Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/23841/2016**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 12th January 2018 **On 5th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

ABDOU FAYINKE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellant: Ms P Solanki (Counsel)
For the Respondent: Mr N Bramble (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Jessica Pacey, promulgated on 4th October 2017, following the hearing at Taylor House on 14th September 2017. In the determination the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Gambia, who was born on 18th June 1967. He appealed against the refusal of entry clearance to enable him to join his sponsoring wife, Ms Debra Elaine Fayinke, the decision of the Entry Clearance Officer being dated 29th September 2016. He had made a previous application on the same basis

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on 12th October 2012 which had been refused also on 12th February 2013. The subsequent appeal had been dismissed on 10th January 2014. The Appellant had provided a marriage certificate confirming his marriage to his Sponsor on 23rd August 2012. The Respondent took issue with this on the basis that the Appellant had on previous occasions provided a divorce certificate showing he had divorced his previous spouse on 16th June 2006, but the divorce had not been registered until 6th June 2012, almost twelve years later. He had produced a second divorce certificate stating that the divorce had been registered on 19th June 2006. He now states that this is the original. The refusal was upheld by the Entry Clearance Manager.

The Judge's Findings

3. The judge began the observation that the Appellant had provided an explanation that the divorce certificate previously supplied was proof that the Appellant had actually divorced his previous wife on 16th June 2006 and that the divorce had been registered on 19th June 2006, and this was evidenced by a subsequent affidavit. Whatever the position, "both the previous marriage certificate and the duplicate copy stated that the marriage had ended on 6th June 2006" (see paragraph 9 of the determination). The Appellant's sponsoring wife now, however, was in employment in the United Kingdom, had family here, had a social life, and enjoyed a quality of life, such that it was not reasonable for her to leave the UK and go and live in Gambia. The witness statement of Ms Fayinke, the Appellant's sponsoring wife, itself stated that she had met the Appellant in 2007 and he had told her that he was divorced at the time. She contacted him again in 2012. She went to Gambia in March 2012 and again in August 2012. She married him on 23rd August 2012. The Appellant applied for settlement on the first occasion on 23rd October 2012. Her evidence was that, "she could not move to Gambia because she had children and family in the UK and had financial commitments. She earned £65,000 per year" (paragraph 11 of the determination).

4. In evaluating the evidence, the judge observed that, "I have copies of entries in the Register of Divorces (the originals have been provided in court but not retained) document one states that the divorce took place on 16th June 2006 and was registered on 19th June 2006 (see paragraph 14)."

5. The judge went on to state that she had "carefully considered all the evidence" (paragraph 19). In doing so, the judge observed that,

> "It is now September 2017 and the partners are still together, as evidenced by the fact that the Sponsor appeared at the hearing. In my view that is strong and material evidence that the relationship is genuine and subsisting. There is, therefore, I conclude, family life between the Appellant and his Sponsor such as to engage Article 8" (paragraph 24).

6. The appeal was allowed.

Grounds of Application

7. The grounds of application place reliance upon the case of **Agyarko [2017] UKSC 11**, where it was stated (at paragraph 25) by the Supreme Court that "the mere fact that Mr Benette is a British citizen, has lived all his life in the United Kingdom, and has a job here...could not constitute insurmountable obstacles to his 'not being able to relocate to Ghana to continue his family there.' The grounds say that the Sponsor has not shown any reason why she may not lawfully settle in Gambia. The judge was wrong to have concluded that there were "insurmountable obstacles" to the sponsoring wife doing so.

Submissions

8. At the hearing before me on 12th January 2018 Mr Bramble, appearing as Senior Home Office Presenting Officer on behalf of the Respondent, began by stating that the grounds were jumbled and inaccurate, because they had been loaded onto the wrong case, and this was an entry clearance matter, and not a matter involving the removal of a person, such that they are to show "insurmountable obstacles" in relation to their Article 8 rights. The grounds also wrongly referred to the Court of Appeal citation which was "not helpful". Subject to this, Mr Bramble submitted that the judge had correctly evaluated the facts before coming to the application of Article 8. There had been an acceptance by the judge that there was family life.

9. However, she had then gone on at paragraph 31 to cite **SS (Congo) [2015] EWCA Civ 387**, which was focused on the maintenance of family life in the UK (rather than being a case involving family life overseas as was the case here, and in this respect the judge had fallen into error.

