Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20140/2019

THE IMMIGRATION ACTS

Heard at Bradford (via Skype)	**Decision & Reason Promulgated**
On 20 January 2021	**On 4 February 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

HANAN MOHADAD-ALI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Adebayo of A2 Solicitors.
For the Respondent: Mrs Pettersen Senior Home Office Presenting Officer.

DECISION AND REASONS

1. In a decision promulgated on 13 October 2020 the Upper Tribunal set aside a decision of the First-tier Tribunal which allowed the appellant's appeal on human rights grounds against the refusal of an application for leave to remain in the United Kingdom on the basis of her private and family life.

Background

2. The appellant is a female citizen of Canada born on 22 September 1979.
3. There are a number of preserved findings from the First-tier Tribunal (FTT) decision being the appellant's immigration history, the finding the appellant is in a genuine and subsisting relationship with her partner, the finding the appellant cannot satisfy the requirements of the immigration rules for the reasons set out in the refusal, and the appellant's first miscarriage and emotional reaction and the effect of the same upon her and her husband.
4. In relation to the appellant's immigration history, the appellant entered the United Kingdom as a visitor on 17 July 2019 but on 22 October 2019 made an application for further leave to remain as a spouse.
5. The appellant underwent an Islamic marriage to Mr Haron Ayid Sallal a British national on 29 June 2019 after which they commenced cohabiting and married in accordance with the laws of the United Kingdom on 10 October 2019. The appellant claims to have been in a relationship since November 2017 which began when she visited her uncle in the UK and met Mr Sallal.
6. The reason the appellant cannot satisfy the immigration rules is that although it was accepted the appellant could meet the suitability requirements, she cannot satisfy the eligibility immigration status requirements of paragraph E–LTRP.2.1 to 2.2 as she entered the United Kingdom as a visitor, a status from which switching is not permitted.
7. In relation to EX.1 the decision maker wrote:

> "EX.1. Requirement
>
> We have considered whether you are exempt from meeting certain legibility requirements under Section R-LTRP of Appendix FM because paragraph EX.1 applies.
>
> We have carefully considered whether paragraph EX.1 of Appendix FM applies to your application, and therefore whether you meet the requirements of paragraph R-LTRP.1.1(d)(iii) of Appendix FM.
>
> You have a genuine and subsisting relationship with your British partner. The Secretary of State has not been any evidence that there are insurmountable obstacles in accordance with paragraph EX.2. of Appendix FM which means the very significant difficulties which would be faced by you and your partner in continuing your family life together outside the UK in Canada, and which would not be overcome or would entail very serious hardship for you or your partner. You therefore failed to meet the requirements of EX.1(b) of Appendix FM of the Immigration Rules so paragraph EX.1 does not apply in your case.
>
> In light of the above the Secretary of State is not satisfied that EX.1 applies to your case and so you do not meet the requirements of paragraph R-LTRP.1.1(d)(iii) of Appendix FM.

8. In relation to paragraph 276 ADE, it was found the application did not fall for refusal on grounds of suitability in Section S-LTR but did in relation to eligibly as she had only lived in the UK for 98 days and had therefore not lived continuously in the UK for at least 20 years; meaning the appellant failed to satisfy the requirements of paragraph 276 ADE(1)(iii) of the Rules.

9. There is no express exceptional circumstances provision in the private life rules, such as that found in EX.1 in relation to family life.
10. It was also found that although the appellant was over 18 but under 25 years of age it had not been shown that she had spend at least half her life living continuously in the UK or that, even though aged 18 or above, there were very significant obstacles to her integration into Canada, the country she will return to if she were to leave the UK.
11. The decision-maker did not accept there will be very significant obstacles to her integration into Canada, if she was required to leave the UK, because she had spent her formative years there and it is accepted that she will have retained knowledge of the life, language and culture, and would not face significant obstacles to reintegrating into life in Canada once more.
12. In relation to the miscarriage, the FTT judge recorded the appellant's evidence that at the time she made her application she did not know she was already pregnant. She lost the baby on 30 December when she was 11 weeks pregnant. The appellant stated she was devastated as this was her first child. The FTT judge also records the evidence of the appellant and her partner that they had gone through a difficult time as a result.

