IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08737/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 8th May 2015	**On 20th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MISS MARGARET MAY HART
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Brown of Counsel
For the Respondent: Miss Johnstone

DECISION AND REASONS

Introduction

1. The Appellant born on 29th April 1962 is a citizen of Jamaica. The Appellant who was present was represented by Mr Brown of Counsel. The Respondent was represented by Miss Johnstone, a Home Office Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made application to remain in the United Kingdom under Appendix FM of the Immigration Rules and on human rights grounds. That application had been refused by the Respondent on 29th January 2014. The Appellant had appealed that decision and her appeal was heard by Judge of the First-tier Tribunal Lambert sitting at Manchester on 30th July 2014. The judge had dismissed the Appellant's appeal under both the Immigration Rules and under Article 8 of the ECHR.

3. The Appellant had appealed that decision and application for permission to appeal was refused by First-tier Tribunal Judge Parkes on 23rd September 2014. The application was renewed on 28th September 2014 and permission was granted by Upper Tribunal Judge Goldstein and 26th November 2014. It was said that without wishing to unduly raise the Appellant's hopes it was arguable there may have been an error of law in the approach taken under EX.1(b) of Appendix FM of the Immigration Rules.

4. The Respondent opposed that application by a letter dated 10th December 2014. The matter comes before me by way of directions to firstly decide whether or not an error of law has been made in this case.

Submissions on behalf of the Appellant

5. Mr Brown referred me to the lengthy Grounds of Appeal and submitted that the judge should have looked at and concluded that there were insurmountable obstacles in the Appellant and/or her partner relocating under EX.1(b). Further it was said that such matters should have been given better consideration in terms of Article 8 of the ECHR.

Submissions on behalf of the Respondent

6. Miss Johnstone referred me to the Respondent's response letter and it was submitted the Appellant was not eligible under the Immigration Rules generally nor could she rely upon EX.1. It was submitted that the case could not have succeeded under the Immigration Rules.

7. At the conclusion of the submissions I reserved my decision to consider the documents and evidence submitted. I now provide that decision with my reasons.

Decision and Reasons

8. The Appellant in this case had entered the United Kingdom in May 2002 as a visitor and thereafter had remained as a student. On 24th May 2004 it was said that she had married a UK citizen and had made application for settlement in that capacity. That application had been refused and she had become appeal rights exhausted in respect of that matter on 8th October 2007. Thereafter in February 2008 she had made an application under Article 8 of the ECHR and that application had been rejected. A

further application had been made in November 2011 under Article 8 of the ECHR and that application had been refused on 13th March 2012.

9. The Appellant's application was for leave to remain in the United Kingdom under Appendix FM of the Immigration Rules or alternatively under Article 8 of the ECHR outside of the Rules. Both those avenues of application were referred to and repeated within the more recent applications for permission to appeal the First-tier Tribunal decision.

10. The judge had considered the Appellant's application under the Immigration Rules. The judge noted at paragraph 4.2 that it was conceded on behalf of the Appellant that she could not satisfy the requirements of Appendix FM because she was an overstayer who had had no valid leave since 8th October 2007. Leaving aside that concession which appears to have been made before the First-tier Tribunal Judge, the judge was correct to conclude that the Appellant could not meet the provisions of the Immigration Rules.

11. Firstly, the Appellant had remained in the UK since October 2007 in breach of the Immigration Rules with no valid leave to remain. It was also concluded that the Appellant had an outstanding debt to the NHS rendering her in breach of suitability requirements under S-LTR2.3. She accordingly did not meet the eligibility requirements. Notwithstanding a person's failure to meet the eligibility requirements there are occasions where paragraph EX.1 may be applicable to an applicant. In this case the Appellant had relied on EX.1(b) on the basis that she was in a relationship with a partner. As the judge noted at 4.1 although it was submitted on behalf of the Appellant that she did not need to meet the cohabitation requirements of Section GEN1.2 because she described herself as a fiancée the judge had correctly noted that in terms of eligibility provisions under Section E-LTRP1.2 she could not rely upon her claimed position as a fiancée unless she had made entry clearance in that capacity which plainly she had not. Accordingly she could not rely upon GEN1.2 which would not necessarily require cohabitation. In terms of reliance upon EX.1 merely as a partner would require her to establish on balance that she had been living with her partner in a relationship akin to marriage for a period of two or more years. The Respondent in the refusal letter had raised a number of concerns as to this alleged relationship but even on the basis of the Appellant's own evidence that she and her partner did not cohabit because of their religious beliefs the Appellant was unable to satisfy that aspect of EX.1(b). Accordingly the judge was entitled to conclude the Appellant did not meet the requirements of Appendix FM leaving aside the plain concession made by Counsel on behalf of the Appellant and noted at 4.2 of the decision that such was conceded.

12. Having concluded that the Appellant did not meet those requirements the judge at paragraphs 4.3 to 4.8 had looked at the evidence to consider whether it was appropriate to look at Article 8 outside of the Rules in accordance with case law. In this respect the judge had also referred herself to the requirements of Section 117B of the 2002 Act. The judge for reasons given, having analysed the evidence considered that having failed to meet the requirements of Appendix FM of the Immigration

Rules she did not find circumstances justifying consideration of Article 8 outside of the Rules. The judge made it clear that whilst alive to the matters under Section 117B of the 2002 Act she had not applied that Section in any proportionality exercise because she did not consider this case needed a consideration outside of the Rules.

13. The interplay between the new Immigration Rules and a consideration of Article 8 of the ECHR has been a vexed and confusing area for some time. The judge in this case had referred herself to the case of **Gulshan** and other case law. It was her view as expressed at 4.3 that she should not consider Article 8 outside of the Rules unless there are good arguments to do so. As indicated above the judge had thereafter outlined salient features of the evidence that led her to conclude that there were not those good arguments to consider Article 8 outside of the Rules.

14. I have noted the case of **SS Congo and Others [2015] EWCA Civ 387** which is a further and recent consideration of this interplay. Those cases were dealing with specific matters but helpfully made some general points. The court referred itself to the case of **Huang** and then at paragraph 29 stated as follows:

> "It is clear therefore that it cannot be maintained as a general proposition that leave to remain or leave to enter outside the Immigration Rules should only be granted in exceptional cases. However in certain specific contexts a proper application of Article 8 may itself make it clear that the legal test for the grant of LTR or LTE outside the Rules should indeed be a test of exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECHR itself in relation to applications for LTR outside the Rules on the basis of family life established in the United Kingdom at a time when the presence of one or other of the partners was known to be precarious see **Nagre** approved by this court in **MF (Nigeria)**."

Having then referred to the question of deportation cases at paragraph 31 the court stated thus:

> "In other contexts, it cannot simply be assumed that a strict legal test of exceptional circumstances will be applicable when examining the application of Article 8 outside the Immigration Rules or within the Rules themselves where particular paragraphs are formulated so as fully to cover the applicability of Article 8. The relevant general balance of public interest considerations and individual interests will vary between different parts of the Rules. It is only if the normal balance of interests relevant to the general area in question is such as to require particularly great weight to be given to the public interest as compared with the individual interests at stake (as in the precarious cases considered in **Nagre** and the foreign criminal deportation cases considered in **MF (Nigeria)**) that a strict test of exceptionality will apply."

Those paragraphs seem to suggest that in the case where the presence of one or other of the partners was known to be precarious as in **Nagre** a strict test of exceptionality will apply in terms of considering a case outside of the Immigration Rules. To some extent that test so far as "precarious" cases are concerned is supported by the statutory factors referred to in Section 117B(4) of the 2002 Act.

15. In this case the Appellant's status in the UK was indeed precarious and had been for some years and that was known to both parties namely the Appellant and her

partner. The judge referred specifically to that feature. It is also clear that whilst she had not gone on to consider the case outside of the Rules and had therefore not placed Section 117 into the proportionality equation she noted at paragraph 4.7:

> "It was known to be precarious from the outset. This is the very scenario to which parliament has so recently by Section 117B(4)(b) of the 2002 Act instructed me, even if I were to go on to consider Article 8(2) of the ECHR to attach little weight."

The judge at paragraph 4.3 had not considered this case outside of the Rules because she did not find applying applicable case law that there were good arguments to do so. The recent case of **SS Congo and Others** referred to above would seem to support the proposition that in respect of those whose immigration status is precarious or deportation cases the test for looking at Article 8 outside of the Rules is a test of exceptionality. In applying a somewhat lower threshold referred to as "good arguments to do so" it cannot therefore be said that the judge's failure to consider the case outside of the Rules is not in accordance with the conclusions reached by the Court of Appeal in **SS Congo and Others** on 23rd April 2015. It cannot therefore be said that any material error of law was made by the judge in this case.

Notice of Decision

16. There was no material error of law made by the judge and I uphold the decision of the First-tier Tribunal.

17. Anonymity not retained.

Signed Date

Deputy Upper Tribunal Judge Lever