



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15452/2017

THE IMMIGRATION ACTS

Heard at UT (IAC) Hearing in Field House
On 28 February 2019

Decision & Reasons Promulgated
On 03 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GURBET HAMAWANDI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Mr J Walsh of Counsel instructed by Morgan Has Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Adio promulgated on 2 January 2019 allowing the appeal of Ms Gurbet Hamawandi against a decision of the Secretary of State for the Home Department dated 2 November 2017 to refuse leave to remain in the United Kingdom on the basis of family life with her partner.
2. Although before me the Secretary of State for the Home Department is the Appellant and Ms Hamawandi is the Respondent for the sake of consistency with the

proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Ms Hamawandi as the Appellant.

3. The Appellant is a national of Turkey born on 6 April 1976. She entered the United Kingdom on 23 August 2013 with entry clearance as a spouse to join her British citizen husband Mr Ribwar Hamawandi. Her leave was valid until 15 May 2016.
4. The Appellant made an application for further leave to remain as the spouse of a British citizen on 6 May 2016. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 2 November 2017.
5. The application was refused with particular reference to the 'suitability' requirements of Appendix FM of the Immigration Rules, and in particular paragraph S-LTR.1.6. The relevant part of the Rules is in the following terms:

"S-LTR.1.1. The applicant will be refused limited leave to remain on the grounds of suitability if any of paragraphs S-LTR.1.2 to 1.8 apply ...

...

S-LTR 1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3 to 1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

6. In this context the RFRL offered the following explanation for finding the Appellant did not meet the suitability requirements.

"Suitability

Under paragraph R-LTRP.1.1(d)(i), your application falls for refusal on grounds of suitability under Section S-LTR because you were convicted at Southwark Crown Court on 8 March 2017 of Facilitate the acquisition / acquire / possess criminal property and Conceal / Disguise / convert / transfer remove criminal property. You therefore fall for refusal under Section S-LTR.1.6 of Appendix FM of the Immigration Rules."

7. The RFRL otherwise indicated that the Respondent accepted that the Appellant met the 'eligibility' requirements of the Rules. It was noted there was no requirement to consider EX.1 because the Appellant failed under 'suitability'. The Appellant's case was also considered to fail in respect of private life pursuant to paragraph 276ADE(1) with reference to 'suitability'.
8. There is no express reference in the RFRL - or indeed in the decision of the First-tier Tribunal - to the particulars of the Appellant's criminal convictions. Nonetheless the particulars are apparent in the materials before the First-tier Tribunal filed by the Appellant, including Counsel's note on sentence and a pre-sentence report prepared by the National Probation Service. In short: a substantial sum of money had been placed in the Appellant's account and she had made personal use of a small proportion of it; the total sum was approximately £1.8 million, which Mr Walsh tells me was the proceeds of a fraud; there is no suggestion that the Appellant was herself

directly involved in the fraud, albeit the proceeds found their way into her account for a period of time; Counsel's note on sentence indicates approximately £119,000 of the total was spent - the majority being spent by the Appellant's husband, and approximately £10,000 by the Appellant.

9. The Appellant received a suspended sentence: 24 months of imprisonment, suspended for 24 months; she was also required to undertake 200 hours of unpaid work. In contrast her husband received a sentence of 33 months imprisonment, not suspended. Mr Hamawandi's conviction is not referenced by the Respondent in the RFRL in relation to the issue of suitability. It is only mentioned in the context of the residual consideration of 'exceptional circumstances', and appears to be done so only in relation to the extent to which the Appellant was in direct contact with her husband given that he was in prison. In this context the RFRL states:

"Your partner was convicted of the same offences as you and was sentenced to 33 months imprisonment. Your direct contact with him is limited in comparison with a couple who are cohabiting. It is considered you can maintain contact with your partner through letters, phone calls and modern means of communication. On his release it is open to him to join you in Turkey. In the meantime, any interference with your family life is considered proportionate in the interest of the legitimate aim of crime prevention."

