Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42812/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 August 2015	**On 14 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS PRINCESS MACALIDONG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Singer (Counsel)
For the Respondent: Mr N Bramble (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Herbert OBE, promulgated on 10th September 2014, following a hearing at Taylor House on 13th August 2014. In the determination, the judge allowed the appeal of Miss Princess Macalidong. The Respondent Secretary of State, subsequently applied for, and was granted permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of the Philippines. She was born on 20th July 1986. She made an application on 9th July 2012 to vary her leave to remain in the UK. This was

refused on 7th August 2013. The refusal was based on the new Immigration Rules which came into effect on 9th July 2012. The new Immigration Rules specify the requirements under paragraph 276ADE where it is clear that the Appellant did not meet the criteria as she was a person who had entered the UK in 2008 and had not lived continuously in the UK for at least twenty years as required by that provision. She was age 25 years. And so in this respect also, she did not meet the requirements of the new Immigration Rules. On the other hand, she had lived in the Philippines for 22 years and in the absence of any evidence to the contrary it was not accepted that she would have lost ties there, so as to be unable to relocate there, or to return there.

The Appellant

3. The Appellant's case is that she met her partner, Mr Glen Blake, on a train in January 2013. Their relationship as a boyfriend and girlfriend started a few weeks afterwards. The Appellant then met Mr Blake's parents as well as his brother and sister. They have been living together now since about March 2014. They plan to marry as soon as practicable.

The Judge's Findings

4. The judge held that the effect of the parties splitting by being required for one of them to return to the Philippines "would be devastating" and that there were "serious and significant obstacles" (paragraph 32). The judge accepted that the marriage was a genuine one (paragraph 37). He also accepted that "given the strength and durability of this relationship that the parties clearly do intend to get married to each other next year in the Philippines and that they have been living together for a period of six months ..." (paragraph 39). He also held that, "there is a large degree of likelihood that even if the Appellant were removed this relationship would continue and that she would subsequently without much delay and expense make a successful application to re-enter ..." (paragraph 41). The case law under Article 8 was applied with reference to **Gulshan** and the appeal allowed (see paragraphs 42 to 43).

Grounds of Application

5. The grounds of application stated that the judge failed to apply Section 117A to Section 117D of the 2002 Act in assessing the proportionality of the Secretary of State's decision. He also failed to have regard to the Court of Appeal judgment in **MM [2014] EWCA Civ**.

6. On 27th November 2014, permission to appeal was granted.

7. On 12th January 2014 the matter came before Deputy Upper Tribunal Judge JM Lewis at Field House for determination. The Tribunal on that occasion determined that paragraph 117B had not been properly applied. She may have been able to speak English, given that she gave evidence in that language before the Tribunal. However, there were issues in relation to financial independence (see paragraph 117B(3)).

8. The judge observed that,

> "This issue was not addressed in the determination. There is documentary evidence of the Sponsor's finances within the Appellant's bundle, which the judge referred to at paragraph 16. At the error of law hearing, Mr Singer submitted that this evidence would have established compliance with the threshold in the Immigration Rules for financial sufficiency ..." (paragraph 10).

9. However, the Tribunal held that,

> "There was no evidence to support the finding at paragraph 32 that the effect of separation upon the relationship of the parties would be devastating. It does not sit easily with the finding at paragraph 26 that the judge was satisfied that this was a long-term serious committed relationship ..." (paragraph 11).

10. There was also no medical evidence that the Sponsor would have difficulty in the heat in the Philippines to be able to cope (see paragraph 12). Neither was there any evidence, as claimed (at paragraphs 33 and 41) that any application made on the basis of engagement or marriage would involve much delay and expense on the part of the Appellant and the Sponsor (see paragraph 13).

11. However, the judge did not determine the substantive issues on this occasion. Instead, it was held that, "on reflection, I have decided that there is a sufficient unreliability about some of the findings of fact that the appeal needs to be reheard entirely" (paragraph 16).

12. It is in these circumstances that this matter comes before this Tribunal.

Submissions

13. At the hearing before me on 3rd August 2015, Mr Singer, appearing on behalf of the Appellant, submitted that he would call both the Appellant and the Sponsor to give evidence. He first called the Appellant herself. She adopted her witness statement (at pages 1 to 4), and the witness statement was signed before me today on 3rd August 2015. She confirmed she was in a long-term relationship with the Sponsor having been living with him since March 2014. She also said that her partner, Glen Blake was working, but she was not working as she was not allowed to. She was asked why she could not return to the Philippines to get married, as she had maintained before Judge Herbert OBE. She stated that she did not want to risk doing so without her immigration status becoming more secure. She went on to say that her partner could not secure a job in the Philippines as he could not speak the local language. She did confirm that she had herself, two brothers and two sisters there. However, her partner had no family there. She had been in the UK on a student visa. If she had leave to remain in this country she would have been working by now. She could not marry in the UK as she did not have her passport with her.

14. In cross-examination, she was asked whether her partner knew about her student status. She said that he subsequently found out after quite a while. She was asked to provide the evidence that her partner had been unable to find a job. She said that he had been searching on the internet but she did not bring any evidence with her today to prove that he had been doing so. She was asked if she knew how long it took for a visa application to get through the system in the Philippines. She said she did not know. It was put to her that the only reason why she was, in that case, refusing to return was simply because she wanted to stay in this country. She had made no enquiries. She had undertaken no research. She and her partner simply did not know. She said this was not the case.

15. There was no re-examination. Mr Singer then called the Sponsor, Mr Glen Blake, to give evidence. He adopted his witness statement (at pages 5 to 7) which was dated in front of me and signed on 3rd August 2015. He was asked to confirm the contents of his P60 for April 2015, which showed that his earnings were £20,847 (see page 6 of 29 of the latest bundle). He said this was indeed the case. The judge had accepted this evidence but had not made any reference to the evidence as such. Mr Singer said that he had no further questions to put.

16. In cross-examination the witness was asked what research he had done for a job in the Philippines. Mr Blake replied that he had been working in the UK in a casino for the last eight years, and so it was natural for him to be looking for a job in the same capacity. He had gone to the website, Gamingfloor.com, and then searched under that for Casino Forum, for jobs in cities like Manila, but nothing had come up. He was asked if he had looked at the length of time it takes for his partner to get a visa from Manila. He said he had not done so. He was asked at what point he found out that his wife's immigration status was precarious. He said it was around March 2014. He said he was not in a rush to find out. As far as he was concerned, he was a British citizen, who had fallen in love, and it was the most natural thing for him to expect that, having fallen in love, he would be allowed to live with his loved one in the country in which he was born and in which he lived. He said that by the time he did find out his relationship with the Appellant had developed very considerably. After all, they had met in January 2013, and he had only found out that the "gravity of her immigration status" was going to be a problem around March 2014. He was asked what was stopping him from being separated with his partner for three or four months. He said that three or four months was a long time and this "would take her away from me".

17. In his closing speech, Mr Bramble relied upon the refusal letter of 7th August 2013. He handed up the Court of Appeal decision in **Singh [2015] EWCA Civ 74**. This establishes that it is unnecessary, in a freestanding Article 8 consideration, to move to a second stage, if at the first stage, all the necessary issues are addressed by the Immigration Rules. If any family life or private life issues raised by the claim have already been redressed at the first stage, then it is unnecessary to go to the second stage (see paragraphs 65 to 67 of **Singh**). That, submitted Mr Bramble, was the position precisely in this case. Second, after 6th September 2012, the new Rules in HC 565 had to be satisfied. This meant that the requirements therein had to be complied with. Third, in relation to the new Rules, the Court of Appeal had now made it clear

in **Agyarko [2015] EWCA Civ 440** that, in complying with Section EX.1(b) the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. It is not simply a factor to be taken into account. (See paragraph 24). The Appellant had not been able to establish that there were "insurmountable obstacles to her returning to the Philippines just in order to make a proper application from that country".

18. Finally, if I was not with Mr Bramble on this point, and freestanding Article 8 jurisprudence had to be invoked, then the Appellant would still fail if regard was had to Lord Bingham's tabulation at paragraph 17 of **Razgar**, because the appeal would be lost on the basis that the decision of the Secretary of State was not disproportionate. Subject to these matters, it was accepted that the Appellant did satisfy the financial requirements test because her sponsoring partner was earning £20,847. Equally, it was accepted that there was a tenancy agreement from the landlord confirming the parties living together so that there was no question mark raised in relation to the "durable relationship" of the parties. Nevertheless, the appeal would fail on the grounds set out above.

19. In his closing speech, Mr Singer submitted that Judge Herbert OBE allowed the appeal. The basis of the refusal letter was wrong. It was also wrong to say that he did not give sufficient consideration to the relationship and to the Appellant's ability to speak English, and to the fact that she was not a charge on public funds. Where Judge Herbert did go wrong, however, it was in failing to make expressed reference to Section 117B of the 2014 Act. Mr Singer submitted that he had conceded as much the last time he appeared in the Upper Tribunal before Judge Lewis.

20. Today, however, there was evidence of earnings over £18,600 given the P60 for 2015. There was also evidence of the tenancy agreement. Both of these were objective pieces of evidence which had been accepted by Mr Bramble as well today. That left the question of Article 8, upon which this appeal was based. Mr Singer submitted that all the case law from **Ganesabalan** to **SS (Congo)**, make it clear that there was indeed a two stage test to be applied before one could decide to leave the domain of the Immigration Rules and enter the domain of freestanding Article 8 jurisprudence.

21. This was because the Rules do not sufficiently cover every eventuality. With respect to a case such as the present, it was plain that the Rules did not cover such an eventuality. The Appellant could not succeed under the Rules because the Rules required her to be in a two year subsisting relationship with a partner. Of necessity, therefore, she had to look to the situation outside the Rules.

22. Second, the Rules also had to be abandoned given that they did not cover the Article 8 rights of Mr Glen Blake and it was clear from the House of Lord's judgments in **Beoku-Betts** that, because family life is composite, one could not divorce the rights of the Appellant from those of the Sponsor in this case.

23. But thirdly, once one was in the domain of freestanding Article 8 jurisprudence, there was no requirement of insurmountable obstacles to be met, which was a creature specifically of statute, and which was one of the conditions needed to comply with

the requirements under Section EX.1(b). This was made clear by Sedley JL in **VW (Uganda)** and it was made clear most importantly by the House of Lords in **EB (Kosovo)**. The test in freestanding Article 8 jurisprudence is that of "reasonableness".

24. It was misconceived to place reliance upon **Agyarko** because that was specifically on EX.1(b) because the issue there was compliance with the Immigration Rules. The facts of **Agyarko** were very different. In that case, Mrs Agyarko, a national of Ghana, had entered the UK with limited leave in 2003, and had then become an illegal overstayer, before forming a relationship and cohabiting with a naturalised British citizen. They married by proxy in accordance with Ghanaian law. Her relationship had always been precarious (see paragraph 11 of the judgment). For this reason, it was unsurprising that the Court of Appeal decided that,

> "…..she had no right to be in the United Kingdom and was therefore precarious in the relevant sense, it is only if her case is exceptional for some reason that she would be able to establish a violation of Article 8." (See paragraph 28).

25. The present case, submitted Mr Singer, was nothing like this. The Appellant was here lawfully. She was still here lawfully. This is because, having formed a relationship and having made her application under the partner's route, she had Section 3C leave under the Immigration Act 1971.

26. In these circumstances, given that the Appellant could comply with all the requirements, including the requirements under Section 117B of the 2014 Act, her position fell to be determined under the "**Chikwamba** principle". In that case, the House of Lords held that there:

> "Would be a violation of Article 8 if the applicant for leave to remain in that case were removed from the United Kingdom and forced to make an out of country application for leave to enter ..... in circumstances where the interference with her family life with the husband associate with the removal could not be said to serve any good purpose" (see paragraph 31).

