Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35031/2014

THE IMMIGRATION ACTS

Heard at Stoke on Trent	**Decision and Reasons Promulgated**
On 30 July 2015	**On 5 August 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Agnes Karieren
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr N Ohanugo, instructed by Moorhouse Solicitors
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Agnes Karieren, date of birth 25.11.71, is a citizen of Nigeria.

2. This is her appeal against the determination of First-tier Tribunal Judge Frankish promulgated 27.11.14, dismissing her appeal against the decision of the Secretary of State to refuse her application for leave to remain in the UK on the basis of private and family life. The Judge heard the appeal on 12.11.14.

3. First-tier Tribunal Judge Grant-Hutchison refused permission to appeal on 23.1.15, but when the application was renewed to the Upper Tribunal, on 6.5.15 Deputy Upper Tribunal Judge Saini granted permission to appeal to the Upper Tribunal.

4. Thus the matter came before me on 30.7.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out herein, I found no material error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Frankish to be set aside.

6. Judge Frankish found that the appellant did not meet the relationship requirements of Appendix FM, because she is an overstaying visit visa entrant to the UK, as set out at E-LTRP 2.1. Neither, in the view of Judge Frankish, did the appellant meet the requirements of paragraph 276ADE in respect of private life. Curiously, the judge then went back to consider EX1 of Appendix FM, which I have addressed below.

7. As noted by the First-tier Tribunal, the appellant had in fact obtained entry to the UK by deception, lying to the Entry Clearance Officer about her circumstances and intentions. Once in the UK she assumed a false identity and went to work illegally. Whilst present illegally she met the sponsor in 2008 and married in 2013.

8. At both the First-tier Tribunal and in his submissions before me, Mr Ohanugo relied on two main features: the terminal and deteriorating ill-health of the sponsor, who was diagnosed with malignant prostate cancer in August 2013. It is said that the appellant provides him essential care. Secondly, in relation to the issues as to whether the appellant's removal would be disproportionate and whether it would be unreasonable to expect the appellant and the sponsor to continue family life outside the UK, reliance is placed on the sponsor's relationship with his daughter, a British citizen residing in Glasgow, Scotland.

9. As Judge Saini pointed out in the decision granting permission, the grounds make pro forma, broad and unimpressive references to the facts of the appeal, which are unhelpful to the appellant. However, Judge Saini identified what was considered to be an arguable error of law in the First-tier Tribunal Judge's consideration of EX1 and the issue of insurmountable obstacles

10. I note that there are some errors in the decision of the First-tier Tribunal that are not material to the outcome of the appeal.

11. First, if the appellant cannot meet the immigration status requirement of E-LTRP 2.1, there can be no consideration of EX1, as the application and appeal has fallen at a previous, threshold, requirement. It is not clear to me why, having decided at §25 that the appellant could not meet the requirements of Appendix FM as a partner and at §26 she could not meet the requirements of Appendix FM as a parent, the judge went on at §31 to consider EX1(a) and (b) and the issue of insurmountable obstacles. The judge found that the sponsor was but a distant figure in the child's life and that

there was little evidence of contact between them and thus that EX1(a) is not engaged. The judge then went on to consider EX1(b) in relation to family life with the sponsor, who is settled in the UK, concluding that she did not meet EX1(b) as defined by EX2.

12. A second non-material error appears at §34 the judge relied on section 117B of the 2002 Act when assessing whether the appellant could succeed under EX1, as defined by EX2. As confirmed by Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC), in which the Upper Tribunal held that for courts and tribunals, the coming into force of Part 5A of the Nationality, Immigration and Asylum Act 2002 (ss.117A-D) has not altered the need for a two-stage approach to Article 8 claims. However, "ordinarily a court or tribunal will, as a first stage, consider an appellant's Article 8 claim by reference to the Immigration Rules that set out substantive conditions, without any direct reference to Part 5A considerations. Such considerations have no direct application to rules of this kind. Part 5A considerations only have direct application at the second stage of the Article 8 analysis. This method of approach does not amount to according priority to the Rules over primary legislation but rather of recognising their different functions."

