



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

Appeal Number: HU/00360/2021

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre **Decision & Reasons Promulgated**
On 31 March 2022 **On 27 April 2022**
Remotely By Microsoft Teams

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

HA RA JEON

and

Appellant

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:

For the Appellant: Mr P Georget, instructed by Duncan Lewis Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of South Korea who is married to a British citizen, Mr Temesghen Asghedom (“the sponsor”). They married on 2 June 2018 in Canada where the appellant’s parents live. Since their marriage, the appellant has visited the UK on a visitor’s visa and her husband has visited her in South Korea, as I understand it, on two occasions.

2. On 3 September 2020, the appellant applied for entry clearance as the partner of the sponsor under Section E_ECP of Appendix FM of the Immigration Rules (HC 395 as amended).
3. On 14 December 2020, the Entry Clearance Officer (“the ECO”) was refused the application on the basis that the appellant could not meet the financial requirements in para E-ECP.3.1.-3.4. as she was unable to provide the required proof of the sponsor’s income being £18,600 income over a twelve month period. In addition, the ECO concluded that the appellant did not meet the English language requirements in E-ECP.4.1. as she had not provided an English language certificate at the required level. Finally, the ECO concluded that the refusal of entry clearance was not a disproportionate interference with the family life between the appellant and sponsor under Art 8 of the ECHR.

The Appeal

4. The appellant appealed to the First-tier Tribunal. In a decision sent on 4 May 2021, Judge Mace dismissed the appellant’s appeal. It was accepted before the judge that the appellant’s relationship with the sponsor was a genuine one and that “family life” existed between them. As regards to Rules, the judge was not satisfied that the appellant met the eligibility requirements in relation to income or English language. Further, the judge found that it was not disproportionate to refuse the appellant entry clearance.
5. On 27 July 2021, the First-tier Tribunal (Judge Welsh) granted the appellant permission to appeal.
6. In a decision sent on 21 January 2022, the Upper Tribunal (Judges Rimington and O’Callaghan) allowed the appellant’s appeal and set aside the First-tier Tribunal’s decision. The UT’s reasons are set out in full in its decision and I do not repeat them here. The UT concluded that there had been a procedural error, in that the judge had failed to take into account evidence upon which permission to submit post-hearing had been granted to the parties. The Upper Tribunal retained the appeal in order that the decision in relation to Art 8 should be remade in the UT. It was accepted by the UT that the appellant met the English language requirements in Appendix FM. It remained the case, however, that the appellant could not meet the financial requirements and the UT preserved the concession made by the appellant’s Counsel, on that basis, that the requirements of the Immigration Rules were not met (see para 26 of the UT’s decision).
7. As a consequence, and following a Transfer Order, the appeal was listed before me at the Cardiff Civil Justice Centre on 31 March 2022 in order to remake the decision. I sat at the Cardiff CJC and Mr Georget, who represented the appellant, and Ms Rushforth, who represented the respondent, joined the hearing remotely by Microsoft Teams, as did the sponsor.

The Hearing

8. On behalf of the appellant, a number of further documents were placed in evidence, without objection by the respondent. These included a bundle running to 123 pages, a statement with attachments by the appellant's solicitor, Ms Templeton dated 30 March 2022 and a skeleton argument prepared by Mr Georget.
9. At the outset of the hearing, Ms Rushforth indicated that she did not wish to make any submissions, other than to rely on the ECO's decision to the extent that it was not inconsistent with a number of findings which she accepted were established on the evidence. She indicated that she did not wish to concede the appeal but that she had been, at least initially, minded to withdraw the ECO's decision but had decided not to do so as that would have delayed a decision as to whether the appellant would obtain entry clearance and that there had already been delays.
10. It is clear, however, that Ms Rushforth did not seek actively to present any argument on behalf of the respondent as to why the appellant should not succeed under Art 8.

Findings

11. The following findings were accepted by both parties on the evidence.
12. First, the appellant cannot satisfy the financial requirements of the Immigration Rules because the sponsor does not earn the required £18,600 as set out in paras E-ECP.3.1.-3.4. of Appendix FM.
13. Secondly, however, it is accepted that the reason why the sponsor does not earn the required amount of money is as set out in his witness statement dated 15 March 2022 at pages 25-30 of the appellant's bundle, in particular at paras 4-6.
14. I can summarise that evidence as follows. The sponsor has Cystic Fibrosis ("CF") which was diagnosed in 1999. He began working for Amazon in Swansea in May 2019. His salary, at the time, would have met the financial requirements under Appendix FM. However, Amazon only provides six month contracts after which they reemploy someone following a two to three month gap. After the sponsor's contract ended, he took another part-time job in order that there was no gap in his earnings but he did not receive enough in order to meet the financial requirements of the Rules. His intention was to return to work with Amazon in March 2020. However, that coincided with the onset of the COVID-19 pandemic and lockdown. As a result of his health condition, the sponsor was instructed to shield as a vulnerable person. That, effectively, prevented him continuing his job with Amazon (by reemployment) and his CF (including the fact that he has to spend two weeks in hospital a few times a year) has made it very difficult for him to gain employment.

