Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29276/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2015	**On 18 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K M
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Everett, Home Office Presenting Officer
For the Respondent: Mr Maqsood of Counsel instructed by Pride Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Gillespie promulgated on 25 June 2015 in which he allowed the appeal of Ms KM under the Immigration Rules with reference to Appendix FM and in particular paragraph EX.1.

2. Although before me the Secretary of State for the Home Department is the appellant and Ms KM is the respondent, for the sake of consistency with the decision of the First-tier Tribunal I shall hereafter refer to Ms KM as the Appellant and the Secretary of State as the Respondent.

3. The Appellant entered the United Kingdom on 17 December 2013 with entry clearance as a visitor. During the time that she was in the United Kingdom she met and married 'H' ('the sponsor').

4. The sponsor was granted leave to remain in the United Kingdom under the Legacy Scheme and is a person who is currently under the care of the West London Mental Health National Health Service Trust, suffering from paranoid schizophrenia. There is extensive medical evidence on file in respect of the history and treatment of that unfortunate condition. It is said that the sponsor was a victim of torture in Libya and that this circumstance is thought to be in some considerable part responsible for his current mental health condition. As suggested from the foregoing, he is a national of Libya. The Appellant is a national of Tunisia. The Appellant married the sponsor on 1 February 2014 and an application for leave to remain as a partner was then made during the currency of her visitor visa.

5. Mr Maqsood today helpfully and realistically acknowledges that because the Appellant was present in the United Kingdom as a visitor at the time that the application for variation of leave to remain was made, she cannot succeed under the Immigration Rules by virtue of paragraph E-LTRP.2.1. Mr Maqsood therefore acknowledges that the First-tier Tribunal Judge was in error in allowing the appeal under the Immigration Rules.

6. For completeness I observe that it would appear that at paragraph 12, in considering the framework of the case, the Judge must have overlooked the effect of paragraph E-LTRP.2.1 because he says this: *"In order to come within the Rules then the Appellant must prove that the Exception EX.1 applies to exempt her as it would from the immigration status requirements and the English language requirement."* As discussed, clearly the effect of paragraph EX.1 does not exempt the Appellant from the immigration status requirements of the eligibility requirement in E-LTRP.2.1.

7. In those circumstances - the First-tier Tribunal Judge having allowed the appeal under the Immigration Rules on the basis of his findings in respect of paragraph EX.1 - it follows that the decision of the First-tier Tribunal must be set aside and requires to be remade.

8. In the context of remaking the decision in the appeal, necessarily it is now acknowledged that the appeal cannot succeed under the Immigration Rules, and so the Appellant relies solely on Article 8. The First-tier Tribunal Judge did not consider Article 8.

9. I have been invited today by Mr Maqsood in cogent, clear - and to a certain extent yet not quite sufficiently - persuasive submissions to accept that the findings of the Judge at paragraph 14 of the decision when considering paragraph EX.1 are sufficient to found a favourable conclusion under Article 8, and thereby to allow the appeal on Article 8 grounds without more.

10. Paragraph 14 of the decision of the First-tier Tribunal is in the following terms:

> *"The fact of the genuine and subsisting nature of the marriage has, as I noted, been conceded. All that is in issue is whether there can be said to be insurmountable obstacles preventing the continuance of the relationship outside the United Kingdom. The respondent has based its decision on the proposition that it has seen no evidence to suggest that there are insurmountable obstacles preventing the continuation of the marriage in Tunisia. This finding leaves out a number of considerations. First, the sponsor is not Tunisian. He has no connection with Tunisia. There is no basis for assumption that he is entitled to entry into Tunisia. Second, the sponsor is a person with protection issues, although these have not been expressly recognised by the respondent with the grant of asylum, they have been implicitly acknowledged in the exceptional leave that was granted. He cannot return with his wife to his own country. Third, the appellant is a person who was displaced in the United Kingdom as an asylum seeker for some seven years while awaiting decision by the respondent on his status. His settled status in the United Kingdom is such as ought not reasonably to be interfered with now. Fourth, the sponsor is, moreover, a survivor of torture and abuse which has rendered him mentally disabled. He suffers paranoid schizophrenia which has for the entirety of his stay in the United Kingdom required constant and very close support and medication that it is most unlikely that he will achieve or be able to access in Tunisia. It would be grossly unreasonable to deprive him of this support. The cumulative effect of these considerations, not adverted to at all in the refusal letter, impels me to the conclusion that there exist insurmountable obstacles to the continuation of married life in Tunisia or outside the United Kingdom."*

11. I am not persuaded that the contents of paragraph 14 provide an adequate assessment of all of the relevant circumstances such that, without more, they are conclusive of a favourable Article 8 decision.

