



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

Appeal Number: IA/33736/2014

THE IMMIGRATION ACTS

**Heard at: Columbus
Newport
On: 23 June 2015**

House, Decision & Reasons promulgated

On: 13 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

ANA YVETTE DE LA CRUZ ENRIQUEZ
(no anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms M Bayoumi, Counsel instructed by Hoole & Co

For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Sweeney in which he dismissed the appeal of the Appellant, a citizen of the Philippines, against the Secretary of State's decision to refuse to vary leave to remain on the basis of her family and private life in the United Kingdom.
2. The Appellant arrived in the United Kingdom on 23 November 2010 with leave to enter as a Tier 4 general student migrant valid until 23 March 2014. On 20 February 2014 the Appellant applied to vary her leave to remain on the basis of her private and family life as the spouse of Amir

Chovaty an Iranian national who had been granted refugee status in the United Kingdom. By notice dated 13 August 2014 accompanied by a reasons for refusal letter dated 12 August 2014 this application was refused. The Appellant appealed against this decision and this is the appeal which came before Judge Sweeney on 18 December 2014 and was dismissed. The Appellant applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Frankish on 17 March 2015 in the following terms

“The application for permission to appeal asserts that SS (Nigeria) (2013) EWCA Civ 550 was not followed in that interference with S8 8 rights should no be no more than required for the proper exercise of the state’s responsibilities and should be proportional; ignored the obstacles to relocating in Philippines; insufficient regard to Chikwamba (FC) v SSHD 2008 UKHL 40.

The sponsor suffered a psychotic breakdown on the initial refusal of his asylum application. His mental health has recovered with the support of the appellant and her church which they both attend. It is arguable that the proportionality assessment omits consideration of the fact that removal of the appellant would amount to the effective end of this marriage or the psychiatric impact of the appellant if he were in fact to attempt to settle in the Philippines with the appellant.”

3. At the hearing before me Ms Bayoumi appeared on behalf of the Appellant and Mr Richards represented the Respondent.

Background

4. The history of this application and appeal is detailed above. The facts, not challenged, are that the Appellant came to the United Kingdom as a student in 2010 and met the Sponsor in 2012. The Sponsor had arrived in the United Kingdom on 23 August 2007 and he was granted leave to remain as a refugee on 22 December 2011. The couple married on 11 January 2014 and the Respondent acknowledged in the refusal letter that this is a genuine and subsisting relationship. The Appellant’s application to remain on the basis of the marriage was refused because the Respondent was not satisfied that the Appellant met the financial requirements of the Immigration Rules or that there were insurmountable obstacles preventing the Appellant and the Sponsor continuing their family life outside the United Kingdom. The Respondent was not satisfied that there were any exceptional circumstances warranting consideration by the Secretary of State of a grant of leave to remain outside the requirements of the Immigration Rules by virtue of Article 8 of the European Convention.
5. In her appeal to the First-tier Tribunal the Appellant asserted that the Respondent’s decision was not in accordance with the law or the Immigration Rules, that an error had been made in calculating the Appellant’s income and that she met the financial requirements of the Rules and that discretion should have been exercised differently.

6. In a lengthy skeleton argument submitted for the First-tier Tribunal hearing by Ms Bayoumi the assertion that the decision was not in accordance with the law or the Immigration Rules was not pursued. It was not suggested that the Appellant met the financial requirements of the Rules and the Appellant's witness statement submitted for the First-tier Tribunal hearing confirmed that she did not. There was no suggestion in the skeleton argument that there were insurmountable obstacles in the way of the couple continuing their family life in the Philippines. It was asserted that the Respondent had not properly assessed the Appellant's circumstances under Article 8.
7. At the First-tier Tribunal hearing it was accepted by the Appellant's representative that she did not meet the financial requirements of the Immigration Rules and, in accordance with the skeleton argument the Judge was asked to consider the Appellant's appeal under Article 8 outside the Rules. There was no assertion either in the skeleton argument or in the submissions recorded that there were insurmountable obstacles to family life continuing in the Philippines such as would engage paragraph EX.1 of Appendix FM.
8. In his decision and reasons the Judge notes that submissions focussed on Article 8 but nevertheless considered whether the Appellant met the requirements of the Rules and found that she did not either in terms of the financial requirements or in accordance with paragraph EX.1 (paragraphs 48-52 of the decision). The Judge went on to find that the Respondent's decision was not a disproportionate interference in the Appellant's family and private life.
9. The grounds of appeal to the Upper Tribunal assert that the Judge's approach to proportionality was flawed.

