



IAC-FH-AR-V1

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

Appeal Number: OA/03385/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 August 2015**

**Decision & Reasons Promulgated
On 7 September 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

ENTRY CLEARANCE OFFICER - MOSCOW

Appellant

and

**MSH
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Miss J Isherwood, Home Office Presenting Officer

For the Respondent: Miss S Lloyd, Counsel, instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

1. The appellant is a citizen of Russia, born in 1959, and is married to the sponsor, a British citizen, born on 15 June 1939. She applied to join the sponsor for settlement on 14 July 2013. This application was refused on 19 June 2013 and the refusal was maintained but modified by the Entry Clearance Manager in a review dated 14 July 2014.
2. The appellant appealed and her appeal came before a First-tier Tribunal Judge on 4 November 2014. The judge set out the grounds of refusal in paragraph 4 of the decision. It is fair to say that at that stage there were

issues about the status of the relationship between the appellant and the sponsor but these matters were resolved in the parties' favour by the judge and an appeal has not been brought against those findings. The point was taken by the respondent that the parties had got married after the date of decision. It was submitted that they had not been in a relationship akin to marriage for two years prior to the date of application. However the principal point at issue is the financial requirements and it was submitted that the couple did not meet the relevant requirements of the Immigration Rules although a final decision had not been reached on this aspect pending a decision of the Court of Appeal.

3. The background to the relationship between the parties is somewhat complex. Both the appellant and the sponsor had previously divorced. They became engaged in 2005 and married in 2007. The appellant has a daughter, L, a British citizen, and she, the daughter, has a son, A.
4. The parties met each other in 2005 and married in Russia in 2007. The appellant was granted an entry clearance as a spouse and arrived in the UK in 2007. The relationship broke down and the parties divorced in 2009. However they reconciled in 2010 and the judge accepted that the couple started living together again in October 2010.
5. The judge heard from the sponsor at the hearing who was then representing the appellant. Among other things the sponsor said he had health problems and had to undergo a surgical operation requiring a responsible person who would look after him for 24 hours after the operation. The absence of the appellant and the lack of psychological stability made his health worse. He had had a long work history, taking over his father's business in 1965 and he had continued to work for the business on a part-time basis.
6. The judge found the sponsor to be a credible witness and was satisfied that the parties had lived together as partners for two years prior to the application.
7. The judge then went on to consider the financial requirements finding that while the appellant and sponsor had sufficient funds they could not satisfy the evidential requirements of the Rules. The judge then went on to consider Article 8. Having referred to **Razgar v Secretary of State [2004] UKHL 27** and the need to safeguard and promote the welfare of children, the judge then directed himself by reference to **Gulshan [2013] UKUT 00640** and **MM v Secretary of State [2014] EWCA Civ 985**. The judge found that the Rules did not provide a complete code and concluded his determination as follows:

"54. I have to consider Part 5A of the Nationality, Immigration and Asylum Act 2002, as added by the Immigration Act 2014 Section 19. Section 117A requires that I must, in considering the public interest question, have regard in all cases to the considerations listed in Section 117B. The public interest question means 'the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)' [Section 117AS(2) and (3)]. Section

117B(1) states that the maintenance of effective immigration controls is in the public interest.

55. Section 117B(2) states that it is the public interest that a person seeking to remain in the UK should be able to speak English. The appellant appears to have obtained the relevant English language certificates.
56. Section 117B(2) states that it is in the public interest, and in particular in the interests of the economic wellbeing of the UK, that persons who seek to enter or remain in the UK are financially independent. I am satisfied (given my findings in relation to Appendix FM) that the appellant and the sponsor are financially independent.
57. However, what I have to consider is not whether it would be proportionate to expect the appellant to reapply. I have not found this is an easy question. I find that the relationship between the couple is a genuine one (although I can understand why the respondent did not – on the basis of the information before him – accept that it was. The appellant also has another – good – reason, for wishing to enter the UK; to be with her (divorced) daughter L. and L.'s son A. L. is a British citizen as is (I assume) A. I am required to take into the account not only the appellant's interests, but also those of the sponsor, L. and A. I specifically consider A. under Section 55. I am satisfied on the evidence, that both the appellant and the sponsor (the one being his grandmother and the other his godfather) have had a much closer relationship with A. than many who have such relationships, if only because of the time they have spent with him. The sponsor has medical conditions, and is waiting for a further operation. He is also over 70, although the appellant is 20 years younger. I accept that Foreign Office advice is that British citizens should not visit North Caucasus where the appellant is at present living. Against that, of course, is the respondent's legitimate interest in the maintenance of effective immigration control, a matter re-emphasised in Section 117B of the 2002 Act. I take into account that the appellant tried unsuccessfully to remain in the UK outside the Rules, and was (eventually) issued with removal direction. However, the evidence of the sponsor is that she left voluntarily. This is marginally against the appellant, but not a matter (in the context of this appeal) of great significance.
58. Taking all these matters into account, I find that the respondent's decision is not proportionate.
59. For completeness' sake I consider this case on the alternative basis that my finding that the Rules do not provide a complete code is incorrect. If that is so, I have to find that there are exceptional or compelling circumstances. I have not found this an easy exercise. I repeat my findings at paragraph above. The exceptional or compelling circumstances are, cumulatively, that the respondent cannot (if only because of Foreign Office advice) live with the appellant in North Caucasus; the appellant has two members of her family (both British citizens) in the UK; the sponsor is suffering from medical conditions and he is waiting for another operation. With considerable doubt, I find that these circumstances, cumulatively, are exceptional and compelling.”

8. The judge accordingly dismissed the appeal under the Rules but allowed the appeal on human rights grounds.
9. Permission to appeal was sought. It was argued that as the appellant could not meet the requirements of the Rules an Article 8 assessment should only be carried out when there were compelling circumstances not recognised by the Rules as made clear in **Gulshan**. Such compelling circumstances had not been identified. The parties could either live together in Russia or make a further application supported by the correct evidence. It would not be unjustifiably harsh for them to live in Russia. They could relocate if required. Article 8 should not be used to circumvent the requirements of the Rules. In relation to the appellant's child and grandchild, the appellant was currently overseas and the refusal maintained the status quo. There was no reason why the appellant could not make a fresh application based on the sponsor's income and the appellant had an alternative remedy.
10. Miss Isherwood relied on the grounds of appeal and pointed out that the judge had misdirected himself in paragraph 9 in referring to the appellant seeking leave to enter as the spouse of the sponsor. She had not been married at that time – the marriage was post-decision.
11. The couple had failed to meet the financial requirements set down by the Rules and I was referred to paragraph 44 of **SS (Congo) [2015] EWCA Civ 387** where the Court of Appeal had referred to the need to assess the force of the public interest given expression in the Rules which would be relevant to the balancing exercise under Article 8.
12. Miss Isherwood pointed out that in paragraph 52 the Court of Appeal had stated that the Rules regarding evidence about funds had the same general objective as the substantive Rules:

“Namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.”
13. Everyone should be treated equally and fairly in relation to the evidential requirements – Miss Isherwood referred to paragraph 53 of **SS (Congo)**. She also relied on paragraph 57 and the fact that it was generally fair that an appellant should wait until he could satisfy the requirements of the Rules and not attempt to jump the queue. The Court of Appeal had also made it clear in paragraph 39(iv) that children were not a trump card. She referred to paragraph 40 of **SS (Congo)** where the Court considered the wider margin of appreciation in leave to enter (LTE) cases as opposed to leave to remain (LTR) cases and the need to show compelling circumstances:

“In the light of these authorities we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions

regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding Section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require a grant of such leave.”

14. Miss Lloyd relied on her chronology and skeleton argument. She submitted that the reference to spouse at paragraph 9 of the determination was a mistake but no more. The matter was clarified at paragraph 40 of the decision where the judge stated he was satisfied that the parties were not married as at the date of decision.
15. While there was no general obligation to facilitate the choice made by a married couple as to where to reside, evidence had been introduced to show that advice from the Foreign Office was to the effect that British citizens should not visit North Caucasus where the appellant resided. As was said by the Court of Appeal at paragraph 26 of **SS (Congo)** it was clearly possible to imagine that there might be some cases where notwithstanding that the requirements of the Rules were not met, the circumstances of the individual case has such force that leave would have to be granted outside the Rules.
16. There would be a need to show compelling circumstances, Miss Lloyd submitted. Although the judge had reached his decision prior to **SS (Congo)** he had directed himself correctly in finding compelling circumstances and the respondent would need to show that those findings were perverse if they were to be overturned. To establish perversity required surmounting a high threshold.
17. The judge had found that the couple had the finances required but the appeal failed under the Rules for evidential reasons and could thus be treated as a near-miss case and reference was made to paragraphs 54 to 58 of **SS (Congo)**. This was not a case where the parties were expecting their position to improve and their position could be distinguished from what was said in paragraph 57 about jumping the queue. This was a case in which the sponsor was over 70 and had health problems and might expect difficulties in travelling. The judge had referred to the sponsor's operations at paragraphs 31 and 37 of the determination. The sponsor had a long work history in the United Kingdom and while the position of the appellant's daughter and grandson did not amount to a trump card, it was a factor to take into account under Section 55 of the Borders, Citizenship and Immigration Act 2009. The situation in this case was different from many cases. There would be difficulty for family life being enjoyed by the parties together with the appellant's daughter and

grandson and the evidence about the situation in North Caucasus added a further complicating factor. The judge had also given weight to the public interest reflected in Section 117B as inserted by the Immigration Act 2014. There was no error in the determination and the conclusions were not perverse. Counsel also mentioned the case of **Chikwamba v Secretary of State [2008] UKHL 40**.

