Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: IA/09685/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 19 January 2015

Promulgated:
On 22 January 2015

Before

Upper Tribunal Judge Kekić

Between

Ms Esperanza Ibe Francis (nee Rivas)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Mr M Sowerby, Counsel
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Determination and Reasons

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission by First-tier Tribunal Judge Osborne on 9 December 2014 in respect of the determination of First-tier Tribunal Judge Morgan who dismissed this article 8 by way of a determination promulgated on 27 October 2014.

2. The appellant is a Filipino national born on 19 May 1961. She arrived in the UK as a visitor in July 2005 and overstayed. No application to

regularise her stay was made until October 2011 when she sought to remain as the unmarried partner of a British citizen. That application was refused without a right of appeal in December 2011 under paragraph 295D. The appellant did not depart and so on 13 January 2014 directions were given for her removal. She lodged an appeal on human right grounds and argued that her partner (whom she had since married) could not be expected to relocate to the Philippines.

3. The appeal was heard by First-tier Tribunal Judge Morgan at Taylor House on 15 October 2014. It was conceded by the appellant's representative at the hearing that the appellant could not meet the requirements of the rules and that only article 8 was relied on. The Presenting Officer concurred with this approach. The judge then undertook an article 8 assessment and dismissed the appeal. Permission to appeal was granted on the basis that the judge had arguably used the wrong test when assessing proportionality.

Appeal hearing

4. Mr Sowerby made several arguments. He submitted that although it could be seen from the refusal letter that the application had been decided under paragraph 295D, the old rules, the judge had wrongly referred to the new rules in paragraph 3 of his determination. He further argued that since the making of the application the appellant and her partner had married and the Secretary of State had not considered that development. He maintained that as the appellant was an overstayer, she was not prohibited from switching categories and that the judge was wrong to find otherwise; under E-LTRP.2.2 which invoked EX.1, it was possible for her to do so. Finally, he argued that the new rules were not a complete code and that when assessing family life, the judge had applied the test of insurmountable obstacles rather than the test of reasonableness as he was required to do. He pointed out that since the judge appeared to have accepted that the appellant would be able to satisfy the requirements of the Immigration Rules if she applied for entry clearance, she should not be expected to leave the country simply to comply with the formalities of making a visa application. He argued that the matter should be remitted to the Secretary of State so that the marriage could be considered. Failing that, there should be a rehearing.

5. Mr Melvin submitted that the decision had been made under the old rules but that the appellant had no right of appeal against that decision as she had been without lawful leave when her application was made. Once a decision to remove her was made, she had the right to rely only on her human rights. In any event, it was conceded at the hearing that the rules could not be met and the judge could not be criticised for proceeding on that basis. The judge had considered Razgar [2004] UKHL 27 and Huang [2005] EWCA Civ 105 and found that removal would not be disproportionate. The appellant had overstayed for some six years and her relationship had been established at a time when her stay was precarious.

A review by another Tribunal would not result in a different outcome and so there was no material error of law.

6. Mr Sowerby responded. He argued that the terms of the concession were unclear. Moreover, the case law did not support the argument that the appellant should leave the UK in order to make an entry clearance application. The credibility findings were unclear and the full circumstances were not set out in the determination. The reasonableness test of Huang should have been used.

7. That completed the submissions. At the conclusion of the hearing I reserved my determination which I now give.

Findings and conclusions

8. I make the following findings based on the submissions made by the parties and the evidence before me.

9. First, the appellant's application was made at a time when she had been an overstayer for a number of years. She therefore had no right of appeal against the refusal of that application and cannot rely on the submission that the appeal should have been determined under the old rules pertaining to unmarried partners (paragraph 295D of HC395).

10. Second, in any event, as conceded by Mr Sowerby, the appellant could not meet the requirements of paragraph 295D (i) and (iv) as she was without lawful leave when her application was made.

11. Third, the application was for leave to remain as an unmarried partner and not as a spouse and the Secretary of State correctly limited herself to consideration of that application when she reached her decision under the Immigration Rules as applicable at that time. It may be seen, however, that she also considered article 8 in a separate letter of the same date (6 December 2011) and whether it would be reasonable to expect family life to continue in the Philippines.

12. Fourth, once directions were given for her removal, the appellant had a right of appeal but only on human rights grounds. Her appeal rights under the rules could have been exercised out of country. There is no entitlement to argue the provisions of paragraph 281 as no application for leave to remain as a spouse had ever been made.

13. Fifth, her marriage was a factor she was entitled to rely on as part of that appeal but only in the context of her private and family life.

