Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11975/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 October 2017	**On 02 February 2018**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE REEDS

Between

PATHUMTHONG TOLEK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D. Bazini, Counsel, instructed by Messrs E&M Solicitors

For the Respondent: Mr D. Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant, a citizen of Thailand, born on 22 December 1978, appeals against the decision of First-tier Tribunal Judge C.M. Phillips, sitting at Taylor House on 26 February 2016, in which she dismissed the appellant's appeal against the respondent's decision of 10 March 2015 to refuse to vary her leave to remain in the United Kingdom and to remove her by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006. Permission to appeal was granted by the First-tier Tribunal on 9 August 2016.

2. So far as relevant, paragraph 319C of the immigration Rules provides as follows:

> "319C. **Requirements for entry clearance or leave to remain**
>
> To quality for entrance clearance or leave to remain as the Partner of a Relevant Points Based System Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
>
> **Requirements:**
>
> **……**
>
> e) the applicant and the Relevant Points Based System Migrant must intend to live with the other as their spouse or civil partner, unmarried or same-sex partner throughout the applicants (sic) stay in the UK.

3. The immigration history of the appellant is essentially as follows. She first entered the United Kingdom in February 2009, with leave to enter until 18 July 2010 as a work permit dependant, subject to a condition restricting employment and prohibiting recourse to pubic funds. On 1 July 2010, she was granted leave to remain until 15 June 2013 as a Tier 2 dependant partner, subject to a condition prohibiting employment as a doctor or dentist in training and prohibiting recourse to public funds.

4. On 25 January 2012, the appellant was granted leave to remain in the United Kingdom until 23 January 2015 as a PBS dependant, subject to the same conditions.

5. On 23 January 2015, the appellant made a combined application for a further leave to remain in the United Kingdom as the partner of a Tier 2 migrant under the points based system and for a biometric residence permit.

6. On 10 March 2015, the respondent issued a decision, refusing the applications. The relevant passage of that letter reads as follows:-

> "In view of the fact you have stated on your application form that you are currently living at [address] Manchester, M19 […] and will continue to do so as you are working in Manchester, and your spouse is living at [address] Hertfordshire, HP4 […] and that his employment will be continuing in [address], the Secretary of State is not satisfied that you intend to live with your spouse throughout their stay in the United Kingdom".

Decision of the First-tier Tribunal

7. The First-tier Tribunal judge heard evidence from the appellant, with the assistance of an interpreter. In her statement, she said that she married her husband in Thailand in 2008 and when he came to the United Kingdom to work in 2009 she was granted leave to enter as his partner. The appellant moved to Hertfordshire with her husband, when he began to work for his current employer. She was then granted further leave to remain as a dependant partner.

8. However, the appellant was not able to find a job in Hertfordshire or nearby and so she went to live and work in Manchester. The appellant said that she was "only living there because of work and that my husband and I were still married and that we are together as a couple".

9. The appellant also said that on their days off "either my husband would come up to Manchester to stay with me or I would come down to Hertfordshire to stay with him".

10. Since 1 April 2015, that is to say, shortly after the respondent's decision, the appellant said she had been living in Hertfordshire with her husband, "in the restaurant downstairs in the same restaurant where my husband works."

11. In oral evidence, the appellant told the judge that, in addition to the contact described, she and her husband had kept in touch by *Google* three times a day and that the sponsor visited her in Manchester once a month.

12. The appellant said that she and the sponsor husband had always intended to live together. She added that they had a "plan". When her husband went to look for work, there had been no position for her and so she had to return to Manchester. She kept asking about working in Hertfordshire and eventually, when a staff member left, she joined her husband at his place of work. Because there were two of them, the employer also provided them with accommodation.

13. At paragraphs 14 to 17 of her decision, the judge recorded the submissions of the parties. The respondent stressed the requirement in the rules for there to be an intention to live together <u>throughout</u> the stay in the United Kingdom. The appellant and the sponsor had not been living together and there was no intention to live together, so the requirement in the immigration rules was not met. The purpose of the rules was to require PBS migrants and their dependants to live together and not to live and work separately, meeting only when they were only able to do so.

14. Although it was accepted that the appellant and the sponsor were now living together, they had been willing to live apart for work reasons. Accordingly, in terms of Article 8, there would, in the respondent's submission be no undue hardship because the couple had clearly agreed to live apart for a substantial period and could continue to communicate as they had been doing, when living apart. It was not unreasonable for them to return to Thailand to enjoy family life there.

15. For the appellant, it was submitted that the appellant and the sponsor intended to live together. Their relationship was subsisting and their credibility had not been attacked. The relevant immigration rule did not require the appellant and the sponsor to live together. The requirement was one of intent. It was the intention that mattered. The rule acknowledged the fact that there may be reasons why the applicant and the sponsor did not actually live together all the time. The gap in co-habitation did not demonstrate a lack of intention. There had been no job for the appellant and no accommodation until that became available.

