



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

Appeal Numbers: IA/15121/2014
IA/15122/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 5th February 2015**

**Decision & Reasons
Promulgated
On 20th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MS EMELIE JUANICO WINGCO (FIRST APPELLANT)
MISS JOANNA MARIE JUANICO WINGCO (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms S. Goh of Counsel

For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are both citizens of Philippines and are mother and daughter respectively. The first Appellant who I shall refer to as the Appellant was born on 4th September 1957 and the second Appellant who I shall refer to a Joanna was born on 22nd March 1996. They appeal against

decisions of Judge of the First-tier Tribunal Blum sitting at Richmond Magistrates' Court on 31st October 2014 in which he dismissed their appeals against decisions of the Respondent dated 12th March 2014. Those decisions were to refuse to allow their applications for indefinite leave to remain as dependants of Mr Renato David Wingco born 18th August 1957 ("Mr Wingco") and to remove them from the United Kingdom pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006. The Appellant is the spouse of Mr Wingco and Joanna is his daughter. Judge Blum allowed Mr Wingco's appeal against that part of the Respondent's decisions which affected him.

2. Mr Wingco entered the United Kingdom on 27th September 2002 as a work permit holder. He was granted further periods of leave to remain in the United Kingdom on the same basis the last period being granted on 1st October 2008 valid until 2nd November 2013. The Appellant was granted leave to enter the United Kingdom on 11th September 2009 as the spouse of a work permit holder with leave valid until 2nd November 2013. Joanna was granted leave to enter the United Kingdom on 3rd February 2010 as the dependant child of a work permit holder with leave valid until 2nd November 2013. On 22nd October 2013 Mr Wingco applied for indefinite leave to remain in the United Kingdom as a work permit holder with the second and third Appellants as his dependants. The refusal of those applications led to these proceedings.

Immigration Rules Relevant to the Appellants

3. Paragraph 134(ii) of the Immigration Rules provides that indefinite leave to remain may be granted on application provided the applicant has met the requirements of paragraph 128(i) to (v) throughout their leave as a work permit holder. Paragraph 128 was deleted on 6th April 2012 by HC 1888 except insofar as it was relevant to paragraph 134. The provisions of paragraph 128 were that an applicant must be capable of undertaking the employment specified in the work permit (subparagraph iii) and must not intend to take employment except as specified in the work permit (iv). Paragraph 134(iv) states that indefinite leave to remain may be granted provided the applicant provides certification from the employer that the applicant is paid at or above the appropriate rate for the job as stated in the Codes of Practice in Appendix J.
4. Paragraph 134(5) requires an applicant to explain those absences covered by paragraph 128A of the Rules which in turn requires a continuous period of five years or four years lawfully in the United Kingdom meaning residence in the United Kingdom for an unbroken period with valid leave. The period shall not be considered to have been broken where the applicant has been absent from the United Kingdom for a period of 180 days or less in any of the five consecutive twelve calendar month periods or four consecutive twelve calendar month periods under the Highly Skilled Migrant Programme.

Explanation for Refusal

4. In refusing the applications the Respondent noted that Mr Wingco had been employed by Woodside Care Home since 13th June 2012 although he had never been issued with a work permit allowing him to take employment with that company. He could therefore not satisfy the requirements of paragraph 128(i) to (v). He had failed to provide a certificate from his employers that he was paid at or above the appropriate rate contrary to paragraph 134(iv). There was an absence of the documentary evidence specified in paragraph 134-SD explaining the reasons for the Appellant's UK absences throughout the five year qualifying period as required by paragraph 134(5)
5. The applications from the Appellant and Joanna fell in line with that of Mr Wingco. The decisions did not breach Article 8 as the family could return to the Philippines together. Consideration was given to the Respondent's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 as Joanna was 17 when the applications were made although she was 18 by the date of decision.

The Hearing at First Instance

6. Mr Wingco was told by Woodside Care Home that they would deal with the transfer of the work permit so that the Appellant would be authorised to work for them. Unfortunately they did not do so and in consequence Mr Wingco took employment with Woodside Care Home that was not specified in his work permit. The Judge found that Mr Wingco should have been aware of the status of his work permit and could have made checks to ensure that the transfer did actually occur. In the end his immigration status was his responsibility. Instead of applying for indefinite leave to remain after living in the United Kingdom for five years he had applied to extend his leave to remain as a work permit holder. That was his decision. Whilst the Judge had sympathy for Mr Wingco the Judge was not satisfied that Mr Wingco met the requirements of paragraph 134(2) with reference to paragraph 128(iv).
7. However Mr Wingco had remained in the United Kingdom lawfully for a continuous period of ten years and had passed his Life in the United Kingdom Test. It was conceded by the Presenting Officer that Mr Wingco met all the requirements for a grant of indefinite leave to remain pursuant to paragraph 276B of the "ten year Rule". Judge Blum found the decision to remove Mr Wingco contrary to the Immigration Rules paragraph 276B and allowed Mr Wingco's appeal on that basis.
8. That left the appeals of the Appellant and Joanna. If Mr Wingco had succeeded under paragraph 134 there was provision for the appeals of his dependants to be granted in line with the main applicant. However

