Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33568/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 25 February 2014	**On: 4 March 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHRISTOPHER YEBA

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr A Bandegani, instructed by Turpin & Miller Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the First-tier Tribunal's decision allowing Mr Yeba's appeal against a decision of 7 August 2013 to remove him from the United Kingdom.

2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr Yeba as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Cameroon, born on 21 May 1979. He claims to have entered the United Kingdom in September 1999 using a French student identity card. On 20 June 2012 he was arrested on suspicion of using a forged instrument, fraud by misrepresentation and illegal entry and was served with form IS.151A as an illegal entrant. On 29 June 2012 he was given a custodial sentence of nine months following his conviction for using false documents and for pecuniary advantage. On 16 October 2012 he submitted an Article 8 claim and further representations were subsequently made to support that claim. His sentence ended on 4 November 2012 and he was released from custody.

4. The appellant's Article 8 claim was based primarily upon his relationship with Kate Fearon, a British citizen, whom he had first met in 2007 and with whom he had started a relationship and subsequently cohabited from 2009. The appellant was stated to have been born in France, although a citizen of the Cameroon, and to have returned to Cameroon with his parents until the age of ten years when he returned to live in France with his mother and siblings. He claimed to have returned to Cameroon on only one occasion to attend his father's funeral in 1992. He came to the United Kingdom in September 1999 and had established strong ties here. His partner, Ms Fearon, had been diagnosed with thyroid cancer in November 2009 and he was her main carer. He had worked for seven years in a psychiatric hospital and his partner also worked in the mental health field. His partner was born in the United Kingdom but had moved to Zambia with her parents as a child, returning to the United Kingdom in 1999 and had remained here since then. Her parents had been living in Mexico for three years. She could not relocate to Cameroon.

5. The appellant's claim was refused by the respondent on 7 August 2013. It was accepted that his relationship with Ms Fearon was genuine and subsisting and that they had lived together in a relationship akin to marriage for at least two years. Accordingly he was able to meet the requirements of GEN 1.2 as a partner. However the respondent considered that his claim fell for refusal under section S-LTR 1.6 of Appendix FM of the immigration rules on the basis that his continued presence in the United Kingdom was considered undesirable as a result of his conviction. The respondent considered that the appellant was in any event unable to meet the Eligibility requirements in E-LTRP as he fell to be refused under E-LTRP.2.1(c) and 2.2. on the basis that he had never held valid leave to remain in the United Kingdom. It was considered that section EX.1. did not apply to him since there were no insurmountable obstacles to his family life continuing in Cameroon. The respondent concluded further that he was unable to meet the requirements of paragraph 276ADE since he had retained ties to Cameroon and that his removal would not be in breach of Article 8 of the ECHR.

6. The appellant's appeal was heard on 24 December 2013 by First-tier Tribunal Judge Maciel. The judge heard from the appellant and from Ms Fearon, who gave evidence that she had always assumed the appellant to be a French national until she found out otherwise when he was arrested. In regard to the category of Suitability, she did not find

that the respondent had shown adequate reasons for concluding that it would be undesirable to allow the appellant to remain in the United Kingdom for the purposes of section S-LTR 1.6 of Appendix FM. With regard to the category of Eligibility, she found that he was not eligible for leave to remain under E-LTRP 2.2. As for EX.1 she considered that the appellant was unable to show that there were insurmountable obstacles to family life continuing in Cameroon and accordingly the exception did not apply to him. Neither, she found, was the appellant able to meet the requirements of paragraph 276ADE. Accordingly she found that the appellant was unable to meet the requirements of the immigration rules relating to family and private life and she dismissed the appeal on those grounds. However, she went on to allow the appeal on Article 8 human rights grounds, concluding that it was wholly unreasonable to expect Ms Fearon to relocate to Cameroon and that the interference to family life would thus be disproportionate.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the reasons given by the judge for considering the appellant's removal to be disproportionate did not establish that there were exceptional or compelling circumstances such as to justify departure from the immigration rules.

8. Permission to appeal was granted on 27 January 2014 on the grounds raised.

Appeal hearing and submissions

9. The appeal came before me on 25 February 2014. The appellant and his partner were in attendance but were not required to give oral evidence.

