



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

Appeal Number: HU/25170/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 5 April 2018**

**Decision & Reasons Promulgated
On 23 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

**JUMBER KHALADZE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER, ISTANBUL

Respondent

Representation:

For the Appellant: Ms I Mahmud, counsel

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing an appeal by the appellant against the respondent's decision made on 18 October 2016 refusing him entry clearance as a partner.

Background.

2. The appellant is a citizen of Georgia born on 5 October 1978. He first arrived in the UK in 2005 with entry clearance as a student and his leave was extended in the same capacity until 2 June 2010. After his leave

expired he remained unlawfully and in 2011 he began a relationship with the sponsor, now his wife. She divorced her first husband on 21 October 2013. The appellant and sponsor went through a marriage ceremony in the UK on 9 August 2014 but, unbeknown to the sponsor, the appellant was still married to the wife he had previously married in Georgia. The appellant left the UK on 14 July 2015 to make an application for entry clearance, which was refused on 30 September 2015. In the course of the respondent considering this application the appellant's previous marriage came to light. The judge accepted that it was only then that the sponsor learnt of the appellant's previous marriage.

3. The appellant obtained a divorce from his wife in Georgia on 21 June 2016 and he and the sponsor married there on 10 August 2016. He made a further application for entry clearance on 9 August 2016 which was refused as the respondent was not satisfied that the marriage was genuine and subsisting or that the appellant was able to meet the financial and accommodation requirements of the Rules.

The hearing before the First-tier Tribunal.

4. At the hearing before the First-tier Tribunal, the judge accepted that the appellant and sponsor were validly married as from 10 August 2016. She also accepted that they had been in a relationship since 2011 and, despite the mendacious behaviour of the appellant in going through a ceremony of marriage when he was married to someone else, she found that they were in a genuine and subsisting relationship and that they intended to live together in the UK [27]. However, she was not satisfied that the financial or accommodation requirements of the Rules were met.
5. The judge accepted that the sponsor was living in a property owned jointly by her and her former husband. Her evidence was that the arrangements on the property had not been changed since the divorce as she and her former husband had agreed between them that they would sell it when the youngest child left home [31]. She said that she was sure that her former husband would have no objection to the appellant residing there but had not clarified this with him and there was no agreement in writing about the arrangement [32]. The judge also noted that there was no clarification from the mortgage company that they agreed to another adult residing in the property.
6. The judge noted that the sponsor's youngest daughter and younger son were living at the property [31] and that her adult son also lived there. He was seriously unwell, the judge accepting that he suffered from schizophrenia and that his mental health had deteriorated between September 2016 and January 2017 [33]. She commented that there was no evidence of the impact on his mental health if the appellant moved into the home. The sponsor's statement had identified some difficulties in the relationship between the appellant and her family but there had been no clarification of the impact of any continuing difficulty [34]. The judge said

that she was not satisfied that the accommodation arrangements were suitable [35].

7. She then went on to consider the income requirements of the Rules and for the reasons she gave in [36]-[40] she found that the sponsor did not meet those requirements as at the date of decision. She also considered the position at the date of hearing but found that there was insufficient evidence to support the sponsor's claimed earnings which in any event was not evidenced by the documents required by the Rules.
8. The judge was urged to consider the matter outside the Rules on the basis that the sponsor could not move to Georgia because of her son's fragile mental health and could not meet the requirements of Appendix FM-SE because of her agency employment [45]. However, she found that there were significant breaches of the Rules and that there were no circumstances making it reasonable for the appellant to avoid meeting them [48].

The Grounds of Appeal.

