



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

Appeal Number: VA/02689/2013

THE IMMIGRATION ACTS

**Heard at Newport
On 6 May 2014**

**Determination
Promulgated
On 20 May 2014**
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Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE ENTRY CLEARANCE OFFICER - MANILA

Appellant

and

MERCEDITA LIWANAG TABAGO

Respondent

Representation:

For the Appellant: Mr K Hibbs, Home Office Presenting Officer
For the Respondent: Mr D Norrie, Sponsor

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a decision of the First-tier Tribunal (Judge Archer) which allowed the appeal of Mercedita Tabago against the ECO's refusal to grant her entry clearance as a visitor under para 41 of the Immigration Rules (HC 395 as amended).
2. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

3. The appellant is a citizen of the Philippines who was born on 1 December 1968. She lives in the Philippines with her 10 year old daughter. She met the sponsor in May 2012 in the Philippines and they began a relationship. Having spent a month in the Philippines before returning to the UK, the sponsor then returned to the Philippines in October 2012 where he remained living with the appellant until 2 February 2013 when again he returned to the UK.

4. On 29 November 2012, the appellant applied for entry clearance to visit David Norrie, a British citizen. On 19 December 2012, the ECO refused the appellant's application. The ECO was not satisfied that the appellant was genuinely seeking entry for the limited purpose of a six month visit nor that she intended to leave the UK at the end of her proposed visit and, as a consequence, did not meet the requirements of para 41(i) and (ii). In the decision letter, it is stated that:

"Your right of appeal is limited to the grounds referred to in section 84(1) (c) of the Nationality, Immigration and Asylum Act 2002".

5. That is a reference to race relations and human rights grounds.

6. On 4 June 2013, the Entry Clearance Manager maintained the refusal of entry clearance and, in relation to the appellant's right of appeal, said this:

"The applicant has applied to visit her boyfriend in the UK. This relationship does not meet the criteria of a family visit and her application was refused with a limited right of appeal.

The applicant has not appealed with regard to the Human Rights Act and I respectfully ask that the appeal be dismissed without a hearing."

7. The appellant appealed to the First-tier Tribunal. Her grounds of appeal (which are numbered as I set them out) were as follows:

"1. She does not have any assets of her own and does not work and also that there was no evidence of where the money come from in her account that we opened for her on 12th 06 December.

1. Mercy does not work as I have been providing her and her daughter, the financial support they need as your colleague should have seen from the receipts of western union. Regarding the money, I put into her account this was money I brought from the UK and some money mercy had saved. The main purpose of this account at first would have been to let her sister Terresa Tabago to use for stephanie's school and any other expenses such as clothing etc. while mercy was in the UK with me and then Mercy would have her own account to keep her money in rather than in the house.

2. that there was no evidence to say what provision had made by her for the care of her daughter.

2. The fact that there was no evidence provided about her daughters Stephanie care was down to the fact there was no question about this in application form for this, so think it would be quote obvious

that as responsible adult we would make provision for her, her sister who live's at [an address in San Ignacio Angles City] a[nd] would look after her Tel. [set out] so I hope that this clears up that point.

3. Finally the officer also stated that the believed that she had no intention of returning from the UK. I hope to clarify some of those concerns.

3. As I stated in my letter before we are planning to marry at the end of this year, and I have been living with mercy since 29 of October 2012 up until my return to the UK on the 2nd of February as we have not decided on where we would like to live I would like mercv to live with my in the UK for 6months to meet my family and friends and experience our weather and culture before we make that decision. I hope this will clear up any doubt that this is a genuine relationship and Mercy and I will both be returning to Philipines at the end of six months visit."

8. On 8 April 2013, while the appeal was pending before the First-tier Tribunal, a document, which appears to be signed by a Duty Judge, stated that:

"Valid human rights as raised in grounds of appeal."

9. The appeal subsequently came before Judge Archer on 15 October 2013. Having considered the evidence submitted by the appellant including the oral evidence of the sponsor (whom he accepted to be a credible witness), Judge Archer found that the appellant met the requirements of para 41 of the Immigration Rules. At para 19 he concluded:

"Overall, the appellant has addressed the concerns raised by the respondent and I am satisfied that his is a genuine visit. The appellant and the sponsor clearly intend to split their time between the UK and the Philipines if and when they marry. Their relationship is still at a relatively early stage in certain respects. The application was not properly refused for the reasons given by the respondent. All of the requirements of the Rules are met."

10. Judge Archer also noted at para 19 that:

"The issue of jurisdiction was dealt with by an Immigration Judge on 8 April 2013 who determined that human rights were raised in the grounds of appeal."

11. The ECO sought permission to appeal to the Upper Tribunal on the basis that there was not a valid appeal before the First-tier Tribunal. The grounds argue that the relationship between the appellant and the sponsor does not fall within the relationships set out in the Immigration Appeals (Family Visitor) Regulations 2012 (SI 2012/1532) ("Family Visitor Regulations 2012").

