IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10489/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision and Reasons Promulgated**
On 30 November 2015	**On 5 January 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ENTRY CLEARANCE OFFICER

Appellant

and

JOYCE LUCENA SORRENTI

Respondent

Representation:
For the Appellant: Mr M Diwnyez, Home Office Presenting Officer
For the Respondent: No appearance and not represented

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Entry Clearance Officer. However, for convenience I refer to the parties as they were before the First-tier Tribunal. Thus, the appellant is a citizen of the Philippines born on 22 April 1963.

2. On 19 May 2014 she made an application for entry clearance as a partner under Appendix FM of the Immigration Rules. That application was refused in a decision dated 14 August 2014. The basis of the refusal was in terms of the financial requirements, accommodation and the English

language requirements of the Rules. However, the Entry Clearance Manager, on reviewing the decision, conceded the financial requirements but maintained the decision in terms of accommodation and the English language requirement.

3. The appeal came before First-tier Tribunal Judge M.M. Hutchinson at a hearing on 16 June 2015. She found in favour of the appellant in terms of accommodation but concluded that the appellant had still not met the requirements of the Rules in terms of English language under paragraph E-ECP.4.1. However, she allowed the appeal under Article 8 of the ECHR.

4. The respondent's grounds refer to the judge's justification for allowing the appeal in terms of the couple having a daughter, M, who is 15 years of age and who has been separated from the appellant for some time. It is argued that the judge had failed to consider that the partner and parent routes under Appendix FM deal fully with the appellant's circumstances, striking a balance between the right to family life and the public interest in immigration control. The judge had not identified circumstances not covered by the Rules to warrant consideration outside the Rules. Reference is made in the grounds to the decision in *MM v Secretary of State for the Home Department* [2014] EWCA Civ 985. The appellant could not meet the requirements of the Rules as a parent and it is argued that the First-tier Judge applied "a lower test" outside the Rules when considering Article 8.

5. At the hearing before me the sponsor, Mr Peter Sorrenti, the appellant's husband, did not attend. No explanation was given for his non-attendance and as far as I am aware there was no application for an adjournment on the basis of his inability to attend. I was satisfied that notice of the hearing before me had been served on the sponsor, as well as on the appellant.

6. An attempt was made by Tribunal staff to contact the sponsor by telephone. A person who identified herself as his sister was spoken to. She reported that Mr Sorrenti was not in the country, having gone to Cairo because, she said, the appellant is gravely ill. No further details were provided.

7. Given that there was no indication as to when the sponsor had left the country, and there being no request from him for the hearing to be adjourned, I decided to proceed with the hearing, being satisfied that it was in the interests of justice to do so.

8. In submissions Mr Diwnyez relied on the grounds of appeal to the Upper Tribunal. However, he was not able to assist in terms of what is referred to in the grounds as the judge's failure to take into account the 'parent route' for entry clearance.

My assessment

9. The appellant, although a citizen of the Philippines, lives in Egypt. She and the sponsor have a daughter, M, who was born on 16 March 2000.

10. The First-tier Judge heard evidence from the sponsor and from M. The only issue under the Rules that was not met, at least in terms of the application for entry clearance as a partner, was the English language requirement.

11. In considering Article 8 of the ECHR the judge said that she had considered whether there was anything not adequately considered within the Rules which could lead to a successful Article 8 claim. She noted in particular that the couple have a 15 year old daughter M who she said had now been separated from her mother for some time. The judge found that there was no adequate evidence that the ECO had considered the best interests of M. She did note however, that this being an entry clearance case there is no express duty to do so, albeit that it is accepted as best practice. She nevertheless concluded that the position of their child and the family life of the family as a whole had not adequately been considered.

