IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20922/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 May 2015	**On 10 June 2015**

Before

LORD MATTHEWS, SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE A L MCGEACHY

Between

MRS CINTHIA MARLI JIMENEZ ROSILLO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sihwa, Solicitor
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Peru, born on 28 June 1986. She is the spouse of Christian Alfonso Tinico Apolo, a citizen of Ecuador, with whom she began a relationship over the internet leading to a meeting in person on 26 February 2010 and a marriage on 1 February 2011 in Peru. Mr Apolo was granted indefinite leave to remain in the United Kingdom on 26 August 2009 and the appellant applied for and was granted a spouse visa on the basis of her marriage from 8 December 2011 to 8

March 2014. She came to the United Kingdom on 9 December 2011 to live with her husband.

2. On 7 March 2014 the appellant applied for further leave to remain in the United Kingdom but that application was refused for reasons set out in a letter dated 29 April 2014. The principal reason was that she did not meet the English language requirements of the Immigration Rules. She provided two IELTS certificates with her application showing speaking scores of 3 and 3.5 which were below the 4 required to meet the minimum A1 level threshold. The Reasons for Refusal Letter indicated that her family and private life was considered but the Secretary of State was not satisfied that she was able to meet the requirements of the Rules. Nor was she satisfied that her application raised or contained any exceptional circumstances which might warrant consideration of a grant of leave to remain in the United Kingdom outside the requirements of the Rules. That decision was the subject of an appeal which was heard by First-tier Tribunal Judge Monaghan on 15 January 2015 and which was refused in a determination promulgated on 28 January 2015. An appeal was then taken against that decision on various grounds including an alleged failure to apply Pankina, Chikwamba, Veerabudren and Article 8 ECHR. Permission was only granted on the basis that it was arguable that the judge failed to adopt the five stage Razgar test and that she was incorrect in stating that the appellant had no family in the United Kingdom as her partner was settled here. The latter point was not argued before us and we have no difficulty in finding that it has no merit. The context in which the reference was made showed plainly that the judge was referring to the appellant's blood relatives and it is a fact that none of them is present in the United Kingdom.

3. The judge in the FtT set out the background to the case then the law and the evidence given by the appellant and her husband. We need not repeat that verbatim. She also referred to evidence from the appellant's sister-in-law and a family friend. Thereafter she set out the submissions of the parties before making her findings. It was not disputed that the speaking score was below the 4 required to meet the minimum A1 level threshold although she found that the appellant had now attained the necessary standard. That did not avail her since she had not met the requirements at the material time.

4. From paragraph 35 onwards the judge set out her consideration of the appellant's family life under Article 8, which she said fell under Appendix FM EX.1 of the Rules from 9 July 2012. The relevant findings are in paragraph 37, which is in the following terms:-

> "It is not in doubt that the appellant has a genuine and subsisting relationship with her partner who is settled in the UK. She married him in Peru in 2011. She came to the United Kingdom on 9 December 2011 and they have lived together at various addresses since that time. Evidence was given by her friend and sister-in-law about the nature of their relationship which confirmed the position.
>
> It is not accepted, however, that there are insurmountable obstacles to the appellant and her husband continuing family life in Peru. This is because the appellant has spent the majority of her life in Peru. She has only been in the United Kingdom for a little

over three years. She is in regular contact with her mother in Peru and sends her money each month to assist with her support. She does not have any family in the United Kingdom. She has worked in Peru in child caring jobs and on her own evidence this is an area that she would like to work in again in the future. There is no reason why she cannot study and or work in Peru to further her wishes to be employed in child care. Similarly although her husband has been settled in the United Kingdom for thirteen years and has held employment in catering, there is no reason why he could not find such work and further study in caring in Peru or in another suitable employment. It is accepted that the appellant has also developed a relationship with her husband's family. However both the appellant and her husband could keep in touch with his family by social media, email and telephone and by family visits.

The appellant has had some health problems in relation to ovarian cysts. She has no other health problems. She could receive medical treatment in Peru for these problems. Her husband is in good health.

Insurmountable obstacles means very significant difficulties which would be faced by the appellant or her partner and which could not be overcome or would entail very serious hardships. On the facts found there was no evidence to support the existence of such obstacles in this case."

5. At paragraph 39 the judge said that there was nothing compelling or exceptional in the case that required consideration of Article 8 outside the Rules. There were no arguably good grounds beyond those already considered within the Rules.

6. In presenting the appeal before us Mr Sihwa commenced his submissions by arguing that the appellant did in fact meet the requirements of the test at the material time but we refused to allow him to develop this argument since no permission had been granted for it to be advanced. He then turned to the submissions on Article 8.

