



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19488/2019 (V)

THE IMMIGRATION ACTS

Heard at : Field House
On : 5 March 2021

Decision & Reasons Promulgated
On : 17 March 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VALERIE MARIE FISHER

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr S Clark, Counsel

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing

2. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mrs Fisher's appeal against the Secretary of State's decision to refuse her human rights claim.

3. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mrs Fisher as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

4. The appellant is a citizen of the USA, born on 6 February 1963. She entered the UK on 4 October 2016 after a successful appeal against a decision refusing her application for entry as an unmarried partner of a British citizen, Brian Coles, and a grant of leave outside the immigration rules, on Article 8 human rights grounds. Their relationship had commenced in December 2012, following the appellant's separation from her husband in October 2012 and the death of Mr Coles' wife in May 2012. The couple lived together for periods in the USA and the UK and then the appellant moved to the UK to live with Mr Coles in his former family home in Stafford. The house was sold in August 2017 and they moved to a new home in Stafford, but shortly afterwards Mr Cole was diagnosed with cancer. They intended to get married, but Mr Coles died before they were able to do so, on 29 November 2017, and his funeral took place on 15 December 2017.

5. On 7 June 2019, prior to the expiry of her leave, the appellant applied for further leave to remain on compassionate grounds, as the partner of a deceased British citizen. Her application was refused on 8 November 2019. The respondent considered that the appellant could not meet the requirements in Appendix FM of the immigration rules and that there were no very significant obstacles to her integration into the USA for the purposes of paragraph 276ADE(1) of the immigration rules, because she had resided for 53 years and had two daughters and various friends in that country. The respondent considered the circumstances of the loss of the appellant's partner and noted that some of his ashes were scattered in the UK but concluded that the appellant could return to the UK as a visitor and that there were no sufficiently compassionate circumstances justifying a grant of leave outside the rules. The respondent noted that the appellant could not qualify for indefinite leave to remain as a bereaved partner as her last grant of leave had not been made as a partner under the immigration rules and she had not made an application for indefinite leave to remain outside the rules.

6. The appellant appealed against that decision and her appeal was heard by First-tier Tribunal Judge Garratt on 18 September 2020. The appellant gave oral evidence before the judge, as did her friend with whom she was living. It was argued for the appellant that her return to USA would have unduly harsh consequences as she would be separated from her partner's ashes and from her friends and family in Stafford. Judge Garratt found that the appellant could not benefit from the bereaved partnership provisions in Appendix FM and could not demonstrate very significant obstacles to integration in USA, but he concluded that there were exceptional circumstances outside the immigration rules on the basis of the appellant's strong private life and he allowed the appeal on human rights grounds on that basis.

7. The Secretary of State sought permission to appeal Judge Garratt's decision on the basis that he had failed to identify anything of an exceptional nature which would elevate the appellant's position above that of the public interest and failed to identify any reasons why the appellant's return to the USA would be unduly harsh.

8. Permission was granted in the First-tier Tribunal and the matter then came before me for a remote hearing conducted through Skype for Business.

Hearing and submissions

9. Mr Melvin submitted that the judge had materially misdirected himself by failing rationally to identify what exceptional circumstances there were and failing to give rational reasons for finding that there was a strong private life when the facts did not reveal one. The judge erred by using Article 8 as a general dispensing power contrary to the decision in Patel & Ors v Secretary of State for the Home Department [2013] UKSC 72. The judge failed to give adequate reasons why the public interest in immigration control was outweighed by the factors in the appellant's case. The previous leave was granted to the appellant on an exceptional basis, but the circumstances were now entirely different. The judge had given weight to the judgment in McLaughlin, Re Judicial Review (Northern Ireland) (Rev 1) [2018] UKSC 48 in the proportionality exercise, but the circumstances in that case were not analogous to the appellant's. In this case, there had been no application made on the appellant's behalf under the bereavement provisions and it was therefore not clear why the appellant should have the benefit of the bereavement rules and policy. Article 8 was not to be used to allow a person to develop a private life in the UK but that was what Judge Garratt was doing by allowing the appeal. The decision contained material errors of law and had to be set aside and re-made by dismissing the appeal.