10. Before hearing submissions on the error of law I indicated to Mr Avery my preliminary view that on the findings made by the judge she ought to have allowed the appeal under the immigration rules rather than on human rights grounds and that her reasons for not having done so were based simply upon a misunderstanding of the concept of "insurmountable obstacles" under EX.1. Mr Bandegani advised me that that was precisely the case he was intending to put forward for the appellant. I rose for a short period of time in order to give Mr Avery an opportunity to consider that point.

11. Upon consideration, Mr Avery advised me that he had no submissions to make in regard to that point but would simply rely on the grounds of appeal. However he submitted that the judge had erred in law in her findings on Suitability under section S-LTR 1.6 of Appendix FM by failing to give adequate weight to the public interest. She had erred by relying upon the appellant's good employment record to undermine the weight of the public interest and in so doing had failed to take into account the fact that he had had been working illegally on the basis of forged documentation.

12. Mr Bandegani agreed that if the judge had erred in her consideration of section S-LTR 1.6, the appellant could not benefit from EX.1. However he submitted that there had been no error in her consideration of section S-LTR since she had had full regard to the Secretary of State's position and had considered all relevant factors as a whole as S-LTR.1.6. required. With regard to her consideration of EX.1, any error made by the judge

in her understanding of "insurmountable obstacles" was not material and her overall decision to allow the appeal ought not to be set aside.

Consideration and findings

13. The basis of the respondent's challenge, in the grounds of appeal, to Judge Maciel's decision was, in essence, that she had failed to give adequate reasons for finding there to be exceptional circumstances to justify allowing the appeal on Article 8 grounds when the requirements of the immigration rules had not been met. However, as I indicated at the hearing, that did not appear to be the correct approach to her findings and to any error that had arisen in those findings. The starting point has instead to be the apparent inconsistency between her findings on the reasonableness of relocation in the context of Article 8 and those made in regard to "insurmountable obstacles" in the context of section EX.1. of Appendix FM of the immigration rules.

14. At paragraph 28 of her determination, when considering Article 8 outside the immigration rules, the judge considered whether it would be reasonable to expect Ms Fearon to relocate to Cameroon in order for family life to be maintained. She found that it would be "wholly unreasonable" to expect her to do so and she gave detailed reasons for reaching that conclusion. Yet at paragraph 15, when considering the same evidence in the context of EX.1 of Appendix FM, she concluded that there were no insurmountable obstacles to the appellant and Ms Fearon having a family life in Cameroon. Clearly, in reaching the latter conclusion, she considered that the test to be met for establishing "insurmountable obstacles" in EX.1 was a higher one than the "reasonableness" test in the established Article 8 jurisprudence (as set out at paragraph 17 of Mr Bandegani's skeleton argument).

15. Since the introduction of the new immigration rules relating to family life in Appendix FM, mention has been made by the higher courts of the attempt to re-introduce the concept of "insurmountable obstacles" disapproved of in the earlier jurisprudence, but no conclusive findings have been made in that regard. However, in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 the Court of Appeal made the following observation:

> 47. "Before we come to the decision that was made on the facts of this case, we need to say something about "insurmountable obstacles". It will be recalled that one of the situations in which para 399 applies is where the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and the partner satisfies the condition stated in para 399(b)(i) and "there are insurmountable obstacles to family life with that partner continuing outside the UK".
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> 48. At para 38 of their determination, the UT said that they were bound by authority to hold that the proper test for article 8 purposes is "reasonableness". It is not in dispute that MF has a genuine and subsisting relationship with SB and that SB satisfies the condition stated in para 399(b)(i). As already noted, it was conceded on behalf of the Secretary of State before the UT that it would not be "a reasonable option" for SB and F to be relocated

with MF to Nigeria and that there were "insurmountable obstacles" to family life with SB and F continuing outside the United Kingdom

49. In view of the concession made before the UT, the question of the meaning of "insurmountable obstacles" does not arise. We did, however, hear argument on the point. We would observe that, if "insurmountable" obstacles are literally obstacles which it is *impossible* to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in *Izuazu* at paras 53 to 59, such a stringent approach would be contrary to article 8. "

16. In the light of those observations, and of the findings of the Upper Tribunal in Izuazu (Article 8 – new rules) Nigeria [2013] UKUT 45 at paragraphs 53 to 59 as referred to by the Court of Appeal in MF, it seems to me that Judge Maciel misunderstood the meaning of "insurmountable obstacles" in EX.1 and applied too high a test. Had she applied the test of "reasonableness", as she was required to do, she ought to have found, on the basis of the findings that she made at paragraph 28, that section EX.1(b) of Appendix FM applied to the appellant such that he was able to meet the requirements of the immigration rules. Accordingly she ought to have allowed the appeal on that basis.