Submissions

10. For the Appellant Ms Bayoumi referred to the grounds of appeal saying that the core of the issue was the Judge's approach to proportionality. Having made findings that the Sponsor suffered in re-establishing his life in the United Kingdom and the impact of the Appellant's removal on the Sponsor's well-being insufficient weight was attached to the evidence given on the impact of the Appellant's removal. It is all well and good to say the Appellant could return to the Philippines but he has not adequately assessed the impact of a temporary separation. Ms Bayoumi accepted that there was no medical evidence submitted. The Judge's analysis of proportionality at paragraph 70 is not sufficient. The Judge has not taken into account the positive factors outlined in section 117B. The couple both speak English and are financially independent. This is an error of law.
11. For the Respondent Mr Richards said that the Judge was required to consider matters by reference to Article 8. He has done all that is required of him. He has found that it is not unreasonable for the Sponsor to go to the Philippines. He has looked at the medical difficulties and given them

due weight. The Judge gives positive comments at paragraph 67 to the Sponsor's abilities. He has overcome difficulties previously. He is quite capable of going to live in the Philippines. The Judge has come to a conclusion that was open to him. So far as the positive factor in section 117B referred to by Ms Bayoumi is concerned it is not clear that the couple are self sufficient. They do not meet the financial requirements of the Immigration Rules. Section 117B does not presume to be exhaustive in any event.

12. I reserved my decision.

Error of law

13. The grounds of appeal to the Upper Tribunal taken together with the grant of permission and Ms Bayoumi's submissions are clear. It is asserted that the Judge's approach to proportionality was flawed so as to amount to a material error of law and indeed that in his proportionality assessment the Judge has failed to take into account matters that he is statutorily required to consider by virtue of section 117B.

14. The facts relevant to this appeal are detailed above. The Appellant is a Filipino national who at the time of the application under appeal had been in the United Kingdom for 4 years with limited leave to remain. The Sponsor is a refugee who has lived in the United Kingdom for 7 years. They married in the United Kingdom in January 2014. They live together and there is no doubt about the genuineness of their relationship. They do not meet the financial requirements of the Immigration Rules. It is accepted that they have established a family life together and that they have a private life in the United Kingdom and that the Respondent's decision is a potential interference in that family and private life of sufficient gravity to engage the Convention. The only issue is whether the decision is proportionate to the legitimate aim of effective immigration control.

15. The Judge deals with proportionality at paragraphs 62 to 71 of his decision. In doing so the Judge examines the issues in a demonstrably comprehensive way. He considers whether it would be unreasonable to expect the Sponsor to travel with the Appellant and finds that it would not. In doing so he takes into account the Sponsor's mental health noting in doing so that there is no supporting medical evidence, that the Sponsor is not taking any medication and has not done so since he got married and that he does not see the doctor on a regular basis. The Judge accepts that the Sponsor has had mental health issues in the past but also notes that the relationship with and stability brought by the Appellant has brought about a substantial improvement in the Sponsor's mental health. The Judge finds that it would be reasonable for the Sponsor to accompany the Appellant to the Philippines but if he chose not to do so that he has the support of his church community. In my judgement the assertion that the Judge failed to take into account or to take into account adequately the impact on the Sponsor's mental health of accompanying his wife to the Philippines or of being separated from her is not made out.

16. Ms Bayoumi's assertion in submissions that the Judge failed to take account of the positive factors in section 117B cannot succeed. Whilst the Judge does not refer to section 117B at all in his decision it is clear that he has conducted a thorough proportionality assessment. Had the Judge specifically considered section 117B he would no doubt have found that the Appellant speaks English. In the context of her failure to meet the financial requirements of the Immigration Rules a finding that she was financially independent may not however have been a foregone conclusion. The Judge would also have been bound to give little weight to the Appellant's private life as it was established at a time when her immigration status was precarious (see AM (section 117B) Malawi [2015] UKUT 260 (IAC)). The Judge found that if the Sponsor chose to go to the Philippines with the Appellant their family life would continue and that it was not unreasonable to expect him to do so.
17. In my judgement any error of law that may have arisen though the Judge's failure to specifically refer to section 117B was not material since his assessment of proportionality is comprehensive and could not have been materially affected by section 117B considerations. The Judge has considered the Appellant's circumstances, he has found after proper consideration of the Sponsor's mental health issues that it is not unreasonable to expect him to accompany the Appellant to the Philippines and he has reached the conclusion that the Respondent's decision is proportionate to the legitimate aim of immigration control. This is a fully reasoned conclusion that was patently open to the Judge to make. The grounds of appeal assert a material error of law but in reality only amount to a disagreement with the Judge's conclusion.

Summary

18. The decision of the First-tier Tribunal did not involve the making of a material error of law. This appeal is dismissed.

Signed:

Date:

**J F W Phillips
Deputy Judge of the Upper Tribunal**