



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01901/2016

THE IMMIGRATION ACTS

Heard at Birmingham
On 10 July 2018

Decision & Reasons Promulgated
On 10 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

JERRAH SONKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Medley-Daley, of the Immigration Legal Advice Centre,
Leeds
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 20 August 1972 and is a citizen of Gambia.
2. The appellant sought leave to remain in the UK because he was in a stable relationship akin to marriage with a British citizen. His application of 9 December 2015 was treated as a human rights claim based on the appellant's claimed family life rights.

3. On 23 March 2017, First-tier Tribunal Judge Colyer decided the respondent's decision dated 15 January 2016 to refuse the appellant's human rights claim was not unlawful under s.6 of the Human Rights Act 1998.
4. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Mailer on 25 September 2017 for three reasons.
 - (i) It is arguable Judge Colyer erred in considering whether the relevant immigration rules had in fact been satisfied.
 - (ii) It is arguable Judge Colyer applied a higher threshold that was appropriate in an article 8 case by relying on a test of exceptionality.
 - (iii) It is arguable Judge Colyer failed to recognise the seriousness of the medical condition of the appellant's partner when assessing insurmountable obstacles to the relationship continuing overseas.
5. Mr Medley-Daley relied on these grounds. His submissions, without conceding any of the issues, focused on the failure of Judge Colyer to consider material evidence about the medical condition of the appellant's British citizen sponsor. That evidence was recorded at [12] and [13]. He argued these issues went to the provisions of paragraph EX.1 of appendix FM to the immigration rules in relation to the question of whether there were insurmountable obstacles that prevented family life continuing overseas.
6. The sponsor's evidence identified she would have difficulties maintaining the strict diet she relies on to control her diabetes in Gambia. The sponsor's evidence also identified the medication she needs to control her diabetes and mental health condition. Despite Judge Colyer's acceptance of the sponsor as being a credible witness at [33], he failed to give any weight to her evidence when assessing whether they caused such difficulties for her that they would amount to an insurmountable obstacle to the relationship continuing in Gambia.
7. Mr Medley-Daley added that the problems arising from the failure to consider the sponsor's evidence properly were compounded by the test applied by Judge Colyer at [67]. In that paragraph, Judge Colyer found the difference in medical treatment available to the sponsor in Gambia did not "constitute exceptional circumstances". That was the wrong approach because the sponsor is entitled to medical treatment in the UK being a British citizen. The correct approach would have been to consider whether it was proportionate in all the circumstances for her to be deprived of the medical treatment she has access to in the UK.
8. A further error arose from Judge Colyer's assumption the sponsor would be able to find suitable employment in Gambia. Not only would she have to retrain but she would not be able to claim the reasonable adjustments put in place by her current employer because of her disability. Judge Colyer has given insufficient reasons for the inferences he makes regarding transferrable skills.

9. Mr Medley-Daley also challenges Judge Colyer's assessment that it would be reasonable to expect the appellant to make an application from Gambia to join his partner in the UK. Not only would the appellant not be able to benefit from paragraph EX.1 of appendix FM, since it applies only to an in-country application, but the likelihood of a lengthy delay in concluding such an application is high because the minimum income requirement cannot be satisfied. Judge Colyer erred in finding at [70] it would be possible for the couple to maintain their relationship by modern means of communication and visits because it was not realistic to expect the sponsor to go to Gambia even for a short period.
10. Mr Mills acknowledged the decision and reasons statement of Judge Colyer was not well structured but of itself that did not identify an error of law. He said the failure of Judge Colyer to apply paragraph EX.1 was immaterial because insurmountable obstacles were considered at [72].
11. Mr Mills turned to the factual issues and said that a finding that a witness is credible is not sufficient to discharge the burden of proof particularly in relation to a medical issue. The appellant did not provide reliable medical evidence that the sponsor could not live in Gambia. Although medical records were provided, there was no commentary about whether the sponsor could live in Gambia without difficulty or with acceptable levels of difficulty. The evidence was not enough and it was clear that was Judge Colyer's finding.
12. After hearing from the representatives, I reserved my decision.
13. I agree with Mr Mills that Judge Colyer's decision and reasons statement is not easy to follow. It is evident Judge Colyer has sought to structure his decision by looking at the different questions that needed to be resolved. Unfortunately, that approach makes the decision and reasons difficult to follow because it makes it somewhat disjointed.
14. It is appropriate to examine what Judge Colyer did.
15. After setting out the appellant's background and the proceedings, at [20] Judge Colyer sets out the legal matrix. He identifies that he will need to consider the immigration rules contained in appendix FM relating to partners, as well as whether the appellant benefits from article 8 ECHR.
16. From [27] to [38], Judge Colyer records his factual findings regarding the evidence of the appellant and his partner. At [39] he sets out the respondent's case as to why appendix FM is not engaged. The respondent decided the evidence failed to show the couple had been cohabiting for over two years, which meant the appellant could not be treated as the sponsor's partner under paragraph GEN.1.2.
17. This leads Judge Colyer from [40] onwards to explain why he finds the appellant and sponsor enjoy a genuine and subsisting relationship, which in any event was not disputed by the respondent, and why he finds that the relationship was akin to marriage and the couple had in fact been cohabiting for over two years.

18. I pause at this juncture because it is evident from the remainder of the decision and reasons statement that Judge Colyer does not revisit whether the appellant might benefit from the ten-year partner route for which provision is made in appendix FM. The respondent conceded the appellant met the suitability requirements in the reasons for refusal letter. The findings made by Judge Colyer meant the appellant satisfied the relationship requirements. The appellant was an overstayer and could only meet the immigration status requirements if he met the provisions of paragraph EX.1. Judge Colyer did not explore the immigration rules.
19. Returning to the decision and reasons statement, I note that from [46] to [54], Judge Colyer explains why the proxy marriage does not satisfy the requirements of English law to be recognised as a marriage. Judge Colyer then moves to consider the appellant's private life and concludes he would not face significant obstacles to his integration in Gambia. None of these findings is challenged.
20. From [61] Judge Colyer examines whether the appellant's claim there are exceptional circumstances in his case requiring a grant of leave is accurate. After setting out the respondent's view at [63], Judge Colyer looks at the factors raised by the appellant. He finds the relationship between the sponsor and her adult son is no more than the usual relationship between a parent and adult child and could be maintained by modern means of communication. At [65] Judge Colyer finds the relationship between the appellant and sponsor began when his immigration status was precarious and it was known he did not have a permanent legal status to be in the UK. At [66]. Judge Colyer accepts the sponsor is employed in the UK and her home is in this country. It is in this paragraph the judge says she could find employment in Gambia because of her good employment history and skills. At [67], Judge Colyer records the sponsor is diabetic and has depression. He points out that the sponsor has a right to access NHS services. The judge at [68] finds the couple can maintain their relationship by modern means of communication.
21. Having considered all the factors identified by the appellant, Judge Colyer concludes they are not sufficient individually or cumulatively to establish exceptional circumstances for a grant of leave to be made outside the immigration rules.
22. At [69] Judge Colyer explores whether it was reasonable to expect the appellant to make an application from Gambia. At [69] he comments that he finds the sponsor's reasons for not relocating to Gambia to be understandable but not insurmountable. Judge Colyer considers a variety of cases which confirm the proper approach to "insurmountable obstacles" and when it is appropriate to expect a person to leave the UK to comply with immigration controls from overseas. Judge Colyer reminds himself that the fact an entry clearance application might be likely to fail is not a factor to be considered.
23. At [77] Judge Colyer looks at whether there are significant obstacles to the appellant returning to Gambia and concludes there are none. He considers whether the evidence suggest the appellant might be destitute in Gambia and identifies there is no reliable evidence.

