Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12241/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 November 2013	**On 31 January 2013**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CHESTER SALEEM ST MARTIN

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr O T Popoola, Community Legal Centre

DETERMINATION AND REASONS

1) This is an appeal by the Secretary of State against a decision by Judge of the First-tier Tribunal Morgan allowing an appeal under Article 8 by Mr Chester Saleem St Martin (hereinafter referred to as "the applicant").

2) The applicant is a citizen of St Lucia. He came to the UK in September 2006 as a student. In 2009 he made a successful application for leave to remain on the basis of marriage. He was granted leave until February 2012. Prior to the expiry of his leave the marriage broke down and the appellant moved in with his current partner. In February 2012 the applicant sought leave to remain as the unmarried partner of a

British national. This was refused on 26 March 2013 and it is against this refusal that the appeal to the First-tier Tribunal was brought.

3) Before the First-tier Tribunal the Secretary of State argued that the applicant did not satisfy the requirements of Appendix FM. In particular he and his partner had not shown they had the required income or savings to maintain themselves.

4) The Judge of the First-tier Tribunal considered that Appendix FM did not apply to the decision because the application was made in February 2012, prior to its introduction to the Immigration Rules. The judge accordingly decided the appeal under Article 8. The judge found that the applicant and his partner started cohabiting in January 2012. They intend to marry. The applicant's divorce was finalised 3 months prior to the hearing on 17 September 2013. The applicant's partner is a British citizen who works as a deputy manager at a betting shop with an income of £21,500 per year. The applicant works as a courier earning £20,000 a year.

5) The judge went on to find that to expect the applicant to return to St Lucia to apply for entry clearance was disproportionate. He had a good immigration history and there was no sensible reason for requiring him to return to St Lucia simply to comply with the procedural requirements of entry clearance. All the requirements for leave were met but for the requirement of entry clearance. The financial provisions were satisfied. If the applicant's passport was returned the couple would be able to marry and satisfy the spousal provisions of the Immigration Rules. The judge went on to consider the delay between the application in February 2012 and the refusal decision of March 2013. The refusal decision was a breach of Article 8.

6) Permission to appeal was granted on the application of the Respondent on the basis that arguably the judge misdirected himself by not applying the appropriate test for return to St Lucia to apply for entry clearance. It was further arguable that the judge failed to identify any exceptional circumstances that would suggest that relocation by the applicant and his partner to St Lucia was an unjustifiably harsh outcome.

7) The grant of leave reflected the grounds of the application for permission to appeal. These contended that the judge was wrong to consider whether it was sensible or not to expect the applicant to apply for entry clearance. It was the duty of the Secretary of State to ensure that proper procedures were followed and there were no exceptional circumstances that would preclude the Secretary of State's proposed course of action. In relation to the meaning of "exceptional" the Secretary of State sought to rely on the case of HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25. The First-tier Tribunal had not identified any features that would mean the failure to grant leave would result in unjustifiably harsh consequences.

8) It was further submitted on behalf of the Secretary of State in the application for permission to appeal that the judge made no findings on the option of relocation, as proposed by the Secretary of State in the reasons for refusal letter. There were no exceptional circumstances identified that would suggest that relocation was an

unjustifiably harsh outcome. If it was found that the applicant would satisfy the provisions of the Immigration Rules then the applicant should made an application in line with the Rules. There were no reasoned findings as to why this would be an unreasonable course of action.

Submissions

9) At the hearing before me Mr Wilding, for the Secretary of State sought to rely on the case of Nagre [2013] EWHC 720 (Admin) and the decision of the Upper Tribunal in Green (Article 8 – New Rules) [2013] UKUT 254. In assessing proportionality the judge had failed to consider that the applicant did not satisfy the Immigration Rules. There was a further error in failing to balance properly the conflicting interests of private life and the public interest. It seemed to be inferred in paragraph 3 of the determination that the applicant could not meet the Immigration Rules but the question remained whether this was accepted by the judge. The applicant could have sought to rely on paragraph EX.1 of Appendix FM. In terms of paragraph 48 of Nagre it was unlikely the applicant would be able to show a "good arguable case" why he should succeed under Article 8 if he would not succeed under EX.1. The applicant did not meet the definition of an unmarried partner because he and his partner had not been cohabiting for 2 years. There were no insurmountable obstacles to family life continuing outside the UK. The applicant could not rely on Appendix FM as a fiancé. The judge fell into error by not engaging with public interest in firm and fair immigration control.