15. Thirdly, and I have already alluded to this, the sponsor suffers from CF. In fact, he suffers from a relatively rare variation of that genetic illness. The appellant's condition and treatment is helpfully set out in a joint letter by Dr Lau (a consultant physician CF) and Mr Edwards (Senior Social Worker CF) from the University Hospital of Llandough dated 3 March 2020. In that letter the sponsor is said to be suffering from a "progressive and life limiting" condition with the possibility that he might need a lung transplant in the "not too distant future". The letter sets out the nature of the sponsor's "uncommon CF genotype" and points out that he "requires time consuming treatments twice a day at home" with a number of medications, as well as daily physiotherapy and "adequate nutrition and exercise". The letter goes on to point out that due to repeated infections, the sponsor has required "seventeen in-patient admissions since his first day" in 2012, the last of which was in April 2021. Each admission generally lasts for fourteen days when he receives "intensive input from our specialist CF multidisciplinary team made up of doctors, psychotherapists, clinical nurses, dieticians, pharmacists and psychologists". The letter points out that the sponsor has started a "new triple CFTR modular therapy last year" on Kaftrio and Kalydeco, in addition to a complex treatment regime that requires a need for "continuous monitoring and regular blood tests". As result, he attends for outpatient appointments every "two to three months" where he is seen by the specialist team. The letter points out that the sponsor has

"A severely reduced lung function and currently within the lung transplant threshold, we would strongly advise in our medical capacity, that as a British citizen he stay in the UK to ensure adequate care of his disease, including pharmacological management, guided by national CF guidance".

The letter concludes:

"without this specialist treatment it is highly likely that there would be an adverse impact on his health which could shorten his life."

16. As I have said, Ms Rushforth accepts this to be the sponsor's situation.
17. Fourthly, in the previous appeal hearings, and in the lead up to the hearing before me, there were attempts to contact hospitals in South Korea in order to obtain information about whether the treatment which the sponsor needs is available in South Korea, and, if it is, at what cost to him. I do not need to set out that evidence in detail because of the stance helpfully taken by Ms Rushforth. She accepts that the specialist treatment which the sponsor requires is not available in South Korea. She accepts, therefore, that it is not relevant to consider what health insurance would be available to him if he lived in South Korea. The evidence is that the treatment would cost in excess of £15,000 per month. However, and despite (as I accept) the best efforts of those representing the appellant, it has not been possible to obtain clear responses from the hospitals in South Korea. Although, the e-mail exchange with two hospitals/clinics, namely the Samsung Medical Center and Severance, offer no tangible support for any of the treatment required by the sponsor being available in South

Korea, in particular the specialist team support and new medication he receives being available. The evidence shows that CF is a somewhat unusual condition in South Korea, unlike in the UK.

18. Having regard to all the evidence, I accept that the treatment which the sponsor requires would not be available to him in South Korea. The only option for the sponsor would be to return to the UK in order to obtain the treatment that he now receives.
19. The burden of establishing a breach of Art 8 lies on the appellant on the civil standard of a balance of probabilities. However, the respondent bears the burden of justifying any interference with the appellant and sponsor's Art 8 rights under Art 8.2.
20. In relation to Art 8, I apply the well-known five-stage approach in R(Razgar) v SSHD [2004] UKHL 27 at [17] :

“(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?”

21. It has already been found, and it was not questioned before me, that family life exists between the appellant and sponsor on the basis that their relationship is genuine and ongoing. I accept that. Further, I accept that the refusal of entry clearance infringes the family life that exists between them.
22. As regards Art 8.2, the decision is in accordance with the law as the appellant cannot succeed under the Immigration Rules. The crucial issue is whether the refusal of entry clearance is a proportionate interference with their family life, having regard to the public interest set out in ss.117B(1) and (3) of the Nationality, Immigration and Asylum Act 2002 (as amended) (the “NIA Act 2002”).
23. In assessing proportionality, a “fair balance” must be struck between the interests of the individual and the public interest (see Razgar at [20] per Lord Bingham).

24. In striking that balance, I bear in mind what was said by Lord Bingham in SSHD v Huang [2007] UKHL 11 at [20]:

“the ultimate question ... is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all the circumstances weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide.”

