IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000772
First-tier Tribunal No: HU/52617/2022
IA/04121/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 May 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

SAMEH EMAN ABUSEIF
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Khan, instructed by Alison Law Solicitors
For the Respondent: Mr C Avery, Senior Presenting Officer

Heard at Field House on 12 May 2023

DECISION AND REASONS

1. The appellant is a citizen of the USA who was born on 11 January 1983. He appeals, with permission granted by First-tier Tribunal Judge Galloway, against the decision of First-tier Tribunal Judge Sweet ("the judge"), who dismissed his appeal against the respondent's refusal of his application for leave to remain as a partner under Appendix FM to the Immigration Rules.

Background

2. The appellant met, Denise McNamee, a British citizen, in May 2019 in Egypt. They began a relationship in July of that year.

3. The appellant first entered the United Kingdom on 14 June 2021, holding entry clearance as a visitor valid until 14 December 2021. He left the United Kingdom

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on 27 November 2021 with Ms McNamee, and they travelled to Turkey for a holiday returning to the United Kingdom on 4 December 2021. The appellant and Ms McNamee married in the United Kingdom on 22 December 2021.

4. On 2 March 2022, the appellant made an application for leave to remain as a partner under Appendix FM.

5. The Secretary of State refused the application on 13 April 2022. She accepted that all eligibility requirements were met save for the eligibility immigration status requirement. This she reasoned could not be met as he was in the United Kingdom without valid leave to remain, and therefore in breach of immigration laws. Further, he did not qualify under the Exception to Appendix FM as there were no insurmountable obstacles to family life continuing outside the United Kingdom. Having addressed the Immigration Rules, she turned to Article 8 ECHR. Her consideration was brief as there was no evidence of exceptional circumstances which would otherwise render the appellant’s removal in breach of Article 8 ECHR.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal and his appeal came before the judge, sitting at Hatton Cross, on 16 January 2023. The appellant was represented by Mr Khan (as he is before me), the respondent by a Presenting Officer. The appellant and his wife gave evidence. The judge then heard submissions from the advocates before reserving his decision.

7. In his reserved decision, the judge concluded the appellant could not satisfy Appendix FM to the Immigration Rules because he was “in the UK with a visit visa when making his application and there were no insurmountable obstacles to their continuing their family life in the US.”

8. Accordingly, the appeal was dismissed.

The Appeal to the Upper Tribunal

9. The appellant sought and was granted permission to appeal on all grounds. The grounds are not set out under separate heads of challenge, but can be summarised as follows. Firstly, that the judge failed to take into account material evidence in his assessment of the insurmountable obstacles test. Secondly, that the judge’s finding that the appellant’s wife could rely upon friends and family whilst the appellant returned to the USA to make an application for entry clearance is vitiated by unfairness. Thirdly, that the judge erred in failing to consider the appellant’s inability to afford health insurance as a relevant factor to the assessment of insurmountable obstacles on return. Fourthly, that the judge had failed to undertake any assessment of proportionality under Article 8(2) ECHR.

10. The Secretary of State provided a response to the grounds of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 dated 30 March 2023 opposing the appeal.

11. The matter comes before me to determine whether the decision of the First-tier Tribunal contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. I had before me a core bundle including the respondent’s bundle and the appellant’s bundle before the First-tier Tribunal. I refer only to those documents relevant to my

consideration if necessary, but I have read all documents when reaching my decision.

12. Before me Mr Khan amplified the grounds of appeal and, in turn, Mr Avery amplified the respondent's rule 24 reply. The observations I make on the grounds reflect the submissions of the parties before me.

13. I announced at the hearing that I was satisfied that the judge had erred in law. I stated my reasons briefly, and indicated to the parties that I would give my reasons in writing which I now do.

Discussion

14. This appeal concerned the appellant's relationship with his wife. Whilst his application to remain in the United Kingdom was made under the Immigration Rules, the appeal to the First-tier Tribunal was limited by statute to human rights grounds under section 6 of the Human Rights Act 1998.

15. It is common ground, and trite, in considering whether the respondent's refusal breaches an appellant's human rights, a judge is required, first, to undertake an assessment of whether the Immigration Rules are met. If they are, subject to Article 8(1) being engaged, such a finding is dispositive of the appeal in the appellant's favour on human rights grounds, but it does not follow that where they are not met, it is axiomatic that the appeal falls to be dismissed. A judge is required to assess in that instance, whether as a consequence of the refusal, there will be "unjustifiably harsh consequences" for either an appellant and/or any family member.

16. The facts of this case are not complex and nor was the evidence voluminous before the judge. The witness statements of the appellant and his wife are not model documents; they are, save for reference to the wife's medical difficulties, bereft of material detail and would have been of some, but limited assistance to the judge. In that context, it is clear why much of the evidence referred to by Mr Khan in his submissions came from the oral evidence. In his grounds of appeal, Mr Khan, set out the evidence given at the hearing before the judge, which he amplified in his submissions before me. Whilst the appropriate course should have been to adduce the notes of the evidence and submissions before the judge on application to this Tribunal, Mr Avery did not, fairly and properly, take issue with that summary in this case.

17. I paraphrase the salient features of the evidence as follows from paragraphs 5 to 7 of the grounds of appeal. The appellant's wife has a functional neurological disorder; she had two strokes in August 2021, as a consequence of which she is medically retired. The evidence was that upon the onset of symptoms she was required to seek immediate medical attention and that she could not live alone. In view of her medical condition the appellant's wife was physically and emotionally dependent on the appellant.

18. The appellant's wife has two sisters who visited when they could, and three brothers in the UK – none of her siblings lived close by. The appellant's wife was supported by public funds. She attended monthly GP appointments and received regular hospital treatment on the NHS. The appellant doubted whether health insurance companies would medically insure her in the USA and, in any event, it would be too costly. The appellant previously rented a home in the USA, and that accommodation was no longer available to him. He had a business which he was

forced to close as a consequence of the pandemic. His mother in the USA is disabled and lived alone in social housing.

19. The judge dealt with that evidence in his substantive reasoning as follows:

> "7. <u>There is documentary evidence of his partner's ill health, including a number of medical conditions, and in particular, she suffered two strokes in August 2021, which has led to her being increasingly dependent on the appellant, both physically and emotionally. However, it appeared from the oral evidence that the appellant's spouse has two sisters in the UK, one living in Cambridge (who attended the hearing today), and the other in Oxford, and furthermore she has three brothers who live in Cheshire. She also confirmed that before the appellant came to the UK, she had support from a couple of friends, including neighbours, who checked up on her well-being.</u>
>
> 8. The appellant explained that he had previously been renting accommodation in New Jersey, USA, and when that tenancy ended, he moved in with his mother in a one bedroom flat. <u>He submitted that he was not able to return to the US with his spouse, because she would not be able to afford the health insurance there. That is not a factor, in my view, which goes to very significant obstacles on return.</u> He had not been aware that he should have made his application out of country.
>
> 9. Just as his spouse lived in the UK, he came to join her from the US, (delayed by the impact of Covid), <u>she can continue to rely on the support of friends and family, including her sister, who attended the hearing today, while he returns to the US to make an application for leave to join her as his spouse.</u>
>
> 10. The appellant remained in the United Kingdom with a visit visa when he made his application on 13 April 2022, but a visit visa is not a pathway to settlement under E-LTRP.2.1 to 2.2. Any such application should have been made from outside the UK"

(my emphasis).

20. In his grounds of appeal Mr Khan takes issue with the judge's consideration of the evidence, first, on the basis that the judge did not adequately deal with or take into consideration all the evidence summarised in the grounds at paragraphs 5 to 7. This is the complaint raised in ground one. Mr Khan does not expressly state which parts of the evidence were material to the issue of insurmountable obstacles that the judge left out of account, and upon a fair reading of the decision that criticism in my view is not wholly justified. The judge's reference to the evidence at [7] to [9] adequately refers to the salient features of the evidence relied upon by the appellant. This was not in my view Mr Khan's best point, and I am satisfied that ground one is not made out.

21. I turn to consider grounds two to four, which do have merit.

22. The appellant did not dispute that he could not meet the eligibility immigration status requirement to Appendix FM because he was here in breach of immigration laws. His application was made on 2 March 2022, after his leave to enter as a visitor expired. The judge misunderstood and/or misstated the position at [10], but nothing turns on this.

23. The contentious issue before the judge under Appendix FM was whether paragraph EX.1.(b) was satisfied by the appellant. The test thereunder is stringent, but nonetheless is fact sensitive, and required the judge to make an evaluative assessment of the evidence and provide adequate reasons for his conclusions either way. The judge plainly was aware of the relevant test of insurmountable obstacles.

24. The judge concluded at [7] and [9] that the appellant's wife could rely on her friends and family for support whilst the appellant returned to the USA to make an application for entry clearance. Mr Khan does not take issue with the judge's apparent conflation of issues relevant to the question of proportionality as being relevant to the test of insurmountable obstacles, however, he nonetheless submits that the judge's conclusion is not supported by the evidence, and that he acted unfairly in reaching that conclusion, without giving the appellant and his wife an opportunity to address that issue in evidence at the hearing.