12. Given that that is my overall conclusion it is not for me to essay any very close analysis of all of the evidence because that will require to be done on another occasion with proper fact-finding - and it would be inappropriate for me to seek, as it were, to set an agenda by indicating any particular view on the facts. It is, however, necessary for me to give something by way of explanation of why I consider paragraph 14 not to amount to a sufficiently complete and conclusive consideration of all of the Article 8 issues that may be in play in this case. (In doing so, necessarily I do not seek to make any particular criticism of Judge Gillespie, who was not considering Article 8 in that paragraph.)

13. The following matters appear to me to be germane.

    (i) There was no consideration of the possibility of the Appellant and the sponsor being separated only for a short period whilst the Appellant

returned to Tunisia to pursue an application for entry clearance in the way that the Immigration Rules would have expected her to do having arrived here as a visitor and the Rules not permitting a switch to a partner or spouse from that category of migrant.

(ii) Furthermore, insofar as the couple might be able to relocate to Tunisia no particular consideration was given to the sponsor's circumstances in that country. There is no evidence whatsoever as to her life in Tunisia and therefore no evidential basis upon which this Tribunal could make any finding without further evidence, either oral or documentary, as to the circumstances in which the sponsor might be able to be accommodated by his wife in her country of origin.

(iii) Further to the foregoing, in considering the ability of the sponsor to enter Tunisia as the partner of the Appellant there was no evidence before the First-tier Tribunal Judge. Insofar as it is suggested that there was no basis to assume that the sponsor was entitled to enter Tunisia, on the face of it this would appear to be a reversal of the usual burden of proof. In short, it is to be maintained that the Appellant could not be joined in her country by her husband, it would be for the Appellant to produce evidence of that circumstance.

(iv) The Judge's observations in respect of the availability of medical treatment for the sponsor's condition are also in my judgment not sufficiently adequate to found a proper basis for the Article 8 consideration. It is to be noted that in the Respondent's appeal bundle at Annex H documentary evidence about the provision of psychiatric facilities in Tunisia was produced and was before the First-tier Tribunal Judge. The Appellant's documents do not produce any such evidence as to the availability of treatment or other support mechanisms in Tunisia. On that basis it is unclear on what evidence the Judge reached the conclusion that it was most unlikely that the sponsor would be able to access adequate support and medication if he were to accompany his wife to Tunisia, whether for a short period to support her application for entry clearance or by way of resettlement.

(v) Moreover, no consideration has been given to any of the public interest considerations pursuant to section 117A-D of the 2002 Act (as amended).

14. I express, as I indicate, no final views in respect of any of these matters, but it seems to me that they are all matters that require some careful further consideration. For that reason I decline the invitation to simply remake the appeal on the basis of the findings at paragraph 14 by allowing it under Article 8 and instead I set aside the decision and remit it back to the First-tier Tribunal for a new decision to be made in respect of Article 8. It is possible, however, particularly in light of the concession made on behalf of the Appellant to remake the decision in the appeal under the Immigration Rules by dismissing it.

15. It may be that the Secretary of State will wish to file and serve the Appellant's entry clearance documents because they should reveal

something of her circumstances in Tunisia. Equally the Appellant may now wish to file and serve documentary evidence in respect of the possibility or otherwise of the sponsor being able to enter Tunisia as a partner, and also in respect of the availability or otherwise of suitable medical support in Tunisia for the sponsor. Ms Everett has acknowledged today that there is no suggestion that the sponsor and the Appellant should relocate to Libya at the present time.

16. Exactly what evidence is to be filed is really a matter for the parties and in such circumstances I do not make any specific Directions. It is for the Appellant to prove her case and it is for the Respondent to put before the Tribunal anything that the Respondent wishes to rely upon: that should be done within the normal timescale and Standard Directions will suffice.

Notice of Decision

17. The decision of the First-tier Tribunal contained a material error of law and is set aside.

18. I remake the decision in the appeal under the Immigration Rules. The appeal is dismissed under the Immigration Rules.

19. The decision in the appeal under human rights grounds is to be remade before the First-tier Tribunal before any First-tier Tribunal Judge other than First-tier Tribunal Judge Gillespie.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The above represents a corrected transcript of an ex tempore decision given at the conclusion of the hearing.

Signed Date: 15 January 2016

Deputy Upper Tribunal Judge I A Lewis