



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/29201/2014

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 15 June 2015**

**Determination issued  
on 23 June 2015**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS TANG CHENG YUEN**

Respondent

**Representation**

For the Appellant: Mrs M O'Brien, Senior Presenting Officer

For the Respondent: Mr V Sharma, of Matthew Cohen & Associates Limited,  
Solicitors

**DETERMINATION AND REASONS**

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.
2. The appellant is a citizen of Malaysia, born on 8 May 1988. In a "reasons for refusal letter" dated 9 July 2014 the respondent advised her that her application made on 26 April 2014 for leave to remain was refused in respect of family life under Article 8 in terms of Appendix FM of the Immigration Rules; in respect of private life under Article 8 and of paragraph 276ADE of the Rules; and that no exceptional circumstances

were found to warrant consideration of a grant of leave outside the requirements of the Rules.

3. The decision on exceptional circumstances is made under reference to the appellant suffering from epilepsy, the medication to control which is also available in Malaysia. The point was not addressed in the Upper Tribunal nor as far as I can see in the First-tier Tribunal, but this part of the decision may reflect a misunderstanding. It is not the appellant but her husband who suffers from epilepsy.
4. The appellant appealed to the First-tier Tribunal. Judge D'Ambrosio allowed her appeal by determination promulgated on 27 October 2014.
5. In her grounds of appeal to the First-tier Tribunal the appellant said at ground 2 that her case should succeed under paragraph EX of Appendix FM, based on insurmountable obstacles to family life with her husband continuing outside the UK, a criterion not to be interpreted literally. Ground 3 maintained that even if the case failed under the Rules, then based on circumstances such as her husband's epilepsy, his need for support of family members, and the appellant and her husband living with her immediate family members who had acquired UK citizenship, the interference would be disproportionate.
6. (The papers on file do not make made it clear whether or when the appellant's relatives moved from indefinite leave to remain to citizenship status, but the distinction is not material.)
7. After a thorough discussion of the circumstances the determination finds that although the appellant and her husband may experience some degree of hardship and difficulty in leaving the UK for Malaysia, that does not amount to insurmountable obstacles. The appeal was therefore not allowed under reference to paragraph EX.
8. The Judge found a good arguable case to determine outside the Rules. He gave his reasons at paragraph 90:-

... it is relevant ... to consider the interests of an applicant's relatives who are entitled to remain in the UK. The evidence ... indicates ... that the appellant's ... removal ... potentially could have serious adverse consequences on the private and family life of the appellant and also of her husband and his parental family members (all British citizens residing in the UK) and also of her own parental family members (all residing in the UK with indefinite leave to remain) ... the refusal decision failed to investigate those potentially serious adverse consequences ... so they remain live Article 8 issues which this Tribunal can and should determine.

9. Following a further extensive discussion the Judge concluded at paragraph 140:-

... albeit on a fine balance, I find ... that the interference with private and family life in the UK of the appellant (and that of her husband, and their respective paternal family members in the UK) which would result by the appellant's removal to Malaysia is of sufficient importance to outweigh the interests of the

British community in implementing a fair system of legitimate immigration control for the appellant and others.

... the respondent's decision that the appellant should be removed from the UK to Malaysia would not be proportionate and would not be lawful under Section 6 of the Human Rights Act 1998 ... her forcible removal would be incompatible with the rights of the appellant (and those of her husband, and their respective paternal family members in the UK) under Article 8 of ECHR.

10. The thrust of the SSHD's grounds of appeal to the Upper Tribunal is that there was no evidence of compelling circumstances such that refusal of leave was unjustifiably harsh; that family and private life matters were addressed through the Rules; and that the Tribunal:

... impermissibly substituted its own decision for that of the SSHD as to where the public interests lies in the income ... to be shown, and from where it should be derived, to achieve the aims of preventing burdens on the taxpayer and promoting integration; the circumstances did not disclose an unjustifiably harsh outcome for the appellant and her husband; the test was "insurmountable obstacles", which the case had been found to fail; the correct assessment would have been that no grant of leave was warranted outside the Rules.

11. On 27 March 2015 permission to appeal to the Upper Tribunal was granted, on the view that arguably the circumstances identified by the Judge at paragraphs 128 to 139 of his decision were insufficient to amount to the type of compelling circumstances that might warrant a grant of leave outside the Rules.
12. In a Rule 24 response to the grant of permission, the appellant says in summary that there is no intermediate threshold of a good arguable case, and that the Judge reached a sustainable conclusion on proportionality.
13. Mrs O'Brien said that the Judge after careful examination within the Rules found no particular circumstances amounting to insurmountable obstacles to family life being carried on in Malaysia. After that thorough analysis in relation to paragraph EX1, the Judge pointed to no further evidence which might show a disproportionate breach, even although the requirements of paragraph EX1 were not met. There was no reason for embarking on a further Article 8 assessment. Everything which the Judge rehearsed had already been considered under paragraph EX1. Nothing was left out of the count in that context, including the preferences and the support of the wider families of both appellants. The Judge simply looked at the same matters but reached another outcome on a practically identical factual matrix. There had to be some feature separate from the Rules, something missing from the Rules, before the Judge could properly allow the appeal under Article 8. The Judge made much of the appellant's ability to be supported by themselves and their families, but the financial criteria were to be taken from the Rules. It was not permissible to allow an appeal under Article 8 by considering matters on which they had fallen short of the requirements of the Rules. There could only have been one proper outcome to this case. The determination should be reversed.

