Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12244/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On the 27th November 2018	**On the 5th December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

SAFINA [F]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Hussain, Counsel instructed by Janjua & Associates
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against the decision of Judge Hands to dismiss the appeal against refusal of her application for further leave to remain in the United Kingdom on private and family life grounds.

Background

2. The appellant entered the United Kingdom on the 5th November 2014 with leave to remain until the 13th May 2017 as the spouse of [FM] (hereafter, "the sponsor"). The sponsor is a British citizen.

3. The instant application was considered under the '10-year route to settlement' because it was made some three days after the appellant's leave to remain had expired (see above). This meant that the appellant had to establish that there were "insurmountable obstacles" to married life continuing outside the UK under Section Ex of Appendix FM of the Immigration Rules unless there was a good reason beyond her control for failing to make the application 'in time'.

4. The appellant's explanation for the delay in making her application was that the expiry of her leave coincided with a time when it was suspected that the sponsor had been suffering from cancer and she had therefore had other things on her mind. The judge did not regard that as a good reason for exercising discretion under paragraph 39E of the Rules [11]. The appellant also argued that there were insurmountable obstacles to family life continuing outside the UK because (a) her husband was the recognised carer of his elderly mother and the appellant assisted him in undertaking this function whilst he was at work, and (b) she no longer had any family, social or economic ties to Pakistan given that all her family members now live in Saudi Arabia wherein her own residence permit had expired [21]. The judge concluded that (a) it was not reasonable to expect the sponsor to follow the appellant to Pakistan given his responsibility for caring for his mother, (b) somebody other than the appellant could assist the sponsor in caring for his mother whilst he was at work, (c) the sponsor could continue to support the appellant financially from the UK were she to return to Pakistan, (d) the couple could maintain their relationship by "modern means of communication" [24], and (e) the appellant could live in Pakistan and visit her parents in Saudi Arabia "until such times as she can return to the United Kingdom" [27].

5. Permission to appeal was granted by Upper Tribunal Judge Kebede on grounds that the First-tier Tribunal's assessment of both aspects of the appellant's case was arguably inadequate. I additionally granted Mr Hussain's application for permission to add a ground that the First-tier Tribunal's conclusion that it was proportionate for the appellant to be required to leave the United Kingdom and to re-apply for entry clearance from Pakistan as the wife of the sponsor was perverse. I granted that application because Mrs Pettersen indicated that she did not object to it and felt able to meet the new argument notwithstanding it being made at the eleventh hour and fifty-ninth minute. In the event, the representatives concentrated their submissions upon this new ground of appeal.

Discussion

6. The structure of Appendix FM of the Immigration Rules is in broad terms as follows. The first section deals with what are called 'suitability' requirements. These are sub-divided into mandatory and discretionary grounds for refusal respectively. The second section deals with so-called 'eligibility' requirements. These requirements are sub-divided into 'relationship', 'immigration status', 'financial', and 'English language' requirements. An applicant will achieve settled status within 5 years if s/he continues to meet all those requirements throughout that period. If however they cannot be met, the applicant will only succeed if s/he is able to demonstrate that there are "insurmountable obstacles" to family life continuing outside the United Kingdom under Section EX. In such a case, it will take ten rather than five years to achieve settled status.

7. In this case the appellant was unable to meet the 'immigration status' requirement of not being in the United Kingdom without leave to remain. This was because her application was made some three days after her initial grant of leave to remain had expired. She was therefore required under the Rules to meet the test of "insurmountable obstacles" under Appendix FM.

