Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35673/2014

THE IMMIGRATION ACTS

Heard at North Shields **Determination Promulgated**
On 8 January 2016 **On 22 January 2016**
Prepared on 11 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

M. S.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Pickering, Counsel, instructed by David Gray Solicitors
For the Respondent: Mr Kingham, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, born 5 February 1974, is a citizen of the Philippines.

2. The Appellant met her husband, a British citizen, whilst working in Oman in 2000. They married on 8 February 2003, and they lived thereafter together in Oman as husband and wife.

3. In February 2010 whilst on holiday in the UK, the Appellant's husband was diagnosed with an aggressive brain tumour following a hospital referral that had been suggested by his optician during a routine

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eye test. At the time he was not prepared to accept the diagnosis of cancer, or the recommended treatment of brain surgery, and instead he returned to Oman with the Appellant.

4. In July 2010 the Appellant's husband's condition deteriorated suddenly, and significantly, causing him to then accept both the diagnosis and the need for the recommended surgery. He expressed the desire to return to the UK immediately and seek treatment, and his employers were prepared to finance that. Accordingly he returned to the UK. The Appellant accompanied him using a visitor's visa to do so, issued on 4 August 2010, so that she had leave to enter until 3 February 2011.

5. Before the expiry of her leave the Appellant applied for, and was granted, a period of leave to remain on discretionary grounds to care for her husband. The period granted was six months. The Appellant was legally advised that the period of this grant was unlawfully too short, and thus she challenged the length of the grant, as a failure to grant a period of three years leave. She did so by way of judicial review on the basis that the Respondent had not followed published policy.

6. The application she had made for leave on 28 January 2011 [ApB p40] had noted the circumstances in which the Appellant had found herself in July 2010, and the advice she had received from the BHC that it was only if she applied for a visitor's visa that she could receive an immediate grant of entry clearance. In the light of this, and the application for judicial review, the Respondent reviewed her decision, and ultimately the judicial review proceedings were compromised upon a discretionary grant of leave until 30 June 2014.

7. Notwithstanding his surgery, and his ongoing treatment, on 8 November 2012 the Appellant's husband died.

8. On 19 June 2014 the Appellant applied for a further grant of discretionary leave to remain. This application was refused on 28 August 2014, when the Respondent also made a removal decision in relation to her by reference to s47. It was against these decisions that the Appellant appealed to the First Tier Tribunal. Her appeal was heard and dismissed by Judge Buchanan in a decision promulgated on 2 March 2015.

9. The Appellant sought permission to appeal to the Upper Tribunal. Permission was refused by the First Tier Tribunal by way of decision of Judge Nicholson of 5 May 2015. The application for permission to appeal was then renewed by the Appellant to the Upper Tribunal on the same grounds. Permission was granted by Upper Tribunal Judge Ward on 10 July 2015 on only the second ground, which asserted that the Judge had adopted a flawed approach to the assessment of the proportionality of the removal decision when considering the Article 8 appeal.

10. The Respondent served a Rule 24 response to the grounds of appeal dated 13 August 2015 in which she asserted that there was no material error of law because the Appellant could not meet the requirements of the Immigration Rules for a grant of leave to remain as a

bereaved spouse. She asserted that it would only be if compassionate circumstances arose that s117A-D should be considered, and that she could not meet all of the requirements of that section. Finally it was said that it was for the Appellant to show what family/private life she had in the UK and the effect her removal would have upon it.

11. Neither party has applied for permission to rely upon further evidence pursuant to Rule 15(2A) of the Upper Tribunal Procedure Rules 2008.

12. Thus the matter comes before me.

Error of Law?

13. It was not disputed before the Judge that the Appellant most recently entered the UK as a visitor, and, that she was not in possession of leave to remain as a spouse when she made her June 2014 application. Thus it was not disputed on the Appellant's behalf that when she applied for a leave to remain in June 2014 she could not meet the requirements of the Immigration Rules (as they then were) for a grant of ILR as a bereaved spouse; paragraph 287(b)(i).