25. In striking the “fair balance”, given that the appellant cannot succeed under the Immigration Rules, there must be “unjustifiably harsh consequences” sufficient to outweigh the Art 8 rights of the appellant and sponsor (see R (Agyarko and Another) v SSHD [2017] UKSC 11 at [60] per Lord Reed).
26. In striking the balance, I take fully into account the accepted facts in this appeal. The sponsor suffers from a relatively unusual variant of CF. The evidence, which is not disputed, is that he requires specialist care provided by a specialist medical team, he receives life-sustaining medication, requires regular clinic appointments with the specialist team and, despite all of this, on a number of occasions each year requires in-patient treatment in hospital for periods of fourteen days. None of this treatment would be available in South Korea. The medical evidence is that without this treatment the appellant’s health would be seriously affected and it is “highly likely” that without it his life would be shortened.
27. There are, in addition other impediments to the sponsor living in South Korea: he does not speak Korean and apart from short visits has never lived there, his only connection with the country is through his wife. There is no reason to believe that the difficulties that CF has caused him in the employment market the UK would not be replicated (indeed would be exasperated) in South Korea where his health would be more greatly affected.
28. The main and central issue remains, however, the impact on the sponsor’s health if he moved to South Korea.
29. In my judgment, it is not reasonable to expect the sponsor, given the impact upon his health, to move to South Korea in order to live with his wife. Equally, given the constant need by him for on-going treatment, it would not be reasonable to expect him to return to the UK, if he moved to South Korea, in order to continue the treatment he currently receives in a UK hospital. Any suggestion that he could or should, is wholly impractical and, in essence, impossible.
30. I find, therefore, that if the respondent’s decision is maintained, such that the appellant is not permitted to enter the UK in order to live with the sponsor, the effect will be that they will be required to live apart and not be in a position to continue a meaningful family life as a married couple. I accept, of course, that they have done their best since their marriage by

visits by the appellant to the UK and by the sponsor to South Korea. That, however, is not a meaningful substitute for a married couple who wish to do so to live together in the same place.

31. I accept that Art 8 does not create a “general obligation to respect a married couple’s choice of country in which to reside” (see, e.g. R(MM) (Lebanon) v SSHD [2017] UKSC 10 at [41] per Lady Hale and Lord Carnwath):

“It will depend upon the particular circumstances of the persons concerned and the general interest. Factors to be taken into account are the extent to which family life would effectively be ruptured; the extent of the ties in the host country; whether there are “insurmountable obstacles” (or, as it has sometimes been put in other cases, “major impediments”: see, for example, *Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798, para 48; *IAA v United Kingdom* (2016) 62 EHRR SE19, paras 40 and 48) in the way of the family living in the alien’s home country; and whether there are factors of immigration control (such a history of breaches of immigration law) or public order weighing in favour of exclusion (para 107).”

32. I accept that the public interest is engaged under s.117B(1) of the NIA Act 2002, namely “effective immigration control” as the appellant cannot meet the requirements of the Rules because she cannot meet the financial requirements on the basis of the sponsor’s income. I also accept that the public interest in s.117B(3) is engaged as the appellant will not, at least at present, be financially independent. I must give both factors proper and due weight as they reflect Parliament’s view of the public interest. I note, however, the evidence which is accepted as to the reasons why the sponsor cannot, at present, earn this income and that he wishes to do so, rather than claim PIP as set out in his witness statement. Undoubtedly, his health condition, together with the impact of the COVID-19 crisis, have affected his ability to earn sufficient income to meet the financial requirements.
33. However, the impact upon the appellant and sponsor of not permitting the appellant to enter the UK is, in my judgment, significant because, in effect, it will prohibit them leading a life as a married couple in the same country. The sponsor cannot reasonably be expected to live in South Korea given his health condition. There are “insurmountable obstacles” to family life continuing there. The impact upon the appellant and sponsor of not being able to do so is, in my judgment, a powerful factor weighing in the balance under Art 8.2.
34. I also bear in mind the evidence that there is an impact upon the sponsor of not having the support of his wife, the appellant, in the UK given his health condition.
35. There is also, in the witness statements, evidence demonstrating the contribution which the sponsor and, if she were in the UK, the appellant would make through his (and in the future her) support to refugees and asylum seekers in Swansea. All be it I give some (but limited) weight to this, this factor weighs in the appellant’s favour. There is also evidence,

which I accept, that the appellant herself has skills, including being a qualified hairdresser and that it would be her intention to work (if permitted) in the UK and therefore not to be reliant on public funds. That latter desire is, of course, also the sponsor's and the reason why he has chosen not to apply for PIP, rather than seeking work, albeit at a level below that which would satisfy the requirements of the Rules.

36. Balancing all these factors together, and seeking to strike a 'fair balance', I am satisfied that the public interest is outweighed by the unjustifiably harsh consequences to the appellant and sponsor if the appellant is not granted entry clearance to join her husband in the UK.
37. On that basis, I am satisfied that the ECO's decision to refuse the appellant entry clearance breaches Art 8 of the ECHR.

Decision

38. The decision of the First-tier Tribunal was set aside by the Upper Tribunal in its decision dated 21 January 2022.
39. I remake the decision allowing the appellant's appeal under Art 8 of the ECHR.
40. Nothing was presented to me to suggest that there was any basis that would not disentitle the appellant to entry clearance if a breach of Art 8 was established. The appellant is, in my judgment, entitled to entry clearance on that basis to join the sponsor, her husband in the UK.

Signed

Andrew Grubb

Judge of the Upper Tribunal
4 April 2022

TO THE RESPONDENT FEE AWARD

Although I have allowed the appeal, the basis of that decision relies largely on material only made available during the appeals process. In these circumstances, I do not consider it appropriate to make a fee award in the appellant's favour.

Signed

Andrew Grubb

Judge of the Upper Tribunal

4 April 2022