



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

Appeal Number: HU/04389/2017

THE IMMIGRATION ACTS

Heard at Newport

On 2 October 2018

**Decision & Reasons
Promulgated**

On 15 October 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

FATIMA [C]

and

ENTRY CLEARANCE OFFICER - MANILA

Appellant

Respondent

Representation:

For the Appellant: None

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the Philippines. She was born on 29 July 1976 and is 42 years old. In 2002, she married the sponsor, [EC], a British Citizen. He was born on 25 April 1937 and so is 81 years old.
2. The appellant and sponsor lived together in the Philippines between 2002 and 2012 when the sponsor returned to the UK for health reasons. He has very poor health. He lives in Clevedon and is supported by his two sons, [MC] and [SC].

3. In 2004, the appellant applied to join the sponsor as his spouse. Her application was, however, refused, and her subsequent appeal dismissed in July 2015.
4. On 15 December 2016, the appellant made a further application to enter as the sponsor's spouse. That application was, however, again refused by the ECO on 10 February 2017. The sole basis upon which the application was refused under the 'partner' provisions in Section EC-P of Appendix FM of the Immigration Rules (HC 395 as amended) was that the appellant had not passed the required English language test at A1 level of the Common European Framework of Reference for Languages (E-ECP.4.1(b)). That decision was upheld by the ECM on 21 August 2017. Both the ECO and ECM concluded that there were no "exceptional circumstances" to justify the grant of entry clearance under Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. The sponsor did not attend the hearing due to his health problems. His two sons, Mark and Simon did so and gave oral evidence before Judge Rolt. It was common ground before the judge that the appellant could not meet the requirements of the 'partner' provisions in Appendix FM because she had not passed the required English language test. The case, therefore, centred around whether the appeal should be allowed under Art 8 outside the Rules. Judge Rolt dismissed the appellant's appeal concluding that there was nothing "exceptional" to outweigh the public interest and so the decision was a proportionate interference with the appellant's family and private life. The judge's reasoning is at paras 14 - 22 of his determination as follows:

- "14. The history of the Appellant's claim is not in dispute. The Appellant and sponsor are married and lived together in the Philippines for 10 years. For health reasons the sponsor had to return to the UK. His health has continued to deteriorate. He cannot travel back to the Philippines due to his health problems. He is cared for by his sons and with the help of medical practitioners and social services. A care package is being put in place. It is hoped that he can continue to be accommodated at home but he might have to move to a care home. Help from his wife, if allowed to travel to the UK to join him would aide his care and possibly avoid a care home placement.
15. It is clear that the Immigration Rules are not met and I note that the Appellant is not taking any further steps to reapply for an English language test which is her only obstacle to coming to the UK.
16. I must also consider the appeal under Article 8. I take into account that Article 8 is a qualified right and does not give an unconditional entitlement for the Appellant and Mr [C] to choose where they might wish to live.
17. In reaching my decision in this appeal I have followed the judgement of Lord Bingham in Razgar v Secretary of State for the Home Department [2004] UKHL 27.

18. The sponsor and Appellant are married and lived together for several years. They would continue to do so if the Appellant was able to travel to the UK. The sponsor is in poor health and I accept that his care could be aided by the presence of the Appellant. However, he is clearly adequately cared for now by his sons and because of the excellent care services available to him. A care package has been applied for. He may have to be accommodated in a care home whether or not the Appellant is able to travel to the UK. The Appellant can continue to learn English and apply for the language test.
19. The Respondent's decision clearly interferes with the enjoyment to family life. However, I find that the interference is in pursuit of the legitimate aim sought to be achieved by the Respondent, namely the maintenance of an effective system of immigration control.
20. I find that the decision is proportionate when weighed against the public interest. I have in this regard taken into considerations section 117B of the Nationality and Asylum Act 2002.
21. I find that the Appellant's inability to pass the language test and seeming reluctance to continue to improve her English by taking lessons and applying for another test weighs against her in the public interest considerations that must be applied.
22. Whilst there are compassionate aspects I do not find anything exceptional such that the interference is outweighed by the public interest and therefore I must dismiss the appeal under Article 8."