paragraph 276B contained no such provision and the issue fell therefore to be decided under Article 8. The Appellant could not meet the requirements of paragraph 276ADE as she was over the age of 25 and had two children and her other family in the Philippines and had therefore not lost ties with that country. Joanna similarly could not meet the requirements of paragraph 276ADE as she had only resided here for four years and nine months. She had not spent half her life in the United Kingdom nor had she lost her ties with the Philippines.

9. The Judge considered the Article 8 claim outside the Immigration Rules following the step-by-step approach required by the case of **Razgar [2004] UKHL 27**. At paragraph 28 he wrote:

“The ultimate question for me is whether the decision affecting the Appellants in circumstances where the family and private life of the Appellants cannot reasonably be expected to be enjoyed elsewhere taking full account of all considerations weighing in favour of the refusal, prejudices the family and private lives of the Appellants in a manner sufficiently serious to amount to a breach the fundamental right protected by Article 8. In light of recent case law I take this to mean that there must be unjustifiably harsh consequences to their private and family lives in order for the Appellants to succeed under Article 8.”

10. The Judge was satisfied that all three Appellants shared a family life together. Although Joanna was now 18 she was still living with her parents. She had been accepted at university and her place deferred for a year. Both she and the Appellant had established a private life in the United Kingdom, the Appellant had been lawfully employed for five years Joanna had established friendships and achieved success at school.
11. There did not appear to be any reason why the Appellants including Mr Wingco could not all relocate back to the Philippines. Mr Wingco had been living lawfully in the United Kingdom for ten years and was now eligible for a grant of indefinite leave to remain but his links to this country were primarily in the form of his employment. There was no other evidence of the links or bonds he had established here. The family lived most of their lives in the Philippines, spoke the language, still owned property and land there and still had immediate family in that country. There was no reason why Mr Wingco could not find alternative employment in the Philippines.
12. Joanna had lived in the United Kingdom for nearly five years since she was almost 14 years old. She had become used to life in the United Kingdom and wished to study at an English university. While she could not study English law in the Philippines there was nothing to stop her from studying for some other degree or putting in an application to study in the United Kingdom as a Tier 4 (General) Student. She had spent the formative years of her life in the Philippines and could maintain contact with her friends in the UK through social media. If Mr Wingco chose to remain in the United Kingdom that would be his choice but there would be nothing to stop him

from returning with his wife and daughter to the Philippines should he wish to continue living with them. He had entered the United Kingdom in 2002 and was separated from the Appellant and Joanna for almost seven years although he did return to see them on holiday. The Judge found there would be no disproportionate interference with Article 8 rights and dismissed the Appellant and Joanna's appeals under the Immigration Rules and on human rights grounds.

The Onward Appeal

13. The Appellant and Joanna appealed against those decisions whilst requesting that the decision to allow Mr Wingco's appeal be preserved. Just as the Respondent had made clear that the Appellant and Joanna's applications fell to be refused in line with the Respondent's decision relating to Mr Wingco so the Appellant's appeal and that of Joanna's were linked to Mr Wingco and therefore stood or fell with Mr Wingco's appeal. The Judge should have had regard to paragraphs 198, 199 and 199A of the Immigration Rules which governed the requirements for settlement as a child of a work permit holder who has had leave to remain under paragraphs 128 and 134. However there was no mention of those paragraphs. Even the Respondent's own internal guidance to caseworkers referred to the need to consider paragraphs 198, 199 and 199A. In relation to the Appellant the grounds argued that paragraphs 196D and 196E governed the requirements for settlement as the spouse of a work permit holder who had leave to remain under in Mr Wingco's case paragraphs 128 and 134 but Judge Blum had omitted any reference to paragraphs 196D and E at all in his consideration. Even the Respondent's own internal guidance to caseworkers referred to the need to refer to paragraphs 196D and E.
14. The application for permission to appeal came on the papers before Upper Tribunal Judge Martin on 22nd December 2014. She found it arguable that the Judge had erred in allowing Mr Wingco's appeal but dismissing the Appellant and Joanna's appeals "under the incorrect Immigration Rule".
15. I pause to note here that paragraph 198 sets out the requirements to be met before leave to enter or remain can be granted to the child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128 to 193. The child may be given leave to enter or remain for a period of leave not in excess of that granted to the person with limited leave to enter or remain provided that the child is able to produce to the Immigration Officer on arrival a valid United Kingdom entry clearance for entry in this capacity. In the case of an application for limited leave to remain the child should not have been last granted entry clearance or leave as a visitor, temporary admission or temporary release and was able to satisfy the Respondent that each of the requirements of paragraph 197(i) to (vi) and (viii).
16. The difficulty with the grant of permission was that it overlooked the point made at paragraph 26 of the First-tier's decision. The Judge was well

