



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

Appeal Number: VA/37295/2012

THE IMMIGRATION ACTS

Heard at Field House

On 14 October 2013

Determination

Promulgated

On 30th October 2013

**Before
UPPER TRIBUNAL JUDGE O'CONNOR
DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA**

Between

**MRS AMAL MISSIOURI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - PARIS

Respondent

Representation:

For the appellant: Mr D Sills of counsel, instructed by JD Spicer Zeb Solicitors

For the respondent: Mrs S Vidyadharan, Senior Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant, a national of Algeria born on 29 July 1980, appeals to the Upper Tribunal against the determination of Immigration Judge Aziz dated 30 April 2013 dismissing her appeal against the decision of the respondent

dated 25 October 2012 refusing to grant her entry clearance to visit her husband for 2 months under paragraph 41 of the Immigration Rules.

2. First-tier Tribunal Judge Nicholson granted the appellant permission to appeal to the Upper Tribunal, finding it to be arguable that there had been procedural unfairness before the First-tier Tribunal. Thus the appeal came before us.

Error of Law

3. The appellant's representatives assert that they first found out about the hearing before the First-tier Tribunal on the day of the hearing itself. They faxed the Tribunal on the same date requesting an adjournment, explaining (i) that they had not received notice of the hearing and (ii) that the sponsor, who wished to give evidence, was in hospital. Coincidentally they had written to the Tribunal on the day prior to the hearing, enquiring as to when a hearing date would be fixed.
4. A printout from the Tribunal Service computer system confirms receipt by the Tribunal of the aforementioned documents.
5. Despite this the First-tier Tribunal proceeded to determine the appeal, noting when doing so that no explanation had been provided for the absence from the hearing of the appellant or her representatives (paragraph 11).
6. At the hearing before us Mrs Vidyadharan did not seek to dispute between the fact that the notice of hearing had not been received by the appellant's representatives and she accepted that the appellant had thereby been deprived of a fair hearing. She was content for the determination of the First-tier Tribunal to be set aside.
7. We find that there was procedural unfairness before the First-tier Tribunal and we set aside its determination.

Re-making of decision

8. Mr Sills requested that the Upper Tribunal proceed directly to re-make the decision for itself, rather than remit the matter back to the First-tier Tribunal. We acceded to such request.
9. The Entry Clearance Officer refused the appellant's application for the following reasons:

"You have stated that you will visit your spouse to whom you were married on 15 November 2011 for the given period and you have provided evidence of sponsorship for your stay. I have taken note of the document from Hillingdon Hospitals regarding your sponsor's health. The sponsor is currently unemployed and in receipt of benefits in the UK. You have stated that you are unemployed in Algeria and that you rely on support from your spouse. You have no resources of your own at present. You have not provided evidence of your own funding in Algeria. In the absence of evidence of sufficiently strong

social or economic ties to Algeria, I am not satisfied that you are a genuine visitor for a limited period, or that you intend to leave the UK at the end of your visit. Paragraph 41 (i) and (ii) of HC 395.”

10. The sponsor gave evidence before us. We observed that an interpreter had been requested, albeit not in accordance with the timescales set out in the Tribunal’s directions, but that one was not available. Rather than seek an adjournment of the proceedings, Mr Sills indicated that the sponsor wished to proceed and that he would provide his evidence in English.
11. The sponsor adopted his written statement and gave the following evidence. He was diagnosed with cancer at the end of August 2012. He is still undergoing treatment but has delayed his chemotherapy because he wants his wife’s support during the treatment. The chemotherapy will be for 4 to 5 sessions every two weeks. The doctors have not indicated how long the treatment will last and the first 4 sessions will be only a start. After his 4-5 treatment sessions, his wife will definitely return to Algeria. The sponsor has delayed the start of his treatment and will only start it when his wife is by his side. The cancer is now “in the hands of God”. If he gets better things will change and he will carry on with his life “like the beginning”.
12. His wife is dependent on him and does not work. She has not been able to join him here because he cannot support her application because he had to stop working due to his cancer.
13. Mr Sills indicated that he would not be calling the appellant’s brother who was in attendance at the hearing centre.
14. We heard submissions from both parties. Ms Vidyadharan in her submissions said the following. She has tremendous empathy for the sponsor but the appellant’s appeal cannot succeed under the Immigration Rules because the appellant has not demonstrated that she will return to Algeria after her visit. The sponsor has not started chemotherapy and there is no timeframe for the length of treatment that the sponsor will require. The appellant will not leave her husband and return to Algeria if her husband is still unwell. The appellant has no incentive to return to Algeria because she is not working and her husband is in this country.
15. Mr Sills in his submissions said the following. The only issue in this appeal is the appellant’s intention to return to Algeria after her visit. It is a very sad case as the appellant and her sponsor married before the sponsor was diagnosed with cancer and he cannot support her application for entry clearance as a spouse. The sponsor’s condition is very serious. The sponsor visited the appellant in Algeria on two occasions last year. The sponsor wants the appellant’s support while he is undergoing chemotherapy. The medical evidence demonstrates that he is delaying chemotherapy until his wife comes to this country to support him. He requires 4 to 5 sessions at three week intervals which will be within the timeframe of her entry clearance as a visitor. The appellant is only seeking

