



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001745
First-tier Tribunal No: HU/07742/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Mary Cris Edmonson
(no anonymity order made)

Appellant

and

Entry Clearance Officer, Manila

Respondent

Representation:

For the Appellant: Mr A. Edmonson, Sponsor

For the Respondent: Mr A. Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 6 March 2023

DECISION AND REASONS

1. The Appellant is a national of the Philippines born on the 3rd June 1977. She seeks entry clearance to come to settle in the UK with her British husband, Mr Alan Edmondson.
2. Mr and Mrs Edmonson met in Hong Kong in February 2016. Mary was there working, and Alan was on holiday. Theirs was a whirlwind romance. In the months that followed that brief holiday Alan flew back to Hong Kong three times to be with her. In September 2016 Mary came to the UK and remained, in accordance with the terms of her visit visa, until February 2017. She returned to the Philippines and Alan then made numerous trips to see her there. After one of those trips the couple received the happy news that Mary was expecting and in November 2017 they welcomed their daughter into the world. Alan continued to make regular trips to the Philippines to be with his wife and daughter. Alan and Mary were married in January 2018 and it remains their intention to stay together.
3. In February 2020 Alan got one of the last flights out of the Philippines back to the UK before the world went into lockdown. He has not seen his wife or daughter

since. Once back in the UK he sought advice from an immigration law practitioner, or at least someone holding themselves out as such. He was assisted in completing the online application form and in providing the relevant documentation. His wife passed and obtained an English language test certificate, and he collated the documents he was told that he would need to prove his income. At that time Alan was employed as a refuse collector, but he was also in receipt of Industrial Injuries Disablement Allowance, following an accident he had at work when in the employ of BAE Systems in his home town of Barrow-in-Furness. His total annual earnings were in the region of £20,000.

4. On the 22nd September 2020 Mary and Alan were disappointed to learn that Mary's application had been refused. Although their daughter would be able to come to the UK – she has a British passport – her mother could not accompany her. She would therefore have to remain in the Philippines with her mum.
5. There were two reasons for refusal. The first related to the validity of the marriage, and that has now been resolved, by consent between the parties, in Mary's favour. The second related to what is referred to as the 'eligibility financial requirement', that is to say whether Alan's income was large enough to provide for his wife should she come to the UK. Notwithstanding the fact that Alan had sought professional legal advice to assist him in preparing the documents to support Mary's application, it turns out that the correct documents had not in fact been supplied in order to prove his income.
6. Mary appealed and on the 28th October 2021 the First-tier Tribunal (Judge Bristow) found as fact that at the date of the appeal before him, Alan was earning in excess of the amount required by the rules. That being the case, he reasoned, there could be no legitimate basis for continuing to refuse to grant Mary entry clearance, since she now met all of the requirements of the rules. Judge Bristow did not in those circumstances consider the position at the date that the application was considered by the ECO.
7. The Entry Clearance Officer appealed the decision to this Tribunal. On the 14th October 2022 the matter came before Upper Tribunal Judge Smith. For reasons that she explains in her decision of the 1st December 2022, Judge Smith found that Judge Bristow had erred in law when he allowed the appeal. Judge Bristow had found that as of the date of the hearing before him the rules were met, and that there was therefore nothing weighing in the ECO's side of the scales. As Judge Smith points out, however, this was not quite right. That is because the rules themselves, drafted by the Secretary of State but approved by parliament, contained requirements that had to be complied with *at the date of application*. A failure to do so could not therefore be remedied at a later date.
8. The matter therefore comes back before me for remaking. Two matters are in issue. The first is whether Mary can meet the requirements of the relevant rules, set out in Appendix FM and Appendix FM-SE. The second is whether, even if she cannot, the decision to refuse her entry clearance is a disproportionate interference with the Article 8 'family life' she shares with Alan. I deal with each issue in turn.

Financial Requirement

9. Ordinarily applicants for entry clearance under this route must be able to show, with reference to paragraph E-ECP.3.1 of Appendix FM, that they have a

household income of £18,600. This level of income must be demonstrated by 'specified evidence'.