aware that there were provisions under the Immigration Rules for the grant of indefinite leave to remain as dependants of those granted indefinite leave to remain under paragraph 134. That however was not the issue in the case because Mr Wingco could not succeed under paragraph 134 and therefore the Appellant and Joanna could not succeed under paragraphs 198 and following. If Mr Wingco had succeeded under paragraph 134 then those paragraphs 198 and following of the Immigration Rules would have been relevant. It was unfortunate therefore that the grant of permission misstated the possibility of an arguable error of law.

17. The Respondent replied to the grant of permission on 5th January 2015 stating it was fully open to the Judge to conclude that there was no breach of Article 8 in the decision to refuse the Appellant's and Joanna's appeals. What had appeared to escape the notice of both the Judge and the Presenting Officer was that Mr Wingco fell foul of the requirements of paragraph 276B(v) which provide that an applicant must not be in the United Kingdom in breach of immigration laws (apart from any period of overstaying for a period of 28 days or less). As Mr Wingco was working not in accordance with his work permit, he was therefore in breach of Immigration Rules and could not succeed under paragraph 276. The Respondent's response continued:

“Notwithstanding that the Respondent appears to have erroneously conceded the point and the Judge has similarly erred in accepting this concession it remains a material matter in the consideration of the Appellants' appeals under Article 8 that the first Appellant has only succeeded on appeal as the result of an error in law. The Judge dealt with the matters as raised before him. It was not for the Judge to descend into the arena and look for alternative means for the Appellant to succeed. The grant of ILR is a permission it does not compel a person to remain in the UK or render it disproportionate for them to live elsewhere. This is particularly pertinent where it does not appear that the decision was reached on the correct legal basis”.

The Hearing before Me

18. In consequence of the grant of permission the matter came before me to determine whether there was an error of law in the Judge's determination such that the decision fell to be set aside and remade. In submissions Counsel accepted that the ground of appeal (that the Judge had overlooked paragraphs 198 and following) could not succeed and indicated she did not wish to make submissions on that point. She was in some difficulties since although she had represented the Appellant at first instance she had not drafted the grounds of onward appeal.
19. The Judge had erred because he had failed to consider Section 117A and B of the Nationality, Immigration and Asylum Act 2002 which came into force on 28th July 2014. The two Appellants and Mr Wingco had a private and family life together in the United Kingdom. They worked and supported

the economy paying taxes. Their appeals should have been allowed under Article 8. Mr Wingco had asked the care home and the managers there, they had assured him that matters had been put in hand. It was therefore harsh not to let Mr Wingco's dependants have indefinite leave to remain. The Respondent had given Mr Wingco a work permit. Organising the work permit was done by the employer Mr Wingco had no hand in it.

20. In reply the Presenting Officer said that the purpose of the hearing was to consider whether there was a material error of law in the first instance decision. The Appellant was attempting to reargue the case. The Respondent had not lodged a cross-appeal against the decision to allow Mr Wingco's appeal. Judge Blum had accepted a concession made by the Presenting Officer during the case as if it was a matter of law on the ten year Rule. The Judge had taken into account the impact on Joanna's education although she had established her own form of private life in this country. Although it was accepted that the Mr Wingco had relied on his employer the Tribunal had also pointed out that Mr Wingco should have been aware of his status and what was happening to his work permit was his responsibility. The new provisions in the 2002 Act at Section 117A and B did not assist the Appellants in this case. There was a reference in the grounds to the fact that someone could be granted leave in line with someone granted leave to remain under a work permit. That was not the case here.
21. Finally in closing Counsel for the Appellants stated that Mr Wingco had been here for more than ten years and the Appellant and Joanna came to join him. Mr Wingco had a right to have a family unit and sending the Appellant and Joanna back to the Philippines meant that that family unit would be broken up and that would breach Article 8. Therefore the appeal should be allowed.