12. Referring to *Razgar v Secretary of State for the Home Department* [2004] UKHL 27, she concluded that there was family life (between the appellant and her daughter and the sponsor) and that the respondent's decision interferes with that family life. In considering proportionality she referred to the best interests of M as a primary consideration, repeating that she had been separated from her mother for a considerable time. She concluded that regular visits are not possible given that M is in school in the UK. She referred to M's evidence that she keeps in touch with the appellant as much as possible by Skype but that she has now missed Christmas and her birthday. The judge found that it was clearly in M's best interests to have both her parents in her life present with her. She said that nevertheless, M's best interests are not an overriding consideration, only a primary one.

13. In assessing the evidence of the sponsor and M, she concluded that they were credible witnesses, noting that their credibility had not specifically been disputed. The sponsor's evidence was that he had been advised after the refusal that his wife should obtain the relevant English language certificate and that this should then be submitted. He said that he was not advised at any time that a fresh application would be necessary. She accepted his evidence that if he had been so advised he would have reapplied.

14. At [22] she said that it was regrettable that the appellant and the sponsor had not sought independent legal advice, observing that it was not clear to her why the appellant had not made an application under EU law as the family member of an EEA national exercising Treaty rights.

15. She considered that the relationship between the appellant and her husband had now been interrupted for approximately a year. She accepted the sponsor's evidence that the appellant and the sponsor were

not advised by the ECO that they would need to resubmit a fresh application, having been led to understand that submission of evidence of the relevant English language test would be sufficient (with any other requisite evidence). She found that this led directly to a further delay of six months after the English test was passed, as the appellant and her family waited for their appeal.

16. In that regard it is to be noted that at [16] the judge referred to evidence that the appellant has in fact now passed the "required English language exam", but only in January 2015. This, of course, postdated the decision which was on 14 August 2014. The judge concluded that she could not take that evidence into account because it was not evidence of the circumstances obtaining at the date of the decision.

17. Referring to the public interest considerations in section 117 of the Nationality, Immigration and Asylum Act 2002, she also referred to the public interest of those seeking to remain in the UK being able to speak English, and she noted that the appellant had now passed the English language test (about six months ago as at the date of the hearing before the First-tier Tribunal). She also took into account that financial independence was established.

18. At [27] she noted that the relationship between them had endured for many years, they having been married in the Philippines in July 2000. The appellant had previously visited the UK lawfully whilst the family were living abroad.

19. At [28], she stated that "all things being equal" it would normally be proportionate to expect an appellant to reapply for entry clearance with the relevant English language test results. However, taking into account the best interests of M, the significant delay to date and the interruption in that family life for approximately a year, as well as the fact that the appellant and the sponsor relied on incorrect or incomplete advice from the respondent, she concluded that the respondent's decision amounted to a disproportionate interference with the appellant's family life.

20. The respondent's grounds before the Upper Tribunal state that the appellant could not meet the requirements of the parent route "as the Appellant cannot meet E-ECPT 2.4 and 2.4. (sic)". E-ECPT.2.4. provides as follows:

> "(a) The applicant must provide evidence that they have either –
>
> (i) sole parental responsibility for the child; or
>
> (ii) access rights to the child; and
>
> (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing".

21. It may be that the grounds also intended to refer to E-ECPT.2.3. which provides that:

> "Either –
>
> (a) the applicant must have sole parental responsibility for the child; or
>
> (b) the parent or carer with whom the child normally lives must be –
>
> (i) a British citizen in the UK or settled in the UK;
>
> (ii) not the partner of the applicant; and
>
> (iii) the applicant must not be eligible to apply for entry clearance as a partner under this Appendix".

22. It appears therefore, that the respondent's contention is that the Rules cater for circumstances where an applicant seeks entry clearance to join a child in the UK. The appellant is not able to meet the requirements of those Rules as a parent, not least because there was no evidence before the First-tier Tribunal that she has sole responsibility for M, or access rights to her. That is aside from the fact that under E-ECPT.2.3 she is not able to establish that the sponsor, being the parent with whom M normally lives, is "not the partner of the applicant".

23. Furthermore, I do not consider that it could be said that the appellant is not "eligible" to apply for entry clearance as a partner, given that that is exactly what she has done, albeit that she failed with reference to the English language requirement.