14. On the other hand it was not disputed by the Respondent either in the course of her decision of 28 August 2014, or subsequently during the course of the appeal, that the Appellant met all of the other requirements of paragraph 287(b), and that it was the lack of entry clearance for settlement as a spouse, or subsequent grant of leave as such, (the requirement of paragraph 287(b)(i)) that was the sole reason for the refusal to grant ILR [8.1].

15. The Judge took the view that the Appellant's circumstances were not exceptional because the Immigration Rules provided a means by which a bereaved spouse could be granted ILR, and that this was simply a case of the Appellant failing to meet the requirements. Whilst that analysis is undoubtedly correct up to a point, it fails in my judgement to address the circumstances in which the Appellant had found herself in late July 2010, and thus there is a failure to assess whether they amounted to exceptional compassionate circumstances so that it was disproportionate for the Respondent either to refuse to grant ILR, or to seek to remove the Appellant.

16. The Appellant's unchallenged evidence was that she was advised in July 2010 that time for her husband's brain surgery and cancer treatment was critical, and that she did not have the time to make an application for, and then await a decision upon, a spouse settlement visa. Moreover her evidence as to the advice that she received from the British High Commission, that a spouse settlement visa application would take too long to process and that she should instead make a visitor visa application which could be processed immediately, was not challenged. Indeed the Respondent's own contemporary file records corroborated it, as the Judge noted [6.1-6.5]. Thus the record of her application on 3 August 2010 is

endorsed with the ECO's note that she is accompanying her spouse to the UK for emergency surgery funded by his employer [ApB p22].

17. Before the Judge the Respondent had also accepted that in January 2011 when the Appellant applied for a variation of her leave, her intention was to seek leave to allow her to settle in the UK as the spouse of a British citizen [8]. At that point his treatment continued.

18. Internal file records show that in response to the Appellant's January 2011 application, the Respondent recognised that although surgery had removed the tumour on 9 August 2010 from her husband's brain, and that he was receiving radical radiotherapy and chemotherapy, the prognosis was that his cancer would prove terminal. The caseworker noted his view that it would be unfair in those circumstances to ask the Appellant to make an entry clearance application for settlement as a spouse from abroad. His decision was to recommend the grant of a period of discretionary leave instead [ApB p28], which resulted in the grant of three months leave.

19. That recommendation was reviewed in the light of the Appellant's challenge to the length of the period of the discretionary grant of leave in March 2011, when a different caseworker also took account of the fact that the couple had been living abroad in a genuine subsisting marriage for over 8 years, and recommended in all of the circumstances the Appellant be granted ILR, notwithstanding her most recent entry as a visitor [ApB p30].

20. The recommendation to grant ILR was not followed by the more senior caseworker to whom it was made. On 31 March 2011 his file note simply makes reference to the failure to enter the UK as a spouse, rather than as a visitor [ApB p31], and thus he appears to have maintained the recommendation to grant only a period of three months DLR.

21. A further review by yet another caseworker on 22 June 2011 prompted the decision to grant a period of three years discretionary leave to remain, and noted the failure to follow published guidance in relation to the length of the period of DLR granted, even though the recommendation of this review was not acted upon by the Respondent by way of a formal decision until June 2011 [ApB p33-5].

22. Before me Mr Kingham was prepared to go so far as to accept both that there was no evidence to suggest;

    i) that if the Appellant had made a spouse settlement application from Oman in July 2010 that she would have failed to meet the requirements of paragraph 281, and,

    ii) that if she had applied to vary her leave for settlement as a spouse in February 2011, that she would have failed to meet the requirements of paragraphs 286 and 284.

