



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14413/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15th June 2018

Decision & Reasons Promulgated
On 26th June 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDREIA [B]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of the United States of America born on 30 July 1964. Her husband is a British citizen and they married in the USA in February 1988. They have a daughter born on 9 December 1994. She has dual American and British citizenship.

2. On 30 October 2002, Mr [B] was detained by USA Immigration Officers and deported to the UK on 8 November 2002 because of his criminal conviction for burglary. He will be eligible to apply for return to the US in 2022. Between 2002 and 2007 the Appellant and her daughter travelled back and forth between the USA and the UK.
3. The Appellant entered the UK on 26 February 2008 and made a decision to remain here with her husband and her child and they live together in London. Mr [B] works full-time to support his family and their daughter has finished her degree in Psychological Studies at [] University and was currently looking for work.
4. On 23 February 2016 the Appellant was detained whilst trying to enter the UK from Spain where she travelled with her husband. The Appellant applied for leave to remain in accordance with Appendix FM of the Immigration Rules. It was refused on the basis that the Appellant could not satisfy paragraph EX.1 because there were no insurmountable obstacles to family life continuing outside the UK. The Appellant appealed to the First-tier Tribunal.
5. It was accepted that the Appellant's husband was not eligible to apply for re-entry to the USA until 2022, therefore the judge found that the Appellant's husband could not follow her to the USA if she was removed. There was no evidence that the Appellant and her husband could reside elsewhere and the Respondent had not suggested that this was such an option. The Appellant had been married for nearly 30 years and had lived the majority of her married life together with her husband and daughter save for the period between 2002 and 2007 when they travelled back and forth between the USA and the UK. The judge was satisfied that there was genuine and subsisting family life which could not be replicated by modern means of communication and that there were insurmountable obstacles to family life continuing outside the UK.
6. In coming to this decision the judge took into account the Respondent's own guidance which states:-

"This means that an insurmountable obstacle can take two forms. A very significant difficulty which would be literally impossible to overcome so it would be impossible for family life of the applicant's partner to continue overseas, for example because they would not be able to gain entry to the proposed country of return".
7. The judge was satisfied on the balance of probabilities that the Appellant would not be able to return to the UK as a visitor because of her immigration history having overstayed since 2008. She was not satisfied that visiting one's spouse was equivalent to enjoying family life. The judge found that the Appellant satisfied R-LTRP.1(a)-(d) of Appendix FM of the Immigration Rules. Accordingly, there was interference with family life and the Appellant's removal was disproportionate.

8. The Respondent appealed on the grounds that the Sponsor, Mr [B], had a criminal conviction and was deported from the USA in 2002 having served a prison sentence for burglary. He would be eligible for entry into the USA in 2022. By relying on the Sponsor's criminal conviction as amounting to an insurmountable obstacle the Appellant would benefit from the Sponsor's criminal act. The Appellant had demonstrated a flagrant disregard for the immigration system by remaining in the UK without leave and she would not be able to benefit from the defence that she would not be granted entry clearance due to her own criminality. In the interests of effective immigration control any separation would be proportionate, although there would be no interference because family life could be conducted through visits. The judge's brief proportionality assessment had been affected by her error in respect of the finding that EX.1 was met.
9. Permission was granted by First-tier Tribunal Judge Alis on the grounds that the judge lost sight of the issues in finding that because of the husband's offending behaviour there were insurmountable obstacles and the judge allowed the appeal because of his conviction and the fact of the Appellant's poor immigration record.

Discussion and Conclusions

10. In deciding whether the Appellant could satisfy the Immigration Rules, the Appellant was a visitor who had overstayed and therefore she would have to show that there were insurmountable obstacles to family life continuing outside the UK. The Respondent's own guidance demonstrates what can amount to insurmountable obstacles. There is no public interest component within the definition of insurmountable obstacles such that the judge could take into account the Appellant's criminal behaviour, a conviction for theft, or her husband's criminal behaviour, his conviction for burglary. It was agreed that the Appellant's husband would not be permitted to apply for re-admission to the USA until 2022. The judge's conclusion that this amounted to insurmountable obstacles to family life continuing outside the UK was one which was open to the judge on the evidence.
11. There was no challenge to the judge's finding that the Appellant satisfied R-LTRP.1(a)-(d) of Appendix FM of the Immigration Rules. Accordingly, the Appellant satisfied the Immigration Rules and this would carry significant weight in the proportionality assessment.
12. There was no challenge to the judge's finding that there was family life, however interference was challenged on the basis that the Appellant and her daughter could continue to visit her husband in the UK. Given that the Appellant had overstayed her visit visa, the judge's found that it was unlikely that she would be able to continue her visits to maintain family life. She also found that the Appellant's family life could not be replicated by modern means of communication. These findings were open to the judge on the evidence before her of a genuine and subsisting relationship during which the family had lived together for 30 years save for a short period of five years

when family life was maintained through visits. I find there was no error of law in the judge's finding that there would be interference in this case.

13. The decision to refuse leave was not in accordance with the Immigration Rules because the judge found that there were insurmountable obstacles. Therefore, the weight to be attached to the public interest, in maintaining immigration control, was reduced by the Appellant's ability to satisfy the Immigration Rules. Whilst significant weight may be attached to the Appellant's criminality in the US and overstaying in the UK, and her husband's criminal conviction in the US, the judge concluded that it was outweighed by the strong family life that the Appellant and her husband had maintained, notwithstanding the difficulties caused by their separation in 2002. The interference with their close family life would outweigh the public interest in removing the Appellant, notwithstanding that she was relying on her husband's criminality to support such a finding because having satisfied the Immigration Rules the weight in favour of granting leave is significant and could not be outweighed by any criminality on the part of the Appellant's husband.
14. Accordingly, I find that the weight to be attached to immigration control, because the Appellant had overstayed for a considerable amount of time, on the particular facts of this case, did not outweigh the Appellant's right to family life and her ability to satisfy the Immigration Rules. The judge's conclusion that the Appellant's removal was disproportionate and that her right to family life outweighed the public interest was one which was open to the judge on the evidence before her. I find that there was no error of law in the decision of 24 November 2017 and I dismiss the Respondent's appeal.

Notice of decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed

Date: 22 June 2018

Upper Tribunal Judge Frances