Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00341/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 August 2014	**On 28 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

LAZARO REDENTOR CASAPAO ORTEGA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

The History of the Appeal

1. The Appellant Mr Lazaro Redentor Casapao Ortega, a citizen of the Philippines, appealed against the refusal of the Respondent to grant him entry clearance to the UK as the husband of his wife under the Immigration Rules and on Article 8 human rights grounds. His appeal was heard by Judge Sullivan sitting at Hatton Cross on 31 March 2014. Both parties were represented, the Appellant by Mr Richardson. In a

determination promulgated on 24 April 2014 the appeal was dismissed under the Immigration Rules and allowed on Article 8 human rights grounds.

2. In relation to Article 8, the Respondent sought permission to appeal. This was initially refused on 22 May 2014 by Judge Hemingway in the following terms:

> "1. The Appellant is a national of the Philippines. In a determination promulgated on 24th April 2014 the First-tier Tribunal (Judge R Sullivan) allowed his appeal against the respondent's decision of 3rd October 2012 refusing to grant him entry clearance to come to the UK as a spouse. The Judge found, as was accepted on behalf of the appellant, that the requirements of the Rules regarding maintenance were not met. However, the appeal succeeded under article 8 of the ECHR outside the Rules.
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> 2. The Respondent has applied for permission to appeal. The grounds of application are a little repetitive but, in essence, contend the Judge erred in failing to identify compelling circumstances such as to justify allowing the appeal outside the Rules and in failing to take into account the facility open to the Appellant of applying for entry clearance again in the future.
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> 3. The Judge, twice in the determination, refers to the case of **Gulshan 2013 UKUT 640 (IAC)** and the need for compelling circumstances. He then sets out the circumstances which, in his judgment, assist and do not assist the Appellant. It is clear, therefore, he found that the factors weighing in favour did amount to compelling circumstances. The Judge did not specifically refer to the possibility of a future application but noted the parties to the marriage had been apart for a number of years and that the spouse was only able to work part time given that she was tasked with looking after the Appellant's and her child. Thus, it did not appear there was any prospect of the financial requirements being met in the relatively near future in any event.
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> 4. The decision might, from one perspective, seem generous but that does not, of itself, indicate an arguable error of law. I conclude that the grounds fail to identify any such arguable error and amount to no more than a disagreement with the ultimate conclusion.
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> 5. Permission is refused."

3. On second application, permission to appeal was granted on 27 June 2014 by Upper Tribunal Judge Pitt in the following terms, which were subsequently supplemented by procedural directions:

> "1. The appellant is a citizen of the Philippines who appealed against the respondent's decision to refuse entry clearance as a spouse and parent under the Immigration Rules and under Article 8 of the ECHR.
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> 2. First-tier Tribunal (FTTJ) Sullivan allowed his appeal on Article 8 grounds.
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> 3. It is arguable that although the FTTJ refers to the need for compelling circumstances where the appellant could not meet the maintenance requirements of the Immigration Rules, the determination may be in error in failing to consider the possibility of a further entry clearance application and assessing the separation of the appellant and his daughter as 'compelling' in all the circumstances of this case."

4. The refusal and the subsequent grant of permission to appeal prove to summarise concisely the arguments addressed to me at the error of law hearing, which the Appellant attended. I have taken them into account, together with the Refusal Letter and the arguments for both parties reported by the judge at paragraphs 17 to 30 of the determination.

Determination

5. Permission was granted on the basis that the judge may have erred in assessing the separation of the Appellant and his daughter as compelling and in failing to consider the possibility of a further entry clearance application by the Appellant. I accordingly consider those issues. In the event of my deciding to re-determine the appeal, I heard broader submissions, which in the event I need not consider.

6. The judge considered the financial requirements of the Immigration Rules at paragraphs 24 (at which Mr Richardson appears to have accepted that the Immigration Rules could not for this reason be satisfied), 25 and 36 of the determination. From the evidence it is clear that a further application under the Immigration Rules could not succeed, at least until the Appellant was in a position to demonstrate twelve months' requisite income. As a statement of fact, the judge did not mention the possibility of a further entry clearance application. Even if this was an error of law, which is arguable, it was not material because a further application could not have succeeded.

7. The judge applied the correct legal test for considering an appeal under Article 8 outside the Immigration Rules (paragraph 34). He considered the issue of legitimate purpose (paragraph 35) and concluded that the refusal served the economic interests of the UK (paragraph 36). Turning to proportionality, he initially considered the best interests of a child aged about four who is a British subject and was at risk of being separated from

a father between whom the judge found the existence of a meaningful relationship (paragraph 37). He evaluated the weight to be given to the public interest (paragraph 38). He evaluated the Appellant's poor immigration history, which he weighed against the best interests of the child (paragraph 39). He noted that the Immigration Rules did not differentiate between deception practised recently and longer ago and concluded that since this was not adequately recognised in the Rules consideration under Article 8 was appropriate (paragraph 40). Taking into account various other considerations, including those advanced for the Respondent (paragraphs 41 to 45) he concluded the balancing exercise in the Appellant's favour (paragraph 46). In the course of this discussion, especially at paragraphs 37 and 39, he gave reasons which were properly open to him from the evidence for assessing the separation of the Appellant and his daughter as compelling.

8. I conclude that neither of the bases for the grant of permission has been established. I need not therefore consider the further submissions.

Decision

9. The original decision does not contain an error of law and is upheld.

Signed Dated: 27 August 2014

Deputy Upper Tribunal Judge J M Lewis