although he had concluded that there “would be difficulties” with relocation. There had been no sustainable finding that there would be insurmountable obstacles to relocation in South Africa.
7. In her submissions Ms Isherwood relied on the grounds, arguing that the appellant who had leave to enter as a student could have no legitimate expectation of remaining save in so far as she could meet the requirements of the rules. The First-tier Tribunal had erred in law by failing to give proper consideration to whether the appellant and her partner could relocate to South Africa.
8. Mr Graham submitted that if the judge had erred by failing to consider South Africa that error would not be material to the outcome of the appeal. The judge had accepted that there would be difficulties there. He had gone on to consider the position under article 8 and reached findings which were properly open to him. He argued that for the appellant to be returned to South Africa would in her circumstances be more akin to exile (relying on a phrase used by Sedley LJ in B v Secretary of State [2000] Imm AR 478 in the context of deportation of a foreign criminal). He indicated that he would also wish to rely on further evidence about the situation in South Africa and in particular a UNHCR Report on attacks on foreigners in South Africa exposing refugee women to new dangers.

Assessment of whether the First-tier Tribunal erred in law

9. The issue for me at this stage of the hearing is whether the judge erred in law such that his decision should be set aside. It is clear that when considering insurmountable obstacles within the provisions of EX.1 the judge took the view that these should be considered only in respect of Dubai and that it was not appropriate to consider South Africa.

10. However there is no such restriction in para EX.1 which provides that:

“(b) The applicant has a genuine and subsisting relationship with a partner who is in the UK... and there are insurmountable obstacles to family life with that partner continuing outside the UK.”

When considering whether there are insurmountable obstacles continuing outside the UK, there is no requirement to choose one of a number of potential locations as the most appropriate or to exclude a possible location as inappropriate without properly considering whether there would be insurmountable obstacles as defined in the rules.

11. It follows that the judge was wrong not to consider relocation to South Africa not least as this was relocation considered by the respondent in the decision letter, albeit under the mistaken apprehension that the appellant had lived there until coming to the UK as a student. Further, there was evidence that the appellant would in fact have difficulties returning to Dubai as she depended upon being supported or sponsored by her father but there would be no such difficulties in returning to South Africa where the appellant is a citizen. This does not mean that there may not be insurmountable obstacles to family life there but this is an issue, which has not been adequately considered by the judge. He confined himself in [53] to accepting that there would be difficulties in relocating to South Africa and commenting that he had no evidence as to any difficulties there except the appellant’s statement that she now had no contact with South Africa and the only family she was aware of was her father’s family with whom she had sparse contact.

12. I find that the judge erred in law by failing to consider whether there were insurmountable obstacles to returning to live in South Africa. The issue was not explored at the hearing before the First-tier Tribunal and it is clear that there is further evidence that the appellant wishes to rely on. It is therefore not appropriate for me to attempt to re-make the decision on the basis of the evidence before the First-tier Tribunal.

13. I am satisfied that the proper course is for this appeal to be remitted to the First-tier Tribunal for that issue to be decided. Mr Graham was content that the matter be remitted to Judge Thanki for him to re-open and continue the hearing whereas Ms Isherwood submitted that in the light of the error of law there should be a different First-tier judge. I am not

satisfied that the judge's error by failing to consider the position in South Africa would put the respondent at any apparent, still less real, disadvantage in putting her case at the next hearing. The appeal is therefore remitted to Judge Thanki to make findings on the issue of whether there are insurmountable obstacles to family life on return to South Africa.

14. The judge also allowed the appeal on article 8 grounds but the assessment of proportionality must be flawed because there was no consideration of the question of whether there would be insurmountable obstacles on return to South Africa and the assessment was to this extent freestanding and did not take proper account of the public interest in maintaining effective immigration control through the proper application of the rules when considering who should be granted leave to remain in the UK.

Decision

15. The First-tier Tribunal erred in law such that the decision should be set aside. The appeal is remitted for re-hearing before Judge Thanki in the First-tier Tribunal for him to consider and make findings on the issue of whether there would be insurmountable obstacles to family life being continued in South Africa.

Signed

Date: 12 April 2016

H J E Latter

H J E Latter

Deputy Judge of the Upper Tribunal