



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26891/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13th July 2018

Decision & Reasons Promulgated
1st August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MISS PAVARISA SAINAK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iengar, Counsel
For the Respondent: Ms L Kenny, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Hussain dismissing her appeal against the refusal of an application for leave to remain on the basis of her family and private life with her British partner.
2. The Appellant appealed against that decision and permission to appeal was granted by First-tier Tribunal Judge L Murray in the following terms:

“The grounds assert that the judge erred in making a perverse finding that there would be no insurmountable obstacles to family life continuing in Thailand in the light of the medical and other evidence relating to the Appellant’s partner; failed to take into account medical evidence dated 19th November 2017 and failed to demonstrate any public interest in the Appellant’s removal.

The grounds are arguable. The First-tier Tribunal found that the Appellant had provided no more recent evidence of her partner’s medical conditions than a letter dated 18th October 2016 (mentioned at paragraph 22). However, there was a letter detailing his medical problems dated 29th November 2017 from Waterloo Health at page 82 and 83 of his bundle. It is arguable that the judge materially misapprehended the evidence on a material issue”.

3. I was not provided with a Rule 24 response from the Secretary of State but was given the indication that the appeal was resisted.

Error of Law

4. At the close of submissions I indicated I would reserve my decision which I shall now give. I do find that there is an error of law such that the decision should be set aside. My reasons for so finding are as follows.
5. In respect of the grounds as they were drafted, Ms Iengar did embellish them to some degree for which I am grateful, particularly as she highlighted the materiality of the alleged error in the judge’s failure to consider the up-to-date evidence of the Appellant’s medical condition. In the judge’s decision at paragraph 22 the judge notes that “it is regrettable that a more up-to-date medical report was not provided” and again at paragraph 27 further states that “it is unfortunate that there is no up-to-date medical report”. Given that the judge seems to have been unaware of the up-to-date letter, it is for this inadvertent error that the judge did not give consideration to that medical evidence which may have resulted in the judge coming to a different conclusion as the letter dated 29th November 2017 from Waterloo Health (see pages 82 to 83 of the Appellant’s bundle) does mention, *inter alia*, that the Appellant is suffering from depression, anxiety and post-traumatic stress disorder and importantly, that he has been under the care of the CMHT and undergone psychotherapy and remains on psychotropic medication, suffers from memory impairment and most important of all “has difficulties in engaging with other people, especially new people and in particular in unfamiliar or new environments”.
6. With that in mind, the judge’s assessment that the difficulties the Appellant would face as a consequence of his medical conditions as being that he does not speak Thai and that medication for his condition would be available in Thailand and that his condition is stable does not, in my view, reflect the evidence to which I have just referred, and in particular does not reflect the fact that there would be more than the “normal” difficulties one might face in adjusting to life in a foreign country given the partner’s stated difficulties.

7. My decision is further supported by the Appendix FM 1.0b guidance published 22nd February 2018 (which was also the version in force at the date of the hearing before the First-tier Tribunal) which mentions various factors on pages 36 to 38 which could constitute insurmountable obstacles (in the Secretary of State's opinion) and which includes the subject of "Serious cultural barriers to relocation overseas" as well as the further heading of "The impact of a mental or physical disability or of a serious illness which requires ongoing medical treatment" which latter passage mentions that if there is independent medical evidence which establishes a mental disability which requires ongoing medical treatment this may lead to very serious hardship. I further note the guidance talks, for example, of the lack of adequate healthcare in the country, however the reality of this appeal is that the Sponsor is a former refugee with longstanding PTSD and is receiving treatment for that from the NHS and so severe are his mental conditions that he is still in receipt of employment support allowance (ESA) as well as housing benefit. Indeed, it is the Sponsor's inability to meet the requirements of Appendix FM which is the sole reason why the Appellant is unable to qualify for leave to remain on the five-year path to settlement given that she has previously held lawful leave.
8. Ms Iengar further argued, and I accept, that an error is revealed in paragraph 30 of the First-tier Tribunal's decision in that: *firstly*, the judge was under the impression that the Sponsor was in receipt of disability living allowance and a host of other benefits, which is quite apart from his employment support allowance and housing benefit which do not form the basis for an exception under E-LTRP.3.3(a) (which relates to disability living allowance as an exception to the financial requirements) and, *secondly*, the judge has materially erred in finding that it is perfectly open to the Appellant to return to Thailand whilst her husband supports her visa application from the UK. This finding is obviously illogical because the Sponsor is in receipt of benefits which are not subject to an exception from the financial requirements to Appendix FM, and consequently *unless* the Sponsor overcomes his PTSD and related mental health problems *and* obtains employment for six months which surpasses the financial threshold of £18,600, the Appellant will be unable to apply for entry clearance from Thailand to join him here. On the evidence before the First-tier Judge, there was no indication that this would ever become a reality and consequently the conclusion of the judge that the Appellant could apply for entry clearance from Thailand whilst being supported by her Sponsor in the UK, is inconsistent with the facts underlying the appeal and the Sponsor's inability to meet the financial requirements.
9. I observe for the benefit of the First-tier Tribunal upon remittal that this appeal may be properly characterised as one where an Appellant fails to meet the financial requirements owing to the unusual nature of the Sponsor's circumstances and in this scenario, the key question at stake for any First-tier Tribunal hearing this matter anew is whether it is proportionate for the Sponsor to permanently relocate to Thailand given the Sponsor's mental health and his receipt of benefits and NHS medical treatment and medication, alongside an array of other factors at stake, and whether such permanent relocation (given that there is no possibility of an entry

clearance application being granted under the rules) is a proportionate outcome to the question of the Appellant's quest for leave to remain with her British Sponsor.

10. In light of the above findings I set aside the decision of the First-tier Tribunal owing to material error.

Notice of Decision

11. The appeal to the Upper Tribunal is allowed.
12. The appeal is to be remitted to be heard by a differently constituted bench of the First-tier Tribunal.

Directions

- (1) Standard directions are to be given.
- (2) No interpreter is required.
- (3) The Appellant states she will provide further medical evidence, however this is not subject to any specific direction.
- (4) Both the Appellant and Sponsor will give evidence at the further hearing before the First-tier Tribunal.
- (5) The time estimate I have been told for that hearing is three hours.

No anonymity direction is made.

Signed

Date: 27. 07. 2018

Deputy Upper Tribunal Judge Saini