



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: HU/14064/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC
On 18 December 2020

Decision & Reasons Promulgated
On 31 December 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

GIAN CARLO RAMOS SAYSON
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Ms S Saifolahi of counsel, instructed by Shahban Solicitors
For the Respondent: Mr A Tan, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Canadian citizen with date of birth given as 1.12.90, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 8.11.19 (Judge Alis), dismissing his human rights appeal against the decision of the Secretary of State, dated 15.7.19, to refuse his application for leave to remain in the UK on private and family life grounds.
2. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 19.8.20, considering it arguable that the judge erred in assessing whether there were insurmountable obstacles or exceptional circumstances, or in the proportionality assessment, by failing to make findings on the significance of the sponsor's grandmother's evidence that she was dependent on the sponsor and that there was family life between the sponsor and his grandmother.
3. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.
4. The relevant background can be summarised as follows.
5. None of the facts were in contention. The appellant has been in a relationship with Mr Ouseley for some 7 years, the first 4 of which was conducted remotely as the appellant lived in Canada and Mr Ouseley in the UK. Although there had been five visits of Mr Ouseley to Canada, the relationship was kept hidden from the appellant's family. He wished to remain in the UK with his partner, whose family were extremely supportive. It was not disputed that they had been in a relationship since 2013 and had lived together in the UK since October 2016.
6. The appellant first entered the UK in September 2016 on a Tier 5 Youth Mobility visa, with leave to remain until 26.9.18. The day before the expiry on his leave, on 25.9.18 he made an invalid application for leave to remain as an unmarried partner. A valid but out of time application was not made until 21.2.19.
7. The application was brought on insurmountable obstacles grounds. As Judge Alis noted at [8] to [9] of the decision, the burden of proof of showing insurmountable obstacles lay on the appellant on the balance of probability. He also bore the burden of showing that family life was engaged, after which it would be for the respondent to demonstrate that the refusal decision was proportionate.
8. The application was refused by the respondent, on the basis that there were no (EX1 of Appendix FM) insurmountable obstacles to family life continuing in Canada, and no very significant obstacles to the appellant's integration there (paragraph 276ADE). In addition, the appellant could not meet Appendix FM as he was an illegal overstayer at the date he made his application. Neither did the

respondent accept that there were exceptional circumstances under GEN 3.2 of Appendix FM.

9. The grounds are not well drafted but Ms Saifolabi was able to encapsulate in brief terms her primary submission that the judge failed to consider, assess, or make findings in respect of the grandmothers evidence, which she submitted was relevant to both the test of insurmountable obstacles and article 8 proportionality outside the Rules. She pointed to the considerations set out by the judge between [41] and [51] of the decision, which make no specific reference to the grandmother. It was submitted that the grandmother's evidence of her emotional and practical dependence on the appellant's partner was the 'kernel' of the appeal but that the judge had omitted this from his considerations and there was no consideration as to whether the refusal decision created unjustifiably harsh consequences for the grandmother.
10. It is important to recognise that at the outset of the First-tier Tribunal appeal hearing, as noted at [10] of the decision, the appellant's representative Mr Sardar made clear that the appeal was being pursued solely under EX1 of Appendix FM of the Immigration Rules, on the basis that there were insurmountable obstacles to family life continuing in Canada with his partner Mr Ian Ouseley. This was repeated in Mr Sarwar's closing submissions, as noted by the judge at [25] of the decision, where he submitted that "this was one of the few cases that the appellant could demonstrate there were insurmountable obstacles to family life continuing outside the United Kingdom." At [45] of the decision the judge records that Mr Sarwar did not content that refusal of the application would breach paragraph 276ADE of the Immigration Rules, which is why the judge did not go on to consider that route in respect of the appellant's private life.
11. In relation to insurmountable obstacles, the appellant's evidence was that when his Catholic parents discovered his sexual orientation and his relationship with Mr Ouseley, they made it clear that they disapproved. They have never met his partner. The claim was made on the basis of insurmountable obstacles, with the appellant asserting that his family and private life would be greatly disrupted because his family would never accept his partner and because he believed his sexuality would not be accepted in Canada. He also submitted that his partner would struggle with the social norms of Canada, such as the humour and limited vacation time.
12. Although it is submitted the judge did not consider or take into account the evidence in relation to the grandmother, that is not borne out by a consideration of the decision as a whole. The assessment of the evidence and findings begins at [29] of the decision. Within that section, at [36] and [37] of the decision the judge recognised the stumbling block to be the close connection between the appellant's partner and his family, in particular his grandmother, who gave oral

evidence explaining that he had been “extremely helpful in providing her support following the recent death of her husband.” She was upset at the thought of the appellant being required to leave. Effectively, the judge took and accepted this evidence at its highest in the appellant’s favour and the argument that it was not considered is unsustainable. As stated, the facts and relevant factors were not in contention and properly identified by the judge, who at [51] of the decision confirmed that he had had regard to the “factors discussed above.” I am satisfied that this reference included all of the assessment made from [29] onwards under the heading ‘Assessment of Evidence and Findings’, including those about the grandmother.

13. It is important to note that Mr Sarwar’s submission was that the combination of this relationship between the partner and his grandmother “coupled with the rejection of their relationship by the appellant’s family amounted to an insurmountable obstacle.”
14. The judge’s conclusion at [33] of the decision that as there was no evidence that the population of Canada is intolerant towards the gay community is unsurprising and has not been challenged. There, the judge observed that “there would be nothing to prevent the appellant and his partner relocating to Canada and if the appellant’s family could not accept the relationship then they were old enough to find their own property.” It follows that the second part of Mr Sarwar’s assertion of insurmountable obstacles because of the rejection of the appellant’s partner by his family is not made out. Frankly, that aspect of the case, including reliance on the claim that the partner would not understand Canadian humour or would have less generous vacations from work, was always painfully weak.
15. The only remaining part of the assertion of insurmountable obstacles relied on by Mr Sarwar was, therefore, in relation to the effect on the partner’s grandmother. However, having accepted the appellant’s case at its highest, including the evidence of the effect on the grandmother of the partner leaving to live with the appellant in Canada, the judge rejected the primary submission that these circumstances reached the high threshold of ‘insurmountable obstacles’ to family life continuing outside the UK. As defined by EX2, insurmountable obstacles are very significant difficulties which would be faced by the appellant or their partner in continuing family life together outside the UK and which could not be overcome or would entail very serious hardship for the appellant or their partner.”
16. Despite Mr Sarwar’s voluntary restriction of the ambit of the appeal, the judge did go on to consider exceptional circumstances within and without the Rules under article 8 ECHR, applying section 117B of the Nationality, Immigration and Asylum Act 2002 to the proportionality balancing exercise, correctly noting at

[48] that in cases of precarious family life a very strong or compelling claim is required to outweigh the public interest in immigration control.

17. The judge set out a number of factor weighing against the appellant in the proportionality balancing exercise, including that he came to the UK on a temporary basis with no legitimate expectation of being able to settle. His relationship with his partner was precarious from the outset. Neither could he demonstrate financial independence sufficient to meet the requirements of the Rules. The judge correctly directed himself on *GM (Sri Lanka) [2019] EWCA Civ 1630* that “the test for an assessment outside the Immigration Rules is whether a “fair balance” is struck between competing public and private interests. This is a proportionality test order to ensure that references in the Immigration Rules and in policy to a case having to be “exceptional” before leave to remain can be granted, are consistent with article 8, they must be construed as not imposing any incremental requirement over and above that arising out of the application of an article 8 proportionality test, for instance that there be “some highly unusual” or “unique” factor or feature.” The judge noted that the appellant could not meet the normal requirements of the Rules for leave to remain under Appendix FM because he had overstayed his leave and because he could not meet the financial requirements.
18. As stated, outside the Rules there would have to be a very strong or compelling claim. Whilst there was no specific reference to the effect on the grandmother between [41] and [51] of the decision, I am satisfied that it is implicit from the decision read as a whole that this was at the forefront of the judge’s mind, describing it in the assessment of the evidence as “the real stumbling block”. Whilst I am satisfied the judge had accepted that the grandmother would be upset and perhaps devastated, there was no evidence that the partner lived with his grandmother or that the relationship between was such as to amount to family life engaging article 8 ECHR, or, more significantly, that there was such a level of dependency between the partner and his grandmother that the decision was unjustifiably harsh. As stated above, the appellant’s case was never put on that basis, as Mr Sarwar was entirely confident that the circumstances amounted to insurmountable obstacles to family life continuing outside the UK. I am satisfied that it was open to the judge to reject that submission, for the reasons given in the impugned decision, and that the claim that the judge merely ignored the effect on the grandmother is not sustainable. Even if the judge should have made specific
19. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the human rights appeal remains dismissed.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 18 December 2020