Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21179/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 29th January 2015

Determination Promulgated
On 20th February 2015

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS MISTY ANN BEARD
(Anonymity Direction Not Made)

Respondent

Representation:
For the Appellant: Miss C Johnstone (Senior Home Office Presenting Officer)
For the Respondent: Ms M Cleghorn (Instructed by Paragon Law)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Respondent, with permission, against the determination of First-tier Tribunal Judge Ennals promulgated on 10th September 2014 by which he allowed the Appellant's appeal against the Secretary of State's decision to refuse her leave to remain in the UK as a spouse and to remove her to the USA.

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2. For the purposes of continuity I shall refer in this determination to the Secretary of State as the Respondent and Mrs Beard as the Appellant.

3. The Secretary of State's grounds argue that the Judge failed to give reasons or adequate reasons for findings on material matters. It is submitted by the Secretary of State that the Tribunal erred in its approach to Article 8. The Appellant entered the UK as a visitor in September 2013 with her leave expiring in March 2014. Prior to the expiry of her leave she applied for leave to remain as the spouse of a British citizen. The grounds refer to MF (Nigeria)[2013] EWCA Civ 1192 which it is said confirms that the Immigration Rules are a complete code and form the starting point for the decision maker. In that the grounds are wrong as the Immigration Rules are a complete code only in deportation cases; that is what MF says.

4. The grounds the go on to refer to Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) arguing that that case states that an Article 8 assessment should only be carried out under the ECHR when there are compelling circumstances, not recognised by the Rules. In this case, it is submitted, the Tribunal did not identify any such compelling circumstances and therefore its findings are unsustainable. In that regard the Secretary of State also relies on the case of Nagre [2013] EWHC 720 (Admin).

5. The grounds point out that the Appellant and her husband entered their relationship in full knowledge of the Appellant's immigration status. They could return to the USA to apply for the correct entry clearance and if the Appellant's husband chose not to return with her, any separation would be short. The relationship could be maintained by modern means of communication. It was also submitted that the Appellant spent her youth and formative years in the USA and was not estranged from the USA's culture.

6. Before me Miss Johnstone relied upon the grounds which she indicated were self-explanatory.

7. In reading of the determination in this case by the First-tier Tribunal it is clear from paragraph 12 that the only reason for refusal was the Appellant's presence in the UK as a visitor.

8. It is clear that before the First-tier Tribunal, the Home Office Presenting Officer made no submissions, simply relying upon the Refusal. The Appellant's representative made submissions on the proportionality of requiring the Appellant to return to the USA to make an out of country application which on the basis of the evidence would succeed. That submission was not challenged. The Judge also noted the submission based on material from the Appellant's pharmacist that she had fragile mental health and a disturbed background such that, it was submitted, not only would there be the stress and distress caused by a potentially lengthy absence from her husband, since she had been in the UK visiting her mother in the USA, with whom she had lived, had given up her own home and so she had neither home nor employment to return to.

9. The judge then goes on to note that the Appellant's husband had researched the possibility of his obtaining employment in the field he was experienced in, in the USA but that his lack of formal qualifications were an insurmountable bar to this. The Judge also note that there is of course no guarantee that in any event he would be granted a visa and work permit by the US authorities.

10. The Judge accepted the basic facts of the case which were unchallenged in any event. The couple had met over the Internet in 2009. The husband travelled to the US and met the applicant in March 2010 and then again visited in September 2010, the summer of 2011, in 2012 and 2013. The couple then returned to the UK with the Appellant entering as a visitor. They then travelled together to Europe in August 2013 and in October 2013 became engaged and married in December 2013 in the UK.

11. The Judge accepted evidence that the husband is employed in the field of vehicle recovery earning in excess of £18,600 per annum. He is 56 years of age and has a good relationship with his sons who live locally and hopes and expects to be a grandfather before long. The Judge noted at paragraph 16 that he could see that all of the requirements of Appendix FM were met save for the requirement that the application be made from the USA. He noted that the Appellant had not waited until she was an overstayer before making her application.

12. At paragraph 18 the Judge indicates that he considered the issues very carefully. It was common ground that the Appellant did not meet the Rules by reason of her presence in the UK. He noted that the argument that he should not require her to return as it would be disproportionate and unreasonable took the case outside of the Immigration Rules. The Judge found that taking into account her health and troubled background and the lack of a home or employment in the USA as well as the husband's likely inability to find work there, this was a case where he should consider Article 8 under the ECHR outside the rules in accordance with the principles set out in Gulshan.

13. At paragraph 19 he found that there was a well established family life between this married couple which requiring the Appellant to return would disrupt. There was no guarantee that the husband would be granted a visa to accompany her and from the information provided to him in the Appellant's bundle concerning the US Immigration Rules it appeared to be highly unlikely that a settlement visa would be granted to him as the Appellant would have insufficient income to meet the requirements.

14. At paragraph 20 the Judge found that there would be a significant disruption to the family life of the Appellant and her husband and then considered whether that disruption is justified as reasonable and proportionate in balancing the interests of the Appellant and her husband against the public interest in maintaining immigration control. He accepted that the Secretary of State is entitled to require people to comply with the Rules in order to maintain immigration control but he considered that in this case Chikwamba [2008] UKHL40 had applicability and that

the severity of the disruption for the reasons he gave made a requirement for her to return purely to make the application disproportionate and unreasonable.

15. In so far as the Judge's reasoning is concerned I can discern no error of law. He has explained why he has strayed outside the Immigration Rules and considered Article 8 under the ECHR and he has specifically referred to Gulshan. The grounds therefore do not have merit. The only thing that the Judge has not done which he ought to have done was have regard to section 117 of the Nationality, Immigration and Asylum Act 2002 as inserted by section 19 of the Immigration Act 2014. However, nothing in that would have altered the outcome of the appeal and accordingly I uphold the decision of the First-tier Tribunal and dismiss the Respondent's appeal.

16. The appeal to the Upper Tribunal is dismissed.

Signed Dated 20th February 2015

Upper Tribunal Judge Martin