Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17565/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision issued**
On 27th September 2018	**On 17th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

MS NGAIRE PETA MCGINTY
(No anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mrs P Farrell, Peter G Farrell, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is brought against a decision by Judge of the First-tier Tribunal Handley dismissing an appeal on human rights grounds.

2. The appellant is an Australian national. She appealed against a decision by the respondent refusing her leave as a partner in a civil partnership. The appellant and her partner, who is a student, did not meet all the income requirements of the Immigration Rules. The respondent considered there were no insurmountable obstacles to the couple continuing to exercise the right to family life outside the UK.

3. The Judge of the First-tier tribunal looked at the evidence of the couple's income. This was a case in which the appellant and her partner were unable

to provide the specified documents under the Immigration Rules to show the minimum income requirements were met. The appellant's partner maintained that she was unable to leave the UK because her elderly father, with whom the couple reside, requires her care.

4. The judge of the First-tier Tribunal considered the "insurmountable obstacles" test under paragraph EX.1. The judge noted that the appellant has lived most of her life in Australia and has family there. She obtained a vocational qualification in Australia and was in employment there. She entered the UK in 2014 with limited leave as a Tier 5 (youth mobility) migrant. The judge was not satisfied that there were insurmountable obstacles to family life being carried on outside the UK.

5. The judge noted that the appellant's partner's father is in receipt of DLA at the middle rate of care component and the lower rate of mobility component. The judge accepted that the appellant's partner provides care for her father. The judge noted, however, that the appellant's partner attends college three days a week. When she is not able to care for her father he is cared for by someone else, normally her sister. If no one was able to care for him he would be entitled to care from the social or health services. The judge further noted that the appellant's partner is being treated for depression though there was little information about the extent of her condition or the treatment being provided.

6. The judge accepted that the couple have a genuine and subsisting relationship. The appellant has complied with UK immigration requirements. Her work in the UK was making a positive contribution to the community. However, there would not be very significant difficulties to continuing family life outside the UK which could not be overcome or which would entail very serious hardship. There was not a strong or compelling claim to outweigh the public interest in maintaining effective immigration control.

7. Permission to appeal was granted principally it appears on the basis that the judge arguably erred in making a proportionality assessment where the substantive requirement for a minimum income was in fact met although the judge had concurred with the respondent's view that the requirement was not met. Arguably the judge should have carried out a more balanced assessment of proportionality having regard to the viability of the appellant's partner accompanying her to Australia or sponsoring an application by the appellant from Australia. The judge further erred by failing to recognise that the appeal could be made only on human rights grounds, which arguably constrained the judge from making a robust Article 8 assessment.

Submissions

8. At the hearing I was addressed on the question of whether the Judge of the First-tier Tribunal erred in law in his decision. Mrs Farrell submitted that the

question of whether the requirements of the immigration Rules were satisfied was not for the tribunal to decide but was a weighty factor in assessing proportionality, in terms of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112. The Judge of the First-tier Tribunal could have looked at new evidence on the appellant's earnings showing these were now £18,800. The minimum income requirement would have already been met if the specified documents had been provided. The judge failed to make a finding on whether the minimum income requirement was met in substantive terms.

9. For the respondent Mrs O'Brien pointed out that Appendix FM of the Immigration Rules was intended to be the starting point for Article 8 compliance. Here there was an inability to meet the Appendix FM requirements. In particular, evidence of the couple's finances was not in the specified form. This was not a trifling technicality but a very clear requirement for administrative consistency. The judge took into account that the evidence did not show the couple could meet the requirement of not being a burden on the public purse.

10. Mrs O'Brien continued that the judge was clearly guided by the principles of the Immigration Rules. He looked at Appendix FM and paragraph EX.1 and then considered the appeal outside the rules. The decision was not disproportionate. The judge took into account section 117B of the 2002 Act and had regard to compassionate factors. The appeal had no realistic prospect of success.

11. In response Mrs Farrell referred to Suri [2017] CSIH 48. The couple were clearly not a burden on the public purse. On the question of whether the appellant's residence in the UK was precarious, Mrs Farrell referred to Agyarko [2017] UKSC 11. The appellant had entered the UK with a lawful visa. She has a good job with the Red Cross and makes a positive contribution to society. If the couple had to relocate this would lead to costs for the care of the appellant's partner's father. It was possible for the appellant to follow the 10 year route to settlement under Appendix FM. If the appellant had to make a further application she would not be allowed to work and this would cause hardship for her and her partner. It would be disproportionate not to allow the appeal.

Discussion

12. The first question I must address in this appeal is whether the Judge of the First-tier Tribunal erred in law. If his decision does not disclose an error of law then the conclusions stand and there can be no alteration made to them.

13. The judge properly considered first whether the requirements of the Immigration Rules were met in their entirety, not merely in substance. The judge considered whether paragraph EX.1 applied and the "insurmountable obstacles test" was met. Then having found the appellant did not succeed

under the Rules the judge considered the application of Article 8 outside the Rules. It needs hardly to be stated, of course, that Article 8 is not to be used as a way of remedying a failure to satisfy the Rules in the absence of other more compelling considerations. As the judge pointed out, there must be a strong and compelling claim to outweigh the public interest in maintaining effective immigration control.

14. One of the strongest points made for the appellant and her partner was that they did in fact satisfy the minimum income requirement even though this was not established using the specified documents. It was implied from this that the public interest in refusing the appellant leave would be substantially reduced. At paragraph 20 the judge noted that the appellant's earnings at the relevant time were accepted as £17,360. At paragraph 22 the judge referred to the appellant's partner's income from SSP of £5344 and from earnings of £2157, but pointed out that the documentary evidence of earnings did not satisfy the specified requirements. It can be inferred from this that the judge was aware that the couple's income in fact exceeded the minimum income requirement even though the provisions of the Rules requiring specified documents were not met. It does not follow from this that the judge was bound to allow the appeal outside the Rules under Article 8. The judge had still to carry out the proper balancing exercise, having regard to section 117B.

15. I accept that the way in which the judge set out the factors taken into account in the balancing exercise and expressed his reasons might have been capable of improvement. The question though is whether the judge had regard to the relevant factors and gave adequate reasons. So far as these matters are concerned I am not persuaded that the decision shows any error of law on the part of the judge.

Conclusions

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

17. The decision dismissing the appeal shall stand.

Anonymity

The Judge of the First-tier Tribunal did not make a direction for anonymity. I have not been asked to make such a direction and I see no reason of substance for doing so.

Fee award (N.B. this is not part of the decision.)

As the appeal has been dismissed no fee award can be made.

Deputy Upper Tribunal Judge Deans 13th October 2018