7. He submitted that the reasoning of the Secretary of State was defective because she had not considered the position of the spouse, who had indefinite leave to remain. He had been in the UK since 2002 and would have to give up his employment if he had to go to Peru. He also had family members in this country. There was no reason he should go to a country of which he was not a national. The appellant had an ovarian cyst and required medical attention. Her spouse's evidence was that he could not give up his work and there would be no accommodation and no family in Peru to assist them. He could not pay for such medication as she would require in Peru. None of this was dealt with in the Reasons for Refusal Letter. The Secretary of State had simply indulged in a tick box exercise, as deprecated in Nagre. There was no reasoning behind the suggestion in the letter that there were no exceptional circumstances to justify a grant of leave outside the Rules. The appellant's leave to remain here was not precarious and she was not an overstayer. The hardship the family would face was exacerbated by the new Rules. Her spouse would now have to meet the requirements to show an income of £18,600. His income had gone down to £1,200 per month. The appellant had no previous convictions and her conduct, character and associations did not demand that she be removed. She now met all the requirements and the decision was disproportionate. If she went back to Peru the parties would be separated for an indefinite time.

8. In reply Mr Nath pointed out that the submissions were directed at the Reasons for Refusal Letter rather than the determination and that our task was to see if there was an error of law in the latter. He pointed to the assessment of Article 8 to which we have already referred. Judge Monaghan had referred to the position of the spouse and properly assessed it. She set out that the appellant had no family in the UK and had worked in Peru in child caring jobs. On her own evidence that was an area in which she would like to work again in the future. She was in regular contact with her mother in Peru. She also considered the position of the spouse. She noted that he had been settled in the United Kingdom for thirteen years, that he had held employment in catering and that there was no reason why he could not find such work and further study in catering in Peru or in another suitable employment. She found that he did have close family links in the United Kingdom, as Mr Sihwa had submitted, and it was accepted that the appellant had developed a relationship with his family but she found that both of them could keep in touch with the family by social media, email, telephone and family visits. She also dealt with the appellant's health. There was no evidence before her that there was no health facility in Peru. In short, there was no reason to find that the assessment had not been carried out correctly.

9. Mr Sihwa had indicated that the spouse's family included a mother, sister and nephew who lived in the United Kingdom and had suggested that the judge had not properly taken that into account. He went on in further submissions, under reference to EB (Kosovo), to say that the failure to take account of the position of the 8 month old nephew was a breach of Section 55 of the Borders, Citizenship and Immigration Act 2009 and the principles set out in ZH (Tanzania) which should have been taken account of in the Article 8 assessment. Nothing was said as to why it was proportionate in relation to the child for the spouse to be required to leave the country.

10. Furthermore, the Chikwamba point was not addressed by her. It was relevant at that time.

11. The Secretary of State said that there were no exceptional circumstances but under the authority of Veerabudren that was not sufficient. The judge simply followed the Secretary of State's reasoning. The medical treatment required by the appellant was not affordable so that made the case exceptional. The spouse had given evidence that he could not afford it, as was set out at paragraph 23 of the determination. There was no reasoning in the judge's finding that there was no reason why he could not find the work. There were letters showing that she required future appointments (which referred to HRT) and they indicated that further treatment might be envisaged in the future. The judge could not have come to the conclusion which she did on the evidence before her.

Conclusions

12. The only issue before us is whether it can be said that the judge in the FTT failed properly to consider Article 8. She took the view that there was nothing compelling

or exceptional which required consideration outside the Rules but it appears to us that in paragraph 37 she did in fact consider all the various matters which Mr S Sihwa desiderated**.**

13. She was satisfied that the appellant had spent the majority of her life in Peru, as was undoubtedly the case, and had family there. She was satisfied that her spouse could find work in Peru, despite his evidence to the contrary, which she obviously did not accept. His lack of ability to afford medical treatment appears to have been based solely on his claimed inability to find work and in any event the judge found that the appellant herself could work in Peru. No other basis was suggested as to why the appellant could not access medical treatment and the judge was entitled to find that the question of treatment did not weigh heavily in her favour.

14. Chikwamba is not relevant to this case. The circumstances were different and in any event this is not a case where it can be said that the appellant meets the Rules as they now are in view of her spouse's financial position. There is therefore more to this case than simply filling in a form with an inevitable outcome.

15. It does not appear that the question of Section 55 or ZH (Tanzania) was raised specifically in the grounds of appeal to the First-tier Tribunal and it was not raised specifically in the grounds of appeal before us, except insofar as it can be said to arise in any case where Article 8 is raised as an issue. However, even if these matters should have been taken into account, we do not think that any error in that regard, if there is one, is material. In the first place the judge deals with the position of the family members in the determination at paragraphs 20 and 37. In the second place, the child is only 8 months old and lives with his own family. There is no reason why the spouse has to leave the country but even if he did, the effect on the child's welfare and development is likely to be minimal. A further application could be made from abroad once the parties meet the requirements of the Rules and there is nothing disproportionate in the Secretary of State insisting on that.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)

Date: