



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/20421/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court
On 6 January 2015

Decision Promulgated
On 20 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

ENTRY CLEARANCE OFFICER, BANGKOK

Appellant

and

THI PHUONG NGUYEN

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Mr R Bates (sponsor)

DECISION AND REASONS

1. On 26 July 2013, Ms Nguyen, who was born on 18 April 1985 and who is a citizen of Vietnam, applied for entry clearance to join her partner, Mr Roy Bates, a British citizen living in the UK. On 28 October 2013 that application was refused.

Error on a point of law

2. The Entry Clearance Officer (ECO) refused that application under the partner route of appendix FM to the immigration rules because he was not satisfied Ms Nguyen

met the financial requirements. When Ms Nguyen appealed that immigration decision she submitted evidence of her sponsor's financial circumstances and an Entry Clearance Manager (ECM) conceded that those requirements were in fact met at the date of decision. However, the ECM identified that she had not shown how she met the provisions of GEN.1.2 of appendix FM and therefore the decision to refuse was maintained.

3. In his determination, promulgated on 2 September 2014, First-tier Tribunal Judge Newberry allowed the appeal because he was satisfied the relationship between the Ms Nguyen and Mr Bates was genuine and subsisting. However, although at paragraph 7 of his determination he referred to the paragraph GEN.1.2, Judge Newberry did not make any finding as to how Ms Nguyen met any of its provisions. It is for this reason the ECO appeals to the Upper Tribunal, saying it contains an error on a point of law and requesting the decision is set aside and remade to dismiss the appeal against the immigration decision of 28 October 2013.
4. Having considered the grounds of appeal and after hearing from both Mr Mills and Mr Bates, I am satisfied that the First-tier Tribunal's determination contains an error on a point of law because Judge Newberry failed to make a finding as to how Ms Nguyen met the provisions of paragraph GEN.1.2 of appendix FM. Furthermore, I find that this failure is material to the outcome because if she did not meet any of the provisions of GEN.1.2 then she could not benefit from the partner route of appendix FM.
5. For these reasons, therefore, I find that the determination not only contains a legal error but that error is such that the decision must be set aside and remade.

Remaking the decision

6. The issue is whether Ms Nguyen can meet any of the requirements of paragraph GEN.1.2. At the date of decision, the provisions of GEN.1.2 were:

Definitions

GEN.1.2. For the purposes of this Appendix "partner" means -

- (i) the applicant's spouse;
- (ii) the applicant's civil partner;
- (iii) the applicant's fiancé(e) or proposed civil partner; or
- (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application,

unless the context otherwise requires

7. I take each provision in turn.

Spouse

8. Ms Nguyen is not married to the sponsor and therefore cannot benefit from the first provision.

Civil partner

9. Nor is Ms Nguyen in a civil partnership and therefore cannot benefit from the second provision.

Fiancée

10. Mr Bates told me at the hearing that he proposed to Ms Nguyen in February 2013 and therefore at the date of decision she was his fiancée. However, neither he nor Ms Nguyen wanted to plan their wedding before Ms Nguyen had a chance to decide if she wanted to live in the UK. At the date of decision, although the couple intended to marry at some time in the future, they did not know whether they would marry in the UK.

11. Mr Bates also advised me that the couple did not want to be forced to marry within six months of Ms Nguyen being granted entry clearance. They both felt this would put undue pressure on them and neither wanted to feel they were being forced to marry to sort out Ms Nguyen's immigration status. Mr Bates did not think they would have been in a position to arrange their marriage within six months in any event.

12. Mr Mills did not dispute anything Mr Bates told me. I am satisfied that Mr Bates has been honest about his relationship with Ms Nguyen and their intentions regarding marriage. The question, however, is whether Ms Nguyen could be regarded as a fiancée for the purposes of appendix FM to the immigration rules.

13. I have had regard to the provisions of the partner route and am aware that paragraph E-ECP.2.8 contains the following requirement:

E-ECP.2.8. If the applicant is a fiancé(e) or proposed civil partner they must be seeking entry to the UK to enable their marriage or civil partnership to take place.