17. That is not the end of the matter, as it is the respondent's case, at paragraph d) of the grounds of appeal, that the judge's finding that it would be unreasonable to require Ms Fearon to live in Cameroon was misguided. However, in my view, that amounts to little more than a disagreement with her findings. The judge gave full and detailed reasons, at paragraph 28, for reaching the conclusion that she did. She was fully aware of the availability of medical treatment for the sponsor in Cameroon and took that into account. She was also fully aware of, and took into account the appellant's past behaviour. She was perfectly aware that the appellant had been living in the United Kingdom without any lawful basis, that he had obtained his employment by misrepresenting his nationality and immigration status, that he had used a false document to retain his employment and that he had been deceitful in failing to inform Ms Fearon of his true status. Those were factors to which she repeatedly made reference, both in the recording of the evidence and in her findings at paragraphs 14, 26 and 27 and it is clear that she had those very much in mind when reaching her conclusions. She nevertheless concluded that Ms Fearon remained committed to the relationship and that the relationship was a genuine and subsisting one for both parties, that Ms Fearon had no knowledge of the appellant's immigration position, and she found, at paragraphs 27 to 29, that the negative factors were outweighed by the positive ones. She reached that conclusion upon a full and careful assessment of the evidence, giving full and cogent reasons for her findings and was accordingly entitled to conclude as she did.

18. Mr Avery did not seek to make further submissions on that aspect of the decision but sought instead to challenge the judge's findings on Suitability. However the grounds of appeal did not challenge those findings and that was not the basis for the grant of permission. Nevertheless, I have considered his submissions in that regard. It was his case that the judge had failed to give adequate weight to the public interest and had instead erroneously placed weight on the appellant's good employment record without considering that he was not entitled to work and that he had obtained his employment on

the basis of false representations and forged documentation. However it seems to me that she took all of those factors into account and was fully aware of the Secretary of State's position and of the numerous concerns she had, as she recorded at paragraph 4 of her determination and in her findings at paragraphs 14 and 27. As Mr Bandegani submitted in responding to Mr Avery's challenge, section S-LTR.1.6 involved a consideration of various factors which, taken as a whole, led to a conclusion that it was undesirable to allow an applicant to remain in the United Kingdom. Having considered all the factors in the appellant's favour and those weighing against him, the judge concluded that the appellant's offence was not so serious as to amount to a suitability bar on its own. That was a conclusion that she was entitled to reach. It seems to me that Mr Avery's challenge amounted to a disagreement with the weight she attached to the negative factors rather than a basis upon which to conclude that she had erred in law in her findings on Suitability.

19. The question therefore remains as to whether the judge's error in relation to her findings on EX.1 is such that her decision has to be set aside, when in fact the end result would be that the appeal is still to be allowed, albeit on a different basis. That was the subject of some discussion upon which neither party had any particular opinion. Mr Avery advised me that in the event I decided to set aside the determination on that basis, he had no further submissions to make as regards the re-making of the decision and agreed that if I found no other error of law, there was nothing further to be said.

20. It seems to me that the judge's error in her interpretation of "insurmountable obstacles" is a fundamental one, given that it led to her dismissing the appeal under the immigration rules. As I have found above, had she applied the proper test in considering "insurmountable obstacles" she ought, on the findings that she made at paragraph 28, to have allowed the appeal under the immigration rules on the basis that section EX.1 applied to the appellant. Accordingly, I set aside her decision and re-make it by allowing the appeal under the immigration rules.

DECISION

21. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. I set aside that decision and re-make it by substituting a decision allowing the appeal under the immigration rules.

Signed Date

Upper Tribunal Judge Kebede