Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/36364/2014**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 19 November 2015	**On 23 December 2015**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

MS AMANDA LYNN KARLBERG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Mullan, Advocate, instructed by Latta & Co
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1) This is an appeal against a decision by Judge of the First-tier Tribunal Bradshaw who dismissed an appeal by the appellant against a refusal of leave to remain as a spouse.

2) The appellant was born in 1990 and is a national of the USA. She entered the UK as a visitor in January 2014. She came to visit the Whiteside family, to whom she was related by marriage. While she was here Patrick Whiteside proposed to her and the couple were married on 14 July 2014. On 28 July 2014 the appellant replied for leave to remain as a spouse but this application was refused by notice dated 3 September 2014.

3) The Judge of the First-tier Tribunal heard evidence about the appellant's father-in-law, who is elderly and disabled. The appellant's husband, Patrick Whiteside, cares for him on a full time basis. The judge had before him evidence from the appellant's GP in relation to the appellant's father-in-law. This stated that the appellant's father-in-law requires 24 hour care. If care and assistance from family members were not available

he would be incapable of being cared for in the community and would require to be admitted to residential accommodation, a nursing home or hospital. The judge pointed out, at paragraph 70 of the decision that the GP referred to care by family members rather than specifically care by the appellant's husband only. The judge was aware that there were other family members living near the appellant's father-in-law and there was a question as to whether or not other family members were involved in the care of the appellant's father-in-law. The judge also commented that the GP's letter did not address the possibility of local authority support and stated from his own knowledge he was aware that local authority support can extend to visits by carers up to four times a day.

4) The appellant's husband is himself disabled and suffers from PTSD. He receives the highest care component of Disability Living Allowance and the lower rate of mobility component.

5) Before the First-tier Tribunal it was accepted that the appellant would not qualify for leave under Appendix FM of the Immigration Rules and the appeal would only succeed under Article 8 outside the Rules. In considering Article 8 the judge found that there would be no significant difficulty for the appellant in returning to the USA to make an application for entry clearance from there. The appellant would have to obtain employment and might take three months or longer to save up the application fee. There would then be a period of 60-90 days while the application was being processed. The judge noted that the appellant and her husband were able to produce £601 to pay for the application giving rise to the refusal decision under appeal. The judge considered that the appellant's husband might be able to assist her with the application fee in the USA, although at the hearing he said he had no savings. There are no children of the marriage. The appellant came to the UK in January 2014 as a visitor and was not expecting to receive a proposal of marriage. If she was to be separated from her husband for a period of time they would be able to keep in contact with each other through modern means of communication. The appellant's husband had visited the USA in 2013 with his father. There was the possibility that the appellant's husband would be able to visit the USA again and this would reduce the adverse effects of separation.

6) On this basis the judge concluded at paragraph 86 that the appellant had not shown there were arguably good grounds for granting leave to remain outwith the Rules and accordingly it was not necessary for the judge to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

7) At the hearing before the First-tier Tribunal it was pointed out on behalf of the respondent that the appellant had visited the UK on several occasions previously. On one of these occasions she had appealed against an adverse immigration decision and her appeal was dismissed by the First-tier Tribunal. It was submitted by the respondent that the appellant was aware of the requirements of the Immigration Rules.

8) The application for permission to appeal contended that the appellant had relied upon the decision of the Outer House of the Court of Session in Muhammad Irfan Khan

[2013] CSOH 176 but the Judge of the First-tier Tribunal had failed to have regard to this decision. This was said to be an error of law. In the case of Khan the Lord Ordinary stated that separating a couple affected the proportionality exercise under paragraph 8. A policy of requiring applicants to make their applications from abroad should not usually be applied without more and an Article 8 appeal should not normally be dismissed on this basis. The findings of the Judge of the First-tier Tribunal contradicted the decision in Khan.

9) It was submitted in the application that the judge further erred by relying on matters that were said to be within his own knowledge. At paragraph 71, as already noted, the judge referred to the provision of care by local authorities as being within his own knowledge. It was contended that this was not a matter which was within judicial knowledge and no evidence had been led in respect of this.

10) The Judge of the First-tier Tribunal further erred, according to the application, by concluding that there were no good arguable grounds for granting leave to remain outwith the Rules. It was submitted that this was the wrong test and that the Upper Tribunal in the case of Oludoyi IJR [2014] UKUT 00539 made it clear there was no threshold test of having a good arguable case.