10. There are exceptions in the rules for people who are in receipt of certain kinds of benefits. Since Alan is in receipt of Industrial Injuries Disablement Allowance, one of those exceptions applies to him:

E-ECP.3.3. The requirements to be met under this paragraph are-

(a) the applicant's partner must be receiving one or more of the following -

- (i) disability living allowance;
- (ii) severe disablement allowance;
- (iii) industrial injury disablement benefit;**
- (iv) attendance allowance;
- (v) carer's allowance;
- (vi) personal independence payment;
- (vii) Armed Forces Independence Payment or Guaranteed Income Payment under the Armed Forces Compensation Scheme;
- (viii) Constant Attendance Allowance, Mobility Supplement or War Disablement Pension under the War Pensions Scheme; or
- (ix) Police Injury Pension; and

(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds.

11. Proving that the family can "adequately" maintain and accommodate themselves is, in theory, a far less onerous task than having to meet the minimum income requirement of £18,600 per annum. We calculate "adequate" with reference to the income support rates.
12. I am not told what the income support rates (or universal credit equivalent) were at the date of application. That does not however matter, since two things are clear on the facts. The £36 per week Alan then received in industrial industry benefit was not in itself sufficient, but the £360 per week he claimed to receive as a refuse collector was.
13. Alan asserts that his combined income at the date of Mary's application was £20,592. I have no reason to doubt that, but the difficulty, as identified by Judge Smith, is that it is not enough that a decision maker is satisfied that the claimed earnings are genuine. The claimed earnings *must* be evidenced by production of the 'specified evidence' set out in Appendix FM-SE.

14. Paragraphs 12 and 12A of Appendix FM-SE read as follows (I have highlighted the relevant parts):

12. Where a person is in receipt of Carer's Allowance, Disability Living Allowance, Severe Disablement Allowance, **Industrial Injuries Disablement Benefit**, Attendance Allowance or Personal Independence Payment or Armed Forces Independence Payment or Guaranteed Income Payment under the Armed Forces Compensation Scheme or Constant Attendance Allowance, Mobility Supplement or War Disablement Pension under the War Pensions Scheme, or a Police Injury Pension, **all the following must be provided:**

(a) **Official documentation from the Department for Work and Pensions, Veterans Agency or Police Pension Authority confirming the current entitlement and the amount currently received.**

(b) **At least one personal bank statement in the 12-month period prior to the date of application showing payment of the amount of the benefit or allowance to which the person is currently entitled into their account.**

12A. Where the financial requirement the applicant must meet under Appendix FM relates to adequate maintenance, paragraphs 2 to 12 apply only to the extent and in the manner specified by this paragraph. Where such a financial requirement applies, the applicant must provide the following evidence:

(a) Where the current salaried employment in the UK of the applicant or their partner, parent, parent's partner or sponsor is relied upon:

(i) **A letter from the employer confirming the employment, the gross annual salary and the annual salary after income tax and National Insurance contributions have been paid, how long the employment has been held, and the type of employment (permanent, fixed-term contract or agency).**

(ii) **Payslips covering the period of 6 months prior to the date of application or such shorter period as the current employment has been held.**

(iii) **personal bank statement covering the same period as the payslips, showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.**

(b) Where statutory or contractual maternity, paternity, adoption or sick pay in the UK of the applicant or their partner, parent, parent's partner or sponsor are relied upon, paragraph 5(b)(i) and (c) or paragraph 6(b)(i) and (c) apply as appropriate.

(c) Where self-employment in the UK of the applicant or their partner, parent, parent's partner or sponsor, or income from employment and/or shares in a limited company based in the UK of a type to which paragraph 9 applies, is relied upon, paragraph 7 or 9 applies as appropriate.

(d) Where the non-employment income of the applicant or their partner, parent, parent's partner or sponsor is relied upon, paragraph 10 applies and paragraph 10(f) shall apply as if it referred to any UK welfare benefit or tax credit relied upon and to HMRC as well as Department for Work and Pensions or other official documentation.