16. The judge's conclusions in respect of the immigration rules were as follows:-

> "30. I find that the appellant does not meet the requirements of paragraph 319C(e), which is satisfied when the parties intend to live together throughout the appellant's stay. The word "throughout" is I find a qualification under relevant Immigration Rule has to be read as a whole, not separately in the way that was submitted strongly on the appellant's behalf.
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> 31. I am not persuaded to read the words intention and throughout as meaning that the requirements are met in this case when the intention to live together has been demonstrated to be qualified by other considerations so that the appellant and sponsor lived apart from very shortly after a Tier 2 dependant visa was granted in February 2012 that from 01 March 2012 until after her visa application was refused on 10 March 2015, that is from the beginning of April 2015.
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> 32. There may indeed as was submitted be reasons why a couple could be apart for a short period of time, for example, because of personal circumstances entirely out of their control, so that there are circumstances in which it can be envisaged that the requirements are met despite short absences. However, I find that the appellant and sponsor have clearly and as a matter of fact demonstrated their intention to work rather than their intention to live together throughout the appellant's stay. The fact that other couples in the modern world may make a decision to live apart by reason of work but still have genuine and subsisting relationships does not I find assist this appellant, the success of whose application depends upon her meeting the requirements of the Immigration Rules. It follows that the appellant's appeal under the Immigration Rules is dismissed because all the requirements in paragraph 319C(e) are not met".

17. As far as Article 8 was concerned, the judge noted it was common ground that the appellant and the sponsor were married and had a subsisting relationship. Removal of the appellant would interfere with family life, engaging Article 8.

However, the judge noted that she had to have regard to section 117(B) of the Nationality, Immigration and Asylum Act 2002, insofar as weight was to be attached to the public interest and the maintenance of immigration control. Little weight should also be given to the private life of the appellant established in the United Kingdom because her status had been precarious.

18. In paragraph 35, the judge found that the appellant and the sponsor, both being nationals of Thailand, could return to live in that country. Neither would have any significant obstacles on return.

19. In conclusion, at paragraph 38 of her decision, the judge found that, giving weight to the immigration rules and to the public interest in the maintenance of effective immigration control, any interference with the appellant's private and family life flowing from the decision to refuse her application, and then to remove, was proportionate.

Submissions

20. At the hearing before us, Mr Bazini stressed the significance of the word "intention" in the rules. The issue, in his submission, was whether the intention was genuinely held. If, as here, the parties had not actually lived together for a period of time, then the focus had to be on their intention. There was no requirement that the fact of their not living together had to be due to circumstances entirely outside their control. Although it would be easier to find a genuine intention to live together if there had been only short periods of separation, this was not essential. A person could still have an intention to live with another person, even if he or she also had other intentions. Each case turned on its own facts. On a literal meaning of the rule, the appellant and her husband could live apart, as long as they had an intention to live together.

21. Reference was made at the hearing to the definitions in paragraph 6 of the immigration rules; in particular, the definition of the expression "intention to live permanently with the other". That is defined as meaning:

> "an intention to live together, evidenced by a clear commitment from both parties that they will live together following the outcome of the application in question or soon as circumstances permit thereafter".

22. Mr Clarke referred to the wording in that definition, whereby an intention to live permanently with the other requires an intention to do so "as soon as circumstances permit". Given that the husband of the appellant had to be earning at least £29,000 a year, in order to qualify as a relevant PBS migrant under the immigration rules the decision of the appellant and her husband to live respectively in Manchester and Hertfordshire was, Mr Clarke submitted, purely one of choice. As the judge had found, their intention was in each case to work, rather than to live together.

23. In reply, Mr Bazini said that if only circumstances beyond one's control could count, then this would destroy the significance of the words "intend to live with the other" in paragraph 319(C)(e).

Discussion

24. We agree with Mr Bazini that, as required by Mahad v Secretary of State for the Home Department [2009] UKSC 16, the Tribunal is required to apply the ordinary meaning of the words in the relevant provisions of the immigration rules. Paragraph 319C(e) uses the word "intends".

25. Mr Bazini submitted that, if the respondent had wished to achieve the result for which she contends in the present case, then sub-paragraph (e) could and should have omitted the reference to intention. We disagree. Sub-paragraph (e) clearly has to cover those cases where the applicant and the spouse or partner are not yet living in the United Kingdom. Accordingly, the reference to intention is unavoidable.

26. We accept Mr Bazini's submission that a person can have more than one intention, at any particular time. The problem, however, is that the present appellant's actual, operative intention was to work in Manchester, rather than to go with her husband to live together in Hertfordshire, where she had been unable to find employment. As a result, the appellant's intention to live with her husband throughout the period of leave fell away. It yielded to her choice that, rather than live with him and face the prospect of being economically inactive, she preferred to live and work in Manchester.