10. The Appellant appealed to the IAC.
11. The Appellant's appeal was allowed for reasons set out in the decision of First-tier Tribunal Judge Adio promulgated on 2 January 2019.
12. The Respondent sought permission to appeal to the Upper Tribunal. This was granted by First-tier Tribunal Judge Parkes on 22 January 2019.
13. The Appellant has filed a Rule 24 response under cover of letter dated 15 February 2019 resisting the Respondent's challenge.
14. Before the First-tier Tribunal it was argued on behalf of the Appellant that the decision of the Respondent on the issue of suitability did not demonstrate that a factual judgment had been made; further or alternatively the decision was not adequately explained. It was identified that the RFRL went from a statement of the fact of conviction immediately to a statement that the requirements of S-LTR.1.6 were satisfied; nothing more was offered by way of reasons or explanation.
15. The Appellant otherwise argued before the First-tier Tribunal Judge that a different evaluation should have been made within the parameters of S-LTR.1.6. In this regard the Appellant's Skeleton Argument before the First-tier Tribunal (drafted by Mr Walsh) refers at paragraph 11 to S-LTR.1.6 requiring "a factual judgment about whether the presence of that individual is not conducive to the public good because their conduct makes it undesirable for them to remain". The Skeleton Argument further submits "that this is a discretionary judgment requiring careful and reasoned analysis of facts and the individual components in the wording of the Rule" (paragraph 12); see similarly "the discretionary basis of the judgment" (paragraph 13).

16. The First-tier Tribunal Judge, having rehearsed the background to the case (including identifying the substance of the Respondent's decision) and the documentation that was before him, having directed himself to the law, and having noted the evidence and submissions heard before him, turned to a consideration of the Article 8 appeal in the first instance by reference to the Immigration Rules: see for example paragraph 14, wherein the relevant Rules in respect of suitability were also identified.

17. The Decision then states:

"15. The Appellant has served her sentence and has not done anything to trigger going to prison. There is no consideration in the letter of the Respondent that there has been a factual judgment about whether the presence of the Appellant is not conducive to the public good due to her conduct. The Appellant was given a suspended sentence and she has served her 100 hours, but the sentence report shows that there is a low risk of reconviction and reoffending. It is also noted that there is no significant or current indicators of risk or serious harm to any known person. There is no indication that the Respondent gave sufficient reasons given the discretionary basis of the judgment and how serious its consequences were for the person affected by it. There is therefore not a fair assessment of the circumstances of the Appellant before judging that her presence in the UK is not conducive to the public good or that it is undesirable for her to remain in the UK. I bear in mind that although she committed a serious offence, the offence was not one for which she was sent to prison.

16. She has since taken on a job and is working, her P60 and pay slips are included in the bundle. The Appellant in her witness statement of 9 April 2018 states that she has taken all necessary steps to ensure that she was not committing a crime and that this is the first crime she has ever committed and that this would be the last. I accept the submissions made by Mr Walsh in his skeleton argument concerning the lack of discretionary judgment applied by the Respondent in this case to the suitability requirement. Conviction did not meet the threshold for deportation. The Appellant's culpability was quite clear, though not as much as her husband. However, I find that the Appellant is not someone who the public needs to be protected from. She has gone on to get a job and is contributing to the economy of the UK. I find that her presence in the UK is conducive to the public good despite her conduct. I also find that although she has committed an offence her risk of reconviction or reoffending is low and taking all the circumstances into account her character does not make it undesirable to allow her to remain in the UK. I therefore find that the Respondent did not exercise discretion properly in refusing the Appellant under S-LTR.1.6. I therefore find that the Appellant does not fall for refusal under the paragraph of the Rules."

18. Thereafter the Judge went on to consider EX.1(b) of Appendix FM and ultimately reached a conclusion in the following terms.

"On the totality of evidence before me I find that there are insurmountable obstacles to family life continuing in Turkey, and this will not be overcome or

would entail very serious hardship for the applicant and her partner.”
(paragraph 17).