18. Miss Isherwood submitted that there was nothing different about the situation in this case and the appeal did not represent a near miss and the circumstances could be distinguished from **Chikwamba**. The couple should wait until they could meet the financial requirements of the Rules.
19. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision if it was materially flawed in law.
20. I also remind myself that the First-tier Tribunal Judge had the benefit of hearing from the sponsor. Miss Isherwood submitted that there was nothing different about the circumstances in this case from any other case. However I respectfully disagree. The first point to note is that the parties were previously married. Indeed the appellant was granted an entry clearance as a spouse and entered the United Kingdom as a spouse. The parties then got divorced and were subsequently reconciled and after the respondent's decision remarried. The history is somewhat unusual. The judge found the relationship as partners was genuine and did not materially err in referring to the marriage at an early stage of his determination - he was quite clear about it being a post-decision matter, as he says in paragraph 40.
21. The judge also specifically considered the interests of the appellant's grandson and found that both the appellant and the sponsor have had a much closer relationship with the grandson than many who have had such relationships. This was a relevant matter for the judge to consider. The judge also referred to the sponsor's age and medical conditions and the need for a further operation. It was not an irrelevant consideration to take into account Foreign Office advice against travel to the North Caucasus.
22. Miss Isherwood correctly refers to the need to take into account the Secretary of State's position. The judge did not have the benefit of **SS (Congo)** when he determined the matter but he does refer, as I have said earlier, to **Gulshan** and **MM v Secretary of State**. He also sets out the amendments made by the 2014 Act and expressly reminds himself that Section 117B(1) states that the maintenance of effective immigration controls is in the public interest.
23. In paragraph 59 the judge finds that the circumstances viewed cumulatively were both exceptional and compelling. There is force in the submission made on behalf of Miss Lloyd that these findings were open to the judge and should only be disturbed if they were perverse. She rightly points out the high threshold - see, for example, **R (Iran) v Secretary of State [2005] EWCA Civ 982** at paragraph 11 per Brooke LJ:

“It may be helpful to comment quite briefly on three matters first of all. It is well known that “perversity” represents a very high hurdle. In **Miftari v SSHD [2005] EWCA Civ 481**, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJ) said that it embraced decisions that were irrational or unreasonable in the Wednesbury sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter.”

24. It is clear that the judge found the matter not an easy one to resolve as he says in both paragraphs 57 and 59 of the determination but resolve it he did and he resolved it in favour of the appellant. It may be that another judge would have come to a different conclusion or supported the conclusion with different or other reasons but he was entitled to find as he did in a properly reasoned decision.
25. When the determination is read as a whole it is clear that the judge gave proper weight to the public interest. The reference to a complete code in the determination needs to be read in the light of the fact that the judge did not have the benefit of paragraph 43 of **SS (Congo)** which reads as follows:

“We should say something about the notion of a ‘complete code’, which has been deployed in argument in some cases (see, e.g., **MM (Lebanon)** at paragraphs [131]-[132] in the judgment of the Court of Appeal). Tribunals and courts should not attach undue weight to this concept, which is capable of giving rise to confusion if not properly understood. In truth, it does not have a significant impact on the proper legal approach to be deployed in any of the types of case to which we have referred.”
26. Happily this case the judge sensibly dealt with the matter both on the basis that the Rules formed a complete code and on the basis that they did not. On the particular facts of this case as the judge found them to be he did not err in law in concluding that cumulatively there were exceptional and compelling circumstances and to allow the appeal on human rights grounds.

Decision

27. The Secretary of State’s appeal is dismissed and the decision of the First-tier Tribunal Judge to allow the appeal under Article 8 stands.
28. The anonymity order made by the First-tier Tribunal Judge (because a minor child was involved) continues.

Fee Award

29. The First-tier Tribunal Judge did not make a fee award. I do not consider it appropriate to make a fee award.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Upper Tribunal Judge Warr
27 August 2015