



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/06637/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 18 January 2018

Decision & Reasons Promulgated  
On 08 June 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

MELY JANE MARCELO  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Singer  
For the Respondent: Mr Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Mely Jane Marcelo, was born on 10 May 1978 and is a female citizen of the Philippines. It is accepted that she is in a genuine and subsisting relationship with her husband, Mr Ramess Seeballuk (hereafter the sponsor). The sponsor is a British citizen who was born on 16 June 1945. The appellant sought leave to remain for the purposes of settlement with the sponsor having previously entered the United Kingdom in 2008 as a student. Her application was refused by a decision of the Secretary of State dated 16 January 2014. The appellant appealed to the First-tier Tribunal (Judge Rowlands) which, in a decision promulgated on 20 August 2014 dismissed the appeal. The appellant appealed to the Upper Tribunal (Deputy Upper Tribunal Judge McWilliam, as she then was) with permission who dismissed the

appeal. Permission was granted to the Court of Appeal by Maurice Kay LJ (retired) on 25 May 2015. The appeal was disposed of by a consent order which is dated 5 October 2015 which provided for the appeal to be allowed to the extent that it was remitted to the Upper Tribunal to be reheard. Consequently, the appeal came before me at Field House on 18 January 2018.

2. The parties agree that Judge Rowlands made an error of fact. He incorrectly recorded the sponsor's income from a pension as £70,000 as opposed to £17,000. Granting permission to appeal to the Court of Appeal, Maurice Kay LJ wrote:

I consider there are compelling reasons to grant permission in this case. A mistake made by the FTT as to income (£70k rather than £17k) had a knock-on effect of rendering any out of country application under the Immigration Rules unlikely to succeed, contrary to the assumption of the FTT. In these circumstances it is strongly arguable that the error led to inferences hence the assessment of "insurmountable" was not made on the correct factual basis.

3. Judge Rowlands repeats several times the same error [20] which has led to him to refer to the appellant and the sponsor as "a wealthy couple". It was on the basis of this misunderstanding that the judge concluded, for the purposes of applying paragraph EX.1, that there were no "insurmountable obstacles" to the appellant and sponsor continuing their family relationship in the Philippines. I find that the appellant is entitled to have her case determined according to the correct facts and, in light of the plain error, I am not satisfied that Judge Rowlands' decision may stand.
4. I set aside the First-tier Tribunal's decision. I proceed to remake the decision. The appellant's circumstances have changed since the appeal was before the First-tier Tribunal. In a helpful skeleton argument prepared for the Upper Tribunal by Mr Singer, the relevant facts are set out in detail. The most significant change is that the sponsor now receives Attendance Allowance. As a consequence, the circumstances of the appellant fall within Appendix FM, E-ECP 3.3:

E-ECP.3.3. The requirements to be met under this paragraph are-

- (a) the applicant's partner must be receiving one or more of the following -
  - (i) disability living allowance;
  - (ii) severe disablement allowance;
  - (iii) industrial injury disablement benefit;
  - (iv) **attendance allowance;**
  - (v) carer's allowance;
  - (vi) personal independence payment;

(vii) Armed Forces Independence Payment or Guaranteed Income Payment under the Armed Forces Compensation Scheme;

(viii) Constant Attendance Allowance, Mobility Supplement or War Disablement Pension under the War Pensions Scheme; or

(ix) Police Injury Pension; and

**(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds.**

[my emphasis]

5. The appellant does not now need to satisfy the £18,600 income threshold (although note that Attendance Allowance now enables that threshold to be crossed) but need only satisfy the requirement as to not relying upon public funds. The calculation of the couple's income from all sources (including the sponsor's pension and attendance allowance) is set out in Mr Singer's skeleton argument and Mr Nath, for the Secretary of State, did not dispute those figures. Not only do the figures show that the couple now are able to cross the £18,600 threshold but, given that the application now falls within a different requirement of Appendix FM (E-ECP3.3), the couple enjoy an income which is greater than they would receive on public funds.
6. Mr Singer urged me to allow the appeal outright. Mr Nath, understandably adopting a more cautious approach, urged me not to act as a primary decision-maker but rather to return the matter to the Secretary of State for further consideration. There is some force in that argument given the fact that the appellant needs to show, in order to comply with the Immigration Rules, that she has provided the documentary evidence to prove her case. However, in the papers submitted to the Upper Tribunal, there are various items of documentary evidence concerning the income of the sponsor. Having considered these documents, I am satisfied that the appellant has proved that the income particular set out in Mr Singer's skeleton argument are accurate. Moreover, I am aware that the appellant has waited a very long time for her appeal to be determined; the decision of the Secretary of State was made almost four years ago. In addition, the appeal falls under the "old" system given the date of the decision and it remains open to the Tribunal to allow the appeal against the Secretary of State's decision under the Immigration Rules. Having assessed the various factors in favour and opposed to allowing the appeal outright, I have decided that I should so allow it. On the evidence which has been produced, it is self-evident that the appellant and sponsor are able to satisfy the financial provisions of Appendix FM. A just and speedy outcome of this appeal would not, in my opinion, be achieved by returning the matter yet again to the Secretary of State which will only cause further delay.

**Notice of Decision**

7. The decision of the First-tier Tribunal which was promulgated on 20 August 2014 is set aside. I remake the decision. The appeal of the appellant against the decision of the Secretary of State dated 16 January 2014 is allowed under the Immigration Rules.
8. No anonymity direction is made.

Signed

Date 18 APRIL 2018

Upper Tribunal Judge Lane