24. At [81] Judge Colyer begins a classic Razgar step-by-step analysis of the appellant's right to private and family life. At [86] and [87] he finds the respondent's decision interferes with the appellant's private and family life and that the impact will be significant. At [88] and [89] Judge Colyer finds the respondent's decision is justified in terms of seeking to maintain immigration controls, and it is for a legitimate purpose. Thereafter, Judge Colyer assesses the proportionality of the respondent's decision. He takes into consideration the appellant's personal history, the precarious nature of his immigration status, and the public interest. In assessing the public interest, Judge Colyer relies on s.117B of the Nationality, Immigration and Asylum Act 2002.
25. Judge Colyer brings his findings together in his conclusions from [102] to [107].
26. Prior to Judge Colyer hearing his appeal, the Supreme Court had given its judgment in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60. The Court of Appeal has subsequently urged First-tier Tribunal Judges to adopt the balance sheet approach recommended by Lord Thomas at [82] to [84]. It is an easier structure to use. It also requires the immigration rules to be regarded not in isolation but in relation to the strength of the public interest, being the expression of effective immigration controls.
27. Judge Colyer followed the earlier guidance which advocated structuring a decision by first considering whether a person met the immigration rules, and if not whether it was necessary to examine whether the person benefited from article 8 ECHR applied directly. The fact the Court of Appeal has recommended not using such a structure even though it suggested it initially reflects how the previous advice on structure was cumbersome.
28. Of course, I do not criticise Judge Colyer for the structure of his decision and reasons statement. It is a product of its time. I do commend him for the detail it contains, which is evidence of his paying careful attention to case law and the appellant's appeal.
29. However, having carefully examined it, as I indicated at [18] above, Judge Colyer did not consider whether the appellant satisfied the immigration rules relating to partners. It is clear Judge Colyer found the appellant satisfied the requirements to be regarded as a partner for the purposes of appendix FM but did not go on thereafter to assess whether he benefited from paragraph EX.1. To this extent I agree with the submissions of Mr Medley-Daley.
30. But that is not the end of the matter, it is also clear from the decision and reasons when read as a whole that Judge Colyer was considering at length the question of whether the appellant had shown there were insurmountable obstacles to the appellant's relationship to his sponsor continuing outside the UK. Any legal error, therefore, is not material.
31. Judge Colyer considered the evidence provided and although he found the sponsor had diabetes and depression he did not find the evidence was sufficient to show she

could not live in Gambia. That is the clear meaning of [69]. I accept Mr Mills's submission that the mere fact that a witness is found to be credible is not sufficient in a case which turns on the balance of probability to establish the appellant's case. In this appeal, as also indicated at [69], Judge Colyer found the sponsor did not want to leave the UK to live in Gambia. He found that position to be understandable but not insurmountable.

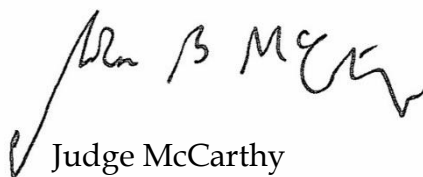
32. The evidence about the sponsor's medical condition was insufficient to establish insurmountable obstacles. At [67] Judge Colyer found that although the sponsor benefited from access to the NHS, there was no evidence to show that the healthcare system in Gambia was so poor as to prevent her living there. Given the lack of reliable evidence, this was a finding open to Judge Colyer. The evidence of the sponsor was not sufficient by itself. The judge did not have to give a reason for that because obviously the sponsor is not a medical expert, has no knowledge of the medical facilities in Gambia and has a reason for trying to keep the appellant in the UK.
33. I conclude there is no actual inconsistency in the findings made by Judge Colyer. I also find his careful consideration of what he describes as "exceptional circumstances" is equivalent to consideration of insurmountable obstacles within the meaning of paragraph EX.1 and for the purposes of article 8 in general. Judge Colyer has not, in my opinion, applied a higher threshold when considering article 8 issues. That finding gives strong weight to the public interest in requiring the appellant to leave the UK.
34. It follows that I do not accept there is legal error in Judge Colyer's decision and reasons statement and the appeal fails.
35. I have reviewed whether anonymity should be ordered but recognising the decision and proceedings in the First-tier Tribunal were not anonymised, there is no reason to make such an order in the Upper Tribunal.

Notice of Decision

The appeal to the Upper Tribunal is dismissed.

There is no legal error in the decision and reasons of FtT Judge Colyer and his decision is upheld.

Signed



Date 7 August 2018

Judge McCarthy
A Deputy Judge of the Upper Tribunal