9. In the grounds of appeal it is argued that the judge erred in law in finding that the accommodation was not suitable; failed to assess the adequacy of the accommodation in accordance with para 9 of the Maintenance and Accommodation Guidance of 6 December 2013 and the provisions of appendix FM; took irrelevant matters into account when assessing whether the accommodation was adequate; failed to assess the public interest under S117B of the Nationality, Immigration and Asylum Act 2002 properly; failed to consider the sponsor's significant difficulties in relocating to Georgia and whether there were exceptional circumstances even though the relationship between the appellant and the sponsor developed when his immigration status was precarious.
10. Permission to appeal was granted by the Upper Tribunal on the basis that it was arguable that the judge had focussed on whether the accommodation was appropriate or suitable which was arguably not the correct test (see E-ECP 3.4).
11. Ms Mahmud adopted her grounds, arguing that the judge had erred in her assessment of the available accommodation by considering suitability rather than adequacy and had taken irrelevant matters into account when considering whether the sponsor's former husband or the mortgage company would agree to the appellant living at the sponsor's home. The judge had failed, so she argued, to follow the provisions of appendix FM when assessing whether the accommodation was adequate and had not focused on whether there would be overcrowding as defined in the Rules.
12. Mr Jarvis submitted that the judge had not erred as alleged in the grounds but, even if she had, it had no material bearing on the outcome of the appeal. She had found that not only the accommodation requirements but also the financial requirements of appendix FM were not met at the date of

decision. When assessing the position under article 8, the judge had been entitled to take into account that the provisions of the Rules were not met but she had not treated that as determinative: she had taken all relevant factors into account and reached a decision properly open to her.

Assessment of whether the Judge Erred in Law.

13. This is an appeal on human rights grounds only under s.82(1)b of the Nationality Immigration and Asylum Act 2002. The appeal can only be determined through the provisions of article 8 of the ECHR and cannot be used as a vehicle for a freestanding challenge to a decision under the Immigration Rules. It is only open to the appellant to raise such a challenge to a decision under the Rules if the circumstances engage article 8(2) and can properly be regarded as relevant to the substance of the decision: see Charles (Human rights appeal: scope) [2018] UKUT 89 at paras 68-71.
14. The judge correctly identified at [3] that the appeal was brought on human rights grounds under s.82(1)b of the 2002 Act and proceeded by considering firstly whether the appellant could meet the requirements of the Rules, finding at [44] that he could not and secondly, whether he could succeed outside the Rules under article 8. If the judge was intending to treat the appeal as a freestanding appeal under the Rules and then consider article 8, that approach would be contrary to the decision in Charles as this was an article 8 appeal only. However, neither party sought to argue that judge had adopted the wrong approach and, in any event, even if the judge did not follow the approach subsequently set out in Charles, that would have had no material bearing on the outcome of the appeal as Mr Jarvis accepted that it was open to the judge when assessing proportionality to consider issues of accommodation and finance.
15. The assessment of article 8 when an appellant is unable to meet the requirements of the Rules has been considered by the Supreme Court in Hesham Ali v Secretary of State [2016] UKSC 60, and Agyarko v Secretary of State [2017] UKSC 11. These judgments make it clear that a failure to meet the requirements of the Rules does not mean that a claim under article 8 cannot succeed but, when considering such claims, a court or tribunal must take into account the respondent's policy as set out in the Rules and give it "considerable weight at a general level, as well as considering all the factors relevant to the particular case" per Lord Reed at [47] of Agyarko and at [57], Lord Reed, when discussing the use of the phrase "exceptional circumstances" used by the ECtHR in Jeunesse (2015) 60 EHRR 17 in the context of the assessment of proportionality, said that:

