IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002980

First-tier Tribunal Nos: HU/52732/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

HEATHER GRACE MCGEE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Lawson, Senior Home Office Presenting Officer
For the Respondent: Mr S Kumar, UK Migration Law

Heard at Birmingham Civil Justice Centre on 7 November 2023

DECISION AND REASONS

Background

1. To avoid confusion and for ease of understanding, in this decision I shall refer to the parties as they were before the First-tier Tribunal i.e. to Miss McGee as the Appellant and the Secretary of State as the Respondent.

2. This matter concerns an appeal against the Respondent's decision letter of 22 April 2022, refusing the Appellant's application made on 25 October 2021.

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3. The Appellant applied for leave to remain on the basis of her relationship with her partner, Mr Shaun Nicholls, the couple having entered into a civil partnership in the UK on 16 October 2021. The Appellant relied on having several medical conditions as a reason why the couple could not live together in the United States of America.

4. The Respondent refused the Appellant's claim by letter sent by email on 22 April 2022 ("the Refusal Letter"). This stated that the application had been considered under Section R-LTRP of Appendix FM of the immigration rules. It was considered that the Appellant did not meet the requirements of the relevant rules because she was in the UK with leave as a visitor. Paragraph EX.1 had been considered but, the letter said, there was no evidence that there were insurmountable obstacles to family life continuing in the USA. In particular, she would be able to seek treatment for her mental health conditions there, as she had done previously. The Appellant also did not meet the requirements of 276ADE (1)(vi) as she would be able to re-integrate into the culture and way of life in the USA.

5. The Appellant appealed the refusal decision. The Respondent undertook two reviews of the matter and each time maintained its position in refusing the Appellant's claim.

6. The Appellant's appeal was heard by First-tier Tribunal Judge Chamberlain ("the Judge") at Birmingham on 21 March 2023. The Judge subsequently allowed the appeal in her decision dated 29 March 2023.

7. The Respondent applied for permission to appeal to this Tribunal. It challenged all of the material findings made by the Judge under EX.1. (b), 276 ADE (1) (vi) and outside of the Rules under article 8 ECHR.

8. Specifically, and with reference to [26], [27] and [29] of the Judge's decision, the Respondent said the Judge materially erred by failing to properly consider that the threshold tests of insurmountable obstacles/ very significant difficulties and very significant obstacles to integration are stringent/ elevated ones re Agyarko and Ikuga, R (on the application of) v SSHD [2017] UKSC 11 at 43 and 44 and Parveen EWCA Civ 932 [2018] at p9. The Respondent submitted that the following factors had not been properly considered:

   (a) the evidence was that the Appellant's mental health had improved and, since being in the UK, she no longer took medication [13]

   (b) the Appellant came to the UK aged 22 years having spent the whole of her life in USA, undergoing her education there

   (c) as a USA citizen she would be entitled to state assistance/ benefits

   (d) no timetable or reasons were given as to why the Sponsor would not be able to work immediately on arrival into the USA as the partner of a US citizen

   (e) whilst it was accepted that a deposit may be required to rent an apartment in the USA, an inability to provide a deposit was not an insurmountable obstacle

(f) the Sponsor's family, who were providing accommodation for the couple in the UK [31], could assist the couple whilst they established themselves in the USA.

9. The grounds further submitted that the failure to consider the above factors led the Judge to erroneously find that the Appellant met the requirements of EX.1(b) [30] and 276ADE1 (vi); this in turn meant the Judge erred when conducting a proportionality exercise outside of the Rules.

10. Permission to appeal was refused by first-tier Tribunal Judge Saffer on 1 May 2023, stating that:

> "The application amounts to nothing more than a disagreement with the evidence based findings of fact and weight the Judge applied to aspects of the evidence".