11) Permission was granted on all three grounds.

12) A rule 24 notice was lodged on behalf of the respondent contending that the Judge of the First-tier Tribunal had issued a comprehensive decision dealing with all the facts of the case and giving considered reasons why it would not be disproportionate for the appellant to return to the USA and apply for entry clearance. In response the appellant submitted a rule 25 notice reiterating the grounds of the application and emphasising the argument that the judge did not apply the correct test when considering Article 8.

Submissions

13) At the hearing before us Mr Mullan, for the appellant, began by referring to the judge's reference to his own knowledge of the care which might be provided by a local authority, as recorded at paragraph 71 of the decision. There the judge stated: "From my own knowledge I am aware that local authority support can extend to visits by carers four times a day, seven days a week, and I note this issue of local authority support has not been referred to in the said letter from the GP especially where there is evidence on behalf of the appellant to the effect that it was previously provided albeit to a very limited extent." It was pointed out that the judge's comment could mean no more than that local authorities had power to provide support to elderly and disabled persons such as the appellant's father-in-law. Mr Mullan nevertheless contended that this was a matter which should have been the subject of proof. He referred to paragraph 72 of the decision, where the judge observed from the evidence that the appellant's husband takes medication called Venlafaxine. In relation to this the judge stated: "I understand this medication is used to treat major depressive disorders, anxiety and panic disorders." Mr Mullan again submitted that this should not be regarded as a matter of judicial knowledge. It was pointed out, however, that the

judge did not express a view on why the appellant's husband was receiving this treatment but only stated what he understood to be the general use of this medication.

14) Mr Mullan referred to the difficulty for the appellant in returning to the USA to obtain a visa. This process might take six months. The appellant had no funds or savings. The appellant would need to travel to her home in South Dakota and earn money to pay for her application. The application itself would be no more than a "tick-box" exercise. A balance should be drawn between the likely period of separation and allowing the appeal outwith the Rules. The appellant's husband took medication and he was in receipt of benefits. Mr Mullan suggested there was Chikwamba issue. The appellant was being expected to apply for entry clearance for the sake of it. She had arrived with a visit visa but her engagement had come out of the blue. This was not a ruse to remain in the UK. She had committed only a minor infraction of the Immigration Rules and reliance was placed on the case of Khan.

15) Mr Mullan concluded in summary that a common sense approach should be taken. The appellant found herself in a situation where her visa required to be changed. She satisfied all the requirements for a spousal visa. An adverse decision would place a considerable burden on her relationship with her husband. She might have to spend up to a year in South Dakota seeking entry clearance. She was being sent away only to bring her back. She would have to work in South Dakota and save money. She had not committed any crime. She was simply required to meet a visa requirement.

16) Mr Mullan continued that the impact on the appellant's husband should be considered, including the impact on her husband's health.

17) Having heard from Mr Mullan we did not consider it necessary to hear at length from Mrs O'Brien. Mrs O'Brien stated that she relied on the respondent's rule 24 notice.

Discussion

18) The first issue on which Mr Mullan relied was the question of whether the Judge of the First-tier Tribunal wrongly relied on his own knowledge of matters which should, out of fairness to the appellant, have been decided only upon the evidence. The first of these issues arose from paragraph 71 of the decision, where the judge referred to the possibility of local authority support being provided to the appellant's father-in-law. As was pointed out at the hearing before us, however, the judge was essentially doing no more than referring to the powers of local authorities to provide care and support. These powers exist as a matter of law and can therefore be regarded as being within judicial knowledge.

19) There is a wider point, however, which is that it was clear from the evidence before the First-tier Tribunal that the appellant's husband had no intention of accompanying her throughout the period in which she would have to reside in the USA until her visa was granted. He would remain behind to look after his father, even if he were to visit the appellant for a short period. Essentially, therefore, the possibility of local authority support was not material to the judge's decision. There was no prospect of the

appellant and her husband going to reside together in the USA. The basis of the judge's decision was that the appellant would return alone to the USA to obtain a visa.

