



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/22566/2016

**THE IMMIGRATION ACTS**

Heard at HMCTS Employment Tribunals, Decision & Reasons Promulgated  
Liverpool on 2 May 2018 on 2 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MOETZ FERCHICHI  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Sinker, Counsel, instructed by Sabz Solicitors

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

- 1 The appellant appeals against the decision of Judge of the First tier Tribunal Shergill dated 12 June 2017, dismissing the appellant's appeal against the decision of the respondent dated 13 September 2016 refusing his human rights claim.
- 2 The appellant is a national of Tunisia, and has been present in the United Kingdom with temporary admission since approximately February 2015. He is married to DK

(‘the Sponsor’), a British citizen. On or around 28 October 2015 the appellant applied for leave to remain on the basis of his family life with the Sponsor.

- 3 The respondent refused the application on the basis that the respondent did not accept that the appellant and Sponsor were in a subsisting relationship with one another, or intended to live together permanently in the UK, and thus could not meet the requirements of Appendix FM of the immigration rules. Further, under paragraph 276 ADE(1), there were no very significant obstacles to his integration into Tunisia.
- 4 On appeal, the appellant and Sponsor gave evidence before the Judge. The appellant argued that he was in a genuine and subsisting relationship with the Sponsor. The appellant does not have a relevant English language certificate and the judge found that the financial eligibility criteria were not satisfied, so it was necessary for the appellant to rely upon the provisions of Section Ex of Appendix FM. The appellant argued that there were insurmountable obstacles to family life continuing outside the UK, in Tunisia, because the UK Foreign and Commonwealth Office travel advice at that time recommended against *all travel* to certain limited parts of Tunisia, and against *all but essential travel* to the whole of the remainder of the country. An incomplete extract of the advice was provided in the appellant’s bundle.
- 5 On appeal, the Judge found that the appellant and Sponsor were in a genuine and subsisting relationship with one another [14]. However, the Judge dismissed the appeal. In doing so, the Judge observed that in relation to the Sponsor’s asserted need to remain in the United Kingdom as a carer for her father, that this was not an absolute barrier to ‘... short stays away’ [19]. Further, at [23], the Judge held as follows:
- “I am satisfied that there are a number of difficulties arising with the continuation of the family life outside of the United Kingdom. *The Sponsor* may well not go to Tunisia due to the security situation; although I note despite the security risk the FCO advice is not advice against ‘all travel’ as with certain parts of Tunisia (or indeed the whole of neighbouring Libya). There are direct flights to Tunisia so limited contact could be maintained between them in the safe areas (at an airport hotel for example) or indeed third countries if the appellant is able to go to such other countries. There will be a disruption to the family life, but this is family life presented as a *fait accompli*. There may well be heartache and hardship but I am not satisfied in all of the circumstances that they would be insurmountable obstacles or a rupture to such family life.’
- 6 The Judge made certain findings at [25]-[29] to the effect that the appellant could make an application for leave to enter from Tunisia. These findings appear to me to be more relevant to whether the respondent’s decision was proportionate, rather than the discreet issue of whether the appellant met the immigration rules. The Judge held at [30] that the rules were not met, and at [44], that the appellant did not meet the requirements of Appendix FM as a partner, as there was unsatisfactory evidence relating to finances and there were no insurmountable obstacles arising.

