



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02874/2017

THE IMMIGRATION ACTS

Heard at Field House
On 22 May 2018

Decision & Reasons Promulgated
On 25 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

RODELIO MORELOS RODRIGUEZ
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Longhurst-Woods, Counsel

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Obhi dismissing his appeal against a decision of the respondent, dated 2 February 2017, refusing his application for leave to remain on the grounds of his family life. The appellant came to the UK in June 2008 in order to study but, after a number of attempts, was unable to gain an extension of his leave in order to continue his studies. However, he has married Mr Grant Taylor, a British citizen, and seeks leave to remain on article 8 grounds, arguing there are insurmountable obstacles to family life continuing in his home country, the Philippines.

2. Judge Obhi found the appellant could not meet the suitability requirements of Appendix FM of the rules, specifically paragraph S-LTR.1.6, upholding the conclusion of the respondent that the appellant had previously submitted an ETS English language certificate which he had obtained by deception. She then considered whether the appellant could succeed on article 8 grounds outside the rules. She applied the guidance given in *R (Agyarko) v SSHD* [2017] UKSC 11. She found there was not *“anything exceptional in this case which tips the balance in favour of allowing the appeal.”*
3. Permission to appeal was granted by the First-tier Tribunal on only two grounds: (1) whether the judge had misdirected herself in law by failing to consider the terms of paragraph LTR.1.6, which require more than a finding of dishonesty; and, (2) the judge had failed to take into account factors which were relevant to the issue of proportionality and, in particular, whether there were insurmountable obstacles to the continuation of family life outside the UK. Permission was refused to argue that the judge had erred in her finding that the appellant had used a proxy to take his English language test. Permission was also refused to argue that the judge had made material errors fact amounting to errors of law.
4. No rule 24 response has been filed by the respondent.
5. I heard submissions from the representatives as to whether the First-tier Tribunal Judge made an error of law in her decision.
6. Ms Longhurst-Woods argued that the reasons given by the respondent for relying on the Suitability grounds for refusal did not stand up to scrutiny. The appellant was fluent in English and had given evidence in English at two appeals. He had qualifications following courses taught in English. Nor had the respondent previously raised concerns about the validity of his English language certificate. She pointed out that, historically, the Immigration Rules had exempted deception from the reasons which would provide for mandatory refusal in marriage cases. In this case, the judge had not explored how paragraph S-LTR.1.6 was made out. This error had fed into the judge’s consideration of proportionality. She accepted the issue for the judge was whether there were insurmountable obstacles to family life being pursued in the Philippines. However, the judge had erred by not taking account of the following factors:
 - (1) the appellant’s husband was 50 years of age, born in the UK and had never been to the Philippines;
 - (2) the appellant’s husband did not speak Tagalog;
 - (3) the appellant’s husband had family, friends and a career in the UK;
 - (4) the appellant’s husband is purchasing a property;
 - (5) the appellant’s mother’s Alzheimer’s is a life-threatening and deteriorating condition as a result of which she is dependent on the appellant and his husband for emotional support;

- (6) the appellant's husband's mother has been dependent on her son for many years;
- (7) if the appellant's husband no longer visited his mother, she would suffer harm and become traumatised;
- (8) the appellant's husband has been given a lasting power of attorney over his mother's affairs;
- (9) the appellant's husband is the first point of contact with his mother's doctor;
- (10) the appellant and his husband are able to attend on the appellant's husband's mother within a short time to calm her down if the need arises;
- (11) the appellant's husband's retired uncle makes occasional visits and lives some distance away such that he is not able to devote the same time or energy to the care of his sister as the appellant's husband can;
- (12) same-sex marriage is not recognised in the Philippines; and
- (13) the right to marry is a fundamental human right.

7. Mr Melvin argued that neither ground had merit. The judge had made a clear finding on the deception point. It was only in exceptional circumstances that an article 8 claim could prosper if deception were found, as shown by recent cases on ETS, such as *R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis)* [2017] UKUT 00288 (IAC). The judge's findings were sufficient to deal with the point on suitability. On the question of the proportionality of removal, the judge had directed herself in terms of *Agyarko*. She accepted the relationship amounted to family life and she had considered the public interest. There was no error in the decision.
8. Ms Longhurst-Woods replied. She confirmed that she did not take issue with the judge's findings on the ETS point. However, her argument was that paragraph S-LTR.1.6 does not refer to deception. In relation to the failure of the judge to consider all the factors in favour of the appellant when undertaking the proportionality balancing exercise, her submission was very succinct: if the factors she had listed were not insurmountable obstacles, she did not know what would be.
9. Having carefully read the decision and considered the arguments put forward by the representatives I have concluded that the decision of the First-tier Tribunal does not contain any material errors of law such that it must be set aside.
10. The appeal is therefore dismissed. My reasons are as follows.
11. Paragraph S-LTR.1.1. states that an applicant will be refused limited leave to remain on the grounds of suitability if any of paragraphs S-LTR.1.2 to 1.8 apply. Paragraph S-LTR.1.6. states that the presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK. The refusal letter

shows that the respondent considered the submission of a TOEIC certificate which had been fraudulently obtained amounted to a flagrant disregard for the public interest according to which migrants are required to have a certain level of English language ability in order to facilitate social integration and cohesion, as well as to reduce the likelihood of them being a burden the taxpayer. This was considered sufficient to invoke the paragraph.