14. I have also considered to paragraph D-ECP:

Decisions on application for entry clearance as a partner

D-ECP.1.1. If the applicant meets the requirements for entry clearance as a partner the applicant will be granted entry clearance for an initial period not exceeding 33 months, and subject to a condition of no recourse to public funds; or, where the applicant is a fiancé(e) or proposed civil partner, the applicant will be granted entry clearance for a period not exceeding 6 months, and subject to a condition of no recourse to public funds and a prohibition on employment.

15. The provisions of these two paragraphs assist me in deciding whether Ms Nguyen could be a fiancée for the purposes of appendix FM. The evidence is that Ms Nguyen

was not seeking to enter the UK to enable her marriage to take place or that she intended to marry within six months of entry clearance being granted. This does not mean I do not accept that Mr Bates and Ms Nguyen are engaged. It simply means that Ms Nguyen cannot be regarded as a fiancée for the purposes of appendix FM.

Unmarried partner

16. I am aware that in her application form Ms Nguyen answered the question, "61. On what basis are you going to the UK?" by stating "As the unmarried or same sex partner of someone settled or going to settle in the UK."
17. It is clear that Ms Nguyen could not meet the criteria set out in GEN.1.2(iv) because at the date of application Ms Nguyen and Mr Bates had known each other for less than 12 months and had spent only nine days or so together. Little had changed by the date of decision which is the date at which I have to consider whether the requirements of the immigration rules were met. It is evident from the facts that the requirements of GEN.1.2(iv) were not met.
18. For the sake of clarity, nothing I have said should be taken to suggest that the relationship between Ms Nguyen and Mr Bates is anything but genuine and subsisting. That finding was made by Judge Newberry and is not challenged so is preserved. It is unsurprising that it is unchallenged given the vast evidence of continued contact between the couple. However, that finding is not enough to satisfy any of the provisions of GEN.1.2.
19. As Ms Nguyen has not shown that she met the requirements of GEN.1.2, the appeal on the grounds that the immigration decision was not in accordance with the immigration rules must fail.

Human rights

20. Before concluding this decision I bear in mind that Ms Nguyen has no legal representative and I cannot expect Mr Bates to have knowledge of the complexities of immigration law or of any rights under Article 8 of the human rights convention. Because the relationship between Ms Nguyen and Mr Bates is not disputed, I have considered their private and family life rights of my own volition.
21. I remind myself that the relevant date remains the date of decision and that if Ms Nguyen can show that it was more likely than not that she had established family life with Mr Bates at that date, then it was for the ECO to show that it was more likely than not that his decision was proportionate. To consider their rights I have regard to the step by step approach suggested by the House of Lords in Razgar.
22. As I have indicated, there is no dispute that the couple are in a genuine relationship or that the immigration decision prevents them living together in the UK. For these reasons I am satisfied that Article 8(1) is engaged.

23. The evidence shows that the couple have been able to maintain their relationship at a distance without any significant adverse consequences. There is nothing to indicate that they could not marry overseas or plan to marry in the UK in accordance with the requirements of the immigration rules. Their desire not to do so is a matter of choices they have made.
24. It is in the public interest that effective immigration control is maintained and that includes an expectation that a person will comply with the immigration rules. This is not only set out in s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended) but has also been confirmed by the Grand Chamber of the European Court of Human Rights in its judgment, Jeunesse v the Netherlands (appl no 12738/10, 3 Oct 2014).
25. The evidence indicates that the ECO's decision is compatible with the provisions of Article 8 of the human rights convention because there is no compelling circumstance that would suggest departure from the usual provisions of immigration control.
26. Having considered all relevant factors, I am satisfied that the appeal could not succeed on the grounds that the immigration decision was not compatible with the human rights convention.

Conclusion

27. As Ms Nguyen does not succeed on any grounds, I must remake the decision in relation to the initial appeal, to say that appeal is dismissed. In other words, Ms Nguyen's original appeal fails.

Decision

The Entry Clearance Officer's appeal to the Upper Tribunal is allowed because the determination of First-tier Tribunal Judge Newberry contains an error on a point of law and is set aside.

I remake the decision and dismiss Ms Nguyen's appeal against the immigration decision of 28 October 2013 refusing her entry clearance under the partner route of appendix FM to the immigration rules.

Signed

Date **9 January 2015**

Deputy Judge of the Upper Tribunal