27. The Court of Appeal in **Agyarko** went on to say that,

> "It is possible to envisage a **Chikwamba** type case arising in which Article 8 might require that leave to remain be granted outside the Rules, even though it could not be said that there were insurmountable obstacles to the applicant and their spouse or partner continuing their family life overseas. ...." (paragraph 31).

Mr Singer submitted that the instant case was precisely such a case. He asked me to allow the appeal.

Findings

28. I have given careful consideration to all the documents before me and to the oral evidence and submissions, which are set out in the Record of Proceedings. I find that the Appellant does discharge the burden of proof. My reasons are as follows.

29. First, this is a genuine relationship. It is a durable relationship. This has been accepted by the Respondent. The Appellant speaks English. She has not been in the UK unlawfully. She is financially self-sufficient. She is not a charge on public funds. The Sponsor can show earnings of £18,600. There is a tenancy agreement from the landlord. There is no poor immigration history. This means that where as under Section 117B(1) the maintenance of "effective immigration control is in the public interest", where the Appellant speaks English and is financially independent there is no public interest in requiring removal. This is also not a case where it can be said that "little weight should be given" to a private life or relationship with a qualifying partner which is "established by a person at a time when the person is in the UK unlawfully". Fundamentally, the Section 117B conditions are in the Appellant's favour.

30. Second, this is important if one is to consider the appeal under freestanding Article 8 jurisprudence, as Mr Singer has maintained it should be considered from the outset. It is unnecessary to show "exceptional circumstances" given that the Appellant has been in the UK lawfully throughout before a freestanding Article 8 jurisprudence can be enquired into. Yet, enquired into it must be because the Rules are not comprehensive enough to cover a situation such as the Appellant's. The Rules require the parties to be living together for two years. They also do not consider the position of the Sponsor. With respect to the consideration of this claim under freestanding Article 8 jurisprudence, however, it is plain that the requirement of "insurmountable obstacles" is not a directly relevant one, and what is required is that a viable case for showing that it is not reasonable to expect the Appellant to return.

31. However, it cannot be said to be reasonable if the "**Chikwamba** principle" applies. I hold that it does. This is because the Appellant has satisfied all of the substantive requirements of the Rules that apply to her. She is financially independent, speaks English, and is not a charge on public funds, and the relationship is a genuine and subsisting one. The only formal requirements she cannot satisfy is that of being in possession of an entry clearance certificate for the purposes of entering the UK to join her partner. It is this result which is "Kafkaesque" in the **Chikwamba** sense. There is, as **Agyarko** makes clear, the unnecessary imposition of a requirement which "could not be said to serve any good purpose" (see paragraph 31).

32. Furthermore, I am emboldened in this conclusion by my clear finding, on the evidence before me, that the Sponsor will find it difficult to obtain a job in the Philippines. Mr Bramble had accepted in his closing speech that both witnesses came across as credible and honest and straightforward. They gave their evidence in the best way they could. The Appellant herself said that she would not think of being anything other than truthful before a Court of Law.

33. The evidence, which I accept, is that the Sponsor has attempted on the internet to find a job commensurate with his current earnings and position in a casino at a management level but nothing has been available. It is also the case that, were he to look for a lesser job, he does not speak the Filipino language. He also has no friends or relatives there.

34. In the circumstances, it cannot be said to be reasonable to expect the Sponsor to accompany the Appellant to the Philippines either. I have already determined that there is no good sense or purpose in requiring the Appellant to return there given that she does comply with all the Rules, substantively speaking, and given that the appeal can be allowed under freestanding Article 8 jurisprudence. This appeal, accordingly, is allowed.

Notice of Decision

35. The decision of the First-tier Tribunal involved the making of an error of law and it has been set aside by DUTJ Lewis. I remake the decision as follows. This appeal is allowed.

36. No anonymity order is made.