



IAC-AH-KEW-V1

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

Appeal Number: IA/06637/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 13 November 2014**

**Determination Promulgated
On 25 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

**MRS MELY JANE MARCELO
(NO ANONYMITY DIRECTION)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Kumar, Kumar Legal Limited

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the Philippines and her date of birth is 10 May 1978.
2. The appellant entered the UK on 13 July 2008 as a student. On 17 February 2012 she was granted limited leave to remain until 22 December 2013. On 18 November 2013 she made an application to vary her leave to remain in the UK on the basis of her relationship with her partner, now husband, Mr Ramess Seeballuck. The appellant's

husband is a British citizen and his date of birth is 16 June 1945. The respondent refused the appellant's application in a decision of 16 January 2014.

3. It was accepted by the decision maker that the appellant has a genuine and subsisting relationship and that relocation may cause a degree of hardship for her husband; however, it was not accepted that there would be insurmountable obstacles preventing the appellant and her husband having a family life together in the Philippines. The decision maker considered that there were no exceptional circumstances in this case which would warrant the grant of leave outside the Rules.
4. The appellant appealed against the decision of the Secretary of State and her appeal was dismissed by Judge of the First-tier Tribunal Rowlands in a decision which was promulgated on 20 August 2014 following a hearing on 24 July 2014. The appeal was dismissed pursuant to the Immigration Rules and under Article 8 outside of the Rules. The appellant was granted permission to appeal against the decision of the First-tier Tribunal in a decision by First-tier Tribunal Judge Foudy of 9 October 2014. Thus the matter came before me.

The Decision of the First-tier Tribunal

5. Judge Rowlands made the following findings:-

“18. Factually I am satisfied that despite what her husband said at the hearing it is a genuine and subsisting marriage. Clearly he wanted to try and persuade both the respondent and myself that removal of her would be an end to their relationship but I don't think that is necessarily the case. The evidence is clear that they have been together for a substantial period of time and that she has stuck by him notwithstanding his illnesses. I am satisfied therefore that there is a genuine and subsisting relationship between them. It seems to be that the one and only issue is whether or not removal of her would be an unlawful interference with her and his right to family life.

19. The appellant argues that the respondent's decision under the Immigration Rules is wrong because it was wrong to consider whether the requirement of paragraph EX.1 apply. I cannot see how that argument can be because Appendix FM R-LTRP1.1 states that an applicant must not fall for refusal under various sections and that paragraph EX.1 applies. Paragraph EX.1 applies only where an applicant has children in the UK which clearly this appellant does not or where there are insurmountable obstacles preventing her and her husband from continuing their relationship in the Philippines. Clearly the respondent considers that there are no insurmountable obstacles and for that reason paragraph EX.1 applies.

20. So far as that particular issue is concerned I agree that there are no insurmountable obstacles. The appellant and her husband are a wealthy couple and there is no reason to believe that their income of about £70,000 a year would not be maintained if they were to have to relocate to the Philippines. I am certain that an income of £70,000 a year for a retired couple in the Philippines would mean that they would live perfectly adequately and there is no evidence that any of the prescribed drugs that the appellant's husband is in receipt of would not be readily available in the Philippines. His health does not prevent him from relocating with her and clearly there is no basis for saying that paragraph EX.1 applies.
21. The respondent then went on to consider the issue of whether the refusal of the appellant's claim amounted to a breach of a right to a private life under the Immigration Rules. This is not specifically covered by paragraph 276ADE of the Immigration Rules which outlines the requirements. Of the requirements the respondent could only argue that she fulfils sub-Section (iv) which applies to applicants who are 18 years or above and have lived continuously in the UK for less than twenty years and who have no ties (including social, cultural or family to the country to which she would have to go if required to leave the United Kingdom). On the appellant's own admission her parents and two siblings still live in the Philippines and it is not that long since she came here. She clearly does have ties with her home country and could therefore not fulfil any of the Rules in relation to private life.
22. I have then considered the case of **Gulshan [2013] UKUT 00640** which states that 'only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.'
23. Paragraph 3.2.8 of the guidance covers 'exceptional circumstances,' where an applicant does not meet the requirements of the Rules under Appendix FM. If it is that that the case refusal of the application would normally be appropriate, but leave can be granted outside the Rules if exceptional circumstances apply. The guidance continues that exceptional circumstances does not mean unusual or unique but that it means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or the family such that refusal of the application would not be proportionate. It further goes on to point out that the circumstances around the applicant's entry to the UK and the proportion of the time that they have been in the UK legally as opposed to illegally and whether they formed their relationship with their partner at a time when they had no immigration status or this was precarious then family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious should be

given less weight when balanced against the factors weighing in favour of removal than the family life formed by a person lawfully present in the UK.