24. Although not raised in the grounds of appeal to the Upper Tribunal, I consider that the judge was in error in taking into account under Article 8 the fact that the appellant had now passed the English language qualification. Just as under the Immigration Rules the judge was constrained to consider only evidence of the circumstances obtaining at the date of the decision to refuse entry clearance, the same applies in a consideration of Article 8 (see *AS (Somalia) & Another v Secretary of State for the Home Department* [2009] UKHL 32). However, it does not seem to me that that was a major feature of the judge's assessment of the proportionality issue, and alone it would not be a sufficient basis from which to conclude that the judge's decision should be set aside.

25. Assuming I have interpreted the respondent's grounds correctly, it is the case that the First-tier Judge did not take into account the Rules for entry clearance as a parent. However, those Rules are not directly on point so far as this appellant is concerned. The judge's consideration was the issue of family life amongst them all as a family unit. Whilst the Rules for entry clearance as a parent plainly cater for circumstances in which a parent is separated from a child, they are remote from the circumstances which the First-tier Judge had to consider.

26. The difficulty however, is that virtually everything that the judge took into account in the proportionality assessment arose post-decision, and was therefore not legitimately taken into account under Article 8, for the reasons given above with reference to *AS (Somalia)*. The judge was plainly heavily influenced by the fact that *after* the refusal the sponsor and the appellant were given certain advice by the ECO. The judge took into account the "significant delay to date" (see [28]); but again, that delay has arisen post-decision. The judge said at [23] that she accepted that the incorrect or lack of advice from the ECO led directly to a further delay of six months after the English language test was passed as the appellant and her family waited for the appeal.

27. Although the judge's taking into account of post-decision evidence is not a matter raised in the respondent's grounds, it is nevertheless not a matter that can be ignored in the assessment of whether the First-tier Judge erred in law in her conclusions with reference to Article 8.

28. I have considered whether it could be said that events post-decision were evidence of the circumstances "appertaining" at the time of the decision, for example in terms of whether the future course of events were foreseeable or in reasonable contemplation. However, it is impossible to conclude that they were. Furthermore, I do not consider that the judge was entitled to conclude that there were circumstances which merited consideration outside the Rules, because those circumstances arose post-decision.

29. Accordingly, I am satisfied that the First-tier Tribunal erred in law in taking into account evidence which postdated the decision, including the fact that the appellant had after the decision established that she met the English language requirement of the Rules. Accordingly, the decision of the First-tier Tribunal is set aside. I proceed to re-make the decision.

30. In doing so it is plainly illegitimate for me to take into account the matters that the judge found in favour of the appellant, in terms of delay and the passing of the English language qualification. As at the date of the decision it was the case that the appellant was not able to meet the English language requirement of the Rules.

31. The application for entry clearance was made on 19 May 2014 and was decided just short of three months later. Taking out of account the post-decision delay and the appellant's obtaining of the English language qualification, I cannot see that there are circumstances not catered for within the Rules meriting a consideration of Article 8 outside the Rules.

32. Even if I did consider that there was a case for consideration of Article 8, simply perhaps by reason of the fact that there is a child of the family who has been separated from her mother, I cannot see that the respondent's decision on the facts could be said to amount to a disproportionate interference with the family life between the appellant and her husband and daughter.

33. The best interests of the child as a primary consideration need to be taken into account. However, in my judgement those best interests are not significantly compromised by reason of the refusal of entry clearance to the appellant. It is evident that their daughter is cared for by the sponsor with whom she lives. She is able to maintain contact with the appellant, albeit that that contact is no substitute for the complete family life involved in the family living together.

34. Nevertheless, the appellant is able to make a further application for entry clearance.

Decision

35. The decision of the First-tier Tribunal involved the making of an error on a point of law. The First-tier Tribunal's decision is set aside. I re-make the decision, dismissing the appeal under the Immigration Rules and under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek 23/12/15