IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10067/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
(Sitting at Taylor House)	
On 15 October 2015	**On 29 October 2015**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MRS TERESITA CANTERO JONES
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – MANILA

Respondent

Representation:
For the Appellant: Mr M Karnik
For the Respondent: Mr D Clarke

DECISION AND REASONS

1. The appellant is a citizen of the Philippines who was born on 11 November 1950. She applied for entry clearance as partner of her husband, the sponsor, who is a British citizen present and settled in the United Kingdom. The application was refused by a decision dated 28 July 2014. The appellant appealed that decision and the matter came before First-tier Tribunal Judge Somal. In a decision promulgated on 30 April 2015 the judge dismissed the appeal.

2. The appellant sought permission to appeal the decision to the Upper Tribunal and this was granted in a decision dated 28 July 2015. It was held to be arguable that "in carrying out the balancing exercise in terms of Article 8 the judge applied the "exceptional circumstances" test and not one of proportionality which could affect the way in which the relevant facts of the case could be considered (see **R (on the application of Ganesabalan) [2014] EWHC 2712 (Admin)** and **Izuazu v SSHD [2013] UKUT 00045 (IAC)**)."

3. The respondent filed a Rule 24 response to the effect that the First-tier Judge properly considered the claim and it was open to the judge to find that in all the circumstances of the case Article 8 does not confer a right of choice where private and family life are to be exercised. It was properly open to the judge to find that the refusal of entry clearance to the appellant is proportionate.

4. It is common ground that the appellant and sponsor were unable to meet the financial requirements of the Immigration Rules and thus Article 8 ECHR was the only provision that could come to the aid of the appellant if the appeal was to be allowed.

The Hearing Before Me

5. Adopting the grounds of appeal (that were not settled by him), Mr Karnik submitted that the judge erred in law in requiring the appellant to show exceptional circumstances for leave to be granted outside the Immigration Rules. An assessment of proportionality involves a balancing exercise weighing up the respective interests of the parties. If the balance favours an appellant, an appeal may be allowed. There is no requirement for an appellant to demonstrate such "exceptional circumstances". Mr Karnik further submitted that what had to be placed in the balance was also the private life of the sponsor. He is a British citizen and has therefore ties to the United Kingdom. For instance, this is a place where he cared for his late wife until her untimely death and he visits the area where her ashes were scattered. Furthermore, the reality is that there is plenty of money available to ensure that the appellant and sponsor would not be a drain on public funds. The sponsor owns his own house and has income and savings. Even though that is insufficient to enable the Immigration Rules to be met this all had to go into the article 8 balancing exercise.

6. Mr Clarke on behalf of the respondent argued that there was no error in the decision of the First-tier Judge and that the decision was properly balanced and one that was open to the judge in all the circumstances.

Decision

7. In paragraph 16 and the following paragraphs the judge sets out a self direction in relation to the law. In paragraph 20 she considered whether any interference in the private and family lives of the appellant and the sponsor would be proportionate to the legitimate aim which, in this case,

is that of immigration control. I see no error in what the judge sets out in paragraph 20 which includes that decisions taken pursuant to the lawful operation of immigration control would be proportionate in all save a small minority of exceptional cases identifiable only on a case by case basis.

8. The judge thereafter considered all the evidence in the round. The judge gave sufficient reasons why this is not a case that although falling outside the new Rules nevertheless in the particular circumstances would entail a breach of Article 8 rights if the application were refused. Although stating "I find that there are no exceptional circumstances such that leave should be granted outside the Immigration Rules" this cannot and does not amount to an error when read in context. The judge was in effect saying that for the reasons set out in her decision the decision of the Entry Clearance Officer to refuse entry was not a disproportionate one. The judge has weighed all the circumstances in the balance and came to the conclusion that she did for the reasons given. There is no error of law and, even more certainly, no material error.

9. I can well understand the frustration of the sponsor who has clearly been upset by the original decision and by the decision of the First-tier Judge and my own decision that was announced at the hearing. Nevertheless the unpalatable truth for him and the appellant is that the judge's decision stands and that decision is that the appeal is dismissed.

10. I was not addressed on the matter of anonymity but no anonymity direction has been made previously and the circumstances do not appear to warrant that one should be made now.

Signed Date

Upper Tribunal Judge Pinkerton