27. It is, we consider, stretching the concept of intention too far to conclude, as Mr Bazini would have us do, that the appellant and her husband intended to live together throughout the relevant period, in the sense that this was their preference if - and only if - the appellant's wish to engage in paid employment could be satisfied.

28. Although the definition in paragraph 6 of "intention to live permanently with the other" does not expressly extend to the provisions of the rules with which we are concerned, we nevertheless consider that the definition is of assistance in construing the ambit of paragraph 319C(e) of the rules. The concept of what future circumstances might permit is, in the definition, part of how one determines whether the requisite intention is present. The existence of the concept in our view nullifies Mr Bazini's submission that the meaning of "intend" would be destroyed if only circumstances beyond a person's control could enable that person to have the requisite intention, where the parties are not in fact living together. Despite the fact that the definition does not apply to paragraph 319C, the concept is, in our view, nevertheless inherent in the words "must intend" in sub-paragraph (e). This is because having an intention is not to be equated with merely having a wish.

29. In the present case, there is no suggestion that the appellant had to live in Manchester, rather than with her husband in Hertfordshire because, if she had lived with him in Hertfordshire, they would have been unable adequately to maintain and accommodate themselves. Indeed, it is difficult to see how she could show this. Paragraph 319(C)(g) requires an applicant such as the present appellant to show that there is "a sufficient level of funds available [to her], as set out in Appendix E." The respondent did not grant the appellant leave on the understanding that the appellant *needed* to work in the United Kingdom in order to maintain herself. The fact that she was *permitted* to work (except as a doctor or a dentist) is beside the point.

30. Accordingly, the factual position, as found by the judge, shows clearly that the couple's circumstances were such as to permit the appellant to live with her husband in Hertfordshire. The fact that she did not do so until it suited her was fatal to her case.

31. As the judge found, as a matter of fact and degree periods of short separation, for the purposes of employment or otherwise, may well not preclude a person from satisfying the requirements of sub-paragraph (e). If, for example, a person works away from home for a period of time, that person and his or her spouse or partner may, on the facts, still properly be said to be living with each other. If so, then it will matter not what motivated the working away.

32. On the facts of the present case, the judge was fully entitled to take the view that the appellant and her husband were not in this situation. They were not living together but, rather, were living in separate domestic establishments in Manchester and Hertfordshire. The fact that they visited each other regularly and kept in touch, whilst demonstrating the genuineness of their relationship, did not, on the facts, require the judge to find that they were living together for the purposes of sub-paragraph (e).

33. Paragraph 339C(e) of the immigration rules is, plainly, intensely fact-sensitive. A judicial fact-finder must determine whether the relationship is a genuine one; that is to say, whether the parties intend to live with each other "as their spouse or civil partner" etc. He or she must carefully consider whether any evidence of physical separation means that the parties have established separate households. If so, then the judicial fact-finder must consider the intention of the parties in the way we have set out above. In particular, he or she must determine whether a period of separate living is due to the free wishes of the parties or is caused by other circumstances.

34. There are no "bright lines" in either of the last two exercises just described; namely, deciding if the parties are living with each other and, if not, whether they lack an intention to do so. The judicial fact-finder must draw the relevant conclusions from the facts, as established in evidence.

35. We agree with Mr Bazini that it would be wrong to construe the requirement, which we regard as inherent in the words "must intend", to live with each other once circumstances permit, so narrowly that it can be met only if there are circumstances keeping the couple apart that are physically entirely beyond their control. One can, for example, envisage a case where the terminal illness of a close relative or friend might lead to a period of separate living. The fact that this would still be the choice of at least one of the parties does not preclude a finding that there are objectively powerful moral and/or emotional reasons for the parties to have to live apart, which do not destroy their intention to live together.

36. In the present case, however, the appellant and her sponsor husband lived separately, in separate households, for a significant period, entirely because they could earn more money that way.

37. So far as Article 8 is concerned, there is no error of law in the judge's decision. The appellant and her husband can continue their family life in Thailand. The appellant's private life can also be continued in that country. Since the appellant has failed to meet the requirements of the immigration rules, the judge was correct to have regard to the importance of maintaining immigration control in considering whether removal would be disproportionate. The judge's findings on the precariousness of the appellant's private life in the United Kingdom were in accordance with the judgments in Ruppiah v secretary of State for the Home Department [2016] EWCA Civ 803. In all the circumstances, the judge was fully entitled to conclude that giving effect to the immigration decision would not be a disproportionate interference of the Article 8 rights of the appellant and her husband.

Decision

38. This appeal is dismissed.

The Hon. Mr Justice Lane
President

Dated 1 February 2018