19. I pause to note that this latter finding – in respect of ‘insurmountable obstacles’ – is not the subject of express challenge in the Respondent’s grounds of appeal to the Upper Tribunal.
20. It may be seen that the First-tier Tribunal Judge addressed the issue of ‘suitability’, accepted the submission made on behalf of the Appellant that the Respondent had not adequately explained the conclusion that S-LTR.1.6 was satisfied; and in any event made his own evaluation of the facts and circumstances of the case against the framework of S-LTR.1.6 concluded that its terms were not satisfied. Having thus found that the Appellant’s application should not have been refused under the Rules by reference to ‘suitability’, the Judge went on to consider the residual aspect of the Rules with particular reference to EX.1, and found in the Appellant’s favour. Accordingly the Judge was satisfied that the Appellant met the requirements of the Rules – which are drafted to reflect a proportionate respect for family life – and concluded that the appeal succeeded on Article 8 grounds.
21. Be that as it may, the Judge also made an alternative favourable finding:

“Even if I had found that the Respondent was right to refuse on grounds of suitability, for the same reasons given above with regards to the issue of the couple trying for a baby as well as the political writings of the Appellant’s spouse, I would have found the Respondent’s decision to be disproportionate.” (paragraph 17)
22. The Respondent’s grounds of challenge have their primary focus on the Judge’s consideration of the Immigration Rule on ‘suitability’. The principal submission is that the Judge has misunderstood that the Rule is mandatory in nature, and has erroneously referred to there being a discretion under the Rule.
23. In my judgement this principal basis of challenge is misconceived.
24. It cannot be disputed that if the conditions of S-LTR.1.6 are satisfied then the refusal under the Rules is mandatory: see the wording at S-LTR.1.1 *“the applicant will be refused”*. This is not a Rule where if S-LTR.1.6 is satisfied there is under the Rules at large a discretion nonetheless to allow or refuse the application. It is evident that this mandatory element of the Rule is the focus of the ground of challenge. In substance it is pleaded that the Judge failed to recognise this.
25. The mandatory element of the Rule – ‘*will* be refused’ – is necessarily premised on the conditions or requirement of the Rule being satisfied. Inherent in paragraph S-LTR.1.6 is an evaluative process; the condition therein – *“presence... is not conducive to the public good”* – is not automatically or mandatorily met by reference to any particular conduct or association, or character feature, or other invoked reason; an evaluative judgement is required as to whether such factors *“make it undesirable to allow [the applicant] to remain”*.