Discussion

13. Paragraph E-LTRP.2.1. of the Rule states that an applicant must not be in the UK-

    (a) as a visitor; or

    (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings

14. The appellant entered the UK as a visitor and so falls foul of this provision.
15. Part 5A of the Nationality, Immigration and Asylum Act 2002 establishes the present regime under the rubric 'Article 8 of the ECHR: Public Interest Considerations'. Section 117A of the 2002 Act addresses the application of the public interest regime; section 117B details the public interest considerations applicable in all cases; section 117C is concerned with additional considerations in deportation matters and interpretation is addressed at paragraph 117D. This is not a deportation case.
16. Section 117A(3) relates to the application of the public interest. This Tribunal is required to carry out a balancing exercise to decide whether the proposed interference is proportionate, with due weight given to the strength of public interest in removal'. See R (Agyarko) v. Secretary of State for the Home Department [2017] UKSC 11.
17. It is accepted the 'little weight' provisions of section 117B(4) and (5) involve a spectrum that within its self-contained boundaries will result in the measurement of the quantum of weight considered appropriate in the fact

sensitive context of every case. See Kaur (children's best interests/ public interest interface) [2017] UKUT 14 (IAC).

18. In GM (Sri Lanka) v. Secretary of State for the Home Department [2019] EWCA Civ 1630 (4 October 2019) the Court of Appeal made the following observations about the test to be applied:

    (a) the immigration rules and section 117B had to be construed to ensure consistency with art.8;
    (b) national authorities had a margin of appreciation when setting the weighting to be applied to various factors in the proportionality assessment;
    (c) the test for an assessment outside the immigration rules was whether a fair balance was struck between competing public and private interests;
    (d) that proportionality test was to be applied to the circumstances of the individual case;
    (e) there was a requirement for proper evidence;
    (f) there was in principle no limit to the factors which might be relevant to an evaluation under article 8'.

19. All relevant guidance has been carefully considered in assessing the merits of this appeal.
20. Applying the structured approach set out in (R (Razgar) v. Secretary of State for the Home Department [2004] UKHL 27; it is not disputed the core question in this appeal has always been whether any interference in the family and private life relied upon by the appellant is proportionate to the legitimate aim relied upon by the Secretary of State, which is that of effective immigration control.
21. The burden of establishing the decision is proportionate lies upon the Secretary of State.
22. It is also necessary to consider the effect of the decision on all members of the family. See Beoku-Betts v. Secretary of State for the Home Department [2008] UKHL 38 . In this appeal the core family members are the appellant's husband and his family in the UK.
23. In relation to the appellant's private life, Section 117B(5) is relevant in light of her precarious status. Case law has established that for the purposes of section 117B(5), anyone who, not being a citizen of the United Kingdom, is present in this country and who has leave to reside here other than to do so indefinitely, has a precarious immigration status' see- Rhuppiah v. Secretary of State for the Home Department [2018] UKSC 58. This is not disputed by Mr Adebayo.
24. Mr Adebayo focused a large proportion of his submissions upon the compassionate element of this appeal arising from the appellant's miscarriages. The medical evidence provided in the most recent bundle and the appellant's witness statement indicates that she has now conceived three times, but that all the pregnancies have failed.
25. The impact upon the appellant and her husband and the emotional distress caused form the first miscarriage is a preserved finding from the FTT determination. It is accepted that whilst one miscarriage is heart breaking enough, albeit not uncommon, recurrent miscarriages can lead to a situation

akin to a 'horrible nightmare'. The impact upon the appellant and her husband as a result of these unfortunate events is understood.

26. The statistics tell us, however, that multiple miscarriage happens in 15 – 20% of pregnancy and therefore the claim by Mr Adebayo that the fact the appellant has suffered three miscarriages makes the case 'exceptional' is not made out. It is also the case the appellant has failed to produce sufficient evidence relating to the cause of the miscarriages, which could relate either to her or her husband, that establishes there is anything exceptional in relation to this case such that she is required to remain in the United Kingdom. It is not made out, for example, that if medical facilities were required in Canada, they would not be available to the appellant. Reference was made in the submissions to vulnerability to Covid-19 arising from a vitamin D deficiency, but it is not made out the appellant would not have access to vitamin D supplements which can be obtained from high chemist or GP in Canada.

27. The appellant's claim, and that made by her husband, that he would not be able to find employment in Canada is not made out as it was admitted by the appellant in cross examination no enquiries have been made to establish whether her husband will be able to obtain work in Canada. The claim he will not is pure speculation, suggested to enhance a case. Insufficient evidence was adduced to show there will be any adverse impact upon the appellant's husband in relation to his employment prospects, or family connections, if he had to leave the United Kingdom to accompany the appellant to Canada. No enquiries have been made regarding prospects of obtaining a spouse Visa. It was not made out it is disproportionate for the appellants husband to travel to Canada with her while she made an application to return to the UK if they did not want to live there.

28. The evidence is that the appellant has family in Canada and there was insufficient evidence to show that she would not have the support and assistance of her family on return. It has not been shown there are any insurmountable obstacles to reintegration into Canada individually or as a couple.

29. The appellant also admitted, in rely to a question put to her in cross examination, that no enquiries have been made with the British High Commission to ascertain how long it would take for an application for entry clearance, to enable her return to the United Kingdom lawfully as a spouse, to be granted. There is no evidence of inordinate delay by the British High Commission in Canada who are those able to undertake all the enquiries required in a case of a person seeking leave to enter the UK in this capacity. The appellants claim that any delay will be disproportionate is mere speculation and not made out on the evidence.

30. The appellant's claim that an application would take much longer as a result of the current application having been made and refused is not supported by any evidence and is mere speculation. As Mrs Petterson observed, the appellant has remained in United Kingdom with section 3C leave pending the conclusion of these appeal proceedings and has therefore not yet overstayed. If the appellant

returned voluntarily to Canada, she will not be removed at cost to the public purse either which is a point in her favour.

31. Although the appellant claims she was told that as a non-Visa national she will be able to switch categories this is not the correct legal position in light of the specific provision of the rules preventing the same. The possession of a valid spouse settlement visa is a mandatory requirement for a person wishing to remain in the UK with their spouse for longer than 6 months.

32. I do not find the appellant adduced sufficient evidence to warrant a finding that it is unreasonable or irrational in all the circumstances to expect her to return to Canada, or that it has been made out that the family life she and her husband enjoy in the United Kingdom cannot continue in Canada. Although Mr Adebayo suggested the husband faced insurmountable obstacles in securing employment this is not made out on the facts of this case especially in light of his failure to make any proper enquiries. Nor is there any evidence of a disproportionate adverse effect on any other family member.

33. Mr Adebayo sought to rely upon the decision in R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) in which it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40. (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das v SSHD [2011] EWHC 2070 (Admin)).

34. The problem for the appellant in this case is that she has failed to provide sufficient evidence to show that temporary separation will interfere disproportionately with any of the protected rights. The desire to remain in the UK is not enough.

