



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/33245/2014

THE IMMIGRATION ACTS

Heard at Bradford

**Decision and Reasons
Promulgated**

On 23rd April 2015

On 28th April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS LILLIETH MARIE SMITH
(ANONYMITY NOT DIRECTED)**

Respondent

Representation:

For the Appellant: Mrs R Pettersen, Senior Home Office Presenting Officer

For the Respondent: Mr G Brown, Counsel instructed by Sheirs Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of Judge Cox to allow the appeal of Miss Lillieth Marie Smith against the refusal of her application for leave to remain in the United Kingdom on private and family life grounds. For ease of reference, I shall hereafter refer to the parties by reference to their status in the First-tier Tribunal.

Background to the appeal

2. The appellant is a citizen of Jamaica who was born on the 15th April 1963. She arrived in the United Kingdom, on the 20th July 2002, with 6 months' limited leave to remain as a visitor. She thereafter overstayed her leave, only seeking to regularise her immigration status by way of an application for leave to remain that was made in October 2011. That application was founded upon her relationship with one 'Samuel Hendricks', a British citizen with whom she has cohabited, in a relationship akin to marriage, since 2004. It was refused on the 20th August 2012, on the ground that the respondent was not satisfied that the relationship was genuine and subsisting. The appellant submitted a further application on the 13th November 2013. This was refused on the 6th January 2014, and it is the appeal against this refusal that was allowed by Judge Cox on the 23rd December 2014.

The decision of the First-tier Tribunal

3. Judge Cox began by noting that the respondent now accepted that the appellant was in a genuine and subsisting relationship with a British citizen and thus met the threshold suitability and eligibility requirements of Appendix FM of the Immigration Rules [paragraphs 24 and 25]. At paragraph 26, the judge said this:

However, the Appellant's Counsel acknowledged that the Appellant has to rely on Ex.1 of Appendix FM, as she cannot meet the Immigration Status (D-LTRP 2.1-2.2) and the English Language (E-LTRP 4.1-4.2) requirements of Appendix FM. I note that the parties dispute whether or not the Appellant meets the financial requirements of the rules, but, in light of the Appellant's counsel's concession, I do not have to determine this issue.

4. The judge thereafter noted that whilst the respondent accepted that the appellant's relationship with Samuel was genuine, she nevertheless considered that there were no "insurmountable obstacles" (as defined by Section Ex.2) to their relationship continuing in Jamaica. The judge expressed the reasons for his disagreement with this conclusion at paragraphs 35 to 37:

35. On the totality of the evidence, I am satisfied that if the Appellant's partner had to uproot himself at this stage of his life, then this would cause considerable hardship. I am satisfied that the Appellant's partner has very strong ties to the UK. The Presenting Officer did not seek to challenge Samuel's evidence as to the strength of his ties to the UK, which was supported by the evidence of his family and friends. In particular Samuel is over 80 years old and has been living in the UK for over 50 years. He considers the UK as his home and provided substantial evidence of his ties to the UK, through the evidence of his friends and family.

36. On the totality of the evidence and having given significant weight to the Appellant's partner's circumstances, I am satisfied that he would

face considerable difficulties if he had to go to Jamaica to be with his partner and these amount to 'insurmountable obstacles'.

37. Accordingly, I am satisfied the Appellant meets the requirements of EX1 and therefore meets the requirements of immigration rules. I allow the appeal.

5. The judge thereafter considered whether the respondent's decision was compatible with Article 8, lest he subsequently be held to have been wrong "as to the meaning of 'insurmountable obstacles' as defined by the immigration rules". He thereafter adopted the structured approach suggested by Lord Bingham in Razgar [2004] UKHL 27 and, in relation to the issue concerning proportionality of the appellant's removal, had regard to the considerations relating to the public interest question listed in Section 117B of the Nationality, Immigration and Asylum Act 2002. He stated that he attached little weight to the appellant's relationship with Samuel because it had been entered into at a time when the appellant's immigration status was precarious. Nevertheless, he attached some weight to it due to his earlier finding that Samuel had been unaware of the Appellant's immigration status when he entered into that relationship [paragraphs 31 and 43]. He concluded that the couple were "financially independent" [paragraph 44] and once again attached significant weight to his finding "that the Appellant's partner would face considerable difficulties if he had to uproot himself from the UK now", stating that he was therefore satisfied that "it would be unreasonable to expect him to do so" [paragraph 45]. He concluded that the appellant's rights outweighed the respondent's legitimate interests in ensuring economic and social order by maintaining effective immigration control [paragraph 46].