10. Mr Clark submitted that the judge had not erred but had considered all the evidence and had given proper reasons at [43] for concluding that the appellant had shown exceptional circumstances. As the judge found at [42], the existence of an immigration rule allowing bereaved partners to remain in the UK showed the weight of the public interest and that was where the case of McLaughlin was analogous. The appellant could not have applied within the bereaved partner category of the immigration rules because she had been given leave to remain previously outside the rules and she had therefore applied for leave outside the rules. The tick-box exercise for making applications did not allow for such explanations to be given. The judge had carried out the correct test and had not erred in law.

11. In response Mr Melvin reiterated the submission that there were no exceptional circumstances in this case and that Article 8 could not be used as a general dispensing power.

Discussion and conclusions

12. Contrary to the submission made by Mr Melvin, it seems to me that the respondent's grounds are simply a disagreement with the First-tier Tribunal Judge's decision and that there is no proper basis to interfere with the decision.

13. The judge had full regard to the evidence and assessed the evidence in the context of the relevant legal provisions and caselaw. At [37], [38] and [40] the judge considered the

nature of the appellant's previous grant of leave to enter and remain, noting that it was granted outside the immigration rules as a result of a previous successful Article 8 human rights appeal which recognised the strong family life the appellant had with her partner before his death and the fact that the parties had been kept apart by circumstances. The judge had regard to the fact that the appellant was unable to make an application for further leave within the immigration rules as a bereaved partner, following her partner's death, owing to the fact that the nature of the previous grant of leave precluded her from meeting the requirements for indefinite leave to remain on such a basis.

14. The judge then gave full and proper consideration to the requirements for exceptional circumstances and unjustifiably harsh consequences for the purposes of Appendix GEN.3.2 when going on to consider the appellant's claim outside the immigration rules and had full regard to the public interest factors in section 117B of the Nationality, Immigration and Asylum Act 2002 in assessing proportionality on wider Article 8 grounds.

15. In so far as the respondent considers that Judge Garratt failed to identify any compelling circumstances or to give adequate reasons for considering that there were compelling circumstances outside the immigration rules, I disagree. The respondent asserts in her grounds that the judge failed to identify any reasons why the appellant would be unable to re-establish herself in the USA, but it is relevant to note that the judge did not find that the appellant would be unable to re-establish herself in the USA. That was made clear at [39], where the judge found that the appellant would have difficulty in complying with the test in paragraph 276ADE(1) to show very significant obstacles to integration into the USA, since she had lived there most of her life and had a house and family in that country. The basis for the judge's decision in the appellant's favour, and the compelling circumstances identified, lay in the strong private life established in the UK with her late partner and the compelling nature of her ties to the UK emanating from that relationship, rather than the lack of ties to the USA. It was not, as Mr Melvin suggested, a matter of the appellant seeking to use Article 8 to develop a private life in the UK but rather, as the judge found at [41], that she did not want to leave behind the strong private life already established here and it was for that reason that the judge concluded that the appellant's return to the USA would be unduly harsh.

16. Furthermore, whether or not the circumstances in McLoughlin were sufficiently analogous to the appellant's situation, the fact is that the judge was entitled to take account of the existence of an immigration rule which benefitted bereaved partners and permitted them to remain in the UK indefinitely as weighing in the appellant's favour against the public interest in requiring her to leave the UK, whilst also acknowledging the limitations of a 'near-miss' in Article 8 terms. It is not the case, as submitted by Mr Melvin, that the guidance in Patel and the warning therein that "*article 8 is not a general dispensing power*" in 'near-miss' cases is applicable to the circumstances of the appellant's case. In Patel the appellant was seeking to use Article 8 in circumstances where there was a near-miss in meeting the requirements of the immigration rules as a student, where there was otherwise "*little or nothing to weigh on the other side of the balance, apart from the time he had spent in this country as a student under the rules*" and where the Supreme Court found that "*a*

near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.” The appellant’s case before Judge Garratt was, on the contrary, a human rights case with substance, based on family and private life, where there were particular relevant circumstances why the rules could not be met and where the inability to meet the requirements of the immigration rules was properly balanced against the various factors which were found to be compelling.

17. In all of the circumstances it seems to me that the judge was perfectly entitled to make the decision that he did. His decision was based upon a full and careful assessment of the evidence and a proper application of the relevant legal provisions and caselaw. I do not find any material errors of law requiring the decision to be set aside.

DECISION

18. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to allow the appeal stands and the Secretary of State’s appeal is dismissed.

Signed: *S Kebede*
Upper Tribunal Judge Kebede

Dated: 8 March 2021