Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17336/2016**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 13 November 2017	**On 7 December 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MAE-JOY RICHARDS

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Webb, NLS Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of the Philippines who was born on 21 June 1971. She entered the United Kingdom as a visitor on 7 October 2007 with leave valid until 29 March 2008. On 12 December 2007, by amendment, the period of leave granted as a result of the visa was extended to 29 September 2008.

2. On 8 September 2008, the appellant applied for leave to remain as a carer. That application was refused on 7 November 2008. A subsequent appeal was allowed and she was granted Discretionary Leave ("DL") from 16 February 2009 until 16 February 2012.

3. On 15 May 2009, the appellant applied for a Certificate of Approval to marry a British Citizen, John Richards. That was issued on 6 August 2009 and she subsequently married John Richards on a date which is not disclosed in the papers.

4. On 8 February 2012, the appellant applied for indefinite leave to remain ("ILR") as the spouse of a British Citizen. That application was refused on the same day.

5. On 14 February 2012, the appellant applied for leave to remain outside the Immigration Rules. On 21 February 2003, the appellant was granted three years' DL "based on [her] family and private life with [her] partner, now spouse John Richards".

6. The appellant's spouse subsequently passed away. On 28 January 2016, the appellant applied for ILR as a bereaved partner under Section BPILR of Appendix FM of the Immigration Rules (HC 395 as amended).

7. On 14 June 2016, the Secretary of State refused the appellant's application for ILR under Appendix FM as a bereaved partner on the basis that she did not fulfil a necessary requirement under Section E-BPILR.1.2., namely that the "last grant of limited leave" to her had not been as a "partner ... of a British Citizen". Her last grant of leave had been outside the Rules and not as a "partner" under Appendix FM.

The Judge's Decision

8. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Powell who dismissed the appeal. It was initially argued by the respondent's representative before Judge Powell that the appellant did not have a right of appeal under the new appeal provisions introduced by the Immigration Act 2014 on the basis that the appellant had not made a human rights' claim and there had been no refusal of such a claim so as to give rise to a right of appeal under s.82(1) of the Nationality, Immigration and Asylum Act 2002 (as amended). Judge Powell rejected that argument and concluded that there was a valid appeal before him. The Secretary of State had not subsequently sought to challenge that conclusion either in the rule 24 notice or in submissions before me. It is accepted that the judge had jurisdiction to hear an appeal based, in effect, upon Art 8 of the ECHR.

9. In dismissing the appeal under Art 8, Judge Powell made essentially two findings.

10. First, he rejected the appellant's argument that she could succeed under Section BPILR of Appendix FM because he concluded that the appellant's "last grant of limited leave" was not as a "partner" granted under Appendix FM but rather was a grant of DL outside the Rules. The eligibility requirement for ILR as a bereaved partner set out in E-BPILR.1.2. required that the "last grant of limited leave" as a "partner" was under the Rules. In other words, he agreed with the interpretation adopted by the Secretary of State in refusing the appellant's application.

11. Secondly, in approaching the appellant's claim outside the Rules under Art 8, having noted that she could not succeed under the Rules, the judge looked to whether there

were "compelling circumstances that outweigh the public interest". He noted that no evidence had been called as to the appellant's circumstances and that the appellant's claim had turned upon the submission that her failure to succeed under the Rules was a "near miss" which was by itself sufficient to outweigh the public interest. The judge rejected that submission and, in the absence of any evidence, concluded that the appellant had failed to establish compelling circumstances sufficient to outweigh the public interest.

The Appeal to the Upper Tribunal

12. The appellant sought permission to appeal to the Upper Tribunal on two grounds. First, the judge had been wrong to find that the appellant could not succeed under Appendix FM as her "last grant of limited leave" was as a "partner" despite being granted outside the Rules. Section E-BPILR.1.2. should, it was contended, not be restricted to grants of leave under the Rules to a person as a "partner". Secondly, it was contended that the judge had erred in law in, nevertheless, dismissing the appeal under Art 8 as the decision to refuse her ILR was disproportionate.

13. Initially, the First-tier Tribunal (Judge Hodgkinson) refused the appellant permission to appeal. However, on 3 August 2017 the Upper Tribunal (UTJ Kekić) granted the appellant permission to appeal on all grounds.

The Submissions

14. Before me, Mr Webb maintained the argument, unsuccessfully advanced before Judge Powell, that Section E-BPILR.1.2. should not be restricted to situations where the applicant's "last grant of limited leave" as a "partner" was under Appendix FM. He relied upon the respondent's decision of 21 February 2013 which stated that the appellant was being granted 3 years "Discretionary Leave based on your family and private life with your partner, now spouse John Richards".

15. Mr Webb submitted that if the Secretary of State in Section E-BPILR.1.2 had meant to restrict the "last grant of limited leave" as a "partner" to someone granted such leave under the Rules, it would have been explicitly included in the wording by the simple addition of "under the Rules". Mr Webb submitted that to allow the appellant to switch from leave as a "partner", albeit granted outside the Rules, to ILR as a bereaved partner, was consistent with the purpose of the Rules which was to allow a surviving partner to remain in the UK after the death of the other partner. The whole basis of leave under the Rules as a "partner" was, Mr Webb submitted, to comply with Art 8 of the ECHR and the respect for the private and family life of the partners and that was precisely the basis upon which the appellant had been granted DL on 21 February 2013. Mr Webb submitted that an interpretation of Section E-BPILR.1.2. that included leave granted outside the Rules would be to interpret the provision consistently with the obligation to recognise the appellant's Art 8 rights under the Human Rights Act 1998.

16. Mr Richards, on behalf of the Secretary of State, contended that Judge Powell had correctly interpreted the Rules. He submitted that it was clear from the grant of leave to the appellant that she had not been granted leave to remain as a partner

under the Rules and, therefore, her claim under Art 8 should be approached on the basis that she could not meet the requirements of the Rules. The judge was right and the appeal should be dismissed.

Discussion

1. Error of Law: The Rules

17. The provisions dealing with ILR (and indeed limited leave) as a 'bereaved partner' are set out in Section BPILR of Appendix FM of the Rules. By virtue of Section BPILR.1.1.(d), the appellant must, in order to meet the requirements of the Rules, meet all the requirements of "Section E-BPILR: Eligibility for indefinite leave to remain as a bereaved partner".

18. The only relevant requirement in Section E-BPILR in this appeal is found in E-BPILR.1.2. which provides as follows:

> "The applicant's last grant of limited leave must have been as –
>
> (a) a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen or a person settled in the UK; or
>
> (b) a bereaved partner".

19. The appellant relies upon E-BPILR.1.2.(a).

20. Appendix FM defines, for the purposes of Appendix FM, a "partner" in GEN.1.2. as follows:

> "For the purposes of this Appendix 'partner' means –
>
> (i) the applicant's spouse;
>
> (ii) the applicant's civil partner;
>
> (iii) the applicant's fiancé(e) or proposed civil partner; or
>
> (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application,
>
> unless a different meaning of partner applies elsewhere in this Appendix".

21. It was common ground between the parties that the appellant could not, at the time she applied for leave as a "partner", meet the requirements of Appendix FM as a partner or, to the extent that the transitional provisions required her application to be considered under Part 8 of the Rules in force before 9 July 2012, because she lacked the necessary or required leave as a condition to the grant of ILR as a spouse.

22. The proper approach when interpreting the Immigration Rules was set out by the Supreme Court in the case of Mahad and Others v Entry Clearance Officer [2009] UKSC 16. Lord Brown, delivering the leading judgment, stated at [10]:

> "The Rules are not to be construed with all the strictness applicable to the construction of a statue or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy".

23. Lord Brown cited his earlier view expressed in MO (Nigeria) v SSHD [2009] 1 WLR 230 at [33] that:

> "the question is what the *Secretary of State* intended. The rules are her rules". (Emphasis in original).

24. Having stated that, Lord Brown continued in Mahad (at [10]):

> "That intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates Instructions (IDIs) issued intermittently to guide Immigration Officers in their application of the Rules".

25. Subsequently, the Court of Appeal recognised in Adedoyin v SSHD [2010] EWCA Civ 773 that, exceptionally, an IDI might provide some guidance where the wording of the Rule was genuinely ambiguous.

26. In this case, neither Mr Webb nor Mr Richards drew my attention to any IDI or other policy document dealing with the interpretation of the provision in Appendix FM in issue in this appeal.

27. During the course of argument, I raised with both representatives whether Appendix FM contained any provision which explicitly required an individual to establish leave granted *under Appendix FM*. Neither representative drew my attention to any such provision. I, however, raised with the representatives the provisions in Appendix FM dealing with the grant of ILR to a partner in E-ILRP.1.3. where specific reference is made to limited leave under the Rules as follows:

> "The applicant must have completed a continuous period of at least 60 months with limited leave *as a partner under paragraph R-LTRP.1.1.(a) to (c)* or in the UK with entry clearance as a partner under paragraph D-ECP.1.1.; or a continuous period of at least 120 months with limited leave *as a partner under paragraph R-LTRP.1.1.(a), (b) and (d)* or in the UK with entry clearance as a partner under paragraph D-ECP.1.1.; or a continuous period of at least 120 months with limited leave as a partner under a combination of these paragraphs, excluding in all cases any period of entry clearance or limited leave as a fiancé(e) or proposed civil partner". (my emphasis)

28. Here, as the emphasised words highlight, the relevant leave must be "as a partner" under particular provisions in Appendix FM. On the face of it, this provides some support Mr Webb's submission that if the Secretary of State had wished to limit the grant of limited leave as a partner to a grant under the Rules in E-BPILR.1.2.(a) she could explicitly have done so.

29. Without setting out in full the two sets of provisions in Appendix FM referred to in E-ILRP.1.3., it is clear that the wording in E-ILRP.1.3. is concerned with the need to establish a period of limited leave under the Rules under one of the two routes which potential leads to ILR under the Rules having been granted limited leave as a partner

under the Rules. The first route where the more onerous conditions in R-LTRP.1.1.(a) to (c) are met is 60 months whilst when the less onerous requirements for leave as a partner in R-LTRP.1.1.(a), (b) and (d) are met is 120 months. These are often referred to as the 'five-year route' and the 'ten-year route'. I accept that these provisions offer some support to Mr Webb's submission. However, the route to ILR as a partner is part of a settlement route built into Appendix FM of the Rules and, therefore, it is hardly surprising that E--ILRP.1.3. refers to the two limited leave routes as a partner under the Rules. The reference to the Rules is a necessary concomitant of that.

30. What is, it seems to me, more significant and more strongly supports Mr Webb's submissions, are the provisions in Appendix FM dealing with the grant of ILR based upon domestic violence set out in Section DVILR. In Section E-DVILR.1.2., one of the eligibility requirements for ILR as a victim of domestic violence is that:

> "The applicant's first grant of limited leave under this Appendix must have been as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen or a person settled in the UK under paragraph D-ECP.1.1., D-LTRP.1.1. or D-LTRP.1.2. of this Appendix and any subsequent grant of leave must have been:
>
> (a) granted as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen or a settled person in the UK under paragraphs D-ECP.1.1., D-LTRP.1.1. or D-LTRP.1.2. of this Appendix; ...".

31. There, the reference to "limited leave" is specifically by reference to Appendix FM both in terms of the "first grant" of such leave and any subsequent grant of leave as a "partner". Those provisions clearly distinguish between the grant of "limited leave" to a partner under Appendix FM and the grant of limited leave to an individual as a partner, albeit outside the Rules.

32. Here, the ILR provisions dealing with a victim of domestic violence cannot, in my judgment, so easily be seen to represent a progression from a grant of limited leave leading to settlement. That said they provide, of course, a substitute route to ILR when the ILR route for settlement as a partner under the Rules is taken away because of the incidence of domestic violence. In that regard, they have a striking similarity with the bereaved partner provisions except that, in the latter instance, there is no requirement that the limited leave must have been granted under the Rules. The contrast between the ILR provisions for a "bereaved partner" in Section BPILR and for the grant of ILR to a victim of domestic violence in Section DVILR is all the more apparent given that the two Sections follow each other in Appendix FM. In my judgment, the wording of E-DVILR.1.2. supports Mr Webb's submission that had the Secretary of State intended to restrict the requirement that the applicant's last grant of "limited leave" as a "partner" to leave granted under Appendix FM, the Secretary of State could have explicitly stated that in the Rules. She did precisely that in E-DVILR.1.2. when dealing with eligibility for the grant of ILR as a victim of domestic violence.

33. Whilst, of course, the vast majority of cases in which an individual seeks ILR as a bereaved partner is likely to arise in the situation where the last grant of leave as a "partner" was under Appendix FM, in my judgment, that is not a necessary requirement because E-BPILR.1.2. is not so restricted.

34. In addition to the juxtaposition of the provisions dealing with ILR for a bereaved partner and the victim of domestic violence, I also accept Mr Webb's submission that the plain intention of the Secretary of State arising from the wording of the relevant provisions was to permit an individual who had leave as a partner to, in appropriate circumstances, seek ILR as a bereaved partner when they could no longer satisfy the requirements of leave as a partner and were, as a consequence, necessarily removed from the ILR route which would otherwise be open to them. The 'bereaved partner' provisions seek, in my judgment, to overcome the perceived unfair disruption to the individual's route to settled status as a partner through no fault of their own as a result of the death of their British Citizen or settled partner in the UK. That underlying purpose is no less reflected in a case such as the present where the appellant was explicitly granted leave, albeit DL and in other cases it may be explicitly leave outside the Rules on the basis of Art 8, as a "*partner*". In such a case, the grant of leave will reflect the Secretary of State's acceptance that there is a genuine and subsisting relationship which justifies the grant of leave, albeit outside the Rules. Whilst there may be no formal route to ILR, and I was not shown any material in relation to this, the partner's death during the course of that grant of leave outside the Rules will, in a closely analogous way, unfairly affect the surviving partner and his or her immigration status in the UK at a time when through no fault of their own they had an expectation of extant leave continuing. It is worth nothing that the letter of 21 February 2013 detailing the appellant's grant of three years' DL specifically referred to the appellant seeking an extension of leave in the future and that she would be eligible for settlement having "completed 6 years of Discretionary Leave". In other words, the appellant, like a partner under Appendix FM, was granted leave on a route which could lead to settlement.

35. Mr Richards did not submit that there was any underlying policy reason why an individual such as the appellant should not fall within the bereaved partner provisions and, in particular, the eligibility requirement for ILR in E-BPILR.1.2. His submission was, put shortly, that the word "partner" had to be understood as a partner granted limited leave under the Rules. I reject that submission for the reasons I have given.

36. Of course, this 'broader' interpretation of the requirement in E-BPILR.1.2., requires a grant of leave outside the Rules explicitly *as a partner* and not on any other basis. So, for example, as occurred earlier in this appellant's immigration history, a grant of discretionary leave or leave outside the Rules as a carer – even as a carer of a partner – would not suffice. A grant of leave outside the Rules as a parent would not suffice; just as a grant of leave as a parent under the Rules would not suffice to meet the requirement in E-BPILR.1.2.

37. However, here the grant of leave on 21 February 2013 – which I set out verbatim above – was explicitly on the basis of her relationship with her "partner". It was not on the basis that she was his carer or, indeed, on any other basis. It was, in my judgment, "limited leave" granted to her as a "partner ... of a British Citizen" within E-BPILR.1.2. The judge erred in law in concluding otherwise.

2. Error of Law: Art 8

38. Having erroneously concluded that the appellant could not meet the requirements of Appendix FM, the judge went on to consider Art 8 on that basis. This was, of course, an appeal only on human rights grounds, namely Art 8. It was in that context that he identified that the appellant must establish "compelling circumstances" to outweigh the public interest (see para 39) and went on to conclude that there were none, rejecting in the process Mr Webb's submission that this was a "near miss" case such that the public interest was outweighed (see paras 40-43).

39. Because the judge approached Art 8 on the basis that the appellant could not meet the requirements of the Rules, he necessarily erred in law in his approach to Art 8. He should, instead, have approached the appellant's claim under Art 8 on the basis that she met the requirements of the Rules in respect of 'bereaved partner'.

40. Consequently, his decision in respect of Art 8 is flawed and cannot stand. That decision must now be re-made.

3. Re-making the Art 8 Decision

41. The judge made a number of findings favourable to the appellant. First, he accepted that she had established private life in the UK (see para 33) and that the refusal of leave engaged Art 8 because:

> "after living here for 9 years, the majority of it as a wife, I am satisfied that the interference with her private life is of sufficient gravity".

42. Having concluded that Art 8.1 was engaged, the judge went on to find that the decision was in accordance with the law and for a legitimate aim. Nevertheless, he went on to find, given the limited evidence, that there were no "compelling circumstances" sufficient to outweigh the public interest so that the decision was not, in his view, disproportionate.

43. Given that the appellant meets the requirements of the Rules, it is difficult to see how the public interest in the "maintenance of effective immigration controls" set out in s.117B of the Nationality, Immigration and Asylum Act 2002 is engaged. Judge Powell pointed out at para 27 of his determination that there was no evidence led on the appellant's behalf as to whether or not she was "financially independent" for the purposes of s.117B(3). By contrast, it does not appear to have been suggested before the judge that the appellant was not able to speak English such that the public interest recognised in s.117B(2) of the 2002 Act was engaged.

44. I accept that the public interest is, albeit to a limited extent, engaged in this appeal. However, the appellant has established that she meets the requirements of the 'bereaved partner' provisions in Appendix FM. She has private life in the UK established over a period of nine years, including with her now deceased husband. That was the basis of the grant of DL in 2013. Her route to settlement, as a partner whether under the Rules or through an extension and application of the DL policy applicable to her, has been frustrated by the loss of her husband. Whilst, as Judge Powell recognised, little evidence has been adduced on the appellant's behalf, the public interest is, however, weak in this case. The appellant is entitled to leave under

the Rules but her appeal both to the First-tier Tribunal and now to the Upper Tribunal is limited to human rights grounds. The mere fact that she can meet the requirements of the Rules does not necessarily lead to the conclusion that a refusal of leave is a breach of Art 8. It is, however, a very significant factor which has to be weighed against the weak public interest in this appeal. The bereaved partner provisions reflect the continuing importance of the surviving partner's private life being respected in the UK after the death of their partner. Taking all those matters into account, and seeking to strike a fair balance between the public interest and the appellant's private life in the UK, I am satisfied on a balance of probabilities that the public interest is outweighed by the consequences to the appellant of a decision which refuses to recognise her entitlement to leave as a bereaved partner.

45. For those reasons, I allow the appellant's appeal under Art 8 of the ECHR.

Decision

46. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of an error of law. That decision is set aside.

47. I re-make the decision allowing the appellant's appeal under Art 8.

Signed

A Grubb
Judge of the Upper Tribunal
6, December 2017

TO THE RESPONDENT
FEE AWARD

This was an appeal which, in my judgment, should have been allowed by Judge Powell and one in which it is appropriate to make a fee award of any fee paid or payable in this case.

Signed

A Grubb
Judge of the Upper Tribunal
6, December 2017