26. The references to 'discretion' employed both in the Appellant's Skeleton Argument and in the decision of the First-tier Tribunal, are references to this evaluative judgement inherent in S-LTR.1.6. The references to 'discretion' are not an indication that it was the Appellant's case, or more particularly the Judge's understanding, that the Rule was a 'discretionary' rule rather than a mandatory rule.
27. I can understand how the confusion has arisen in the mind of the drafter of the Respondent's grounds pursuant to the use of the word 'discretionary' in the context of a 'discretionary judgment' in both the Appellant's Skeleton Argument (paragraphs 12 and 13) and the Decision of the First-tier Tribunal (paragraph 15), and most particularly pursuant to the Judge's phrase "*did not exercise discretion properly in refusing the Appellant under S-LTR.1.6.*" (paragraph 16). It seems to me that to avoid such confusion it would have been better to identify that the judgment within the framework of S-LTR.1.6 is essentially an *evaluative* judgment in which the decision-maker brings to bear their individual judgment.
28. I do not accept that the use by the Judge of the word 'discretionary' in this context demonstrates that he misunderstood the nature of the Rules in respect of 'suitability'. Indeed far from it. It seems to me that the Judge identified that there was a deficiency of reasoning in the Respondent's own evaluation of factors potentially relevant to S-LTR.1.6, and in any event appropriately embarked upon an independent evaluation of the facts and circumstances of the case. In this context the Judge has adequately identified and explained the facts and circumstances of the case, and how they informed his evaluation of the issue of whether it was "*undesirable to allow [the Appellant] to remain*" pursuant to paragraph S-LTR.1.6.
29. The Judge's evaluation under S-LTR 1.6 is also the subject of criticism in the grounds of appeal, with particular reference to: the Judge's comment that the "*Conviction did not meeting the threshold for deportation*" (paragraph 16); the Appellant's association with her husband; and the wider public interest - including public revulsion, deterrence, and confidence in an effective immigration system.
30. I am not persuaded that the Judge was in error in stating that the Appellant's conviction did not meet the threshold for deportation. Necessarily where a conviction is being considered in the context of S-LTR.1.6 it will be one that does not fall within the threshold for deportation. It seems to me that it cannot be inferred from the simple and accurate statement of fact - "*Conviction did not meeting the threshold for deportation*" - that the Judge overlooked that that was inevitable in the context of S-LTR.1.6, or that he otherwise accorded it conclusive weight. It is clear the Judge went on to consider other factors. In the overall context of considering suitability it is not irrelevant to make such an observation on the nature of the criminal conduct.
31. As regards the reference in the Respondent's grounds to 'association', I note that this was not a matter raised in the RFL in the context of S-LTR.1.6, or otherwise in the context of 'suitability'. As I have identified above, the conduct of the Appellant's

husband was only raised in the context of his imprisonment reducing the quality of shared family life.

32. Similarly, the Respondent did not make any express reference in the RFRL to the notions of revulsion and deterrence.
33. In all such circumstances I do accept that the First-tier Tribunal Judge can be criticised for not having made any particularised reference to the Appellant's association with her husband as an aspect of conduct to be considered under S-LTR.1.6., or for not having made any particularised reference to public revulsion and/or deterrence.
34. Mr Avery also submitted that the Judge erred when considering S-LTR.1.6 in having regard to the impact of removal on the Appellant. He argued that the focus is on the public interest, not the effect on the applicant. As such, the Judge's observation - *"There is no indication that the Respondent gave sufficient reasons given the discretionary basis of the judgment and how serious its consequences were for the person affected by it"* (paragraph 15) - was in error.
35. Even if the premise of Mr Avery's submission is sound, I do not accept that the quoted reference was made by the Judge in the context of his evaluation of S-LTR.1.6. It seems to me plain that the Judge's observation was made in the context of considering the adequacy of the Respondent's reasons in the RFRL: the Judge was saying that in circumstances where a decision that S-LTR.1.6 was engaged would have serious consequences, the duty adequately to explain the reasons for such a decision was that much greater than might be the case otherwise - and this was also appropriate given that there was an evaluative element.
36. Mr Avery also suggested that the First-tier Tribunal Judge should not have accorded any weight to the fact that the Appellant was now in employment. I disagree. It seems to me that that is a relevant consideration in evaluating whether the Appellant's conduct is such as to make it undesirable that she be allowed to remain in the United Kingdom. It is part of the overall picture of her conduct, and part of an evaluation of the desirability or otherwise of her remaining in the United Kingdom. The extent to which an individual may have rehabilitated herself subsequent to undesirable conduct is part of considering whether it is undesirable to allow her to remain.
37. Ultimately it seems to me that Mr Avery was driven to argue that the mere fact of the Appellant's convictions was itself adequate justification for the engagement of S-LTR.1.6. It seems to me clear that the First-tier Tribunal Judge took a different view for reasons adequately explained. To that extent ultimately the Respondent's case was one of disagreement with the decision of the First-tier Tribunal.
38. In all of the circumstances I can identify no error of law.

Notice of Decision

39. The decision of the First-tier Tribunal contained no error of law and accordingly stands.
40. The Appellant's appeal remains allowed
41. No anonymity direction is sought or made.

Signed:

Date: 30 March 2019

Deputy Upper Tribunal Judge I A Lewis