The grounds of appeal

6. The first ground of appeal asserts that, contrary to authority, "the judge considered section EX1 as free standing". It further states that, "if an appellant does not meet the requirements of certain immigration rules, then compelling circumstances have to be established for the purposes of Article 8". It is then asserted that failure of the appellant to meet the Immigration Rules by reason of the fact that she is an overstayer meant that she would need to establish "compelling circumstances" in order to rely upon Article 8, and further complains that it is not clear from the judge's determination on what basis he found that such circumstances existed.
7. The second ground of appeal asserts that the Tribunal "failed to demonstrate" that it had attached little weight to the appellant's relationship, entered into as it was at a time when she was an overstayer.
8. The third ground asserts that there are no "insurmountable obstacles" and neither would it be "unduly harsh for the relationship to continue in Jamaica, bearing in mind the judge's finding that the appellant's partner is originally from Jamaica and that adequate health care would be available to him in that country.

Analysis

9. Despite Mrs Pettersen's best efforts to persuade me otherwise, I am satisfied that the first ground of appeal is wholly misconceived. It is predicated upon the erroneous assumption that it was not possible to navigate to Section EX from within the terms of Appendix FM itself. In fact, both the eligibility requirement concerning overstayers *and* the financial requirements of Appendix FM are subject to the caveat, "unless paragraph Ex applies" [see the concluding words to E-LTRP.2.2 and E-LTRP.3.1(c)]. It is not therefore necessary to cross an intermediate threshold in order to arrive at Section EX. On the contrary, it is clear that Section EX provides an alternative to the requirements in question. Moreover, as Mr George pointed out, the appellant was exempted from the English language requirement because she is a citizen of an English-speaking county [see GEN.1.6]. There was thus no requirement for the judge to find compelling circumstances in order to apply Section EX, and the only error of law lies in the contrary assertion that is made in this particular ground of appeal. Interestingly, it was not an error made by the original decision-maker.
10. The second ground of appeal is dependent upon it being accepted that the judge was not entitled to allow the appeal on the ground that the respondent's decision is not in accordance with immigration rules, and that it was therefore necessary for the Tribunal to have regard to the factors in Section 117B when considering the public interest question under Article 8. However, as previously noted, the judge was entitled in principle to allow the appeal within the terms of Section EX of Appendix FM of the Immigration Rules, wherein there is no reference to little weight attaching to a relationship entered into when an applicant's immigration status is unlawful. In this respect, the terms of the Immigration Rules may be regarded as more generous than the public interest considerations to which a decision-maker must have regard when considering a case under Article 8.
11. The third ground of appeal is in my judgement simply a quarrel with a conclusion that was reasonably open to the judge; namely that Samuel would face "very significant difficulties" (to quote from the definition of 'insurmountable obstacles' within Section Ex.2) were he, as an 80-year-old man who has continuously resided in the UK for the last 50 years, now to relocate to Jamaica. The judge quoted the definition of 'insurmountable obstacles' that is contained within the immigration rules at paragraph 27 of his determination. Moreover, it is clear from paragraph 35 that he applied it [see paragraph 4, above]. His conclusion that Samuel would face "very serious difficulties" in relocating to Jamaica that "would entail very serious hardship" for him, was one that in my judgement fell comfortably within the range of reasonable decisions.

Notice of Decision

12. The appeal is dismissed.

Anonymity is not directed

Signed

Date

Judge D Kelly
Deputy Judge of the Upper Tribunal