Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/19449/2019 (P)**

THE IMMIGRATION ACTS

Decided under rule 34 (P)	**Decision & Reasons Promulgated**
On 29 September 2020	**On 05 October 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

GESSICA CRISTIAN DE SOUZA ASSIS FREIRE

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)

For the appellant: Mentor Legal LLP Solicitors

For the respondent: No submissions received

DECISION AND REASONS

© CROWN COPYRIGHT 2020

Background

1. This appeal comes before me following the grant of permission to appeal to the appellant by First-tier Tribunal Judge O'Garro on 28 May 2020 against the determination of First-tier Tribunal Judge Ford, promulgated on 6 February 2020 following a hearing at Birmingham on 31 January 2020.

2. The appellant is a Brazilian national born on 2 February 1991. She entered the UK as a visitor in June 2013 and has been here as an overstayer since then. On 22 October 2015 she married a Brazilian national by proxy. Her husband has been in the UK since he was 10 but had no leave until 16 August 2018 when limited leave to remain was granted on the basis of his private life. At the date of the hearing, the appellant was expecting her first child. That child has since been born.

3. On 15 August 2019, the appellant sought to regularize her status. As she could not meet the requirements of the rules as a partner because her husband was not British or settled in the UK, the application was made outside the rules on article 8 grounds.

4. The respondent considered the appellant's private life under paragraph 276ADE but found that she could not meet the requirements. The matter was then considered outside the rules under article 8 but the respondent found that there were no exceptional circumstances to warrant a grant of leave. The respondent considered that the appellant could live with her husband in Brazil.

5. The appeal came before First-tier Tribunal Judge Ford who heard oral evidence from the appellant and her husband as well as from two friends. The judge accepted that the appellant had family life with her husband and, further, that she had established a private life arising from her presence here since June 2013, her involvement in the church community, the sharing of her husband's well-established private life and friendships that she had formed. She found, however, that the appellant and her husband had been strategic in their planning of their immigration applications and that neither of them had any regard for immigration control. She noted that they met when neither had any long-term status and that they had evaded immigration control for many years. The appellant's husband made his application to remain in June 2017 some four years after they had met and two years after they were married. The appellant, however, did not make any application until after she fell pregnant and after her husband had been granted limited leave to remain on the basis of his private life.

6. The judge found that the appellant would not face very significant difficulties in integrating on return to Brazil. She spoke the language and she had lived there until 2013. Her mother and five siblings

remained in Brazil and the appellant had a good relationship with her siblings. Her mother-in-law also lived in Brazil and they were on good terms. The judge found that the appellant's husband was working and earned additional money from his own construction business. She found that the husband could set up a similar business in Brazil. She considered that the appellant and her husband could continue their private and family life there. She recognised that they did not wish to do so and that there would be repercussions in terms of lost work, study, business opportunities and the potential loss of leave to remain for the appellant's husband but found that these problems did not amount to the high threshold of very significant obstacles to the appellant's return. The judge noted that the appellant and her husband were in good health and that although the appellant was anxious over her late pregnancy and uncertain immigration situation, she had not been diagnosed with any psychiatric or psychological condition that could not be treated in Brazil. The judge found that the appellant's husband had a good understanding of Portuguese. The judge also found that the appellant had the option of applying for entry clearance from Brazil. She found that the public interest in immigration control was strongly served by the decision because the appellant had deliberately overstayed over a period of several years. The judge found that the decision was proportionate and justified on the facts and that article 8 had not been breached. Accordingly the appeal was dismissed.

7. The appellant successfully sought permission to appeal. She argued: (i) that the judge had focused on whether there were very significant obstacles to the appellant's return rather than on whether her departure amounted to a disproportionate interference with family life and that the reasoning on the latter issue was inadequate; (ii) that the determination of family life issues was not confirmed to assessing whether family life could be continued outside the UK; (iii) that the judge failed to have regard to the fact that the appellant's partner would lose his right to settle in the UK were he to relocate to Brazil; and (iv) that the judge did not attach weight to the fact that the appellant's husband had been here since he was ten years old.