"the critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

16. The judge considered the relationship between the appellant and the sponsor and accepted that it was genuine and subsisting and it followed that family life existed and that the refusal of entry clearance engaged article 8. There was no issue about whether the decision was in accordance with the law or for a legitimate aim. The sole issue under article 8 was the proportionality of the decision. When the judge was assessing proportionality, she was entitled to consider to what extent the appellant failed to meet the requirements of the Rules.
17. The judge considered what accommodation would be available and whether it would be adequate. She accepted that the sponsor was living in her former matrimonial home with her children and it was clear from the office copy entries in evidence that the home was in the joint names of the sponsor and her former husband and there was also a mortgage recorded on the property. In [31]-[32], the judge highlighted the fact that there was no agreement in writing to the arrangement identified by the sponsor that her former husband would have no objection to the appellant residing at the property and no clarification from the mortgage company that it agreed to another adult living there.
18. The availability of the property is a prerequisite to considering its suitability or adequacy. No court order or written agreement between the parties was produced to confirm what arrangements had been agreed as to the occupation of the property. The judge was entitled to take the view that the evidence failed to show that there was no objection to the appellant joining the sponsor at that property. In these circumstances, there was no need for her to go further and consider the detailed provisions of the Rules and guidance about assessing the adequacy of accommodation.
19. The judge was also entitled to take into account the fact that the appellant's adult son was living at the property and had been diagnosed with schizophrenia. She was referred to a letter confirming that there had been a serious deterioration in his mental health between September 2016 and January 2017 and she accepted the sponsor's evidence that he continued to display serious symptoms of paranoia. She was entitled to comment that there was no evidence before her of the impact on his mental health of the appellant moving into the home. The sponsor's statement had identified some difficulties in the relationship between the appellant and her family but there was no clarification of the impact of any continuing difficulty. She was entitled to take into account that there was no evidence to satisfy her that it would be appropriate in these circumstances for the appellant to live at the property.
20. I am satisfied that when considering proportionality, these were issues the judge was entitled to take into account. Even if she erred in her assessment of the adequacy of the accommodation within the Rules, this has no material bearing on the outcome of the appeal because she identified factors she was entitled to take into account when assessing proportionality and, in any event, she went on to deal with the financial

requirements of the Rules at [36]-[43], finding that they were not met at the date of decision or at the date of hearing [43]. There is no challenge in the grounds to the judge's findings on this issue and she was entitled to take the inability to meet the financial requirements into account in her assessment of proportionality.

21. The grounds seek to challenge the judge's assessment of proportionality arguing that she failed to assess the public interest under S117B of the Nationality Immigration and Asylum Act 2002 properly and failed to proceed on the basis that exceptional circumstances had to be considered even though the relationship between the appellant and the sponsor was developed when the appellant's immigration status was precarious.
22. There is no substance in these grounds. The judge set out the relevant provisions of s.117B at [47]. She was clearly aware of the circumstances of both the appellant and the sponsor. She accepted that the appellant spoke English. The fact that the relationship was established when the appellant's status was precarious was an important factor, reinforced by s.117B(4)b that little weight should be given to a relationship formed with a qualifying partner established when he was in the UK unlawfully, as the appellant had been since 2010. Accordingly, the judge was entitled to give weight to the fact that the relationship developed when the appellant had no leave to remain in the UK [48].
23. Whilst the judge did not refer in terms to exceptional circumstances, I am satisfied that her approach to proportionality was consistent with the guidance given by the Supreme Court, requiring the appellant to show a very strong or compelling case. I am satisfied that when considering proportionality, the judge took all relevant matters into account and reached a decision properly open to her. She was clearly aware of the issues arising from the mental problems of the sponsor's son and there is no reason to believe they were left out of account. She was entitled to give weight to the fact that there were significant failures to meet the Rules and to note that this was not a case where family life had been enjoyed in the UK for any length of time and would be disrupted. The appellant was not living in harsh or unpalatable conditions in Georgia. He had his own property there, living with his parents and spending time working in his father's shop [48]. Her findings and conclusions on proportionality make it clear that there no exceptional circumstances or any very strong or compelling factors sufficient to outweigh the public interest in immigration control.

Decision.

24. For these reasons, I am not satisfied that the judge erred in law in any way capable of affecting the outcome of the appeal. It follows that the appeal must be dismissed.

Signed: H J E Latter
April 2018

Dated: 16

Deputy Upper Tribunal Judge Latter