Findings

22. Given the Judge's findings under paragraph 134 in relation to the work permit that Mr Wingco had worked at the Woodside Care Home in circumstances where he had no permit to do so, Mr Wingco could not succeed under paragraph 276B as he was in breach of Immigration Rules. Nevertheless the Presenting Officer made a concession that Mr Wingco could succeed under the ten year Rule and the Judge accepted that concession and allowed Mr Wingco's appeal accordingly. The Respondent has not sought to cross-appeal the Judge's decision perhaps because it arose from a concession by the Presenting Officer (albeit one incorrect in law).
23. For the purposes of this appeal it matters not that Mr Wingco succeeded in his appeal under what was arguably an incorrect interpretation of the Immigration Rules. The situation could still have arisen that Mr Wingco was granted further leave. The Respondent could for example have exercised her discretion simply to grant Mr Wingco leave to remain regardless of the merits of his application and that decision would be unimpeachable.

24. The only significance therefore for this appeal is whether the fact that Mr Wingco now has leave to remain means that when carrying out the proportionality exercise under Article 8 there is a disproportionate interference with the family's established rights. There is clearly no error in the Judge's decision that Mr Wingco could not succeed under paragraph 134. Nor is there any error that the Appellant and Joanna could not succeed under the Rules as Mr Wingco's dependants. The grant of permission was in error. That strictly speaking would be the end of the matter but I permitted counsel for the Appellants to make submissions to me on whether the Judge erred in law in his treatment of Article 8.
25. The Judge found that Mr Wingco, his wife the Appellant and Joanna had a family life together and that is not disputed by the Respondent. Undoubtedly there would be interference in that family life by requiring the Appellant and Joanna to return to the Philippines since there could be no such requirement that Mr Wingco goes with them as he has leave to remain here. The decision to interfere with the family's life together is in accordance with the legitimate aim of immigration control because of the fact that Mr Wingco was in breach of his work permit by working for a company for which he was not authorised to work and that gave rise to the Respondent's decisions. The question is whether the interference potentially splitting the family is proportionate to the legitimate aim pursued.
26. The Judge carefully considered the matter. He was aware of the arguments regarding Joanna's education and the Appellant's work history. He was also aware on the other side of the balance the connections which both Appellants had to the Philippines and how they could relocate to their country of origin.
27. It is not clear whether the Judge had in mind that the Appellants could in any event return to Philippines and make an application from there for leave to enter the United Kingdom as the dependants of someone with indefinite leave to remain. However if such a route were to be taken then clearly the Appellants would need to show that other requirements such as financial matters could be satisfied.
28. Ultimately the question on proportionality under Article 8 was a matter for the Judge. He was aware that in carrying out the balancing act he had to take into account the fact that the Appellants could not succeed under the Immigration Rules and therefore there had to be compelling and compassionate circumstances such that they should be allowed outside the Rules. He referred at paragraph 28 (which I have quoted above) to the fact that there must be unjustifiably harsh consequences for the Appellants for them to succeed under Article 8. Whilst therefore he did not cite the extensive Article 8 case law on this point it is clear he was aware of the general thrust of the jurisprudence what the Appellants needed to demonstrate to be able to succeed outside the Rules.

29. As the Respondent points out the grant of leave to remain to Mr Wingco is not a requirement that he must reside in this country merely permission to do so if he so chooses. He had lived in this country for several years before the Appellants joined him. What was the obligation on the United Kingdom to promote family life in those circumstances? The Judge expressed the view at paragraph 31 that there was no reason why the Appellants could not all relocate back to the Philippines (to include Mr Wingco). In other words that family life could be developed there it did not have to be developed in the United Kingdom. It is correct that the Judge did not refer to the provisions in Section 117A to D which were in force by the time he heard the appeal but as was submitted to me those provisions did not assist the Appellants in this case.
30. Joanna was not a qualifying child. By the date the appeal was heard she was over 18 and had not lived in this country for seven years. Any private or family life established by the Appellant whilst her status was precarious would be afforded little weight in the balancing exercise in any event. The case was not without its difficulties but the Judge considered the circumstances of the case in some detail and gave cogent reasons for his findings. I consider there was no error of law in his decision to dismiss the appeals of the Appellant and Joanna.

Notice of Decision

The decision of the First-tier did not involve the making of an error of law and I uphold the decision to dismiss the Appellants' appeals.

Appeals dismissed.

No anonymity direction is made as there is no public policy reason for so doing.

Signed this 20th day of February 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT **FEE AWARD**

As the appeals of the Appellants were dismissed there can be no fee award for them (Judge Blum made a fee award for Mr Wingco).

Signed this 20th day of February 2015

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Deputy Upper Tribunal Judge Woodcraft