25. The judge recorded the presence of the appellant's wife siblings in the United Kingdom, (who all lived some considerable distance away from her in Bournemouth) and the presence of a sister at the hearing. He also recorded evidence of the appellant's wife receiving support from a couple of friends before the appellant came to the UK. I cannot understand how on that evidence the judge reached the conclusion that the appellant's wife could, in the appellant's absence, rely on support from her family and friends. The evidence does not support that conclusion. Neither the appellant or his wife gave evidence to the effect that she relied on the support of her family before the appellant came to the UK, or that she could call upon them for support in the appellant's absence, or that her friends could continue to provide support. The judge was clearly alerted to these matters from the evidence given at the hearing and, if these were matters he considered to be relevant, this should have been drawn to the attention of the representatives so that the matter could have been explored in evidence. What the judge was not entitled to do was to assume what the position would in fact be. I agree with Mr Khan that not only has the judge misconstrued the evidence he has done so unfairly.

26. I derive no assistance from Mr Avery's reliance on the Presenting Officer submitting to the judge that the appellant's wife had support available because submissions are not evidence and, in any event, submissions and any finding(s) of fact in consideration of them, must be based on the evidence. No evidence has been drawn to my attention that could support the judge's conclusion. I do not accept Mr Avery's contention therefore that the judge was entitled to find as he did. I am satisfied that the judge's conclusion was not based on the evidence, his approach and consideration of the evidence caused unfairness and his conclusion is thus erroneous. I am satisfied that ground two is made out.

27. The third ground is a reasons challenge. The duty to give reasons is well established both in this jurisdiction and elsewhere: see, for example, <u>MK (duty to give reasons) Pakistan</u> [2013] UKUT 641 (IAC) and, more recently, <u>Simetra Global Assets Limited v Ikon Finance Ltd & Others</u> [2019] EWCA Civ. I am satisfied that the judge failed in that duty. The subject matter of this ground relates to the judge's view at [8] that the affordability of health insurance in the USA to cover the medical needs of the appellant's wife was not a factor "which goes to very significant obstacles on return". Despite misstating the test he was considering, the judge's expressed view at [8] is a conclusion without reasons. The issue of whether the appellant's wife could obtain health insurance, which she would require if she continued family life with the appellant in the USA, was a relevant factor in the consideration of whether there were insurmountable obstacles and, given that this was one of the few conclusions the judge reached to support his finding that the appellant did not satisfy that test, required the judge, in my view, to do much more than he did. Mr Avery submitted that there was no evidence other than the appellant's evidence in respect of affordability, whilst he is correct in that contention, the appellant is entitled to know why his evidence on the point was insufficient. I find the judge failed in his duty to provide reasons in respect of

a material consideration and erred in not doing so. I am satisfied that ground three is made out.

28. The fourth ground criticises the judge in his failure to consider Article 8 at all. The judge's decision solely considers the position under Appendix FM, notwithstanding that he was seized of a human rights appeal, the focus being on family life. The judge did not consider the position outside of the Immigration Rules or carry out any proportionality assessment taking into account public interest considerations under section 117A and 117B of the 2002 Act, as he is mandated to do. Mr Avery accepts the failure, but nonetheless submits it is immaterial because the Immigration Rules are Article 8 compliant. Whilst that is correct in law, the submission incorrectly presupposes that where the Immigration Rules are not met, that finding is dispositive of the appeal. Whilst it is a matter relevant to the assessment of proportionality it is not determinative of it in all cases. The judge is required to conduct a balancing exercise, weighing into the balance factors on both sides, an exercise it is appreciably clear he failed to undertake. It is by no means clear that had the judge conducted that exercise and taken into account the factors relied upon by the appellant that the appeal was bound to fail.

29. I am conscious of the fact that the First-tier Tribunal is a specialist jurisdiction and that its decisions should be respected unless they are clearly wrong. I have reminded myself of what was said by Lewison LJ about appeals in Volpi v Volpi and the call for brevity in judicial decision making. The judge dealt with the evidence and issues in four paragraphs. Whilst that in itself is not objectionable, the judge is required nonetheless to address the evidence and issues material to the appeal and provide adequate reasons for either rejecting or accepting that evidence. It is appreciably clear that the judge failed in that duty and I am quite satisfied in this instance that the judge fell into material error in his assessment of the evidence and issues.

30. I am entirely satisfied for these reasons that the decision of the First-tier Tribunal is erroneous in law and cannot stand. I set aside its decision. Having reached that conclusion, I have taken into account the latest guidance in Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC) as to whether the case should be remitted or retained at the Upper Tribunal. The approach of the judge raises fairness issues, but as Begum makes clear this form of unfairness does not automatically cause the appeal to be one which should be remitted. However, having regard to the nature of the errors established in this case that impact on the judge's decision, which is far wider than the impact on the discreet issue in Begum, such that the appellant would effectively lose the benefits of a two-stage appeal if his case was retained in this Tribunal, I have decided that it should be remitted to be held de novo in the First-Tier Tribunal. Neither party objected to that course.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law. The decision of the First-tier Tribunal is set aside in full and the appeal is remitted to be heard afresh by a judge other than Judge Sweet.

R.BAGRAL

Deputy Judge of the Upper Tribunal

26 May 2023