IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34179/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 October 2014	**On 24 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SAMY FANOS FAHMY FANOS

Respondent

Representation:

For the Appellant: Mr M Shilliday, Home Office Presenting Officer
For the Respondent: Ms A Smith, Counsel, Danielle Cohen Immigration Law Solicitors

DECISION AND REASONS

1. The respondent in these proceedings is Mr Samy Fanos Fahmy Fanos. I shall refer to him as the appellant as he was before the First-tier Tribunal. The appellant is a citizen of Egypt and his date of birth is 11 April 1978.

2. The appellant was granted leave to enter the UK as a visitor on 14 March 2009 which expired on 14 September 2012. In 2010 in Egypt he married a

British citizen, Nivin Samuel Aneis (hereinafter referred to as the sponsor). He made an application for leave to remain on 2 July 2012 and the application was refused by the Secretary of State in a decision of 6 August 2013.

3. The decision maker acknowledged that the appellant had a genuine and subsisting relationship with Ms Aneis, but it was asserted in the decision letter that the appellant did not meet the requirements of the Immigration Rules under Appendix FM because he could not satisfy E-LTRP 2.2 and in these circumstances EX1.1 did not apply. The decision maker considered the appellant's private life and whether or not there were exceptional grounds outside the Immigration Rules and found that there were not.

4. The appellant appealed against the decision of the Secretary of State and his appeal was allowed by Judge Doran in a decision of 4 July 2014 following a hearing on 30 June 2014. The appeal was allowed under Article 8 of the 1950 Convention on Human Rights. The Secretary of State was granted permission to appeal against that decision by Judge Parkes on 28 August 2014.

The Decision of the First-tier Tribunal

5. The appellant's evidence is that he did not want his wife and their unborn child (the appellant's wife is expecting a child at the end of October 2014) to live in Egypt as they are Coptic Christians and are discriminated against. His wife needs to remain in the UK to look after her elderly and unwell parents. The sponsor's father has serious health problems and needs 24 hour care. He has a part-time carer and he lives with the sponsor's brother but he is also unwell. Ms Aneis is depressed and has back problems and is as a result unable to work. She has dual nationality (Sudanese and British). She came to the UK in 1995 and was granted British citizenship in 2005.

6. The Judge accepted the evidence of both the appellant and the sponsor and allowed the appeal outside the Rules under Article 8. He made the following observations and findings: -

> "11. At the outset of the hearing, I clarified with Ms. Smith (on behalf of the appellant) that she was no longer suggesting that the decision reached by the respondent was not in accordance with the Immigration Rules based on the fact that the appellant made his application on 2nd July 2012 i.e. prior to the introduction of the amendments to the Immigration Rules introduced on the 9th July 2012 following the Court of Appeal decision in **Edgehill & Another-v-SSHD [2014] EWCA Civ 402** which decided that the new Human Rights Rules introduced on the 9th July 2012 did not apply to application made before that date. She confirmed that this was the case and that the only basis for the appellant's appeal was that under Article 8 of the European Convention on

Human Rights as it applied before the introduction of the new Human Rights Rules into the Immigration Rules on the 9th July 2012.

...

40. The appellant's wife herself suffers from a number of health problems which are set out in a report from Dr. Isis Neoman dated the 16th August 2013 (pages 402 – 3 of the appellant's bundle) which include Scoliosis of the spine giving her back and shoulder pain, depression, dizziness and asthma. She is in receipt of employment support allowance (ESA) which prevents her from working and thus would prevent her from sponsoring her husband in an entry clearance application under the Rules. She is currently five months pregnant and due to give birth in October 2014 from which it follows given her own medical problems it would not be reasonable to expect her to contemplate removing herself from the UK at this time to give birth to this child in Egypt.