11. The Respondent applied to this Tribunal for permission on the same grounds.

12. Permission to appeal was granted by Upper Tribunal Judge Macleman on 27 September 2023, stating:

> "1. In the FtT, Judge Chamberlain allowed this appeal, and Judge Saffer refused permission to appeal to the UT.
>
> 2. There appears to have been no evidence on whether the USA does anything to preserve a citizen such as the appellant from destitution. The grounds show an arguable lack of underpinning for the crucial findings at [17] and [26] that on her return she and her UK citizen partner would face that fate, and at [27], that she would be unable to integrate.
>
> 3. The grounds suggest that the sponsor would be able to work immediately in the USA and it would take only a short time for the couple to establish themselves. This speculation is perhaps unlikely to show error, but it may reveal another shortcoming in the appellant's evidence of the practical realities around her return.
>
> 4. Parties may wish to consider whether, if the UT sets aside the decision of the FtT, to offeradditional evidence; see also accompanying standard directions.".

13. The Appellant did not file a response to the appeal.

The Hearing

14. The matter came before me for hearing on 7 November 2023 at Birmingham Civil Justice Centre. Mr Lawson attended for the Respondent and Mr Kumar attended for the Appellant.

15. Mr Kumar said that the grounds of appeal were opposed in their entirety. He confirmed that the Appellant had provided a new witness statement which she sought to adduce under rule 152A of the Tribunal procedure rules, but agreed that this did not go to the issues being discussed in the error of law hearing. Rather, this statement would become relevant if and when the decision of the Judge was set aside and fell to be remade. I therefore confirmed I would not consider the statement.

16. Mr Lawson took me through the grounds of appeal in detail. He expanded in particular as follows:

(a) there was no evidence that the Sponsor would not be able to find employment immediately in the USA, noting that the Civil Partnership certificate stated the Sponsor was an apprentice with a heating ventilation and air conditioning company. Mr Lawson submitted that, given the use of air conditioning in the Appellant's home area in the USA, it was likely that the Sponsor would be able to find work there.

(b) Carter, R (On the Application Of) v Secretary of State for the Home Department | [2014] EWHC 2603 (Admin) defined 'destitution' as not having adequate accommodation or any means of obtaining it, whether or not essential living needs are met. Mr Lawson said there was no evidence that the Appellant would not receive any assistance from the US authorities and the Judge's reasoning on this point was insufficient.

17. Mr Lawson asked me to set aside the Judge's decision and remit the appeal. In answer to my questions, he confirmed that no challenge was made to the credibility Appellant or Sponsor, nor to the medical evidence. He agreed that the Appellant would face difficulties finding employment as she has no employment history, although he noted the evidence that her mental health had improved since being with the Sponsor which could possibly help her in this regard. He said the Appellant could maintain this improvement by returning with the Sponsor and keeping away from her own family. He confirmed there was no evidence as to whether the US authorities could provide assistance but said the US was not a third world country. He admitted there was nothing in the decision to indicate whether, before the Judge, the Sponsor had been asked if he would support the Appellant if she returned alone. Mr Lawson said the lack of a rental deposit is unlikely to affect the ability to obtain accommodation provided by the state or any charitable organisations.

18. Mr Kumar responded to say that the Judge's decision was well reasoned and disclosed no errors. He said the Respondent's representative at the hearing had ample time in which to raise the points now being taken and even the grant of permission refers to there being speculation in the grounds. He said the medical evidence and credibility were not challenged and the Judge relied on the medical report when making findings about the Appellant's family and support on return. He said the Sponsor having been an apprentice is not sufficient evidence on which to say he could find employment in US; if the UK has immigration rules concerning workers, then the US is bound to as well. He said it is well known that the US does not have free healthcare akin to the NHS in the UK and this goes to the Appellant likely being destitute on return. The medical evidence opined that that she is likely to end her life if made to return. The Sponsor also has mental health conditions, of which evidence was before the Judge. Overall, Mr Kumar submitted that the Judge correctly considered everything holistically and made sound, reasoned findings such that the decision should stand.

19. In answer to my question, Mr Kumar confirmed that there was no country evidence concerning the job market in the US but submitted that this was not a point raised by the Respondent at the time; neither was the point about the Sponsor's family being able to provide support. He said the Judge cannot be criticised for failing to address points which were not raised.

20. Mr Lawson had no reply other than to say it was for the Appellant to prove the ability to meet the rules and there was a lack of evidence concerning the Sponsor's ability to find employment.

21. At the end of the hearing, I reserved my decision.

Discussion and Findings

22. I remind myself of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the decision under challenge.

23. I note that both parties were represented at the hearing before the Judge. The Judge states at [3] that both Appellant and Sponsor gave oral evidence and the representatives made submissions. Neither the oral evidence or submissions are described but appear to be referred to under the heading "Findings and Conclusions", as are the correct legal provisions. The Judge refers in [5] to the correct burden and standard of proof. At [8] the Judge finds that the Appellant and Sponsor are "honest and credible witnesses" and that their credibility had not been challenged such that their evidence could be relied upon.

24. At [9] Judge confirms she has considered the medical evidence and finds that the Appellant "has established diagnoses of Autistic Spectrum Disorder, ADHD and anxiety and depression" for which she has previously been treated in the US. In [10] the Judge finds the psychiatric report from Dr. Mala Singh dated 11 July 2022 to be reliable. I find that these were findings open to the Judge, given that the medical evidence and the credibility of the oral evidence were not challenged, this being referred to in [11] and also by Mr Lawson before me.

25. At [12] in reliance on Dr Singh's report, the Judge finds that:

> "the Appellant's depression has improved since coming to the United Kingdom (page 56). I find that this is due largely to the fact that she had considerable difficulties with her family in the USA, and considerable interpersonal difficulties with her mother."

26. At [13] the Judge further finds that the Appellant has not needed medication since being in the UK due to the support from the Sponsor. At [14] the Judge finds the Appellant's mental health conditions have prevented her from obtaining employment. Mr Lawson accepted this finding in the hearing before me.

27. At [15] the Judge finds the Appellant's family in the USA have disowned her. I consider this was a finding open to the Judge to make, given the Appellant's credibility was accepted and this is what her evidence said. Following on from this, the Judge finds at [16] that the Appellant "has no home to return to, and no financial support", and at [17] that "She would have no support and no social network" and "without these it is very likely that her mental health would deteriorate, especially given her ASD and the difficulties this causes with social interaction and engagement". I see nothing at all wrong with these findings which were properly made with reference to the unchallenged evidence. It is against this background that the Judge goes on to address the requirements of the immigration rules and potential breaches of articles 3 and 8 of the ECHR.

28. The Judge's finding in [18] that the Appellant did not meet the high threshold for a claim under article 3 ECHR has (rightly I find) not been challenged.

29. At [19] the Judge accurately sets out the requirements of paragraph EX.1 of the rules, being the correct provision given the contents of the Refusal Letter and Appellant's failure to meet the eligibility requirements concerning her immigration status in the UK. As referred to above, the grounds of appeal challenge the Judge's findings in this section on the basis that she fails to consider certain factors, which I shall now address.

30. As to the fact that the Appellant had lived in the USA until aged 22 and completed her education there, I see that this was a point raised in the Refusal Letter and also mentioned in the Respondent's second review of 9 February 2023. I find the Judge recognises the length of time the Appellant has lived in the USA when she refers in [9] to the Appellant having been treated in the USA "for many years" and when referring to the Appellant's account of her difficult family life - see, for example, [12], [15], [16], and [25] in particular. Even had the Judge explicitly recognised the length of time spent in the USA as something that went against the Appellant, I do not consider this would have made any difference to her overall findings given that the Appellant's evidence centred on the problematic family life and poor mental health she experienced whilst living there. Indeed the Refusal Letter itself recognised this when it said that:

> "You have also stated that it would be difficult for you and your partner to establish a private life here as you have various mental health conditions including Autism, depression, ADHD and anxiety which have made it difficult for you to establish an income and that the family members you lived with previously did not support you stated [*sic]* that they were emotionally abusive".

31. I therefore find this part of the grounds to be without foundation.

32. As regards the possibility that the Appellant could rely on state benefits or assistance in order to support herself/her partner and avoid destitution, I can see no evidence that this was raised by the Respondent before the Judge. It is not in the Refusal Letter or the Respondent's reviews and there is no reference to any such submission at the hearing. As such, the Judge cannot be expected to have addressed it. The same goes for the issues now raised about i) the lack of a rental deposit not being an obstacle if the Appellant could obtain accommodation provided by the state or charitable organisations and ii) the possibility of the Sponsor's family in the UK providing the couple with remote support. I cannot see that these issues were raised. Whilst Mr Lawson said these kind of issues were raised in the majority of similar cases, he could not point me to any evidence of it actually being raised before the Judge. Even had the question being raised concerning the Sponsor's own family providing support in the UK, I do not see that it automatically follows that simply because somebody is providing accommodation in the UK, that they would be willing to fund separate, further accommodation in another country. In this regard I note the application states that the Sponsor's grandmother also lives in the accommodation that she provides to the couple rather than funding a second property. I also note the Judge's finding in [24] that neither Appellant or Sponsor has any savings. Overall, I find the allegations in the grounds concerning these factors are without merit.