13. However, neither of the above issues are material to the outcome of the appeal.

14. Although it was not raised in the grounds of application for permission to appeal, the grant of permission claims an arguable material error of law in that the consideration of EX1(b) because the judge failed to take into account findings and observations concerning the sponsor's deteriorating health in light of his worsening prostate cancer and the implications of this upon his relocation. It is also suggested that "in reaching findings on insurmountable obstacles the judge failed to take into account the most recent letter concerning the deterioration of the sponsor's health and the spread of cancer throughout his body, preferring instead an older letter when the sponsor's health with clearly better than it has become."

15. First, given that EX1(b) was not available to the appellant as she did not meet the requirements of E-LTRP2.1, the claimed error cannot be material. Second, it is quite apparent from a reading of the decision of the First-tier Tribunal that the judge did take both medical letters into consideration. The first letter, dated 20.8.13, is summarised at §14, and the second letter, dated 3.3.14, is summarised at §15. Dr Leitch expressed the view that if he returned to Nigeria he would be able to receive similar treatment on a private basis to that he is receiving in the UK, and that it would be relatively inexpensive. Both letters are also referenced in the judge's findings at §33.

16. In the circumstances, there is no merit in this ground of appeal.

17. The second issue relied on is the sponsor's relationship with his daughter. This is addressed in detail at §29 of the First-tier Tribunal decision. The judge noted that the only evidence of contact was a single rail ticket to Glasgow, where the daughter lives, from Chester, where the sponsor lives. The judge also noted that in his unfortunate

and terminal ill-health the sponsor is unable to travel far. The judge concluded that the sponsor was, "a distant figure who has had little to do with his daughter since her birth and with the best will in the world, his contact is now even more constrained by his terminal illness." The judge did not accept that her medical condition required, as claimed, long and frequent staying visits by him to be by her side. At §32 the judge accepted that in all probability the contact was more frequent than the one train ticket demonstrated, but concluded, "Nontheless that does not amount to the appellant having developed a parental relationship with 'E' in any shape or form, she having her own mother with whom she lives in Glasgow." The judge thus found that the relationship did not engage EX1(a), although it has to be borne in mind that it is the appellant and not the sponsor who would have to meet EX1(a), even if this provision were applicable. Mr Ohanugo confirmed in the hearing before me that there was no further evidence of contact between the sponsor and the child. In the circumstances, I find that there is no error of law in the judge's assessment of the sponsor's contact or relationship with his daughter. The findings and conclusions of the judge were open on the rather limited evidence and for which cogent reasons have been given. These findings cannot be described as either irrational or perverse. In the circumstances there is no merit in this ground of appeal and I find no material error of law in respect of the same.

18. In granting permission to appeal, Judge Saini also considered there was a further arguable error of law in the judge's reliance on Gulshan and that the judge had applied an incorrect standard of "exceptional circumstances," in refusing to consider article 8 outside the Rules. However, following Singh v SSHD [2015] EWCA Civ 74, and SSHD v SS (Congo) & Ors [2015] EWCA Civ 387, it is clear that whilst the assessment of Article 8 claims requires a two-stage analysis, and there is no threshold or intermediary requirement of arguability before a decision maker moves to consider the second stage, whether that second stage is required will depend on whether all the issues have been adequately addressed under the Rules. In other words, there is no need to conduct a full separate examination of article 8 outside the Rules where in the circumstances of a particular case, all issues have been addressed in the consideration under the Rules. Leave to remain outside the Rules on the basis of family life (where no children are involved) established in the UK at a time when the presence of one or other of the partners was known to be precarious, does require, if not exceptional circumstances, certainly compelling circumstances. In this case, although it appears to have been unnecessary, there was a very full consideration of EX1 and the issue of insurmountable obstacles. In the circumstances, all the factors that would be relevant to any article 8 consideration have already been considered by the First-tier Tribunal Judge. In the circumstances, there is no merit in this ground of appeal.

Conclusions:

19. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

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

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated