Appeal number: IA / 20115 / 2012

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at:	Field House		Determination promulgated
On	20 June 2013	On	**28** August 2013

Lord Burns
Upper Tribunal Judge Gill

Between

Appellant

SP
(ANONYMITY ORDER MADE)

And

Respondent

The Secretary of State for the Home Department

Representation:

For the appellant: Mr. N. Klear, of Counsel, instructed by Ziadies Solicitors.
For the respondent: Mr. D. Hayes, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal from the First-Tier Tribunal refusing an appeal against a decision dated 6 September 2012 refusing the appellant further leave to remain in this country.

Background

2. The appellant is a national of Thailand born in November 1971. She arrived in the United Kingdom as a visitor on 31 May 2005 and on 22 July 2006 applied for leave to remain in order to care for her "husband" who was suffering from HIV/Aids. This was granted until 22 January 2007. On 10 January 2007 she applied for leave to remain as the "spouse" of a person present and settled in the United Kingdom. That application was refused but, following an appeal, she was granted further discretionary leave to remain until 19 June 2010. On 16 June 2010 she made an application for leave to remain which was refused on 6 September 2012 on the basis of the immigration rules and a removal direction was made in respect of her. This is the decision that is the subject of the appeal before us.

3. It appears from the history given to the First-Tier Tribunal that she had, in fact, been divorced from her husband in Thailand in 2004 prior to applying to come to the United Kingdom. Her ex-husband, who had come to the United Kingdom after the divorce, became ill with HIV/Aids and the appellant came to the United Kingdom in order to look after him. In 2005, however, she met and began a relationship with another man (AP) and subsequently had a son by him born in 2009. Accordingly, the appellant had deceived the immigration authorities as to her marital status in order to remain in the United Kingdom in 2006 and persisted in that deception when she applied for further leave to remain in 2007.

4. Prior to the birth of her son, her partner AP had been convicted of sexual offences involving young girls and sentenced to 4 years imprisonment. Because of this, care proceedings were taken in respect of the child who was eventually taken into care and adoption proceedings commenced. In August 2012, the child was placed with his new adoptive family. It is not clear from the papers whether or not that child had been formally adopted by the time of the hearing before the First-Tier Tribunal. His whereabouts were unknown to the appellant at that time. The care proceedings were complicated and

protracted, not least because the appellant had falsely named her former husband as the father of her child whereas, in fact, AP was the father of that child.

Proceedings before the First-Tier Tribunal

5. The First-Tier Tribunal had a statement from AP before it and also heard evidence from both him and from the appellant. The appeal was argued under Article 8 grounds only since it was clear, as the First-Tier Tribunal judge points out at paragraph 39, that the appellant could not succeed under the immigration rules in respect of either family or private life. He found that the appellant had used deception in obtaining leave to remain in the United Kingdom by claiming that she was still the wife of her ex-husband but found that she did care for him here. He also found that the appellant had started a relationship with AP and had a son by him. He found that that relationship was a genuine one and, in addition, that they were genuine in a desire to be married.

6. At paragraph 42 of the determination, the First-Tier Tribunal judge embarked upon an assessment of the Article 8 family and private life rights of the appellant. In that and subsequent paragraphs the relevant cases on how such an assessment ought to be carried out are set out. Those include the case of *Razgar* (2004) 2 AC 368. The judge also refers to the House of Lords case of *Chikwamba* 2008 UKHL 40 in which Lord Browne said that it would only be "comparatively rarely" that an article 8 case involving children should be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. The First-Tier judge also notes that in subsequent cases it has been held that such a principle was not confined to cases where children were involved.

7. The judge had regard to the nature of the balancing exercise which it was necessary to carry out in cases of this sort by reference to *VW (Uganda)* and *AB (Somalia)* v *SSHT* 2009 EWCA Civ 5 where it is stated that if a removal is to be held to be disproportionate:

> "What must be shown is more than a mere hardship or a mere difficulty or a mere obstacle. The question in any one case will be whether the hardship consequent on removal will go far enough beyond this baseline to make removal a disproportionate use of immigration control. This in turn will depend, among many other factors, on the severity of the interference".

8. Having directed himself to these principles, the First-Tier Judge stated at paragraph 42 that he did not need to consider the rights of the child of the appellant in this case because that child was due to be, or may already have been, adopted. However, he expressly recognises that the appellant had established family life with AP and that article 8 is thus engaged. Further, he accepted that, albeit to a lesser degree, she had established private life in the United Kingdom. At paragraphs 54 to 56 he sets out the reasons why he finds that the respondent had justified the decision to refuse leave to remain and that her removal was a necessary and proportionate step. He begins by highlighting that the appellant came to the UK and obtained a visa under the false pretence that she was still married. The factors which had justified her being granted subsequent extensions, namely the fact that she was looking after her ex-husband and then her role as a mother of her child born in the UK no longer pertained. What was left in the appellant's favour was first that she had a genuine relationship with AP. However, as the First-Tier judge pointed out, AP knew from an early stage of the precarious nature of the immigration status of the appellant and that she had no legitimate expectation of a right to remain in the United Kingdom. She maintained strong family and private life links with Thailand where she had a son and a sister. Secondly although it was accepted that she herself had contracted HIV the judge found that she could be treated for that condition in Thailand. There was no suggestion before the First-Tier Tribunal that this was not the case. In the last sentence of paragraph 56 the judge states:

> "Given her immigration history, I find that it is reasonable for her to be expected to return and to make such an application which would then have to be considered on its own merits."