12. To the extent Ms Longhurst-Woods sought to argue that these reasons were not made out because it was plain the appellant did have a certain level of English language ability, her submissions missed the point. The suitability issue is that the appellant submitted a fraudulently obtained certificate as evidence of his English language ability. The importance of this is not the extent to which the certificate does or does not reflect his level of English but the flagrant disregard for the law shown by such conduct.
13. The fact that the word deception is not used in the rule is irrelevant. The use of the word 'conduct' would plainly embrace the use of deception in obtaining an English language certificate and submitting this to the Home Office as if it were genuine. Therefore, whilst it is fair to say the judge in this case did not set out reasons for finding that the paragraph was met beyond her finding that the respondent had established that deception had been used, I do not consider that she could have materially erred. The paragraph does not import a requirement for the exercise of discretion. It is a mandatory ground. I suspect the reason that the ETS cases to date appear to proceed on an understanding that an applicant cannot meet the requirements of Appendix FM if the respondent is able to establish that deception had been used is because in most cases there is no scope for argument that, under these circumstances, paragraph S-LTR.1.6 would not have been met.
14. The judge gave ample and lengthy reasons for her finding on the deception point. Those reasons applied directly to the question of suitability and I find she did not err by failing to give separate reasons for finding the requirements of the paragraph were met.
15. The correct approach to article 8 in cases of precarious family life has been the subject of definitive guidance in the judgment of Lord Reed in *Agyarko*. His Lordship explained that the test of insurmountable obstacles, as used in paragraph EX.1 of Appendix FM of the rules and later defined in paragraph EX.2, was taken from the jurisprudence of the ECtHR:

“42. In *Jeunesse*, the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under article 8 of the removal of non - settled migrants from a contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were “insurmountable obstacles” in the way of the family living in the country of origin of the non - national concerned, and whether there were factors of

immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (para 107).

43. It appears that the European court intends the words “insurmountable obstacles” to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non - national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to “un obstacle majeur” (*Sen v The Netherlands* (2003) 36 EHRR 7, para 40), or to “major impediments” (*Tuquabo - Tekle v The Netherlands* [2006] 1 FLR 798 , para 48), or to “the test of ‘insurmountable obstacles’ or ‘major impediments’” (*IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could “realistically” be expected to move (*Sezen v The Netherlands* (2006) 43 EHRR 30, para 47). “Insurmountable obstacles” is, however, the expression employed by the Grand Chamber; and the court’s application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant’s partner was in full - time employment in the Netherlands: see paras 117 and 119.”

16. In the recent case of *TZ (Pakistan) and PG (India) v SSHD* [2018] EWCA Civ 1109, the Senior President of Tribunals emphasised the importance of tribunals following the approach described by the Supreme Court. It was lawful for the respondent to set a requirement within the rules that there be insurmountable obstacles to the continuation of family life in the country of proposed return. The respondent’s policy that leave should only be granted outside the rules where exceptional circumstances apply was lawful. Where precariousness exists, it affects the weight to be attached to family life in the balancing exercise. That is because article 8 does not guarantee a right to choose one’s country of residence. The weight to be attached to family life will depend on what the outcome of immigration control would otherwise be. Section 117B of the 2002 act is also relevant. The consideration of article 8 outside the rules is a proportionality evaluation. Some factors, such as the public policy in immigration control, are heavily weighted. When a tribunal considers article 8 outside the rules, it will factor into its evaluation of whether there are exceptional circumstances both the findings of fact that have been made and the evaluation of whether or not there are insurmountable obstacles.
17. The appellant therefore faced an uphill struggle in establishing his article 8 claim having failed to show that he should be considered under the rules. The factors set out in section 117B would have to be applied. His deception would weigh heavily against him in the assessment of the public interest. Whether or not there were insurmountable obstacles to family life continuing in the Philippines was an important consideration but did not provide a complete answer to the proportionality balancing question.

18. I do agree with Ms Longhurst-Woods that some of the matters put forward by the appellant are powerful ones and it might have been open to a judge to allow the appeal. However, there was no misdirection in law in the judge's consideration of article 8 and it has not been suggested that her conclusions were irrational or not open to her on the evidence. She was sympathetic to the "huge emotional trauma" for the appellant's husband in seeing his mother suffer. She accepted the appellant supported his husband and, in turn, his husband's mother. She accepted that the appellant's husband's role had "the greatest impact", even though she was cared for by professional staff.
19. The judge was less impressed by the suggestion that family life could not be continued in the Philippines because homosexual relationships were forbidden or contrary to law. She found there may be an element of discrimination but that was, sadly, true of the UK as well. She noted the couple had not made proper enquiries about whether they could live in the Philippines. They had not made enquiries about suitable jobs in the Philippines. She concluded there was nothing exceptional in the case.
20. I find that conclusion was open to the judge on the evidence and there is no error of law.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and her decision dismissing the appeal is upheld.

No anonymity direction is made.

Signed

Dated 23 May 2018

Deputy Upper Tribunal Judge Froom