24. Having considered all of this and bearing in mind the public policy of requiring a person to apply under the Immigration Rules from abroad then I am satisfied that in this case there are no exceptional circumstances. It may well be that the appellant would fulfil the Immigration Rules but I can see no reason why she should not be made to go back to the Philippines in order to come back to the United Kingdom. I can equally see no reason why her husband could not go back with her whilst those applications are pending. The decision is perfectly correct and proportionate."

The Grounds Seeking Leave to Appeal and Oral Submissions

6. The grounds seeking leave to appeal argue that the Judge made a mistake. The sponsor's annual income is £17,000 not £70,000. He has been living in the UK for more than 45 years and he sees his family here every week. The Judge did not consider the harsh consequences should he have to go to the Philippines to live with his wife. He has no friends or family there and he is unable to speak the language.
7. At [21] of the determination the Judge failed to appreciate the ties that the appellant has made here in the UK and her private life. The Judge failed to consider EX.2 of the Rules which states as follows:
- "EX.2 For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the appellant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."
8. The Judge found at [24] that it may be the case that the appellant would be able to satisfy the Immigration Rules however this was not the case because the income threshold is £18,600 and the sponsor's income is only £17,000.
9. The Judge failed to consider **Izuazu (Article 8 - New Rules) [2013] UKUT 45** and distinguish between the appellant and someone whose conduct has been criminal.
10. I heard oral submissions from both Mr Melvin and Mr Kumar. Mr Melvin submitted that there was no evidence before the First-tier Tribunal or indeed before the Upper Tribunal that £17,000 per annum would not be sufficient in the Philippines. Indeed in Mr Melvin's opinion the couple would be considered wealthy. The error is not material. There was no **Chikwamba** argument as far as the Secretary of State is concerned (**Chikwamba and SSHD [2008] UKHL 40**). The appellant does not meet the private life Rules and the requirements of Appendix FM.

There was no evidence before the Judge that the sponsor saw his grandchildren regularly. The appellant has extensive family in the Philippines.

11. Mr Kumar confirmed that the appellant was not relying on any further evidence should a material error of law be found such that the decision of the Judge is set aside.

Conclusions

12. The Judge made a mistake. The sponsor's income is £17,000 and not £70,000. However, in my view, this error does not infect the Judge's decision in relation to insurmountable obstacles and or Article 8 of the 1950 Convention on Human Rights.
13. The Judge considered whether or not there were any insurmountable obstacles to family life continuing outside the UK in accordance with EX.1.(b) of Appendix FM. The Judge took into account all relevant factors including the sponsor's health condition (he has had two heart attacks and he also suffers from a bad back and he takes medication). The Judge was also aware that the sponsor sees his family here every week. The sponsor's income of £17,000 is from a pension and the couple would receive this income should they relocate together to the Philippines. There was no evidence before the First-tier Tribunal Judge that an income of £17,000 would not be sufficient for the couple to live comfortably in the Philippines. In my view the decision of the Judge is not irrational or perverse and there is no material error of law. The mistake did not lead to unfairness and was not material in my view to the decision.
14. In relation to the appellant's private life here, the Judge's decision under paragraph 276ADE is lawful and sustainable. There is no error of law contained therein.
15. The Judge decided that there were no arguably good grounds for granting leave to remain outside the Rules. The Judge concluded that there were no exceptional circumstances in this case. In my view, the Judge took into account all relevant circumstances to a proportionality assessment in concluding that the appellant could not succeed under the Immigration Rules. The Judge was entitled to take into account the appellant's precarious immigration status and did not consider the issue on the basis that the appellant was here illegally. The Judge noted the appellant's evidence that she has family in the Philippines including a 9 year old son. In my view the Judge's decision is one that was open to him on the evidence before him and the grounds do not establish that it was irrational or perverse.
16. The Judge went on to comment on the possibility of the appellant making an application for entry clearance. I have considered this in the context of the Judge's error in relation to the sponsor's income in light of the grounds seeking permission because it seems that the Judge was wrong to conclude that the appellant would meet the maintenance requirements of the rules. However, in this context there is no material error. The Judge refused the application under substantive Article 8 and

there was no need for him to go on and consider the possibility of the appellant making a further application for entry clearance.

17. The decision of the Judge to dismiss the appeal under the Rules and Article 8 of the 1950 Convention on Human Rights is maintained.

Signed: Joanna McWilliam

Date 24 November 2014

Deputy Upper Tribunal Judge McWilliam