(e) Where the cash savings of the applicant or their partner, parent, parent's partner or sponsor are relied upon, paragraphs 11 and 11A apply.

(f) The monthly housing and Council Tax costs for the accommodation in the UK in which the applicant (and any other family members who are or will be part of the same household) lives or will live if the application is granted.

...

15. It is not now in dispute that not all of the highlighted items were supplied with the application. It follows that not all of the specified evidence was supplied, and that the application, and therefore the appeal, fall to be dismissed under the rules.

Article 8

16. It is now accepted that there is a genuine family life at stake here. Having had the opportunity to hear from Alan myself I can say that if that matter had been in issue before me it is certainly one that I would have resolved in his favour. No one hearing his testimony would have had any serious doubts about how much he desperately misses his wife and daughter, and how much he wants to be reunited with them.
17. Although Alan, Mary, and so far as she is able their young daughter, maintain contact by daily telephone and video calls, this is no substitute for being together. I am satisfied that the decision to refuse entry clearance does represent a 'lack of respect for', or interference with, the Article 8 rights of these family members.
18. The decision of the ECO is in accordance with the law insofar as it is one that the ECO is empowered by statute to take.
19. The only outstanding issue is proportionality.
20. As I have said, I do not doubt in any way the strength of the family life here. Nor do I doubt how difficult it is for Alan and Mary to understand why she cannot come to the UK when Alan has consistently been earning well over the amount that he is required by the rules to provide for his family.
21. I do not have any specific evidence relating to Alan and Mary's daughter but I am quite prepared to accept, for the purpose of this decision, that the normal assumption applies and that it would be in her best interest to be growing up with both of her parents together. That is an important factor and it is not one that I underestimate. She is also a British citizen and entitled to the benefit of living in this country. That is also a matter that attracts some weight, although not of particular significance, given that she is also a national of the Philippines.

22. I understand that expecting Mary to make another application will lead to further delay in the reunification of this family, and will cost the family more of Alan's hard earned cash. Mary will be required to take another English language test because the one she has already passed is now out of date.
23. The rules are however there for a reason. The government introduced Appendix FM with a view to ensuring that people who settled in the UK with family members had the means to support themselves. It introduced Appendix FM-SE to ensure that there was uniformity in the way that decision makers assessed claimed incomes. Both of those parts of the rules have been upheld as lawful and proportionate by the Supreme Court: MM (Lebanon) and Ors [2017] UKSC 10. They are, ordinarily, where the balance is to be struck between the public interest and the rights of migrants seeking to establish a family life in the UK.
24. A case does not have to be 'exceptional' in the sense that it is unusual, to be allowed on Article 8 grounds outside of that scheme. It does however have to demonstrate that some particular feature, or a combination of features, showing the decision to be disproportionate, notwithstanding the failure under the rules. I have weighed here the toll that their continued separation is having on Alan and Mary, and the fact that this continued separation is no doubt contrary to the best interests of their daughter. Having done so I am unable, having regard to the relevant authorities on Article 8, to find that its consequences are 'unjustifiably harsh' for them. They need not be separated forever, or even for much longer, if Mary just makes another application, this time properly supported by all of the relevant documents, including those matters highlighted in bold text at my paragraph 14 above. Mary will also need to obtain a new English language certificate, and **carefully check Appendix FM-SE to ensure that all of the relevant documents are supplied**. The very real benefit of taking this route will be that Mary will be on a 5 year route to settlement as opposed to the 10 year route she would have been on had this appeal been allowed on human rights grounds.
25. I know that this decision is disappointing for this family, and I am sorry that the appellate process has taken as long as it has. They may however take some solace in that it has not entirely been a waste of time, given that the matters in issue between the parties have as a result been narrowed. In this regard a **copy of this decision should be submitted to the ECO with any future application that Mary makes**.

Notice of Decision

The appeal is dismissed on human rights grounds.

Gaenor Bruce
Judge of the Upper Tribunal
Immigration and Asylum Chamber
8th March 2023