23. Mr Kingham also accepted that the decision records that these same concessions were also made to the Judge. The Judge treated them as being no more than the basis for a "near miss" argument (of the sort dealt

with in Miah [2012] EWCA Civ 261), but I am not satisfied that this was the correct approach. Indeed that too is conceded before me. This was not a points based system appeal, with a failure to meet one of the evidential stipulations of Appendix A, C, or FM-SE, said to be trivial or immaterial. The argument pursued is much more easily recognised as a “but for” argument. The Appellant accepts that she knew in July 2010 that she could be travelling to the UK for an extended period well in excess of six months, whilst her husband undertook treatment. It was not in dispute before the Judge that but for the urgency of the situation that the Appellant found herself in July 2010 a successful spouse settlement application could, and would, have then been made. If that application had been successfully made, then after the death of her husband on 8 November 2012 the Appellant would have been entitled to ILR. She would also ultimately have been in that same position, if it were not for the failure to advise her to formally make an application to vary her leave as a visitor under paragraph 286, as opposed to the application for discretionary leave that was made. She would also ultimately have been in that same position, if it were not for the failure of the Respondent in January 2011 to consider her application for an extension of her leave by reference to the requirements of paragraphs 284 and 286 rather than simply as an application for a period of discretionary leave. As it happens, one of the caseworkers who subsequently reviewed this application did precisely that, but his recommendation was not acted upon, and the decision not to act upon his recommendation was itself subsequently accepted by the Respondent to be wrongful.

24. The Judge accepted, and the Respondent has not sought to cross-appeal this point, that the Appellant had established both a “family life”, and a “private life” in the UK, which was centred upon her husband’s extended family. He was satisfied upon the unchallenged evidence before him that the necessary threshold of emotional dependency upon the adults relied upon, was passed. Thus he found Article 8 engaged in both respects, although there is no obvious consideration within the decision of the effect of the Appellant’s proposed removal upon the British citizens with whom he had found that “family life” existed, and in this respect too he erred.

25. There was of course no error in the Judge’s acceptance of Counsel’s concession that the Appellant did not meet the requirements of paragraph 287(b)(i); she did not.

26. There was however in my judgement a further error of law in the Judge’s approach to the assessment of the proportionality of the decision to remove the Appellant from the UK. That error was to fail to identify what (if any) public interest there was upon these facts either in the decision to refuse to grant ILR, or, to remove her from the UK. There is of course a public interest in the maintenance of effective immigration controls, as s117A reiterates, but as Mr Kingham accepted before me it is extremely hard to see how that public interest is advanced upon these facts by either decision.

27. In the circumstances I am satisfied that I should set aside the decision upon the Article 8 appeal and remake it.

28. My starting point must be the Appellant's circumstances in July 2010, which as set out above, I am satisfied amounted to exceptional and compelling compassionate circumstances. Realistically she then had no option but to enter the UK as a visitor, as indeed the Respondent has subsequently recognised. Were it not for that, as the Respondent also accepts, she would by the date of the decision under appeal have qualified for a grant of ILR as a bereaved spouse.

29. As the Judge accepted, she had by the date of decision, exceptionally, also established a "family life" with her husband's extended family as a result of her emotional dependency upon them. This then is a "family life" Article 8 appeal, by one who has always been present in the UK lawfully with the result that s117B (4-6) has no application.

30. Whilst the maintenance of effective immigration controls is in the public interest (s117B(1)) it is, as set out above, difficult to see how the Respondent's decisions advance that public interest. The Appellant is fluent in English, and is financially independent (s117B(2 & 3)). Whilst she can obtain no positive right to a grant of leave to remain as a result, these matters do diminish, and indeed appear to largely (if not entirely) extinguish the weight that could otherwise be given to them as public interest factors weighing against the Appellant; AM (s117B) Malawi [2015] UKUT 260 [18]. Since this is a "family life" as opposed to only a "private life" appeal the Appellant's precarious immigration status does not require the Tribunal to give diminished weight to it.

31. Having considered the guidance to be found in SS (Congo) [2015] EWCA Civ 387 I am satisfied, as set out above, that compelling compassionate circumstances exist in this case. When all the relevant matters are properly weighed, I am satisfied that the decision under appeal is readily seen to be disproportionate to the public interest in the maintenance of effective immigration controls. Thus I remake the decision so as to allow the Article 8 appeal.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 2 March 2015 did involve the making of an error of law in the dismissal of the Article 8 appeal that requires that decision to be set aside and remade.

I remake the decision so as to allow the appeal on Article 8 grounds.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to

proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes
Dated 11 January 2016