35. In TZ (Pakistan) [2018] EWCA Civ 1109 it was found at [25]:

> 25. The settled jurisprudence of the ECtHR is that it is likely to be only in an exceptional case that article 8 will necessitate a grant of leave to remain where a non-settled migrant has commenced family life in the UK at a time when his or her immigration status is precarious (see, for example *Jeunesse v Netherlands* (2016) 60 EHRR 17 at [100] and [114]). That general principle applies to any consideration of the Rules which involves engaging with a requirement or requirements that possess an article 8 element (often wrongly described as an article 8 consideration within the Rules) and to the consideration of article 8 outside the Rules. Where precariousness exists it affects the weight to be attached to family life in the balancing exercise. That is because article 8 does not guarantee a right to choose one's country of residence. Both the unlawful overstayer and the temporary migrant have no right

to remain in the UK simply because they enter into a relationship with a British citizen during their unlawful or temporary stay. The principle was accepted in *Agyarko* at [49] to [54] leading to a statement of general principle at [57]:
"In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

26. In relation to assessing the public interest, it is necessary to consider section 117 of the Nationality, Immigration and Asylum Act 2002, as noted above, which reads:

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8:public interest considerations applicable in all cases:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to— (a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

36. It was held in Agyarko [2017] UKSC 11 that a court or tribunal had to decide whether the refusal to grant leave to remain was proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the rules and instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. "The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control".

37. The Supreme Court referred to the judgment in Jeunesse v Netherlands and said that the fact that family life had been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affected the weight to be attached in the balancing exercise. Circumstances could be envisaged however "in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate" (para 53). Nevertheless, in general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

38. In this case both the appellant and her husband were aware of her immigration status and that she had neither applied for nor obtained a Visa giving her permission to enter the United Kingdom to be with her husband. It is not made out that the appellant could be said to have been under a 'reasonable misapprehension' as to her ability to maintain her family life in the United Kingdom. It is not made out that a less stringent approach of the type envisaged by the Supreme Court is applicable in this case. The simple fact of the matter is that the appellant came to the United Kingdom to be with the person who is now her husband and now claims that she wishes to remain without having any application considered under the Immigration Rules.

39. As a result of the appellants husband's employment and support in the UK it is not suggested she will be burden on taxpayers or unable to integrate into society in the UK as she speaks English, but an appellant can obtain no positive right from either section 117B(2) or (3) whatever the degree of his/her fluency in English, or the strength of his financial resources'. See AM (s117B) Malawi [2015] UKUT 260 (IAC).
40. It is not made out any medical issues arise sufficient to engage article 3 ECHR, or article 8 on the basis removal will amount to an interference with the appellants private life based upon access to medical services sufficient to make the decision disproportionate.
41. Whilst Mr Adebayo refers to the Covid-19 situation, the respondent has published removal policies relating to those unlawfully in United Kingdom which includes specific consideration of ensuring safe removals in such circumstances.
42. The error of law finding illustrates the appellant's claim that she will be unable to fly due to the lockdown was not shown to be a determinative point in light of the resumption of flights by airlines to Canada. Even though at the date of this decision there is another lockdown in the UK and international travel is difficult, it is not made out this is a situation that is likely to prevail indefinitely and even if it remains until the summer or beyond that does not make the decision arguably disproportionate.
43. It is also the case that despite the general restrictions on the population, in relation to immigration removals, as of 22 January 2021, there is no evidence of a general policy of suspending removals. 285 people were removed between 1 April and 30 June 2020 and charter flights have continued to operate, with more scheduled during this month and beyond.
44. The appellant's case is purely that she and her husband wish to choose where they want to live as a couple and that is in the United Kingdom. It is a preserve finding that there are no insurmountable obstacles to the appellant and her husband continuing their family life together in Canada. I find that the respondent has established that the interference in any protected rights that will result as a result of the requirement for the appellant to return to Canada, where she can continue to live with her husband or to make an application to return to United Kingdom, is with the States margin, lawfully, and has been shown to be proportionate. It has not been established there is anything exceptional to which sufficient weight can be given, individually or cumulatively, to outweigh the strong public interest in effective immigration control.
45. On that basis the appeal must be dismissed.

Decision

46. I dismiss the appeal.

Anonymity.

47. The First-tier Tribunal made not an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 21 January 2021.