Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22808/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 10 October 2019

Decision & Reasons Promulgated
On 17 October 2019

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

GUY [H]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Sarker, instructed by Adam Bernard Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes before me following the grant of permission to appeal to the Upper Tribunal.

2. The appellant is a national of the Ivory Coast, born on 7 June 1972. He applied for entry clearance to the UK under Appendix FM of the immigration rules on the basis of his family life with his wife [OA].

3. The application was refused on 19 October 2018. The respondent considered that the appellant could not meet the eligibility relationship requirement of paragraphs E-ECP.2.1 to 2.1 because the sponsor, the

appellant's wife, was a national of the Ivory Coast and was not settled in the UK but had discretionary leave. The respondent considered that the appellant had not demonstrated any compassionate or compelling circumstances that would merit a grant of leave outside the immigration rules.

4. The appellant appealed that decision. In his grounds of appeal he submitted that the sponsor ought to have been granted indefinite leave to remain herself but her solicitors had made an error and had failed to appeal in time. Further, he and the sponsor had had a daughter in May 2005 who had passed away and they had been unable to have a child since then. They wanted to start IVF treatment but could not do that unless he was in the UK. He had previously resided lawfully in the UK but had returned to the Ivory Coast to comply with immigration control. The ECO should have considered such circumstances to be compassionate and exceptional.

5. In an Entry Clearance Manager (ECM) Appeal Review, the ECM maintained the decision, concluding that the appellant's circumstances were not exceptional.

6. The appellant appealed against that decision and his appeal was determined on the papers by First-tier Tribunal Judge Louveaux in a decision promulgated on 17 June 2019. The judge had before him a bundle of documents including evidence that the appellant had lived, studied and worked in the UK from at least January 2003 to 2014, a marriage certificate indicating that the appellant and sponsor were married in the Ivory Coast on 23 August 2007, photographs of the marriage, transcripts of messages between the appellant and sponsor in May 2019, evidence that the sponsor had been living, studying and working in the UK and a tenancy agreement for the appellant and the sponsor.

7. The judge found that the appellant did not meet the immigration rules as the sponsor was not settled in the UK. The judge accepted that the appellant had previously lived in the UK but did not find any evidence of a relationship between the appellant and sponsor beyond a marriage ceremony in 2007. He found there to be no evidence of cohabitation, no evidence of how the relationship was sustained from 2014 onwards and no evidence of the existence and death of a child. Accordingly he found that there was no family life between the appellant and sponsor, but that in any event there was no evidence as to why the IVF treatment could not be undertaken in the Ivory Coast and no evidence why the sponsor could not relocate to the Ivory Coast. The judge concluded that the respondent's decision to refuse entry clearance was not disproportionate and he dismissed the appeal on human rights grounds.

8. The appellant sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge's refusal to accept the relationship was harsh, that the judge had overlooked the fact that the bundle of evidence contained the couple's baby's birth certificate and that the judge had applied too high a standard of proof.

9. Permission to appeal was granted on the basis that the judge had overlooked the birth certificate in the appellant's appeal bundle and therefore may have reached a different decision on family life under Article 8.

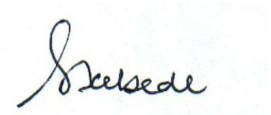
10. At the hearing Mr Sarker produced the original full version of the birth and death certificate for the appellant and sponsor's baby confirming her birth on 24 May 2005 and her death the same day, naming the appellant as the informant on the death certificate. Mr Sarker submitted that if the judge had considered the birth certificate in the appeal bundle he would have found that there was family life between the appellant and the sponsor. He would then have had to consider if there were compelling circumstances. The judge therefore erred in law. In re-making the decision the appeal should be allowed on the basis of the compelling circumstances, namely the loss of the couple's child, the fact that the couple had been together for 18 years and trying to conceive for 12 years as confirmed in the consultant's letter at page 180 of the appeal bundle and the fact that the sponsor was now 43 years of age. The sponsor had been in the UK since 2004, having come to the UK on a student visa and qualified at university, and she was now working for Samsonite and had discretionary leave. The appellant had been in the UK lawfully from 2001 until 2014 and had gained qualifications whilst here. The need for IVF was a medical issue which, if combined with the couple's family life and the loss of their child, would outweigh the public interest in refusing entry clearance.

11. Mr Walker agreed that the judge had made a material error of law by failing to consider the birth certificate and other evidence. Although he was not able to concede the appeal as such, he agreed that the decision to refuse entry clearance was disproportionate in all the circumstances, given the evidence of family life and the immigration history of the appellant and sponsor and the other compelling factors.

12. In light of the concessions made by Mr Walker, there is no need for me to say anything more. The judge clearly erred in law by failing to consider material evidence showing that there was family life between the appellant and the sponsor. The judge's decision is therefore set aside. In re-making the decision, and in light of Mr Walker's agreement that the refusal of entry clearance was disproportionate given the compelling circumstances in this case, I accept that the respondent's decision is not a proportionate one and is in breach of the appellant's Article 8 human rights. Accordingly, I allow the appeal on Article 8 human rights grounds.

DECISION

13. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision and re-make it by allowing the appellant's appeal on Article 8 human rights grounds.

Signed: 
Upper Tribunal Judge Kebede

Dated: 11 October 2019