- 7 The Judge considered the proportionality of the decision at [31]-[43] finding in particular that although the respondent had not invoked the suitability paragraphs of Appendix FM against the appellant, an apparent attempt to evade lawful immigration control (discussed at paras [35]-[36]) counted against the appellant in the balancing exercise. Further, any period of time that the appellant might need to be outside the UK to make an application for entry clearance, even if accompanied by the Sponsor, would not amount to an interference with the Sponsor's right to have the enjoyment of her EU citizenship (paras [37]-[43]). The appeal was dismissed.
- 8 Grounds of appeal dated 23 June 2017 argued that the Judge's assessment as to whether family life could continue outside of the UK was irrational and unreasonable in light of the FCO advice. Further, there was a challenge in relation to the Judge's assessment of the appellant's satisfaction of the financial eligibility criteria under Appendix FM.
- 9 Permission to appeal was granted by Judge of the First tier Tribunal Nightingale on 3 December 2017 on the first ground only:
- "It is, however arguable that the Judge fell into error in considering 'insurmountable obstacles to family life with that partner continuing outside the UK' in light of the FCO advice to British Nationals not to travel to Tunisia unless essential. It is arguable that the judge conflated the issues of whether the appellant should make an application from Tunisia, which is not a requirement of EX1 as defined at the EX2, with whether there were obstacles to continuing family life together in Tunisia."
- 10 Before me, Mr Sinker adopted the appellant's grounds of appeal and argued that the Judge's decision as to whether there were insurmountable obstacles failed to have any or sufficient regard to the ECO advice before him. Both parties agreed that the appropriate version to take into account for these purposes was the full version seemingly printed by the Judge on 4 June 2017 (updated on the FCO website on 16 May 2017) and placed on the Tribunal file. Copies were provided to the parties. No issue is taken before me that the Judge undertook his own post hearing research. I observe that it would have preferable for the appellant to have provided the full version (only 7 pages long) rather than the 3 page summary in the appellant's bundle.
- 11 For his part, Mr Bates argued that the Judge had taken the FCO advice into account adequately, and it was sustainable for the Judge to find that family life could continue in Tunisia, as the sponsor would not be travelling to Tunisia alone, she would be in the company of her Tunisian husband, and any risk of harm to her would not be such to make it unreasonable for her to be present in Tunisia.

### **Discussion**

- 12 I find that the appellant's grounds of appeal, as understood by Judge Nightingale, are made out. The error in my view was not whether the Judge took the FCO advice properly into account *per se*, but rather, whether it was considered in the correct context. I find that the Judge misdirects himself in law as to the meaning of EX1 of

Appendix FM, in appearing to consider whether the appellant met the requirements of EX1 by reference to the possibility of family life continuing outside the UK for limited periods only, or under restricted conditions. For example, at [19] the Judge referred to short stays away from the UK, and at [23] to the possibility of 'limited contact' between the appellant and sponsor in safer areas such as an airport hotel.

- 13 I am of the view that EX1 requires the consideration of whether family life can continue outside the UK on an indefinite basis, not for short intervals and in specific restricted locations. The Judge therefore considers the FCO evidence in the wrong context - relatively high levels of risk to a British national maybe arguably be acceptable if there was to be exposure to such risk for limited periods only, whereas the evidence should have been considered on the basis of whether family life could continue in Tunisia indefinitely. That was not the question which the Judge sought to determine.
- 14 I therefore find that there is a material error of law in the Judge's decision in his assessment of whether insurmountable obstacles existed under the immigration rules.
- 15 At the hearing, I reserved my decision as to whether or not there was an error of law in the Judge's decision. However, in accordance with my findings above, I now set the Judge's decision aside.
- 16 Although reserving my decision on error of law at the hearing, I invited submissions from the parties as to how the decision should be remade, in the event that I found there to be a material error of law. I received such submissions. Neither asked that the appeal be remitted to the First tier Tribunal. Both parties also agreed that any new decision as to whether there were insurmountable obstacles to the family life continuing outside of the UK should be made in light of *updated* guidance given by the FCO, issued on the 4 April 2018, a copy on which was before the Tribunal and the parties.
- 17 Mr Bates submitted that the current guidance was materially different to the previous guidance, reflecting a marked improvement in security conditions in Tunisia. The amended guidance cautioned against all travel to certain parts of Tunisia which were limited in their geographical area, and additionally cautioned against all but essential travel to the following areas:

\* areas south of, and including, the towns of Nefta, Douz, Medenine and Zarziz (marked on the map)

\* within 30 km of the border area with Algeria south of, and including, the town of Jendouba (this area includes the archeological sites of Bulla Regia and Chemtou)

\* the governorate of Kasserine, including the town of Sbeitla.