Covid-19 crisis: preliminary matters

8. The matter would ordinarily have been listed for a hearing after the grant of permission but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen and instead directions were sent to the parties on 31 July 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

9. The Tribunal has received written submissions from the appellant dated 13 August 2020 but there was been no response from the respondent. I now consider whether it is appropriate to determine the matter on the papers.

10. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

11. I have had regard to the submissions made and to all the evidence before me before deciding how to proceed. The appellant agrees to a determination of the error of law issue without an oral hearing. The respondent has not replied to the directions but I am satisfied that these were properly served and, further, that the appellant's submissions were also served on the respondent. A full account of the facts are set out in those papers and the arguments for and against the appellant are clearly made. I am satisfied that I am able to fairly and justly deal with this matter on the papers.

Submissions

12. The appellant relies on her grounds for permission in her reply to the Tribunal's directions. The Tribunal is notified that the appellant's child was born on 19 February 2020 and that she, her partner and their baby daughter live together in Watford.

Discussion and conclusions

13. I have considered all the evidence, the determination, the grounds for permission and the submissions before making my decision.

14. It is common ground that the appellant does not meet the definition of a partner within the Immigration Rules as her husband is neither British nor settled in the UK.

15. The bases on which the appeal was presented to the judge can clearly be seen from the skeleton argument. The judge was asked to make findings on whether there were very significant obstacles to integration on return to Brazil. The basis for this contention was that the appellant was nearing her due date of delivery and that her private life here with her partner and friends could not be replicated in Brazil (at paragraph 17 of the skeleton argument). It was also argued for the appellant that in applying the public interest factors, she spoke English and her partner had a business. It was also

maintained that he was settled[1] with no connections to Brazil, that he had been here since the age of ten and was on the route to settlement. The appellant's submissions as recorded in the Record of Proceedings confirm that the appeal was presented in this way. It was argued that there would be very significant obstacles on return and that the appellant's absence from Brazil of over six years, her husband's presence here since childhood, their ties here and the fact that the separation would not be a temporary one given that he could not seek indefinite leave to remain until 2027 were compelling circumstances.

16. Given the manner in which the appeal was presented and submissions were made, it is hardly surprising that the judge proceeded as she did. It is unhelpful when grounds are prepared by someone other than the representative who attended the hearing as a different view of what could and should have been argued is often put forward. However, the fact remains that the judge determined the appeal on the arguments that were put at the hearing and the issues for determination were properly highlighted at 19.

17. The factors relied on in the present grounds were all matters which the judge had regard to. The appellant's ability to speak English and her husband's ability to support her were considered at paragraph 30. Contrary to what is argued, the judge was well aware of the appellant's husband's limited leave and loss of the route to settlement were he to leave the UK (at 24) and had regard to the fact that he had been here since the age of ten (at 9(d) and 15(a)). She also considered the imminent birth of their child (at 19), language ability (at 20), the presence of family in Brazil (at 20-22), the husband's business and employment (at 23), the repercussions of their relocation to Brazil (at 24), the appellant's past work experience and education (at 25), the health of the appellant and her husband (at 26), the husband's ability to relocate (at 27) and the need to maintain immigration control given the blatant disregard for the rules by both the appellant and her husband (at 18 and 29). This it can be seen that all the factors the appellant now relies upon were considered by the judge and at best the appellant's complaint about the determination is one of form rather than substance. Plainly the appellant's inability to meet the provisions of the Immigration Rules as a partner are also a weighty factor against her when proportionality is assessed.

Decision

18. The decision of the First-tier Tribunal does not contain any errors of law and it is upheld. The appellant's appeal is dismissed.

Anonymity

[1] Presumably this is not meant to be taken in immigration terms.

19. I continue the anonymity order made by the First-tier Tribunal.

Signed

R. Kekić
Upper Tribunal Judge

Date: 29 September 2020