entry clearance for a limited period of time. Once the treatment is over she will return to Algeria and the sponsor can continue to visit her there or the appellant can visit him in the United Kingdom again. The appellant stopped working but she can resume employment.

Discussion

16. The burden is on the appellant to prove on a balance of probabilities that she satisfies the requirements of paragraph 41 of the Immigration Rules. The respondent takes issue with only two of the requirements of paragraph 41, that being whether the appellant is genuinely seeking entry clearance as a visitor for the period stated by her and whether she will leave the United Kingdom after her visit here, as stated by her.
17. The appellant married her sponsor, a British citizen, on 15 November 2011 in Algeria. We accept that it was their intention that the appellant would apply for entry clearance to join him in this country as his spouse. Unfortunately, the sponsor was diagnosed with cancer and as a result had to stop working and could not meet the maintenance requirement of the Immigration Rules as he is become reliant on public funds.
18. A letter from Hillingdon hospitals dated 16 November 2012 states that the sponsor's chemotherapy sessions will take place every three weeks for 12 weeks in total. It is asserted therefore that they will be completed within the time frame of a visitor's visa of six months. It is to be observed at this stage that the appellant in facts seeks entry for only 2 months [Q12 of her VAF]. The sponsor in his evidence stated that these sessions would be a start and that he is in "God's hands" as to the prognosis of his cancer.
19. The sponsor has refused to start chemotherapy until his wife's application is resolved because he wishes her moral and physical support whilst the treatment is going. He has been receiving other forms of medical treatment since his cancer was diagnosed in 2012 as evidenced by his medical records. It is difficult to predict when the sponsor's treatment for his cancer is likely to be completed or whether additional chemotherapy sessions will be required. The evidence before us does little to assist in this regard.
20. There is no doubt that the appellant and sponsor are in a committed marital relationship and in such circumstances the wish of the appellant to be in the United Kingdom to support her husband through chemotherapy treatment is only natural. The question raised by the Entry Clearance Officer is, what incentive is there for her to thereafter leave her sick husband to return to a country where she has little or no social or economic ties?
21. One would have anticipated, in the face of the matters raised in the refusal decision, that the appellant would have provided evidence seeking to rebut the doubts raised therein. Whilst we have heard the sponsor's evidence, somewhat surprisingly the appellant has not provided any

evidence engaging with the matters raised in the refusal decision. It is for the appellant to make her case and it is her intentions that are the relevant consideration. There is no evidence before us from the appellant as to what incentive she has to return to Algeria after her visit. We observe that her sister lives in the United Kingdom. Whilst the appellant provides the details of her parents in her VAF, she provides no evidence as to her connections to them. The evidence is that the appellant does not work in Algeria and is supported by her sponsor from this country. She has not drawn attention to any particular matter which would provide her with an incentive to return to Algeria, but there is an undoubted incentive for her to remain in the United Kingdom, so that she can care, and provide support, for her sick husband; whose long, or even medium, term prognosis is, for obvious reasons, as yet unknown.

22. We have carefully considered all of the evidence before us in the round, including that contained within the appellant's Visa Application Form. We do not accept that the appellant has demonstrated, to the balance of probabilities, that she meets the requirements of paragraphs 41(i) and (ii) of the Immigration Rules.

23. We feel a great deal of compassion for the appellant and her sponsor given the circumstances in which they find themselves. However, our legal task is to consider whether the appellant satisfies the requirements of paragraph 41 of the Immigration Rules. We find on the evidence that she does not. No other grounds were pursued before us and consequently we must dismiss the appellant's appeal.

Decision

For the reasons given above, the determination of the First-tier Tribunal is set aside.

Having re-made the decision on appeal for ourselves, we dismiss it.

October 2013

Dated this 23rd day of

Signed

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Mrs S Chana
A Deputy Judge of the Upper Tribunal