12. On 29 January 2014, the First-tier Tribunal (Judge De Haney) granted the ECO permission to appeal. Thus, the appeal came before me.

13. Mr Hibbs, who represented the ECO submitted that the appellant only had a limited right of appeal based upon human rights grounds. That was because, he submitted, the relationship between the appellant and sponsor did not fall within the relationships set out in reg 2 of the Family Visitor Regulations 2012, in particular that they had been:

“in a relationship that is akin to marriage...for at least the two years before the day on which [the appellant’s] application for entry clearance was made”.

14. Mr Hibbs acknowledged that the Judge had found the relationship of the appellant and sponsor to be a genuine one but on 29 November 2012, when the appellant’s application was made, it had not been in existence for two years. Mr Hibbs submitted that Judge Archer was wrong to consider the application of the Immigration Rules and since the appellant’s grounds of appeal to the First-tier Tribunal did not raise human rights grounds, in fact, there was no valid appeal before him.

15. In my judgement, Mr Hibbs’ submissions are correct.

16. By virtue of s.88A(1) of the Nationality, Immigration and Asylum Act 2002:

“A person may not appeal under s.82(1) against refusal of an application for entry clearance unless the application was made for the purpose of –

- (a) visiting a person of a class or description prescribed by regulations for the purposes of this section....”

17. However, by virtue of sub-section (3):

“Sub-section (1) –

- (a) does not prevent the bringing of an appeal on either or both of the grounds referred to in section 84(1)(b) and (c)...”

18. The effect of this provision is that an appeal against a refusal of entry clearance as a visitor may only be brought if the requirement of the Family Visitor Regulations 2012 are met, in particular the relationship with the person to be visited falls within those relationships set out in the Regulations which came into force on 9 July 2012. (There is an additional requirement concerned with the sponsor’s immigration status in the UK: reg 2(1)(b) and reg 3.) That limited is, however, subject to the caveat set out in s.88A(3) that an appeal may be brought even if the relationship does not fall within the Family Visitor Regulations 2012 limited to race relations or human rights grounds.

19. For present purposes the relevant provision in the Family Visitor Regulations 2012 is in reg 2(1)(4) which requires the applicant and sponsor to be:

“(a) in a relationship that is akin to a marriage...for at least the two years before the day on which [the applicant’s] application for entry clearance was made; and

(b) such relationship is genuine and subsisting.”

20. Here, as Mr Hibbs submitted, although the relationship between the appellant and sponsor was found by Judge Archer to be a genuine and subsisting one, it had not at the date of application been a relationship for “at least the two years” before that date. Therefore, the appellant did not have a general right of appeal against the refusal of entry clearance; her right of appeal was limited to reliance upon race relations or human rights grounds.
21. It is clear from the appellant’s grounds of appeal set out in section D of Form IAFT-2 (the Notice of Appeal to the First-tier Tribunal) that the appellant did not rely expressly or by implication upon human rights grounds. I have set out the grounds in detail above. They were accepted by Judge Archer but they all relate to the substance of the appellant’s claim under the Immigration Rules and seek to rebut the ECO’s reasoning that led to the refusal of entry clearance. At no point in those grounds, is there any suggestion that the appellant is relying upon her private and family life protected by Article 8 of the ECHR. Whilst I accept that it would not necessarily be essential for an individual to refer expressly to Article 8, it is at least necessary that they rely on the substance of Article 8 expressly or by implication. It is not, in my judgement, sufficient merely to assert that the individual has a genuine relationship with the person whom they are seeking to visit.
22. As I have already pointed out above, Judge Archer noted in his determination that a Duty Judge had considered that human rights had been raised in the grounds of appeal and therefore there was a valid appeal by virtue of s.88A(3) of the 2002 Act. That was, in my judgement, not correct. The appellant had not raised human rights, in particular Article 8 of the ECHR, in her grounds of appeal. As a consequence, she had no right of appeal under the 2002 Act. Judge Archer erred in law because there was no valid appeal before him either in general or solely on human rights grounds. As a consequence, I set aside his decision and substitute a decision that there was no valid appeal before the First-tier Tribunal.
23. At the conclusion of the hearing, I explained to the sponsor the effect of my decision and that, despite the entirely favourable findings by Judge Archer in relation to the Immigration Rules, his decision could not stand because of the legislative scheme applicable to appeals in visitor cases. That said, those findings were made having considered all the evidence including the oral evidence of the sponsor whom Judge Archer found to be a credible witness. It will be a matter for the ECO in any future application by the appellant to consider the evidence again.

Decision

24. For these reasons, the decision of the First-tier Tribunal involved the making of an error of law. I set that decision aside.

25. I remake the decision which is that there was no valid appeal before the First-tier Tribunal.

Signed

A Grubb
Judge of the Upper Tribunal
Date: