



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

Appeal Number: HU/01942/2020 (P)

THE IMMIGRATION ACTS

**Decided without a hearing under
Rule 34
On 9 November 2020**

Decision & Reasons Promulgated

On 17 November 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MARIE FRANCOISE ISABELLE PHELPS

Respondent

Representation:

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer (written submissions only)

For the Respondent: Ms G Mellon instructed by Wesley Gryk Solicitors (written submissions only)

DECISION AND REASONS

1. Although this is an appeal by the Entry Clearance Officer (“ECO”), for convenience I shall refer to the parties as they appeared before the First-tier Tribunal.

Introduction

2. The appellant is a citizen of Haiti who was born on 2 January 1956. She moved to the USA when she was aged 13, she is now 64 years old, and has permanent residence in the USA with a ‘Green Card’.
3. The appellant is married to a British citizen, [DA] who is 75 years old.

4. On 16 December 2019, the appellant made an application for entry clearance to join her spouse in the UK under the 'partner' rules in Appendix FM of the Immigration Rules (HC 395 as amended). On 8 January 2020, the ECO refused her application under the Rules and under Art 8 of the ECHR. As regards the Immigration Rules, the ECO was satisfied that she met the suitability requirements and all of the eligibility requirements apart from the English language requirement in Section E-ECP.4.1. - 4.2. She had not taken and passed an English language test and was not exempt from that requirement.

The Appeal to the First-tier Tribunal

5. The Appellant appealed to the First-tier Tribunal. Her appeal was determined, at her request, without a hearing. In a determination sent on 8 July 2020, Judge R A Pickering allowed the appellant's appeal. Although he accepted, as had the ECO before him, that the appellant could not meet the requirements of the Rules because she could not meet the English language requirement, he concluded that the separation of the appellant from her husband in the UK was disproportionate under Art 8 of the ECHR on the basis that it had unjustifiably harsh consequences which outweighed the public interest. As a consequence, the judge allowed the appellant's appeal under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

6. The ECO sought permission to appeal to the Upper Tribunal. Permission was granted by the First-tier Tribunal (Judge Andrew) on 28 July 2020 on the ground that the judge had arguably failed to give adequate reasons as to why there were unjustifiably harsh consequences if the appellant could not join her husband in the UK.
7. In the light of the COVID-19 crisis, on 17 August 2020 the Upper Tribunal (UTJ Pitt) issued directions expressing the provisional view that the issues of whether the First-tier Tribunal's decision involved the making of an error of law and, if it did, whether the decision should be set aside, should be determined without a hearing. The parties were invited to make submissions both on the merits of the appeal and also on whether the error of law issue could be determined without a hearing.
8. In response, both parties made submissions. Neither party raised any objection to the appeal being determined without a hearing and the submissions focused on the substantive issues raised in the appeal.
9. In the light of the parties' submissions, and in the absence of any objection, and having regard to the overriding objective of determining the appeal justly and fairly and the nature of the legal issues raised, I am satisfied that it is in the interests of justice to determine this appeal without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) and para 4 of the *Amended General Pilot Practice Directions: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal* (14 September 2020) issued by (then)

Vice Senior President and (now) Senior President Tribunals, the Rt. Hon. Sir Keith Lindblom.

The ECO's Grounds

10. The ECO's grounds raise a single point. Having noted that the judge accepted that the appellant could not meet the English Language requirement (para 1) and that the judge then went on to consider whether the decision would result in "unjustifiably harsh consequences" (para 2), at para 3 the grounds set out a reasons challenge to his decision as follows:

- "3. The reasons given are that the sponsor would be assisted emotionally and practically by the appellant's presence in the UK. It is submitted that there is no evidence that unjustifiably harsh consequences will ensue in the appellant's absence. There is no evidence that the sponsor is unable to cope and is described as having largely recovered from a road traffic accident he suffered in 2017 [28].
4. It is therefore submitted that the FTTJ has erred in law by failing to give adequate reasons for his findings."

The Judge's Decision

11. The judge reached his decision on the documentary evidence submitted. He did not hear any oral evidence as the appeal was determined without a hearing. In large measure, it is fair to say, he accepted the primary facts as set out in the appellant's evidence.

12. He set those facts out at paras 21-29 as follows:

- "21. There is not, any real dispute over the factual matrix in the appellant's case.
22. The appellant is a 64 year old Haitian woman who has lived in the USA since the age of 13. There is no reason for me to doubt this but for clarity, I accept these matters.
23. The appellant has provided evidence that she has permanent residence in the USA in the form of a Green Card. Again, no issue has been taken with this and I accept that the appellant is a Haitian National with permanent residence in the USA.
24. Since the age of 13, the appellant has been educated and worked in the USA. I accept that she graduated from John Adams High School in 1973 as she has provided a certificate to evidence this. The appellant explained in her representations that she was educated in English. Again, this seems entirely plausible, given the USA is a majority English speaking country. Therefore I accept, as a fact that the appellant was educated in English.
25. The appellant has provided her Curriculum Vitae, which details nearly a decade of experience in the hospitality industry, including a role as the Assistant Manager at the Helmsley Park Lane Hotel, New York, from 1983 - 1988. Since the mid 1990s until 2001, the appellant has been employed as an Executive Assistant to those in senior positions at organisations, such as Bank of America and the New York Stock Exchange.

26. I have no reason to doubt the appellant's work experience as set out within her CV and I accept that she was employed in the manner described. When considering the various roles she has undertaken, I accept that the appellant would have been required to have, amongst other skills, an excellent command of the English language in order to discharge the requirements of her various different roles.
 27. Turning to her relationship with [DA], a 75 year old British Citizen, there is no challenge to the genuineness of this relationship. The appellant and Mr [A] were married on 11 December [2019] but have known each other since 1988 having both worked for the same company. The appellant and Mr [A] met up again in 2017 and have been in a relationship since then. As there is no challenge to this, I accept these matters and make findings of fact to that effect about the genuineness of the relationship.
 28. There is no challenge to the fact that Mr [A] was in a near fatal car accident in 2017, although now largely recovered, this does cause some difficulties in movement of his shoulder joint and right hip. Mr [A] suffers from Macular degeneration in his left eye and short sightedness in both eyes. Again, I seen no reason to reject these aspects of the evidence.
 29. Mr [A] has grown up children, as well as grandchildren, living in the UK. He is retired, but works as an author. He is a published author of the Encyclopaedia of Real Estate Terms and is working on further publications. I have no reason to doubt Mr [A]'s circumstances in respect of his family or work and I accept those matters."
13. Having set those primary facts out, the judge went on to consider whether under the 'partner' rule, the appellant met the one requirement which was in dispute, namely the English Language Requirement in Section E-ECP.4.1-4.3. At paras 32-37, the judge concluded that she could not. In her submissions made to the Upper Tribunal, the appellant did not seek to challenge, in response to the grant of permission, the judge's finding that the appellant could not meet the requirements of the Immigration Rules as a 'partner' for the reasons he gave, namely that she could not meet the English language requirement.
 14. Having reached the conclusion that the appellant could not meet the requirements of the Rules, the judge then went on to consider Art 8 outside the Rules.
 15. At para 39, the judge found that there was family life between the appellant and her husband and that the refusal of entry clearance interfered with that family life. At para 40, the judge found that the interference was in accordance with the law, namely for the purpose of maintaining immigration control. He then went on in paras 41 - 48, to consider whether the refusal of entry clearance was proportionate to the legitimate aim of maintaining immigration control.
 16. At para 41, the judge said that in assessing proportionality: "I have found it helpful to adopt a balance sheet approach".

17. Then, at paras 42–45, the judge considered ss.117B(1)–(3) of the Nationality, Immigration and Asylum Act 2002 (as amended) as follows.

18. At para 42, the judge said this about ss.117B(1) and (3):

“42. The fact that the appellant is unable to meet the requirements of the Immigration Rules is a matter I have weighed against her. The maintenance of effective immigration control is in the public interest (117B(1)). The appellant meets the financial requirements of the Immigration Rules, therefore, she is in my judgment financially independent. This means ultimately, she is not going to be a burden on the taxpayer and will be better able to integrate into society (117B(3)). This is a matter that lessens the weight that I have attached to the public interest.”

19. At para 43, the judge set out s.117B(2) dealing with the public interest and an individual’s ability to speak English. In relation to that provision, the judge reached the following conclusion at para 44:

“The appellant has lived in the US for over 50 years, and has been educated there and worked in occupations that would have required her to converse confidently in English. I accept her ability to speak English. This would mean, in line with primary legislation, that she is less of a burden on taxpayers and will be able to integrate. This reduces the weight I attach to the public interest.”

20. At para 45, the judge noted that no other factors in s.117B of the 2002 Act were relevant which needed to be considered.

21. At paras 46–48, the judge considered the circumstances of the appellant and her husband and carried out the balancing exercise under Art 8.2 as follows:

“46. I have considered the impact on the appellant’s husband, adopting a holistic approach to the family unit. The appellant’s husband, is being adversely impacted by the separation from his wife. Having experienced a traumatic injury, it is apparent from the evidence that they are very close and [he would] be assisted and supported both emotionally and practically by his wife’s presence in the United Kingdom.