The appellant's submissions

9. Before us Mr Klear argued, in short, that the First-Tier Tribunal judge had erred in his assessment of the Article 8 issues pertaining in this case. He had got the balance wrong in that there had only been one incident of deception by the appellant. Her personal circumstances, such as the relationship with AP and her HIV status, had not been given sufficient weight. We referred Mr. Klear to the case of *Mumu* v *Entry Clearance Officer-Dhaka* 2012 UKUT 00143 but Mr. Klear sought to distinguish that case on the basis that the deception carried out by the appellant in that case was more extreme than the present one.

Discussion

10. We are unable to agree that the First-Tier Tribunal erred in law in making the determination that it did in this case. The First-Tier judge addressed himself to the correct legal tests and had regard, in our view, to all the material considerations which were applicable in the balancing exercise that was required to be carried out. He weighed up those considerations appropriately. He correctly identified that there was no reason for the appellant to remain in this country but for her relationship with AP. He was entitled, on the evidence before him, to find that the HIV condition from which the appellant was suffering could be treated in Thailand. There was nothing to prevent her returning to that country. She maintained close links there. Indeed, she had returned to Thailand on 3 or 4 occasions between 2005 and 2009 in order to see her family there. In those circumstances, the tribunal was entitled to conclude that public policy considerations in requiring the appellant to return to Thailand to make an application to return outweighed considerations in her favour. Deterrence of the use of deception in making applications of this type is plainly of substantial importance. The detection and subsequent rectification of the results of such deception constitutes a drain on the resources of the state. The First-Tier Tribunal was accordingly entitled to give such considerations considerable weight in this case and, in our view, standing the factors in the appellant's favour which the tribunal correctly identified, it cannot be said that the First-Tier Tribunal judge erred in finding that the refusal for further leave to remain and order to remove was proportionate.

11. We reject the arguments Mr. Klear advanced for distinguishing *Mumu*. He drew attention to the fact that *Mumu* concerned an entry clearance application where there were no issues other than the use of a false passport, whereas in the instant case, the appellant is HIV positive, that AP has criminal convictions for sex offences; that the claimant's husband had made the application for leave on her behalf in which dishonesty was employed; that in any event, there was only one instance of dishonesty; and that in the instant case, the sole factor in favour of the interests of the state in the balancing exercise was that the appellant should be required to make an application for entry clearance. Our reasons are as follows:

12. The Tribunal in *Mumu* made the point that in relation to the application of the *Chikwamba* principle in cases where dishonesty has been employed so that the mandatory grounds of refusal in the Immigration Rules are applied, there must be recognition of the fact that there are "*clear, cogent policy reasons*" in favour of the state's interests and, further, that the state's

interests are not to be automatically diminished on the basis of some speculation about the outcome of a future application for entry clearance that may be made by an appellant. These points are equally applicable whether the appeal under consideration is an in-country appeal or an entry clearance appeal. The suggestion that the application in which dishonesty was employed was made by the appellant's ex-husband ignores the fact that the First-tier Tribunal judge made the finding that *the appellant* had used deception, a finding which has not been challenged. We do not accept that there was only one instance of deception, as the appellant's application of 22 July 2006 for leave to remain was an application to care for her "husband" whereas she had already been divorced, and her application on 10 January 2007 was an application for leave to remain as the spouse of a person present and settled in the United Kingdom whereas she had been divorced from her ex-husband and had not married AP. However, even if only there was only one instance of dishonesty, this goes to weight and does not mean that *Mumu* does not apply.

13. The First-tier Tribunal judge has already taken into account the fact that the appellant is HIV positive and that AP has criminal convictions for sex offences. Finally, we do not accept that the sole factor in favour of the state's interests in the balancing exercise is the procedural requirement that entry clearance should be obtained from abroad. A second and weighty consideration in the state's favour concerns the need to deter foreign nationals from employing deception. As the Tribunal said in *Mumu*, those who engage, or who might be tempted to engage, in dishonest attempts to deceive the United Kingdom authorities in relation to immigration control need to be aware that such actions will have disadvantageous consequences for those who are the intended beneficiaries of the dishonest conduct. A third and also weighty consideration is the impact of the second consideration on the state's interests in efficient immigration control, which is undermined if the possibility that a future application for entry clearance may be refused on a mandatory ground of itself means that removal would be disproportionate.

14. We appreciate that the First-tier Tribunal judge made a finding that it would not be reasonable to expect AP to give up his job and home here and live in Thailand which he has never visited. Nevertheless, we cannot speculate on the outcome of an entry clearance application. If and when an application for entry clearance is made, the Entry Clearance Officer would need to consider the Article 8 rights of the appellant and AP on such evidence as is put forward at the relevant time.

15. It was not drawn to our attention that the respondent made two decisions at the same time: a decision to refuse to vary leave to remain and a decision to remove the appellant under s.47 of the Immigration, Asylum and Nationality Act 2006. However, at the date of the two decisions (7 September 2012), the respondent did not have power to make a removal decision at the same time as a decision refusing to vary leave (*Secretary of State for the Home Department v. Ahmadi* [2013] EWCA Civ 512). Accordingly, we declare that the decision under s.47 is not in accordance with the law. However, the First-tier Tribunal judge did not make any error on a point of law in relation to the appeal against the decision to refuse to vary leave to remain.

Decision

The appeal is dismissed.

Anonymity

We make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the applicant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Lord Burns Date: