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

Appeal Number: UI-2022-003787
HU/51086/2022; IA/01670/2022

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On** 9 December 2022

**Decision & Reasons Promulgated**
**On** 16 February 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Luz Mercedes Espinal Ramos
**(ANONYMITY ORDER NOT MADE)**

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr E Wilford, of Counsel, instructed by MPB Solicitors.
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Colombia born on 10 June 1972. She appeals against a decision of Judge of the First-tier Tribunal Head (hereafter the "judge"), promulgated on 13 July 2022 following a hearing on 27 June 2022 by which the judge dismissed her appeal on human rights grounds (Article 8 ECHR) against a decision of the respondent of 16 February 2022 to refuse her application of 26 January 2021 for leave to remain in the United Kingdom on the basis of her family and private life.

2. The appellant arrived in the United Kingdom on 6 November 2018 with entry clearance as a visitor valid until 3 May 2019. She remained unlawfully thereafter. She made an application for leave to remain in the United Kingdom on 9 July 2019 which was refused by the respondent on 18 October 2019. Her appeal against this decision was dismissed by Judge of the First-tier Tribunal Beg in a decision promulgated on 13 January 2020. In that appeal, she relied, inter alia, on her family life with her husband, Fausto Patricio Cabera Silva, a dual British and Ecuadorian national born on 17 November 1962 (hereafter the "sponsor").

3. On 26 January 2021, the appellant applied again for leave to remain in the United Kingdom on the basis of her family life in the United Kingdom with the sponsor.

4. At the time of the appellant's arrival in the United Kingdom on 6 November 2018, she and the sponsor were already married. They were married in Colombia on 10 January 2017. They had met in Colombia in late 2014 hen the sponsor was on holiday there. He returned to visit her in 2014 and they subsequently commenced a long-distance relationship.

5. The sponsor had suffered from Covid and was very unwell. He then required heart surgery in 2021. Subsequently, he needed knee replacement surgery. He had previously had an operation on the same knee in Ecuador in 2014/15. However, it required another operation. He was disabled and was in receipt of Personal Independence Payment ("PIP") benefit.

6. In the appeal before the judge, the appellant argued that her partner would not be able to live in Colombia and that her removal would breach Article 8.

7. The judge said that she did not find that there were insurmountable obstacles to family life continuing in Colombia or Ecuador and therefore the requirements of para EX.1.(b) of Appendix FM of the Immigration Rules were not met (para 45). She gave her reasons at paras 17-45 of her decision, summarised at paras 9-11 below.

8. The judge said (para 45) that, for the same reasons and in relation to para 276ADE(vi) of the Immigration Rules, there was no evidence that would cause her to conclude that there were very significant obstacles to the appellant's reintegration in Colombia, bearing in mind that the appellant had only left Colombia in 2018, having lived the entirety of her life up until that point in her home country.

9. The judge then considered the Article 8 claim. She accepted that the appellant and the sponsor enjoyed family life together; that they lived together and had a genuine and subsisting relationship and that the appellant and the sponsor had established private lives in the United Kingdom. However, she found that there were no exceptional and/or compelling circumstances which warranted a grant of leave to the appellant under Article 8 outside of the Immigration Rules, for reasons she gave at paras 48-73 of her decision. She found that the consequences of the respondent's decision were not unjustifiably harsh.

The judge's decision

10. The judge's reasons for finding that there were no insurmountable obstacles to family life continuing outside the United Kingdom may be summarised as follows:

11. The judge noted that the sponsor had suffered from three separate medical complaints since 2019, resulting in him being hospitalised for Covid, undergoing a

heart bypass and "*now a requirement for a knee replacement*" (para 41); that the only current bar to the sponsor travelling was that he *"[was] due to have an imminent knee replacement*" (para 41); that, on the evidence before her, the sponsor's knee operation was due to take place "*imminently*" (para 41) being "*within a matter of weeks*" (para 33); that he had received a pre-assessment appointment booked for 30 June 2022 (para 33); that his current disability was a temporary situation; and he could reasonably expect a significant improvement in his mobility "*over the coming weeks and months*" (para 35).

12. In relation to the prospects of employment in Colombia, the judge noted that the appellant's representative relied upon a letter from Mr Juan Felipe Ochoa Mafla (incorrectly referred to as Mr Mafia at para 28 of the judge's decision), a lawyer in Colombia who had stated that it was very unlikely that at the age of 50, the appellant would be able to secure work. The judge said (para 29) that she had considered with care the submission advanced on the appellant's behalf that there would be a lack of employment opportunity for the appellant and that the sponsor would be unable to work. However, she considered that "*no background material was referred to that supports this contention*". She noted that the appellant had worked in Colombia until she came to the United Kingdom in 2018 and that she had confirmed in her statement that she would continue to work on return to Colombia, albeit for limited income. She also noted the background material relied upon indicated an unemployment rate of 17% and did not indicate that as a 50-year-old, the appellant would be unemployable (para 29). The judge noted that the sponsor had consistently worked in the United Kingdom and she considered that there was no sensible reason given why, once he had recovered from his knee operation, he could not work in Colombia if he so wished (para 42). She did not accept as credible the suggestion that women over 50 and men over 60 would be unable to find work in Colombia (para 42).

13. At para 38 of her decision, the judge noted that the sponsor had historically had knee surgery in Ecuador and that no reason had been given as to why the couple would be prevented from living in Ecuador if the medical facilities there were preferable. At para 39, she said that the sponsor did not, in her view, have any medical conditions which would prevent him from living in Colombia or, if "*they so choose*", Ecuador.

14. The judge gave her reasons for finding that the decision was not disproportionate at paras 54-73. Given that the grounds for challenging the judge's finding on proportionality are limited to the same issues, i.e. the judge's assessment of the availability of employment to the appellant and the sponsor in Colombia and the availability of healthcare to the sponsor, as are raised in relation to her finding that there were no insurmountable obstacles to family life being enjoyed outside the United Kingdom, there is no need to summarise the judge's detailed reasons for finding that the decision is not disproportionate.

15. Suffice it to say that, in her assessment of proportionality, the judge found, inter alia, that, if the appellant were to return to Colombia to make an entry clearance application, it was likely that she would be granted entry clearance (para 59). However, she found that there was significant public interest in this case in requiring the appellant to make an entry clearance application for reasons she gave at para 64. In summary, the appellant had knowingly obtained a visit visa when she intended

to join her husband in the United Kingdom. She overstayed her visa by over 2 months and made no attempt to regularise her stay during that time. She then submitted an application which was refused and her appeal dismissed. However, she still did not return to Colombia. She submitted a further application instead, despite her relationship with the sponsor having been established whilst she was living in Colombia. Finally, the judge said that no good reason has been given for her failure to make an appropriate application for entry clearance and the delay in her subsequent application.

The grounds

16. In summary, the grounds contend that the judge erred in law as follows:

(i) (Ground 1) In relation to the judge's finding that para EX.1.(b) of Appendix FM of the Immigration Rules was not satisfied and her assessment of proportionality under Article 8, the judge erred by failing to consider the situation as it was at the date of the hearing rather than some future date. The judge failed to consider who would care for the sponsor in the two to three-month-period following his knee operation whilst the appellant was in Colombia. She had not disputed the sponsor's evidence that his brothers in the United Kingdom would be unable to care for him.

(ii) (Ground 2) The judge erred in her consideration of the evidence before her about the availability of healthcare and employment for the sponsor in Colombia, as follows:

(a) In reaching her conclusion (para 42) that she did not accept as credible the "*suggestion*" that women over 50 or men over 60 would be unable to find work in Colombia, she overlooked the letter dated 24 June 2022 from Mr Mafla, a Colombian lawyer specialising in labour law and social security, which set out the difficulties for the sponsor to find work because of his age and his pre-existing medical conditions. Mr Mafla had stated that the latter would mean that employers are reluctant to employ him because of the extra protections afforded to people with such vulnerabilities. Mr Mafla had further stated that the appellant would struggle to find work because of her age. The judge should have given adequate reasons for discounting the evidence of Mr Mafla which was more than a "*suggestion*".

(b) In making her finding at para 37 that the sponsor would not be denied medical treatment in Colombia if he obtained health insurance, the judge overlooked the evidence at page 24 of the appellant's supplementary bundle that showed that individuals who are over the age of 60 and who have pre-existing health problems would not be eligible for private health insurance and would need to pay for their healthcare from their own pockets.

(c) In making her finding that the sponsor would have access to medical treatment through his wife, the judge overlooked the evidence of the complicated nature of the healthcare system in Colombia; specifically, the evidence of Mr Mafla that the appellant would need to be working in order for the sponsor to access treatment and that even then, the process to register takes time [ibid and SB/28].

(iii) (Ground 3) The judge erred in law by considering whether the appellant and the sponsor could live in Ecuador. This was not the respondent's case and the possibility of the couple living in Ecuador was not put to the appellant or the sponsor at the hearing.

17. The grounds do not challenge, in terms, the judge's finding that there were no very significant obstacles to the appellant's reintegration in Colombia for the purposes of para 276ADE(vi) of the Immigration Rules.

Assessment

18. At the hearing, Mr Wilford acknowledged that he would have "*a greater problem*" showing that ground 3 was material. He therefore said that he placed greater weight on grounds 1 and 2 which he submitted should be considered together.

19. I asked Mr Wilford to address me on the question whether the judge's finding that it would not be disproportionate for the appellant to make an entry clearance application was determinative, if there was no material error of law in that finding. In that regard, Mr Wilford informed me that there was no evidence before the judge that the sponsor would not be able to obtain care from social services if he temporarily needed care after his operation.

20. Mr Wilford informed me that, although the judge had found that the sponsor's knee operation was due to take place imminently, it had still not taken place. However, he accepted that this constituted post-hearing evidence that could not be taken into account. He did not disagree when I pointed out that the evidence before the judge appeared to be that the sponsor's operation was due to take place imminently, given that he had had his pre-assessment appointment booked for 30 June 2022. Furthermore, I have noted (since the hearing before me) that the judge's finding that the operation was imminent on the evidence before her was not challenged in the grounds.

Ground 1

21. Mr Wilford submitted that the fact that there was no evidence before the judge that the sponsor would not be able to obtain care from social services after his knee operation in the United Kingdom did not negate ground 1. He submitted that the judge should have considered the circumstances as they were on the day of the hearing and not "*cast an eye into the future"*. He submitted that the difficulty with the judge's approach is underlined by the fact that the sponsor has still not had his operation.

22. Although Mr Wilford accepted that any Article 8 assessment looks to the future and that it would be unrealistic for him to submit otherwise, the judge still had to consider the facts as they were before her, in his submission. The judge had to take account of the circumstances of the sponsor after the operation. The judge did not appear to have considered the sponsor's post-operation circumstances, i.e. who would be caring for sponsor if the appellant were not in the United Kingdom. The evidence was that the sponsor would not be able to rely upon his brothers. Although Mr Wilford accepted that he was unable to point to any evidence that was before the judge to show that the sponsor would be unable to obtain any care that he required from social services, there was a qualitative difference between the support that the appellant could give and that which social services could give, in his submission. This

was not considered by the judge. She failed to consider the circumstances of the sponsor between the date of hearing and the date when the appellant and the sponsor may be re-united following an entry clearance application.

23. In my judgment, the submission in ground 1, that the judge erred by failing to consider the facts and evidence as at the date of the hearing, is misconceived. It ignores the reality that any assessment of whether there would be very significant obstacles to family life being enjoyed outside the United Kingdom necessarily involves a judge having to consider the circumstances of the individuals concerned in the event that the respondent's decision is upheld and the appellant and the sponsor were to either separate temporarily or the sponsor were to accompany the appellant to Colombia.

24. In any event, ground 1 ignores the fact that the facts as they were on the evidence that was before the judge was that the sponsor's operation was imminent. He had had his pre-assessment appointment booked for 30 June 2022. The judge's finding that the sponsor's knee operation was imminent was not challenged in the grounds. Indeed, it is difficult to see how it could have been challenged given the evidence that was before the judge. The fact that it has subsequently transpired that the operation did not take place is simply not relevant in deciding whether the judge erred in law, as Mr Wilford acknowledged.

25. Whilst it is correct that the judge accepted at para 43 of her decision that the evidence before her was that the sponsor's brothers who live in the United Kingdom would be unable to care for him after his operation as they both work and have their own responsibilities, the fact is that the burden of proof was upon the appellant to adduce evidence that the sponsor would not be able to obtain any care that he may temporarily require after his operation from social services. There was no such evidence.

26. Mr Wilford submitted that the judge should have considered the qualitative difference in the care that the appellant could give and the care that could be provided by social services. However, in the absence of evidence, the judge would have been embarking upon an exercise in pure speculation if she had done so.

27. For all of these reasons, ground 1, as advanced in the written application for permission to appeal and in submissions before me, is without any merit.

Ground 2

28. There are three aspects to ground 2, which I have set out at para 16 (ii)(a) to (c).

29. Mr Wilford submitted that the judge erred in treating the evidence of Mr Mafla as amounting to a mere assertion. She gave inadequate reasons for rejecting his evidence that women over 50 and men over 60 would experience difficulty in obtaining employment in Colombia. The judge erred in finding that health insurance for the sponsor would be available as a result of the appellant obtaining employment in Colombia. Furthermore, the difficulties in both the appellant and the sponsor obtaining employment would affect the couple beyond the availability of healthcare for the sponsor.

30. The judge dealt with the evidence of Mr Mafla at paras 28 and 29 of her decision which read:

> "28. [The appellant's representative] relied upon the letter from Mr Mafia, a lawyer in Colombia who states that it is very unlikely that at the age of 50, the appellant would be able to secure work.
>
> 29. I have considered with care [the appellant's] submissions that there would be a lack of employment opportunity for the appellant and the sponsor would be unable to work, however, no background material was referred to that supports this contention and I note that the appellant worked in Colombia until she came to the UK in 2018 and has confirmed in her statement, that she would continue to work on return to Colombia, albeit for limited income. I note the background material relied upon indicates an unemployment rate of 17% and does not indicate that as a 50 year-old, the appellant would be unemployable."

31. Ground 2 as set out at paras 16(ii)(a) and (b) concerns the sponsor and the difficulties that he would face in obtaining employment and healthcare in Colombia due to his "*pre-existing medical conditions*". However, on the evidence before the judge, the only medical condition that was relied upon was that he required a knee operation, an operation which was due to take place imminently, and that, once he had had that operation and recuperated from the operation, his medical condition gave rise to no further obstacle to his enjoyment of family life with the appellant in Colombia.

32. Ground 2 as set out at para 16(ii)() and (b) above simply ignores the judge's finding, that the sponsor's operation was due to take pace imminently and that this might mean that the appellant and the sponsor would be temporarily separated whilst the sponsor had his operation in the United Kingdom and the appellant made an entry clearance application.

33. Further, and in any event, I do not accept that the judge failed to consider or give adequate reasons for rejecting the evidence of Mr Mafla. She specifically referred to his evidence at para 28. In referring to the submissions of the appellant's representative at para 29, she was in effect also referring to the evidence of Mr Mafla. Nothing turns on the fact that she described Mr Mafla's evidence as "*contention*" or (for that matter) "*assertion"*. It is clear from paras 28 and 29 of her decision that she rejected his evidence because it was not consistent with other background material before her, referred to in the final sentence of para 29, and that it was not consistent with the fact that the appellant had worked in Colombia until she came to the United Kingdom in 2018 and had confirmed in her witness statement that she would continue to work on return the Colombia albeit for a limited income.

34. There is therefore simply no substance in ground 2 as set out at paras 16(ii)(a) and (b) above.

35. Although ground 2 as set out at para 16(ii)(c) above concerns the appellant's employment in Colombia, the real nub of this ground concerns the need for the sponsor to access treatment in Colombia. Again, this ignores the fact that, on the evidence before the judge, the only medical condition relied upon in relation to the sponsor was that he needed a knee operation and that that operation was due to take place imminently on the evidence before the judge.

36. Thus, there is no substance in the third and final aspect of ground 2.

Grounds 1 and 2 – to be taken together?

37. No good (or any) reason has been given in support of Mr Wilford's submission that grounds 1 and 2 should be considered together. I cannot see why they should. Ground 1 concerns the sponsor's circumstances in the United Kingdom if he and the appellant were to be temporarily separated whilst she makes an entry clearance application and he undergoes the knee operation, whereas ground 2 concerns the circumstances that the appellant and/or the sponsor may experience in Colombia as to employment prospects and the availability of healthcare. I simply cannot see how or why the assessment of one ground is hampered by it not being considered together with the other.

38. In any event, even taking the two grounds together, I am satisfied that they do not show that the judge materially erred in law, for the reasons I have already given above.

Ground 3

39. Although it was for the appellant to establish her case, I accept that she had no reason to address whether she and the sponsor could enjoy family life together in Ecuador given that the respondent had not raised this possibility in the decision letter or at the hearing. Accordingly, I accept that the judge ought not to have relied upon this aspect of her reasoning. It was unfair for her to do so.

40. However, this makes no material difference given that there is no material error of law in the judge's finding that there were no insurmountable obstacles to family life being enjoyed in Colombia and no material error of law in her finding that the decision was not disproportionate. As I have indicated above, Mr Wilford effectively accepted that ground 3 could not succeed on its own.

41. For all of the reasons given above, the judge did not materially err in law.

## Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal against the respondent decision stands.

Signed

Upper Tribunal Judge Gill Date: 14 December 2022

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period**

after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**