



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/27056/2014

THE IMMIGRATION ACTS

Heard at Field House

On 24 August 2015

Decision and Reasons

Promulgated

On 27 August 2015

Before

Deputy Upper Tribunal Judge MANUELL

Between

**Mrs ELANINE GERALDA DE MENDONCA SOUZA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal, Counsel (instructed by Samuel Ross Solicitors)

For the Respondent: Ms A Fijwala, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Ransley on 28 May 2015 against the determination of First-tier Tribunal Judge Cameron who had dismissed the Appellant's appeal under Appendix FM as the spouse of British Citizen and on human rights (Article 8 ECHR family life) grounds against her removal in a decision and reasons promulgated on 25 March 2015.

2. The Appellant is a national of Brazil, born on 12 March 1987. The Appellant had entered the United Kingdom on 28 November 2010 claiming to be the spouse of man she had divorced on 16 September 2010. She had admitted to a previous overstay in 2006. She did not meet the suitability requirements of Appendix FM of the Immigration Rules. She retained her ties to Brazil. The judge found that family life could reasonably be enjoyed in Brazil and that the Appellant's removal was proportionate. Alternatively she could return to Brazil and seek entry clearance from there.
3. Permission to appeal was granted because it was considered that it was arguable that the judge had erred (a) by failing to apply the doctrine of "issue estoppels" when considering the Respondent's grant of leave to enter to the Appellant in 2010 notwithstanding her overstay in 2006 and (b) in his assessment of the Article 8 ECHR claim when finding that the Appellant did not meet the suitability requirements yet had been treated as "suitable" by the Entry Clearance Officer.
4. Standard directions were made by the tribunal. A rule 24 notice dated 12 June 2015 had been filed on the Respondent's behalf, opposing the onwards appeal.

Submissions

5. Mr Iqbal for the Appellant relied on the grounds of onwards appeal (which had not been settled by him). He submitted that even if there were no application of "issue estoppel" in this public law context, the judge should have examined the inconsistency in the Secretary of State's reasoning when considering the Appellant's conduct against the suitability criteria. There was no material difference between the formulation used for entry clearance and that used for leave to remain. Whether a person's behaviour was not conducive to the public good was a fact sensitive analysis and the judge had not adopted the right approach. It was also questionable that the judge's understanding of the term "precarious" was right: SS (Congo) [2015] EWCA Civ 387. The Appellant had had leave to enter the United Kingdom.
6. Ms Fijwala for the Respondent relied on the rule 24 notice. "Issue estoppel" did not exist in immigration law. There had been persistent disregard of the Immigration Rules by the Appellant. Her immigration status was correctly described as "precarious", as explained in AM (S 117B) Malawi [2015] UKUT 0260 (IAC). The Appellant was simply expressing disagreement with the decision. The decision and reasons should stand.
7. Mr Iqbal in reply submitted that the Appellant had been treated in a heavy handed way. Overstaying up to 28 days was no longer considered significant by the Respondent. There had been no real

criminality and the Home Office's own guidance (IDI Family Migration Appendix FM Section 1.0a stated that the applicant "can meet the suitability requirements even where there is some criminality".

No material error of law finding

8. In the tribunal's judgment the grant of permission to appeal was ill considered, far beyond being merely excessively generous. There was no arguable error of law in the determination as described by the grant. The references to "issue estoppels" in the grounds of onwards appeal were unarguably wrong: see *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka ** [2002] UKIAT 00702. The fact that the Respondent chose to grant entry clearance to the Appellant as a spouse in 2010 despite her overstay in 2006 was well within the Respondent's discretion: see, e.g., paragraph 320 of the Immigration Rules. There was, however, no binding effect as a result, absent some accompanying promise which it was never suggested had been made in this case. Any similarity in the wording of "suitability" for entry clearance and leave to remain has no impact on the underlying principle.
9. The judge's determination was appropriately detailed and he explained his conclusions with clarity at [55] to [62]. He took into account the Appellant's particular circumstances. His analysis was indeed fact sensitive.
10. A person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave: see *AM (S 117B) Malawi* (above). The judge's finding at [76] of his determination that the Appellant's status was precarious was undoubtedly correct.
11. The Appellant's attempts to challenge the determination are merely an expression of disagreement with a careful and comprehensive decision, in the hope of avoiding having to leave the United Kingdom to make a fresh entry clearance application from Brazil, which was the securely reasoned substance of the judge's findings: [61], [67] and [68] of the determination. The tribunal finds that there was no error of law and there is no basis for interfering with the judge's decision.

DECISION

The making of the previous decision did not involve the making of an error on a point of law and stands unchanged

Signed

Dated

Deputy Upper Tribunal Judge Manuell