



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/01202/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 29th October 2013

Determination Promulgated
On 5th December 2013

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS AROSIK ARTIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs Pettersen, Home Office Presenting Officer
For the Respondent: Mr Ahmed

DETERMINATION AND REASONS

1. In this appeal the Appellant is the Secretary of State for the Home Department and the Respondent is Mrs Arosiak Artin. For ease of reference I shall refer to the Secretary of State as “the Respondent” and Mrs Arosiak Artin as “the Appellant”.

2. This is the review of an appeal against the Entry Clearance Officer Abu Dhabi's decision to refuse the Appellant entry clearance to the United Kingdom as a spouse to join her husband who is now a British citizen.

History

3. The Appellant is a citizen of Iraq born 1st June 1945. She made application to join her husband "the Sponsor" Ramzi Hanna who is now a British citizen. The application was refused by the Respondent on 10th December 2012 on two main grounds.

- (i) The Appellant could not meet the financial requirements of Appendix FM to the new Immigration Rules.
- (ii) The Respondent was not satisfied that the Appellant was in a genuine subsisting marriage with the Sponsor.

It has since been agreed and determined that the Appellant and Sponsor are in a subsisting marriage and the second ground plays no further part in these proceedings.

4. The Appellant and her husband were both in their late 60s at the date of decision. They are of Armenian descent and Christians. Their parents had settled in Iraq after fleeing the Turkish pogroms of the early 20th Century. Although they were brought up in Iraq, both the Appellant and Sponsor spent the majority of their adult life living and working in the UAE. They raised their two children there and their son Berge remains working in the UAE. Their daughter Alice now lives in the USA.
5. The Sponsor came to the United Kingdom in 2002, leaving his wife in the UAE. The Sponsor sought asylum which was refused. He was nevertheless granted indefinite leave to remain in 2010 and became a British citizen in February 2012.

The First-tier Tribunal Hearing

6. At the hearing before Judge Kelly it was accepted that the Appellant could not meet the financial requirement of the Immigration Rules. The Sponsor is in receipt of pension credits from the UK government. The Appellant was working in the UAE and it is correct that her son had transferred to her account in November 2012 AED 350,000 leaving her with a closing balance of £63,622 – but at the date of decision that amount had not been held in her account for the requisite six month period under the Immigration Rules.
7. Judge Kelly went on to consider Article 8 ECHR and allowed the Appellant's appeal on the grounds that the Respondent's decision to refuse entry clearance was disproportionate.
8. The Respondent sought and was granted permission to appeal. In granting permission DJ Peart said,

*“It is arguable that in allowing the appeal, Judge Kelly failed to give adequate reasons for finding the Respondent’s decision to be disproportionate. It is arguable there was inadequate reasoning in terms of the parties claimed exceptional circumstances and the claimed unjustifiably harsh consequences of removal. See **HH Genoa [2012] UKSC**”.*

Thus the matter comes before me to decide if the First-tier Tribunal Judge’s determination discloses an error of law such that the decision must be remade.

The Hearing Before Me

9. At the hearing before me I confirmed with both parties that I had all the documents which were before Judge Kelly. Mr Ahmed served a Rule 24 response dated 18th September 2013.
10. Mrs Pettersen sought to rely in the main on the grounds seeking permission. She submitted that the First-tier Tribunal Judge had misdirected himself because he had failed to give adequate weight to the Immigration Rules and the Article 8 section of the Rules had to be factored in to any proportionality exercise. The Judge had omitted this and thus a key element of the balancing exercise was missing.
11. Further the Judge had found that the Appellant’s case was exceptional and had thereby allowed it under Article 8. He had approached the question of exceptionality incorrectly. There was nothing exceptional or compelling on the facts of this Appellant’s case, such as to bring it within Article 8.
12. Mr Ahmed in response submitted that the Judge had asked himself the correct questions when dealing with proportionality. He had taken into account all the relevant factors and at paragraphs 17 and 18 of the determination had considered that the Sponsor on account of his age and limited employment prospects could hardly relocate to join his wife abroad. That would require the Sponsor to sacrifice his British citizenship and financial benefit of remaining in the UK. That could not be reasonable. Therefore in order to resume their married life, the Appellant would need to join the Sponsor here in the UK.
13. At the end of submissions both parties indicated that there was no further evidence to call. Mrs Pettersen accepted that there was no challenge to the facts found by Judge Kelly and therefore it was agreed that should I find an error of law I could go on and remake the decision.

Error of Law

14. I am satisfied that the analysis of Article 8 ECHR by Judge Kelly discloses an error of law. The decision shows inadequate reasoning on why the Appellant’s case is one of exceptionality. In **HH v Deputy Prosecutor of the Italian Republic Genoa [2012] UKSC** Lady Hale commented in paragraph 32 when discussing exceptionality said, “Some particularly grave consequences are not out of the run of mill at all. Once again, the test is always whether the gravity of the interference with family life is

justified by the gravity of the public interest pursued. Exceptionality is a prediction just as it was in **Razgar** and not a test”.

15. What are the facts relied upon in this appeal? Firstly the Appellant has lived apart from her husband for a number of years. She has been in employment and so far as is known is in good health. There is nothing exceptional there. She is in no reported danger. She enjoys contact with the Sponsor, according to the evidence of her son, by way of Skype.
16. She visited the UK in 2010 and saw the Sponsor there. Against the Appellant is the fact that she cannot meet the financial requirements of the Immigration Rules. Her husband is in receipt of public funds and even though Judge Kelly found that in the medium term the overall charge on public funds would be actually reduced, this, is the wrong approach. What needs to be looked at is whether the admission of the Appellant would lead to a recourse to public funds. The answer to that must be “Yes”. This is because it is accepted by the parties that the Appellant cannot meet the Immigration Rules. It is a stark reality that not meeting the financial requirements of the Immigration Rules means that the Appellant and the Sponsor remain physically apart. The consequence of not being able to meet the Immigration Rules does not render the Respondent’s decision to refuse entry disproportionate under Article 8. The Respondent’s decision is made to ensure that those seeking entry the United Kingdom do not become a charge on public funds. However there is nothing disproportionate about the Respondent’s decision to ensure that those seeking entry to the United Kingdom do not become a charge on public funds.

DECISION

17. The First-tier Tribunal Judge having made an error of law, I hereby remake the decision. The Appellant’s appeal against the Entry Clearance Officer Abu Dhabi’s decision to refuse entry clearance is dismissed.

No anonymity direction is made

Signature
Judge of the Upper Tribunal

Dated

Fee Award

I have dismissed the appeal and therefore there can be no fee award.

Signature

Dated