8. At paragraph 25 of her decision, the judge appeared to accept that there were "insurmountable obstacles" to family life continuing outside the United Kingdom -

> "Whilst I accept the Appellant will help her husband with the care of his mother and his mother prefers to be cared for by someone she has got to know, it is not an insurmountable problem to have that care provided by someone else as I have found above. The problem arises if the sponsor had to leave the United Kingdom to live with the Appellant in Pakistan as he would not be able to care for his mother as expected of him by the United Kingdom government. **The sponsor would, if he were to continue with his family life with the Appellant, be forced to leave his mother in circumstances which would amount to an insurmountable obstacle to his departure from the United Kingdom." [**Emphasis added]

9. That finding is based upon the questionable assumption that because the sponsor was in receipt of "carer's allowance" he was necessarily the only person who was able to fulfil the role of caring for his mother. The possibility that some other person may have been able to take over this responsibility in his absence – such as another relative or a professional carer for example – is not one that appears to have been explored or even considered at the hearing. It is nevertheless a finding that has not been challenged by the Secretary of State either by way of a Rule 25 Notice or a cross-appeal. It would thus appear to follow that the judge ought, by her own logic, to have allowed the appeal on the ground that the appellant had met the requirement for insurmountable obstacles to family life being enjoyed outside the UK under Section EX, given that this was a route to success that was available to the appellant as a direct alternative to meeting the 'immigration status requirements' under E-LTRP.2.1 of Appendix FM of the Immigration Rules. This failure of logic in the judge's

reasoning amounts to an error of law going to the very core of her decision to dismiss the appeal.

10. However, it is not the only fundamental error of law. The judge also went on to consider whether it was proportionate to require the appellant to re-apply for entry clearance from Pakistan to join her husband in the UK. The judge's consideration of this issue begins at paragraph 26 -

> "The Respondent has accepted that the Appellant meets all the other suitability and eligibility requirements of Appendix FM under the partner route therefore it is more than likely that if she were to leave the United Kingdom to make an application to join her husband in the United Kingdom that application would be successful. The guidance in Chikwamba would indicate it is a disproportionate interference to the family life of an Appellant to make them leave the United Kingdom in order to make an application from their home country before re-joining their family in the United Kingdom. This is the situation the Appellant would find herself in as I do not find it would be reasonable to expect the sponsor to leave the United Kingdom because of the situation in respect of his elderly and infirm mother."

11. This legal self-direction accurately reflected the observation of Lord Brown in Chikwamba v SSHD [2008] UKHL 40 that it will be comparatively rare for an article 8 appeal be dismissed in a family case on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. It also reflected the observation of Lord Reed in R (on the application Agyarko) v SSHD [2017] UKSC that where an applicant is unlawfully residing in the UK there may nevertheless be no public interest in his or her removal if an application from abroad would be certain to succeed. As previously noted, the respondent apparently accepted that any application the appellant might make from abroad would likely succeed (see paragraph 26 of the decision, quoted at paragraph 10 above). I am however unable to ascertain any point in the judge's decision where she identifies the public interest to support her conclusion that, nevertheless, "it would not be unjustifiably harsh on all members of the family unit ... to expect the Appellant to leave the United Kingdom" [emphasis added]. It is true that the judge identified several ways in which the appellant could mitigate what might otherwise prove to be the "harsh" consequences of removal (see the final two sentences of paragraph 27, as summarised at paragraph 4 above). However, this was predicated upon the unspoken *assumption* that there was a counterbalancing public interest that justified removal in the first place. I have therefore looked for myself to see whether there was a specific public interest capable of justifying the appellant's removal from the United Kingdom with a view to her seeking re-admittance from abroad. I remind myself that the only justification relied upon by the Secretary of State was the fact that the appellant had remained in the UK unlawfully for 3 days before making an application for leave to remain that would otherwise have succeeded. In my judgement, that falls very far short of a reason capable justifying removal and requirement to seek leave to enter from abroad. I therefore

conclude the judge made a further error of law going to the core of her decision to dismiss the appeal.

12. Given the nature of the above errors of law, I conclude that the only decision that was reasonably open to the Tribunal, on the facts as found, was to allow the appeal on the ground that the appellant's removal would be unlawful under section 6 of the Human Rights Act 1998. It follows that the decision to dismiss the appeal was perverse and should accordingly be reversed.

Notice of Decision

1. This appeal is allowed.
2. The decision of the First-tier Tribunal to dismiss the appeal against refusal of the appellant's application for further leave to remain is set aside and substituted by a decision to allow that appeal.

Anonymity is not directed

Signed

Date: 28th November 2018

Deputy Upper Tribunal Judge Kelly