47. Therefore weighing matters, against one another, the public interest and the interests of the appellant, on the particular facts of this case, for the reasons I have given, I consider that the matters weigh in favour of the appellant in the balancing exercise.

48. In my judgment, this is a case, where the refusal of entry clearance, results in an unjustifiably harsh consequences (*sic*), making the decision disproportionate.”

The Submissions

22. In respect of the reasons challenge in the grounds of appeal to the judge’s finding that there were “unjustifiably harsh consequences” sufficient to outweigh the public interest, para 8 of the ECO’s further submissions elaborate as follows:

“The reasons given are that the sponsor would be assisted emotionally and practically by the appellant’s presence in the UK. It is submitted there is no evidence that unjustifiably harsh consequences will ensue in the appellant’s absence. There is no evidence that the sponsor is unable to cope, having been described as largely recovered from a road traffic accident he suffered in 2017 [28] and in an employment, with the presence of various family members in the UK [29]. At no point does the FTTJ factor into the assessment that the appellant could like many others facing similar obstacles, take the requisite test. The FTTJ has utilised Art 8 as a vehicle to circumvent the requirements of the Rules.”

23. In addition, the ECO’s submissions make a further point. It is contended that the judge misdirected himself in law in paras 42 and 44 in stating that reduced weight should be given to the public interest as the appellant respectively was financially independent (s.117B(3)) and was able to speak English (s.117B(2)). It is contended that that is a misdirection following Rhuppiah v SSHD [2018] UKSC 58 as neither of those factors can positively weigh in the appellant’s favour under Art 8 (see [57]).
24. In response to the grounds, the appellant contends that the judge did give adequate reasons for his conclusion in the light of the evidence, which was not in dispute, and upon which the judge found in the appellant’s favour. Reliance is placed upon the appellant’s husband being 79, living alone, having experienced “a traumatic injury” and a “near-fatal accident” in 2017 resulting in medical difficulties including difficulties with mobility and short sightedness. In addition, the appellant’s evidence that her husband is suffering from “emotional distress” and reports “isolation and loneliness”. Further reference is made to a letter from the sponsor’s doctor, Dr Rafiq that the sponsor was finding it painful to carry out his daily routines and the presence and support of his wife (the appellant) would help with his daily activities and care.
25. On behalf of the appellant, it is contended that the judge gave adequate reasons and the grounds are no more than a disagreement with the judge’s findings of fact.
26. In relation to the Rhuppiah point, it is submitted that, the appellant would be granted entry clearance but for the procedural requirement of not taking the English language test, it was entirely appropriate for the judge to decide the weight to be placed on the public interest.

Discussion

27. Having concluded that the appellant could not meet the requirements of the Immigration Rules, the judge correctly directed himself that in order to succeed in her claim under Art 8 outside the Rules the appellant had to establish that there were “unjustifiably harsh consequences” sufficient to outweigh the public interest (see R (Agyarko) and Another v SSHD [2017] UKSC 11 at [60] per Lord Reed).

28. In carrying out the 'balancing exercise', the judge dealt first with the public interest and then, secondly with the appellant's circumstances and those of her husband.
29. As regards the former, I accept the ECO's submissions that the judge misdirected himself as to the effect of the appellant being financially independent and having the ability to speak English.
30. At paras 42 and 44 respectively in relation to these issues, the judge concluded that in these circumstances the public interest was reduced. That is a misdirection in the light of the Supreme Court's approach in Rhuppiah. It, in effect, gives positive weight to these factors in assessing the extent of the public interest.
31. As Lord Wilson pointed out in Rhuppiah at [57], the relevance of an individual speaking English or being financially self-sufficient, is that it might be a legitimate factor to take into account in assessing the strength of their private or family life in the UK. It could not, however, affect the public interest which is engaged by s.117B(1), namely effective immigration control. Sections 117B(2) and (3) are concerned with the opposite context, namely that if an individual was *not* financially self-sufficient or could *not* speak the English language then, as a result of the legislative provisions, that was a negative factor weighing against the individual as a further aspect of the public interest. At [57], Lord Wilson said this:

"So Judge Blundell erred in concluding that Ms Rhuppiah was not financially independent within the meaning of section 117B(3). The further submission on her behalf is and has been that the effect of section 117B(2) and (3) is to cast her ability to speak English and her financial independence as factors which positively weigh in her favour in the inquiry under article 8. But the further submission is based on a misreading of the two subsections and was rightly rejected by Judge Blundell, upheld by the Court of Appeal, just as an analogous submission was rejected in para 18 of the decision in the *AM* case, cited at para 38 above. The subsections do not say that it is in the public interest that those who are able to speak English and are financially independent should remain in the UK. They say only that it is in the public interest that those who seek to remain in the UK should speak English and be financially independent; and the effect of the subsections is that, if claimants under article 8 do not speak English and/or are not financially independent, there is, for the two reasons given in almost identical terms in the subsections, a public interest which may help to justify the interference with their right to respect for their private or family life in the UK. In seeking to portray the strength of their private or family life by reference to all their circumstances, claimants may wish to highlight their ability to speak English and/or their financial independence; but the legitimate deployment of such factors in that context is to be contrasted with the erroneous further submission that the subsections propel a conclusion that, where those factors exist, there is a public interest in favour of the claims."

32. That latter error is, in my judgment, precisely the error which Judge Pickering fell into in paras 42 and 44 when he said that because the appellant was financially independent and could speak English that “lessens” or “reduces” “the weight ... I attach to the public interest”.
33. In addition, I accept the ECO’s submissions that the judge failed to give adequate reasons for his finding that there would be “unjustifiably harsh consequences” sufficient to outweigh the public interest if the respondent’s decision to refuse entry clearance were upheld.
34. The judge’s reasons are, in fact, very briefly expressed and are, in essence, limited to para 46 of his determination. At para 47, he says that “for the reasons I have given” the public interest is outweighed by the appellant’s circumstances. Of course, the judge’s reasons in para 46 have to be seen in the light of his factual findings that he made, in particular in paras 27-29 concerning the circumstances of the appellant’s husband in the UK. I recognise that an appellate body, in particular on hearing an appeal from a specialist tribunal, should show restraint when considering whether reasons were adequate. In RB (Jones) v First-tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19, Lord Hope said at [25]:
- “It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.”
35. Despite the UT itself being a specialist tribunal, the approach still applies.
36. Whilst I accept that the judge’s reasons are tolerably clear in para 46 for his finding - namely relying upon the impact upon the appellant’s husband of the separation - in weighing that impact against the public interest, in part the judge’s reasons were that the public interest had a lessened or reduced weight. That, as I have already indicated, was impermissible and resulted in flawed or inadequate reasons for concluding in para 47 that the public interest was outweighed by the circumstances of the appellant’s husband.
37. In Lal v SSHD [2019] EWCA Civ 1925 (a case to which Ms Mellon referred in her submissions) the Court of Appeal at [68] said this:
- “In considering ... whether there are ‘exceptional circumstances’ the applicable test is whether refusing leave to remain would result in ‘unjustifiably harsh consequences’ for the applicant or their partner, such that refusal would not be proportionate: see the passage from the Secretary of State’s instructions to officials quoted at paragraph 11 above and the *Agyarko* case at paras 54 - 60. The essential difference (reflected in the word ‘unjustifiably’) is that the latter test [as opposed to the ‘insurmountable obstacles’ test] is that the latter test requires the tribunal not just to assess the degree of hardship with the applicant or their partner would suffer, but to balance the impact of refusing

leave to remain on their family life against the strength of the public interest in such refusal in all the circumstances of the particular case.”

38. The judge’s misdirection in paras 42 and 43 of his determination deprived his reasoning of the appropriate foundation when assessing the public interest and the “weight” to be given to it when considering whether the impact upon the appellant’s husband was sufficient to outweigh that public interest.
39. Ms Mellon, in her submissions, recognised that the judge’s assessment of proportionality was not necessarily one which every judge would have made in the circumstances. Whilst that acknowledges, and I accept, that any assessment would need to be irrational, and that is not a basis upon which the ECO challenges the judge’s decision, it reflects the reality that the outcome of the balancing exercise was not clear cut in this appeal. The appellant did not have an overwhelmingly strong case. The misdirection, therefore, as to the weight to be given to the public interest was material to the eventual conclusion made by the judge. If he had given proper weight, rather than a lessened or reduced weight, to the public interest it is not inevitable that he would still have reached the same finding that the circumstances of the appellant’s husband outweighed the public interest. All that I am able to say is that he *might* have reached the same conclusion but, on the other hand, he might not have. His misdirection, therefore, led to inadequate reasons being given for his finding in favour of the appellant that there were unjustifiably harsh consequences sufficient to outweigh the public interest properly formulated.
40. For these reasons, the judge materially erred in law in allowing the appellant’s appeal under Art 8.

Decision

41. The decision of the First-tier Tribunal to allow the appellant’s appeal under Art 8 involved the making of a material error of law. That decision cannot stand and is set aside.
42. In the light of the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President’s Practice Statement, the appropriate disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* re-hearing by a judge other than Judge Pickering.
43. Although the appeal was originally determined “on the papers”, given that the appellant is now legally represented, the appeal should be listed for an appropriate hearing unless the appellant notifies the First-tier Tribunal that she does not require such a hearing.

Signed

Andrew Grubb

Judge of the Upper Tribunal
12 November 2020