33. At [22] the Judge finds that the Appellant's mental health has improved since being in the UK, although at [12] this was limited to the condition of depression, rather than also including the autism. The Judge did therefore consider the improvement in mental health as a factor. The Judge was entitled to make these findings as the medical evidence was unchallenged. In addition to Dr Singh's report, the Appellant had adduced a significant amount of historical medical

evidence from the USA demonstrating that she had received medical treatment for her conditions in the past but had made no improvement. It therefore does not follow that simply because there is a health system in the USA which the Appellant could access, any treatment would be effective now when it had not been in the past.

34. Having said that, I note the Judge specifically says at [22] that "in reliance on the medical evidence I find that they [the mental health problems] would likely deteriorate on return to the US". What is missing from the Judge's analysis here is discussion as to whether the Sponsor accompanying the Appellant back to USA would reduce any potential deterioration, having found in [13] and [20] that the improvement in the Appellant's health was due to the support of the Sponsor. I cannot see that the report of Dr Singh addressed the likely state of the Appellant's mental health in these circumstances. It is not listed in section 2 as a question asked of Dr Singh in her instructions nor is it addressed in section 12, in answering the question as to whether a return to the USA would worsen the Appellant's condition. Rather this section focuses on the Appellant either returning to her family or being alone and "unable to fend for herself". Therefore, whilst reliance on Dr Singh's report was sufficient a reason for the Judge's finding that the Appellant would deteriorate if she returned alone, it was not sufficient to justify a finding that the Appellant would deteriorate even if the Sponsor were to accompany her, which is within the remit of the questions to be asked under EX.1.

35. I find this to be an error. It may be that the Judge considered the Appellant's past traumatic history in the USA in itself likely to cause a deterioration, but this is not made clear. Instead the Judge appears in [22] to be referring back to findings in [17] where she says:

> "I have considered Dr. Singh's opinion on whether returning the Appellant to the USA would worsen her condition (pages 60 and 61). She considers that the Appellant's mental health would deteriorate where she to return to live with her family. However she cannot return to live with her family, and therefore is likely to be destitute. She would have no support and no social network. I find that without these it is very likely that her mental health would deteriorate, especially given her ASD and the difficulties this causes with social interaction and engagement".

36. This indicates she only considered the position of the Appellant returning alone without the Sponsor.

37. I also find the Judge erred in finding at [23] that:

> "I find that the Sponsor would not be able to work immediately on moving to the USA. I therefore find that neither of them would be earning any money and that they would be unable to support themselves."

38. And at [24] that:

> "I therefore find that the Appellant and Sponsor would arrive in the USA with neither of them able to work and with no financial support."

39. It is unclear why the Judge found the Sponsor would not be able to work immediately on moving to the USA, or on what evidence this finding was based. Both Mr Lawson and Mr Kumar confirmed there was no country/objective evidence concerning the employment market or USA immigration requirements before the Judge and I cannot see that the witness statements mention any

research having been done in this regard. Whilst it is correct that there was evidence before the Judge of the Sponsor also having struggled with his mental health, this is not mentioned by the Judge in her decision. She does find at [20] that:

> "I find that the Sponsor is a British citizen. I find that he has lived in the United Kingdom for all of his life and has never been to the USA. I find that his only connection with the USA is the Appellant"

which may have formed part of her reasoning but if it did, this is not made clear and I find, would have not been adequate reasoning in any case given many people are able to find work in countries entirely new to them and without having support in doing so. I cannot see any other reason for this finding. There is therefore a lack of adequate reasoning in this regard which is an error.

40. To summarise, I have found two errors disclosed in the discussion of EX.1; concerning the findings that the Appellant's mental health will deteriorate on return without having considered the impact of the Sponsor accompanying her and that the Sponsor would not immediately be able to find work. I consider that these findings were key to the Judge's finding that the requirements of EX.1 were met given her final paragraph in the relevant section of the decision ([26]) states (my emphasis in bold):

> "Given these circumstances I find that there would be very significant difficulties for the Appellant and Sponsor in continuing their family life in the USA which would entail very serious hardship for both of them. I find that the Appellant **would experience a deterioration in her mental health**, which has become a little more stable and a little more manageable for the first time in her life. I find that they would **both experience significant financial hardship and would find it very difficult to establish themselves and to avoid destitution**. I find that the Appellant has shown on the balance of probabilities that she meets the requirements of paragraph EX.1(b) of Appendix FM".

41. The Judge's conclusion concerning EX.1 was therefore infected by error.

42. In [27] the Judge goes on to address whether requirements of 276ADE(1)(iv) are met, stating:

> "For the same reasons as set out above in relation to Appendix FM I find that the Appellant meets the requirements of paragraph 276ADE(1)(vi). I find that the Appellant would be returning to the USA as a young woman with no family support and no social network. She suffers from ASD and anxiety which would likely worsen without the support of the Sponsor. I find that she would be destitute. She would not have the finances to be able to afford to rent accommodation. I find that she would not be able to find employment. Given her mental health difficulties she would struggle to reintegrate and to rebuild a private life without any support. Without the support of the Sponsor she would struggle to maintain herself and to keep herself safe. I find that there would be very significant obstacles to her reintegration into the USA".

43. It is well established that the test to be applied under paragraph 276ADE is set out in Kamara [2016] EWCA Civ 813:

> "the idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to

> operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life".

44. It is also uncontroversial that the requirements of EX.1 and 276ADE are different, the first requiring there to be insurmountable obstacles to family life continuing outside the UK, whereas the second requires there to be very significant obstacles to the Appellant's integration on return. I find this distinction can be seen as recognised by the Judge when, despite having said her reasons for finding in favour on 276ADE are the same as those in relation to Appendix FM, she nevertheless goes on to list the reasons that specifically apply for the purposes of 276ADE in any case. As can be seen, here, the Judge specifically says the Appellant's mental health would worsen without the support of the Sponsor, which is a finding she was entitled to make based on the unchallenged report of Dr Singh. The reasoning also includes that the Appellant would not be able to find employment which, as above, was accepted by the Respondent. The other reasons were that the Appellant had no family support and no social network, did not have the finances to afford accommodation and would not have the support of the Sponsor with her. These reasons are all sound and were based on the evidence.

45. Overall, I find the Judge did undertake a broad evaluative assessment pursuant to Kamara. The Judge found the Appellant would not be able to operate on a day-to-day basis on return in the USA without the supportive presence of the Sponsor.

46. Overall I find the Judge's reasoning as regards 276ADE is untainted by the errors found above concerning EX.1, and is sound.

47. I do not find it made out that the Judge failed to properly consider that the relevant tests under the separate immigration rules are stringent/elevated ones. The Respondent has not challenged the medical and other evidence concerning the Appellant's health conditions, which it accepts are so serious as to have prevented her finding employment in the past, and her family being abusive (Refusal Letter). The Respondent also accepts in her second review that "independent medical evidence could establish that a physical or mental disability, or a serious illness which requires ongoing medical treatment, would lead to very serious hardship", which is exactly what Dr Singh's report said was the case.

48. As the Appellant was rightly found to meet the requirements of 276ADE(1)(iv), the erroneous finding that she also met EX.1 is not material, as the Appellant's appeal would have succeeded in any case. Having met the immigration rules, this was determinative for the purposes of the article 8 proportionality assessment pursuant to TZ (Pakistan) [2018] EWCA Civ 1109, correctly cited by the Judge at [34].

49. To conclude, I find the decision is not infected by any material errors of law. The decision therefore stands.

Notice of Decision

50. The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge Chamberlain of 29 March 2023 is maintained.

51. No anonymity order is made.

L.Shepherd

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
9 November 2023