This therefore meant, Mr Bates argued, a significant portion of the country, including most cities and the capital, which were no longer the subject of FCO advice to avoid

all travel or to avoid all but essential travel; rather, such remaining areas were subject to the observation, in the map, that travellers should 'see our travel advice before travelling'.

- 18 Mr Bates also pointed out that there was no evidence of any repetition of the serious and widely reported attack on (largely) British tourists in Sousse in June 2015. Although some recent security incidents were set out at page 5-6 of the advice, this set out only one incident since 2015 regarding foreign tourists - a non fatal knife attack on two western tourists (one being British) in El Kef in March 2018. The reference to there being a heightened threat of attack against UK interests and British nationals was said at page 5 to apply globally.
- 19 Mr Sinker argued that El Kef was in fact the appellant's home town and this was material to the threat to the Sponsor there. He also referred to the advice stating that terrorists were very likely to try to carry out attacks in Tunisia (page 5).

### **Discussion - remaking**

- 20 I find, in agreement with the respondent's submissions, that there has been an improvement in security conditions in Tunisia since the matter came before the Judge and that there is now a significant portion of the country, including most major cities, and the capital, which is not subject to FCO advice to avoid travel to that area, whether completely, or to avoid it for all but essential travel.
- 21 The actual evidence of the appellant and Sponsor on the issue of whether the Sponsor could live in Tunisia, as set out in their respective witness statements, is in fact rather limited, asserting simply that the Sponsor could not live in Tunisia because she provided care for her father in the UK, and because of danger to British nationals in Tunisia. The Sponsor's concerns are not set out in any more detail than that, and do not disclose any specific threats or discuss what part of the country they may or may not be able to live in.
- 22 I find that insofar as the appellant argues that the appellant is obliged to live with the Sponsor in the town of El Kef, that argument is not made out by evidence.
- 23 I find that the appellant has not demonstrated by evidence that there are insurmountable obstacles to family life continuing outside of the UK on an indefinite basis, in Tunisia. The appellant has not established, by reference to adequate country information, that there would be very serious hardship if the appellant and Sponsor attempted to continue their family life there. The current FCO guidance indicates that travellers should be vigilant. The appellant has not established that the Sponsor would not, in the significant proportion of the country which is not subject to any particular travel advice, be sufficiently safe from harm by adopting the vigilance recommended in the advice.

- 24 I therefore find that the appellant has not established that there are insurmountable obstacles to family life continuing outside the UK, and I find that the appellant does not meet the requirements of the immigration rules.
- 25 As regards the proportionality of the respondent's decision, I agree with the Judge's assessment that there is limited probative evidence as to why the Sponsor's father requires her specific care and/or what alternatives might be put in place including from social services if necessary. Whereas the Judge considered that the Sponsor's father's health did not constitute an absolute barrier to the Sponsor spending 'short stays' away, I am of the view that the limited evidence advanced in the appeal regarding the Sponsor's father does not establish that it would amount to a disproportionate interference with the Sponsor's private or family life that she has with her father for the Sponsor to leave the UK on an indefinite basis.
- 26 Further, it is to be noted that there was no challenge to the remainder the Judge's assessment of the proportionality of the respondent's decision, including the Judge's finding that the appellant's immigration history counted against him and that he could reasonably return to Tunisia to make an application for entry clearance based on appropriate evidence of the Sponsor's financial position. I agree with the Judge's analysis in that regard.
- 27 Although I have set aside the Judge's decision, his finding that the appellant and Sponsor are in a genuine and subsisting relationship stands, that finding not being vitiated by any error of law.

### **Decision**

- 28 I find that the decision involved the making of a material error of law.

I set aside the Judge's decision.

I remake the decision by dismissing the appellant's appeal.

Signed:

Date: 28.7.18



Deputy Upper Tribunal Judge O'Ryan