Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05422/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd October 2018	**On 16th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

P B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Ms S Iengar, counsel instructed by Paul John & Co solicitors

DECISION AND REASONS

1. The Claimant is a national of the Philippines born on 3 September 1981. She arrived in the United Kingdom in possession of a student visa on 5 November 2008 and her leave was subsequently extended on this basis until 27 July 2012. The Claimant then overstayed and on 25 July 2017 she applied for further leave to remain on the basis of

her marriage to a British citizen. This application was refused and certified and the Claimant was detained pending removal on 13 March 2018. This removal was subsequently deferred and the Claimant made an asylum claim which was based on a fear of return to her home province of Tabuk Kalinga due to a tribal war taking place there. This application was refused on the decision dated 16 April 2018 and the Claimant appealed against this decision to the First-tier Tribunal.

2. The appeal came before First-tier Tribunal Judge Sweet for hearing on 30 May 2018 where he heard evidence from the Appellant and her husband D M. In a decision and reasons promulgated on 14 June 2018, the judge allowed the appeal. Whilst rejecting the credibility of the Claimant's asylum claim, the judge found it would be disproportionate to expect the Claimant to return to the Philippines and her appeal under Article 8 should be allowed.

3. Permission to appeal was sought, in time, by the Secretary of State on the basis that there were a number of inconsistencies between the evidence of the Claimant and her husband. The judge failed to make a finding on whether or not the relationship between the couple was subsisting which was a material error and if the judge did implicitly accept the relationship his reasons for so doing were inadequate and arguably inconsistent given the judge's own conflicting findings, the conflicting evidence of the witnesses and the absence of strong evidence submitted on the Claimant's behalf.

4. Permission to appeal was granted by Judge of the First-tier Tribunal P J M Hollingworth in a decision dated 10 August 2018 on a number of bases, but essentially, that it was arguable that the judge had erred in attaching insufficient weight to his negative findings in the context of the relationship and marriage and attached too much weight to the factors linked with ostensible evidence of cohabitation and reached an arguably unsustainable conclusion in light of the discrepancies in the evidence and the stated concern of the judge as to the genuineness of the relationship.

Hearing

5. At the hearing before the Upper Tribunal, Ms Willocks-Briscoe submitted that the judge had found the Claimant to be lacking in credibility at [35] and had found there were issues with regard to the relationship between the Claimant and her husband. The judge apparently felt that the sole issue of cohabitation was sufficient to establish a genuine and subsisting relationship. However if, despite his adverse findings, the judge was going to find in favour of the relationship there was an inadequate engagement with the evidence, apart from the fact that the two people lived in the same property. She submitted that this was not enough to show a subsisting and genuine relationship, that the judge had given inadequate reasons, particularly in light of the significant credibility findings. Ms Willocks-Briscoe submitted that this impinges on the Article 8 assessment and any findings which flow from a well-reasoned positive finding impact on the end result. She submitted that the

proportionality assessment was undermined as it was unclear upon what basis it had been made.

6. In her submissions, Ms Iengar accepted it was a brief decision but that she would argue that it is sustainable. She submitted that if the decision was adequately reasoned then the proportionality assessment must stand. She submitted the grounds of appeal were a disagreement with the judge's assessment of the weight to be attached to the evidence which was a matter for the judge. In respect of the Claimant's credibility, Ms Iengar submitted that there is a clear line drawn between [34], i.e. credibility in respect of the asylum claim, and [35] which was concerned with Article 8. She submitted that the marriage was accepted, it was just the genuineness of the marriage that was in issue. She submitted that the judge had not based his finding simply on mere cohabitation: see [12] to [27], and that the judge had taken into account positive and negative aspects of the case at [36]. Ms Iengar submitted that the judge had resolved his concerns at [37] by applying the appropriate standard of proof. In respect of a point put to her by the Upper Tribunal as to the absence of findings relating to the public interest considerations, Ms Iengar submitted that these have been dealt with in a blanket manner at the end of [37].

7. In reply, Ms Willocks-Briscoe submitted that the matter of weight is for the Tribunal to decide but what is telling in the submissions is that the judge does not engage with that and does not show as part of the consideration that weight is to be applied and that the Claimant has been left in a vacuum. She submitted it is possible to have cohabitation without a genuine and subsisting relationship. The judge's brief references give no indication as to how that balance is resolved and the judge had to deal with both conflicting sides and show how it weighed in the Claimant's favour.

8. I found material errors of law in the decision of the First-tier Tribunal Judge and announced my decision at the hearing. I now give my reasons.

Findings

9. Whilst I accept that the judge does distinguish the Claimant's credibility in respect of her asylum claim and the credibility in respect of the Article 8 assessment based on the Claimant's marriage to and relationship with D M, who is now a British citizen, I find that the judge made a number of conflicting findings. At [35] he held "*Neither the appellant nor her husband, both of whom gave evidence before me, gave the appearance of being a couple and in other circumstances I would have rejected their relationship on this basis*". The judge then went on to find that there was evidence of them living in the same address in the form of bank statements from February 2018 only. In respect of their oral evidence, the judge noted that the evidence about the tenancy agreement was inconsistent, the tenancy agreement is only in the Claimant's husband's name, the Claimant was unaware whether the rent was paid weekly or monthly and whether the rent was £100 or £103. Further inconsistencies were whether the Claimant's family would accept her husband who is from Kosovo and whether there would be tension due to the religious differences, the Claimant stating there would be a religious issue and her husband stating that there would not.

10. At [37] the judge held as follows:

> *"However, despite these discrepancies in the evidence and my concern as to whether they were in a genuine relationship, applying the appropriate standard of proof, namely the balance of probabilities in respect of the Article 8 ECHR claim, I am satisfied that they had been living together for 2 years before their marriage in January 2017 and therefore they would meet the requirements of partners in any event, whether or not they were married. Mr M is a British citizen and is employed as a bricklayer on an annual salary of £19,000. Taking all these factors into account, I consider it would be disproportionate for the appellant to return to the Philippines and her appeal under Article 8 ECHR should therefore be allowed."*

11. The difficulty with this finding is that the conflict between the judge's findings based on the inconsistencies between the evidence of the Claimant and her husband have not been resolved properly or at all. In light of such inconsistencies it is incumbent upon a judge to make a finding, e.g. as to the amount of rent paid, as to whether or not there would be a religious issue given the family's different religions, and whether there was any further evidence which would tip the balance in addition to the somewhat limited evidence of cohabitation. On this basis, I find there is merit in the grounds of appeal and submissions on behalf of the Secretary of State in that there is an inadequacy of clear and proper reasons upon which the judge could allow the appeal on the basis of Article 8.

12. For the reasons set out above, I find material errors of law in the decision of First-tier Tribunal Judge Sweet. I set that decision aside and remit the appeal for a hearing *de novo* in respect of the Article 8 aspect of the case only, there having been no challenge to the findings in respect of asylum as a result of which the asylum appeal was dismissed.

DIRECTIONS

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1. The appeal should be listed for a hearing *de novo* at Hatton Cross.

2. The time estimate is three hours.

3. If either party requires an interpreter then that should be requested at least 14 days in advance of the hearing date.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any

member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Rebecca Chapman* Date 11 October 2018

Deputy Upper Tribunal Judge Chapman