10) It was put to Mr Wilding that the phrase "no sensible reason" was taken from the decision of the Court of Appeal in Hayat [2012] EWCA Civ 1054. Mr Wilding questioned the relevance of Hayat because the judge had ignored the issue of relocation to St Lucia as a couple. This made the assessment incomplete. The judge did not show how the Immigration Rules were met. The errors were material. The decision should be remade with further evidence and might be suitable for remitting to the First-tier Tribunal.

11) For the applicant, Mr Popoola submitted that the judge applied the right test, which was one of reasonableness. If the applicant went back to St Lucia, he would meet the rules for entry clearance. On the question of relocation, the applicant and his partner chose to remain in the UK. The position of the Secretary of State was that it was reasonable for the applicant to return to St Lucia to apply for entry clearance. However, the right test was applied and there was no error of law. According to the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the test of insurmountable obstacles was to be equated with a test of reasonableness. Where the judge referred to there being no sensible reason, this could be equated to reasonableness.

12) In response Mr Wilding submitted that sensible did not properly equate to reasonable. There were two aspects to the test of reasonableness. The first was the possibility of relocation and the second was that of return to apply for entry clearance. The judge's decisions on each should be based on proper findings. No findings could be shown in relation to this. The determination was inadequate in this respect.

Discussion

13) The argument for the Secretary of State is based to a large extent on an assumption that the application fell to be considered under Appendix FM of the Immigration Rules. The Judge of the First-tier Tribunal found that Appendix FM did not apply because the application was made in February 2012, before Appendix FM came into force.

14) I note that according to Appendix FM it applies to applications "under this route made on or after 9 July 2012 and to applications under Part 8 as set out in the Statement of Changes made on 13 June 2012 (HC194), except as otherwise set out at paragraphs A277-A280." This is given further clarification by HC 194 itself, which states that if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8 July 2012.

15) The terms of HC194 and Appendix FM support the view taken by the Judge of the First-tier Tribunal that Appendix FM did not apply to this application. The judge was therefore entitled to consider the application under Article 8 without specific reference to the changes in the Immigration Rules made with effect from 9 July 2012.

16) The decision of the Court of Appeal in Hayat is still good law, at least so far as applications made before 9 July 2012 are concerned. Although the Judge of the First-tier Tribunal did not refer specifically to Hayat, the test applied of there being no sensible reason to require the applicant to return to St Lucia to apply for entry clearance is taken directly from the judgment of Elias LJ at paragraph 30. At paragraphs 27-29 of the judgment reference was made to an earlier decision in MA (Pakistan) [2009] EWCA Civ 953, a case not dissimilar to the present one, where the Court found that the real question was not whether there were "insurmountable obstacles" to the applicant returning to his country of origin in order to make an application for entry clearance from there, but whether there was any sensible reason as to why he should be required to do so.

17) This is the same approach that was taken by the Judge of the First-tier Tribunal in the present appeal. He found there was no sensible reason why the applicant should be required to return to his country of origin to apply for entry clearance and the interference with his private and family life resulting from a requirement to do so would be disproportionate. This was a finding which the judge was entitled to make. Whether the outcome would have been different had the application been made after the coming into force of Appendix FM on 9 July 2012 is not a matter which I am required to consider. It is sufficient to determine this appeal that having regard to the application made in February 2012 the Judge of the First-tier Tribunal was entitled to make the decision allowing the appeal under Article 8 and did not err in law.

Conclusions

18) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

19) I do not set aside the decision.

Anonymity

20) The First-tier Tribunal did not make a direction for anonymity and I see no reason to make such an order.

Signed Date

Judge of the Upper Tribunal