The Appeal to the Upper Tribunal

6. The appellant appealed to the Upper Tribunal. On 27 February 2018, the First-tier Tribunal (Judge E M Simpson) granted the appellant permission to appeal. The judge's lengthy grant of permission can be summarised as follows: it was arguable that the judge's decision was irrational, having overemphasised the importance of the appellant complying with the relevant Rules and failing adequately to consider the sponsor's circumstances, in particular his deteriorating health.
7. The respondent did not file a rule 24 notice.

Discussion

8. As I have already noted, it was accepted before the judge that the appellant could not meet the requirements of the Rules because she had not passed the required English language test. Indeed, the evidence before the judge was that she had not taken any further steps to do so having previously been unsuccessful in seeking entry clearance. It was, however, accepted before the judge that the appellant met all the other requirements of the 'partner' provisions in Appendix FM, including the financial requirements.
9. Mr Howells, who represented the ECO, accepted that that was the position. Nevertheless, he submitted that the judge had been correct to take into account, in considering proportionality, that the appellant could not meet the requirements of the Rules which was a "weighty" but not

“determinative” factor. He relied upon the decision Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) for that submission. He submitted that the judge had properly applied the 5-stage test in R (Razgar) v SSHD [2004] UKHL 27 and had reached a decision open to him on the evidence that the public interest outweighed the competing factors relevant to the appellant and the sponsor.

10. Whilst I accept Mr Howells’ submission relying upon Mostafa, that the judge was entitled to take into account (indeed required to take into account) as an aspect of the public interest that the appellant could not meet the requirements of the Immigration Rules (see s.117B(1) and (2) of the Nationality, Immigration and Asylum Act 2002), I am, however, persuaded that the judge has failed properly to carry out the balancing exercise required under Art 8 in assessing the proportionality of the respondent’s decision not to grant the appellant entry clearance.
11. In approaching that question, the judge was required to decide whether there were any “compelling” circumstances such that the effect of the decision would result in “unjustifiably harsh consequences” for the appellant (and the sponsor) (see R (Agyarko and another) v SSHD [2017] UKSC 11 at [57]-[60]). In dismissing the appellant’s appeal, the judge made no specific reference, or self-direction, in those terms. Instead, he referred to there being nothing “exceptional” sufficient to outweigh the public interest (see para 22 of his determination). That raises, at least, the possibility that the judge failed properly to direct himself. But even if that was not a wrong self-direction, I am satisfied that the judge failed properly to consider the impact upon the sponsor of continued separation from the appellant, his spouse. There was no prospect, reasonably at least, of expecting the sponsor to live with the appellant in the Philippines. His health problems effectively prevent that. This was, therefore, a case where the decision has the foreseeable effect of separating the appellant from the sponsor.
12. The medical evidence before the judge was particularly telling. There was a letter from his GP, Dr McCloskey dated 21 November 2017 which stated that he suffered from “significant health issues”. These are stated to include “extensive osteoarthritis, previous myocardial infarction, ischemic cardiomyopathy, type 2 diabetes and emphysema”. The letter notes that he takes five different types of medication on a daily basis to manage his condition. The letter continues:

“we have significant concerns about his ailing health and he is certainly becoming very frail”.
13. The letter notes that:

“In addition to this gentleman’s physical health, there is a separation that he has had to endure from his wife which has caused a great deal of emotional distress”.
14. The letter then continues:

“it is also becoming apparent that he is needing more and more support, not only to help look after him physically but also help with regards to managing his medication regime”.

15. In addition, there was the evidence from the sponsor’s two sons. They help provide care and, at that time, there was an application seeking help and a care package from the Social Service which was pending.

16. It was not, in my judgement, a sufficient characterisation of the sponsor’s circumstances for the judge to state at para 18 that:

“he is clearly adequately cared for now by his sons and because of the excellent care services available to him.”