20) The second issue where Mr Mullan submitted the judge was wrong to rely on personal knowledge was at paragraph 72, where the judge gave his understanding of the use of Venlafaxine, which is taken by the appellant's husband. As was pointed out at the hearing before us, the judge did not say from his own knowledge why the appellant's husband took this medication but he simply recorded his understanding of what the medication was generally used for. There was evidence before the judge showing that the appellant's husband suffers from PTSD. He is in receipt of Employment Support Allowance because of incapacity to work and is also in receipt of Disability Living Allowance. It does not appear to us that the judge's reference to the general use of this medication had any material bearing on the outcome of the appeal. There was medical evidence relating to the appellant's husband, which the judge fully took into account. In any event, we are not persuaded that the general uses of common medication are a matter which cannot be within judicial knowledge.

21) We turn next to the question of consideration of the appeal under Article 8 outside the Immigration Rules. Our attention was drawn to paragraph 86 of the decision, where the judge stated that the appellant had not established "that there may be arguably good grounds for granting leave to remain outwith the Rules" and because of this the judge did not consider it necessary to consider whether there were compelling circumstances under Article 8 not sufficiently recognised under the Rules.

22) It was pointed out that the judge's decision was issued in December 2014 within days of the decision of Upper Tribunal in Oludoyi, cited above. We see nothing of substance in the judge's conclusion at paragraph 86, however, which runs contrary to the views of the Court of Appeal in SS (Congo) [2015] EWCA Civ 387, at paragraph 33 in particular, to the effect that compelling circumstances need to be identified to support a claim for the granting of leave outside the Rules in Appendix FM.

23) Although Mr Mullan placed reliance on the Outer House decision in Khan he made no reference to the subsequent decision of the Inner House in that case, cited as [2015] CSIH 29, or to other recent decisions of the Inner House on the application of Article 8, such as Mirza [2015] CSIH 28, Asif Ali Ashhiq [2015] CSIH 31 and Shahzad Butt [2015] CSIH 72.

24) The case of Mirza, like Khan, is largely dependent upon its particular facts. As was pointed out by Lady Smith in Shahzad Butt, at paragraph 29, the outcome of the proportionality exercise in each individual case is bound to turn very much on its own particular facts and circumstances as placed before the decision maker by the applicant.

25) In Asif Ali Ashiq Lady Smith stated at paragraph 6, referring to MM (Lebanon) [2014] EWCA Civ 985, that reference to "a good arguable case" does not impose a separate hurdle to be overcome by an appellant in pursuing a claim under Article 8. The concept of a good arguable case refers to the need for it to be evident from the terms of

the application that an Article 8 issue arises. It does not raise a bar any higher than the need for there to be "realistic prospects" of the claim succeeding.

26) As already noted, in the present appeal the Judge of the First-tier Tribunal found that it was open to the appellant to return to the USA to obtain entry clearance as a spouse in accordance with Immigration Rules. This was a finding that was open to the judge upon the evidence. Having made this finding the judge concluded that there were no arguably good grounds for granting leave outwith the Rules and no compelling circumstances not sufficiently recognised under the Rules which would require him to consider Article 8 outside the Rules. This was a decision the judge was entitled to make.

27) Mr Mullan referred briefly to the case of Chikwamba [2008] UKHL 40 and the reasonableness of expecting the appellant to return to the USA to apply for entry clearance. While Mr Mullan submitted that an application for entry clearance as a spouse by the appellant would be no more than a "tick-box" exercise, the respondent's position before the First-tier Tribunal was that any practical difficulties the appellant would face in returning to the USA to apply for entry clearance would not engage Article 8. The judge appears to have accepted this submission in finding, at paragraph 83, that there would be no significant difficulty in the appellant returning to the USA to make an application. As was pointed out in Chen IJR [2015] UKUT 189, it was for the appellant to show that temporary separation would be a disproportionate interference with protected rights and it is apparent from the judge's decision that he was not satisfied that this had been demonstrated.

28) In this appeal the Judge of the First-tier Tribunal reached a decision which was based upon the evidence and supported by adequate reasons. Mr Mullan has not shown that any of the material findings or conclusions reached by the judge are affected by an error of law. Accordingly, the decision shall stand.

Conclusions

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

30) We do not set aside the decision.

Anonymity

31) The First-tier Tribunal did not make an order for anonymity. We have not been asked to make such an order and we see no reason of substance for so doing.

Signed Date

Upper Tribunal Judge Deans