41. The appellant's wife is also very involved in supporting her elderly parents. Her 82 year old father has multiple complex health problems having had a severe stroke in 2009 and additionally suffering from Advanced (End-Stage) Mixed Vascular and Parkinsons Dementia, COPD and heart problems and borderline glaucoma (which are outlined in letters from the Redcliff Surgery dated the 20th June 2014 at pages 363 – 365 of the appellant's bundle). Her mother, whilst designated as his primary carer has herself health problems with diabetes, osteoarthritis, high blood pressure and borderline glaucoma (as outlined in a further letter from the Redcliff Surgery dated the 20th June 2014 at pages 366 – 367 of the appellant's bundle where the GP says she finds it difficult to attend to her own health problems let alone those of her husband). Whilst the brother of the appellant's wife resides with his parents he too has health problems including heart problems, high blood pressure, gout and diabetes as outlined in a report from Dr. Christopher Cook of Hammersmith Hospital dated the 24th April 2014 (pages 374 – 5 of the appellant's bundle) indicating that he will require surgical intervention this year. The Care and Support Plan for the father of the appellant's wife prepared by the Royal Borough of Kensington and Chelsea and the Care Assessment (pages 378 – 88 and 389 – 94 of the appellant's bundle set out the extent of the dependence of the father on the appellant's wife for his essential care needs, which are confirmed in a letter from the Independent Living Assessor dated the 14th August 2013 (page 408 of the appellant's bundle) where Social Services recognise her caring role and the level of support she provides as well as in a letter from the Redcliff Surgery itself dated the 20th June 2014

(pages 363 – 5 of the appellant's bundle) which indicates that she is extremely supportive and caring and spends a great deal of time providing emotional support for her mother and physical support for her father.

42. Whilst I acknowledge that the wife of the appellant does not live with her parents she does sleep at their address on three nights a week. In addition she does act as the key link person for her parents (who speak little English) in attending all medical appointments and dealing with correspondence. She is therefore, without doubt, an integral part in their day to day living and in her absence there would be a major upheaval with significant repercussions both of an emotional and practical nature in their living arrangements and emotional wellbeing which are factors that need to be taken into consideration in the overall Article 8 assessment.

43. The final factor that needs to be considered is the position for Orthodox Coptic Christians in Egypt. I note from the legal representatives letter of the appellant dated the 2nd July 2012 (pages 1 – 4 of the appellant's bundle) that some information was referred to the respondent in this respect, including references to the US State Department Report for September 2011 which records that the Egyptian Government's respect for religious freedom remained poor during the reporting period and that Christians faced personal collective discrimination and the government failed to prosecute perpetrators of violence against Coptic Christians in a number of cases, together with the fact that violence targeting Coptic Orthodox Christians increased significantly during the reporting period and that the transitional government had failed to protect religious minorities from violent attacks at a time when minority communities had been increasingly vulnerable. Whilst this may not amount to a situation reaching levels entitling an individual to international protection it is further background information relating to the country conditions facing the appellant and his wife in Egypt against which this appeal has to be assessed.

44. Whilst I acknowledge that the appellant entered the United Kingdom on a visit visa and was not able to meet the requirements of the Immigration Rules to be granted leave to remain at the date of his application I do not accept that when coming to the UK he entered without any intention at that time of returning within the visa period granted to him. I accept that he genuinely believed when he came to the UK that he could legalise his position whilst he was in the UK. I note that he did not deceive the Entry Clearance Officer in the details in his application in that he clearly stated that he had a wife in the UK. He didn't remain in the UK beyond the period of his leave before

making his application for leave to remain. On the other hand however when he married his wife in 2010 both were aware of his immigration status and that there was no entitlement for them to live as a married couple in the UK without more.

45. Taking account therefore of those factors weighing against the appellant in maintaining a fair and orderly system of immigration control with the combination of factors weighing in his favour I am satisfied, taking all factors into consideration (including the fact that he is unlikely to be able to make a settlement application because of his inability to meet the requirements of the Immigration Rules having regard to his wife's financial circumstances but conversely his ability to find work in the UK as indicated at pages 415-6 of the appellant's bundle) that in the circumstances the life of this family cannot reasonably be expected to be enjoyed elsewhere and that as a consequence the appellant's removal would amount to a disproportionate interference with their family life within the terms of Article 8 of the ECHR."

The Grounds of Appeal and Oral Submissions

7. The grounds of appeal assert that the Judge erred because he did not consider the Immigration Rules in the Article 8 proportionality exercise. It is asserted that the appellant did not meet the requirement of the relevant Rules namely those in force before 9 July 2012 and paragraph 284 of the Immigration Rules applies. The appellant had leave as a visitor before making his application and could not satisfy the requirement in paragraph 284(i). In addition the Judge did not make a finding in relation to maintenance or the English language requirement of the Rules (viii and ix of paragraph 284 respectively). These are all relevant considerations pertaining to the public interest in firm immigration control and the interests of the economic wellbeing of the UK. The Judge made a "freewheeling analysis unencumbered by the Rules" and this was not the correct approach to take in accordance with **Gulshan [2014] UKUT 640 (IAC)**.

8. I heard oral submissions from Mr Shilliday who argued that in his view the grounds of appeal can only be interpreted as an attack on the decision in that the new rules applied (Appendix FM). He asserted that the grounds seeking leave to appeal were in his view wrong because they do not directly challenge the Judge's decision to determine the matter under the pre 9 July Rules, but this ground is made out because the grounds as drafted raise **Gulshan**. In the event that I was not with him, he indicated that he would make an application to amend the grounds of appeal to raise the **Edgehill** point (**Edgehill and Anor v SSHD [2014] EWCA CIV 402.**

9. Miss Smith objected to the amendment of the grounds arguing that the Secretary of State had had plenty of time in order to raise the issue and in support of her submission she referred me to **Nixon (Permission to appeal: grounds) [2014] UKUT 00368 (IAC)**.

10. I took into account the oral submissions made by both parties. Ms Smith's oral submissions were in the context of her skeleton argument.

Conclusions

11. The Judge followed the reasoning in **Edgehill** and decided that as this was an application made before 9 July 2012 the approach to Article 8 before the changes applied. The grounds seeking permission to appeal do not challenge this and indeed they agree with the approach. The Judge was of the view that the decision maker had considered the application under the wrong rule. It does not appear that there was any objection to the Judge proceeding on this basis by the representative for the Secretary of State at the hearing. It is expected that grounds seeking permission specify clearly and coherently the areas of law said to contaminate the decision or at least make a timely application to amend the grounds. I do not accept Mr Shilliday's submissions in relation to the interpretation of the grounds. I refused to allow the grounds to be amended at such a late stage.

12. The First-tier Tribunal set out the evidence in detail and made findings in the appellant's favour. The appellant's wife is a British citizen and she has health problems as well as caring for her elderly father. There was also the issue of violence against Coptic Christians in Egypt. The issue for me is whether or not the balancing exercise conducted by the Judge (article 8 outside the rules) was ultimately flawed for reasons identified in the grounds seeking leave. In my view it was not. The Judge was mindful of the public interest and the fact that the appellant was not able to meet the requirements of the Immigration Rules. I refer specifically to paragraph 45 where the Judge refers to the appellant's wife's financial circumstances. In addition the Judge found the appellant and his wife to be credible witnesses and accepted the appellant's evidence relating to his intention when he entered the UK as a visitor.

13. The appellant's wife and her parents are all British citizens. The Judge concluded at paragraph 45 that in the circumstances the life of the family cannot reasonably be expected to be enjoyed elsewhere. In my view he applied the appropriate test. I refer to **Izuazu (Article 8 – new Rules) [2013] UKUT 45 (IAC)** (paragraphs 53-58) from which it is clear that insurmountable obstacles is not a test for engagement of Article 8 (outside the Rules) in accordance with **Huang [2007] UKHL 11**, **EB (Kosovo) [2008] UKHL 41**. The decision of the First-tier Tribunal was before the further change in the rules and the 2014 Immigration Act.

14. The grounds of appeal do not identify a material error of law in the decision of the First-tier Tribunal. In these circumstances the decision to allow the appellant's appeal under Article 8 is maintained.

Signed Joanna McWilliam Date 22 October 2014

Deputy Upper Tribunal Judge McWilliam