17. The support of a caring and loving spouse is, as a matter of common experience, an important part of the support that an elderly person would regard as significant in their day-to-day well-being. There is no doubt that the appellant’s sons provide excellent care for their father. Notwithstanding that, the support of a caring, loving spouse who is living with the individual adds to the overall bundle of care needed and, indeed perhaps expected, in later life.

18. In my judgment, the judge failed properly to have regard to the importance of the support that the appellant could afford her spouse, the sponsor if she came to live with him in the UK. They have now been married for 16 years and lived together for ten years in the Philippines. The sponsor’s health is deteriorating, and he is frail. He lives on his own albeit with support from his son and, at the present as [MC] told me, with the support of carers a few times a day.

19. In my judgment, therefore, on the evidence before him, the judge failed adequately to take into account the sponsor’s circumstances in reaching a finding on whether there were “compelling” circumstances such that there would be “unjustifiably harsh consequences” to the appellant and sponsor if she were not allowed to enter the UK. That was a material error of law and I set aside the judge’s decision.

20. Mr Howells indicated in his submissions that he was content for me to remake the decision on the basis of the evidence if I were to find a material error of law.

21. I apply the 5-stage test in R (Razgar) v SSHD.

22. Art 8.1 is engaged. There is plainly a significant interference with the family life of the appellant and sponsor.

23. Under Art 8.2, the decision is in accordance with the law and is for a legitimate aim. The central issue is that of proportionality.

24. The sponsor’s circumstances have not improved. I have an up-to-date letter from his GP dated 24 September 2018. [MC] also told me that the appellant’s English has improved. He has spoken to her many times on

the phone and he submitted a letter dated 27 September 2018 from a private tutor in the Philippines speaking to the appellant's improvement in her English communication skills. The fact remains, however, that the appellant cannot meet the requirements of the Rules because she has not passed the required English language test. I take that into account as an aspect of the public interest (see s.117B(1) and (2) of the NIA Act 2002).

25. This is not a case where the appellant and sponsor can be expected to live together in the Philippines. The medical evidence denies that possibility stating that his "complex health issues make it unable for him to travel to the Philippines to be with his wife". Their separation is, therefore, for the foreseeable future 'set in stone' unless and until the appellant passes the required English language test. Their marriage is a long one, namely some sixteen years and they lived together for ten of those years until 2012 in the Philippines when the sponsor's health caused him to return to the UK. Despite the fact that he is cared for by his two sons and has professional help, the respondent's decision denies him the support and comfort of his long-term spouse. That is, as I have already noted, a matter of some significance in depriving the sponsor (and of course the appellant) of the mutual support and care which, perhaps, only a spouse can provide emotionally (and otherwise) living with the sponsor. The GP's letter remarks upon the emotional impact upon the sponsor of the separation from the appellant. This is a case where, in the words of Lord Bingham in Huang v SSHD [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 considerations 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."


26. In my judgment, the decision to refuse the appellant entry clearance in this case does prejudice the family life of the appellant (and sponsor) in a manner "sufficiently serious" to breach Art 8. The circumstances of the sponsor are "compelling" in the sense that to deny the appellant entry clearance so as to live with the sponsor and provide emotional and other support to him given his deteriorating health and frailty amounts to "unjustifiably harsh consequences" on the appellant and sponsor.
27. Bearing fully in mind the public interest based upon the appellant's inability to satisfy all the requirements of the Immigration Rules (in fact solely on the basis that she has not passed the required English language test), I am satisfied that the public interest is outweighed by the appellant and sponsor's circumstances such that the refusal to grant the appellant entry clearance is a disproportionate interference with her and the sponsor's family and private life.

Decision

28. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of an error of law. I set that decision aside.

29. I remake the decision allowing the appellant's appeal under Art 8.

Signed



A Grubb
Judge of the Upper Tribunal

9 October 2018

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and I consider it appropriate to make a full fee award of any fee paid or payable in respect of the appellant's application.

Signed



A Grubb
Judge of the Upper Tribunal

9 October 2018