10. Whilst the judge had begun to examine the question of whether there were "insurmountable obstacles" the judge was wrong to have concluded that

> "In this case there are obstacles to the Sponsor going to Gambia to continue her family life with the Appellant there. She is now aged 55, and in my view it would be unreasonable to expect someone of that age, with no cultural or blood family ties or connections to Gambia to uproot and settle in a country so very different from that which she has known all her life".

11. Finally, insofar as **Agyarko** was referred to, the judge was wrong to have concluded that the Appellant fell within its tenets. This is because paragraph 48 of **Agyarko** states the following:

> "If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which would not be overcome or would entail very serious hardship, then the 'insurmountable obstacles' tests would be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are 'exceptional circumstances'. In the absence of either 'insurmountable obstacles' or 'exceptional circumstances' as defined, however, it is not apparent why it should be incompatible with Article 8 for leave to be refused." (paragraph 48).

12. Accordingly, what the judge had stated at paragraphs 11 and 25 simply did not demonstrate that there were "insurmountable obstacles" or that the Appellant had been able to demonstrate "exceptional circumstances".

13. For her part, Ms Solanki submitted that the reference to a requirement of "insurmountable obstacles" was a digression and, quite frankly, a "red herring" because this was an entry clearance case of a spouse joining for permanent settlement a British citizen settled wife in this country, and all they had to do was to show whether they could satisfy the requirements of the Immigration Rules. The requirement of "insurmountable obstacles" only applies under EX.1. The Appellant met Appendix FM of the Immigration Rules.

14. The Immigration Rules clearly set out that applications under Appendix FM reflect how under Article 8 the balance would be struck between the right to respect for private and family life and the relevant public interest considerations.

15. With respect to GEN.1.1, what is stated here is that

> "This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (and the applicant cannot seek leave to enter or remain in the UK as a family member under Part 11 of these Rules)."

It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic wellbeing of the UK..."

16. Ms Solanki submitted that the judge had in fact erred by going on to a consideration of the "insurmountable obstacles" herself after paragraph 31 and into paragraphs 32 and 33. Neither, is it the case that "exceptional circumstances" have to be shown in a case such as this. In short, the Appellant had satisfied the Immigration Rules and his application for entry clearance should be allowed on that basis.

No Error of Law

17. I am satisfied that the making of the decision by the judge did not involve the making of an error of law such that I will set the decision aside (see Section 12(1) of TCEA 2007). My reasons are as follows. This is a case where the Appellant applied for a spouse's visa in order to join Debra Elaine Fayinke, a person present and settled in the UK, and holding British citizenship. There had been previous applications. These had been refused. There had been an appeal decision which also went against the Appellant.

18. On this occasion, however, the judge held that, "it is now September 2017 and the parties are still together" and the sponsoring wife had attended the hearing. The judge was clear that there was "strong and material evidence that the relationship is genuine and subsisting" (paragraph 24). The judge could have stopped right there

because at that stage there is compliance with the Immigration Rules and he refused it to be allowed. There was an unnecessary conflation of the requirement of the Immigration Rules with Article 8 ECHR.

19. However, even more unfortunate was a digression into an enquiry where "there are obstacles to the Sponsor going to Gambia to continue her family life with the Appellant there" (paragraph 32) because this was quite unnecessary for the judge to consider once the requirement of the Immigration Rules had been met. The Entry Clearance Officer had accepted that the suitability requirements were met for entry clearance as a partner. Two of the three eligibility requirements were also satisfied, namely, the financial requirements test and the English language test. What the ECO did not accept was that the relationship was genuine and subsisting because the ECO could not accept that the marriage was valid as the divorce documentation had been questioned. This was a matter that the judge had found in favour of the Appellant in no uncertain terms. At that point the appeal stood to be allowed. It was unnecessary for the judge to have gone any further.

20. As for the Grounds of Appeal by the Respondent Secretary of State, these fall into error for two main reasons. First, the grounds were predicated on the assumption that this is an Appellant's " leave to remain application". The Appellant is not in the United Kingdom, and has never been, and is not making a leave to remain application. Second, the grounds focus upon the judge having misinterpreted the meaning of "insurmountable obstacles" which was not a matter for the judge to consider given that the Appellant had satisfied the requirements of Appendix FM and could demonstrate compliance with the requirements of the Immigration Rules, such that his appeal stood to be allowed.

Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity direction is made.

This appeal is allowed.

Signed Dated

Deputy Upper Tribunal Judge Juss 26th February 2018