14. The appellant presented a line of argument under her first ground of appeal to the First-tier Tribunal, framed as a response to a Section 120 notice, which she maintained at the hearing and which is discussed at paragraphs 7, 23, 26 and 27 and 37 to 40 of the First-tier Tribunal determination. She seeks to deduce from her immigration history and from the grants of leave she had in the past that she somehow ought to qualify for a grant of leave within the Rules. The First-tier Tribunal found nothing in this line of argument. It was also taken by Mr Sharma in his submissions in the Upper Tribunal, although it does not appear to be raised in the Rule 24 response as a point on which she was previously unsuccessful but again seeks to argue.
15. As to the Article 8 outcome Mr Sharma said that the Rules did not cover all cases. The Rules did not take into account the family life which the appellant had with her parents and her brother, nor the situation of her mother-in-law who was recovering from cancer. Her husband is epileptic and needs to be near his parents. The Judge had considered all relevant circumstances. He should have allowed the appeal within paragraph EX1 on a consideration of insurmountable obstacles but in any event his decision outside the Rules was properly reasoned having considered the relevant case law and the requirements of Section 117B of the 2002 Act. The determination should stand.
16. I reserved my determination.
17. The point stemming from the first ground of appeal to the First-tier Tribunal is one which, as presented, I also find impenetrable. What does emerge from it is that the appellant came to the UK with her parents and brother in 2006, has always lived with them, even after forming her own family with her husband, and that the family intention was always to remain together. The appellant meanwhile became an adult, married, and fell into a different route within the immigration regime, while the other three are now settled here. Any challenge to the respondent's decision making at earlier stages comes too late, and Article 8 is not for "near misses"; but this is an important and somewhat unusual family context. Both spouses, not just one, have their families of origin close to them in the UK. The appellant in particular may be said, despite her marriage, scarcely to have left that family. The case was not presented as one in which an adult retains her family relationships within the strict Article 8 sense after leaving childhood but the case at least came close to that. In any event, such relationships remain important in terms of Article 8 whether classified as family or as private life. These are features which the judge recognised.
18. Section EX of Appendix FM aims only at difficulties and hardship to be encountered by a couple outside the UK. It is not concerned with the interference with family and private life relationships among the couple and their relatives who are likely to remain in the UK. The judge was correct to deal with that aspect as one separate from the Rules. There is a distinction drawn between the factual matrices for those two purposes. An

appeal succeeding on such a basis would always have to be based on Article 8 outside the Rules.

19. The Presenting Officer argued that impacts on relationships with relatives in the UK are always likely in cases like this and so are within the ambit of what the Rules anticipate and do not justify looking outside. I agree that it is readily foreseeable, and built into the Rules, that they draw lines and impose family separation where that is highly unwelcome to those affected, but that cannot be taken to the point of governing every case. There is a category of cases where the Rules have not sufficiently addressed all relevant issues; cases which the Rules seek to reduce to a minimum but which cannot be entirely eliminated.
20. I agree with the submission for the respondent that the financial limits set by the Rules are not generally to be overridden by a broad based assessment based on the principle in Section 117B(3). However, in a case which for reasons not related to finance calls for appraisal outside the Rules, then it becomes relevant that although the Rules cannot be met, there are not likely to be adverse effects on public funds. The judge was entitled to find that once he did embark upon consideration of the public interest question the factors specified in section 117B were not significantly against the appellant; indeed, there would be no good reason to find otherwise.
21. The appellant's case rather exaggerated the adverse consequences for her and her husband of removing to Malaysia, and the significance of the health condition of her husband, which is well controlled; but those are not the issues on which her case succeeded.
22. The respondent's grounds of appeal are not very accurately framed. They are largely a repetition of the case in terms of paragraph EX, on which the judge found for the respondent. Paragraph 12 of the grounds says that the determination amounts to a finding that the Rules will never be proportionate in a case involving a British citizen, but that misrepresents the determination. The criticism was better put by the Presenting Officer along the lines that there was no justification for going outside the Rules. But some cases do call for that, the judge explained why he thought this was one, and he went on to explain why, although on a fine balance he struck the proportionality balance on the appellant's side. I do not think that the respondent's grounds and submissions have shown that conclusion to be legally erroneous.
23. The determination of the First-tier Tribunal shall stand.



19 June 2015

Upper Tribunal Judge Macleman