14. Sixth, as the appeal was heard after Part 5A of section 19 of the 2014 Act had come into force, the judge was obliged to consider article 8 in terms of the rules and also obliged to consider section 117 when assessing the evidence.

15. Seventh, the judge was required to consider article 8 in terms of the post 9 July rules; i.e. within Appendix FM and paragraph 276ADE. It is now well established that if the appellant did not meet those requirements then, as the rules were not a complete code, the judge could examine whether there was an arguably good case for consideration of article 8 outside the rules.

16. As submissions were made with regard to 295D, E-LTRP.2.2, EX.1 and 117B, It is helpful to set out the exact terms of these provisions.

17. Paragraph 295D states:

> *The requirements to be met by a person seeking leave to remain as the unmarried or same-sex partner of a person present and settled in the United Kingdom are that:*
>
> *(i) the applicant has or was last granted limited leave to enter or remain in the United Kingdom which was given in accordance with any of the provisions of these Rules, unless:*
>
> *(a) as a result of that leave he would not have been in the United Kingdom beyond 6 months from the date on which he was admitted to the United Kingdom;*
>
> *...*
>
> *(iv) the applicant has not remained in breach of the immigration laws, disregarding any period of overstaying for a period of 28 days or less; and.....*
>
> *(vi) the parties have been living together in a relationship akin to marriage or civil partnership which has subsisted for two years or more; and*
>
> *...*
>
> *(viii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and*
>
> *(ix) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and*
>
> *(x) the parties intend to live together permanently; and*
>
> *(xi)(a) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference)....*

18. E-LTRP.2.2. provides the following:

> *The applicant must not be in the UK –*
>
> *(a) on temporary admission or temporary release, unless paragraph EX.1. applies; or*
>
> *(b) in breach of immigration laws (disregarding any period of*

overstaying for a period of 28 days or less), unless paragraph EX.1. applies.

EX.1. states:

This paragraph applies if

...

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

19. 117B sets out the public interest considerations applicable in all article 8 cases. These are said to be:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

> *(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*
>
> ....

20. The meaning of insurmountable obstacles is addressed in the case of Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 00640 (IAC) where Mr Justice Cranston, sitting as a Judge of the Upper Tribunal, said:

> "*The term 'insurmountable obstacles' in provisions such as Section EX1 are not obstacles which are impossible to surmount (MF (Nigeria)). They concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, if removal is to be disproportionate it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh by any test.*"

21. I now turn to the determination of Judge Morgan. It has to be said that this could have been better prepared. However, I must consider whether the criticisms made of the determination are such that I must set it aside.

22. Plainly there is some difficulty with paragraph 3 of the determination. The refusal letters do not address Appendix FM or paragraph 276ADE, not surprisingly as they were prepared before these provisions came into force. The judge therefore errs in setting out the respondent's reasons for refusal.

23. There is also some difficulty with paragraphs 4 and 15 where the judge refers to the agreement between the representatives that the appellant did not meet the requirements of the rules. I return to this point below (at paragraph 25).

24. There was no appeal before the judge under paragraph 295D and even if I am mistaken about that, it is accepted by Mr Sowerby that the appellant cannot meet those requirements. The fact that she married her partner subsequent to her application does not assist as no application for variation of the unmarried partner application was made prior to the respondent's decision. Further, as she was without lawful leave, any such application could not have succeeded. It was, however, a matter which could properly be relied on as part of the article 8 claim.

25. The judge was, as I have noted above, tasked with consideration of the appellant's article 8 grounds. These are set out in her notice of appeal albeit in brief terms and without any reference to her marriage. The judge was obliged to consider the appellant's family/private life under the terms of Appendix FM and 276ADE notwithstanding the date the application was made. It may be that his reference to the 'rules' in paragraphs 4 is in this context.

26. Mr Sowerby argued that the appellant could meet the requirements of Appendix FM because EX.1 applied to her however this submission totally disregards the judgment of Upper Tribunal Judge Coker in Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC). Judge Coker found that EX.1 was parasitic upon the relevant rule within Appendix FM that otherwise grants leave to remain and that if it had been intended to be a free- standing element, some mechanism of identification would have been used. It may be seen from Judge Morgan's determination that no assessment of the other requirements of Section R-LTRP was undertaken and indeed there was no submission made to him by the appellant's representative that those requirements could be met.

27. What was left for the judge to consider was whether the appellant's circumstances including those of her spouse, were such as to amount to arguably good grounds for a grant of leave outside the rules on article 8 grounds. This meant that the appellant had to show some non standard grounds which were not covered by the factors normally considered under article 8 within the rules. The grounds pleaded on behalf of the appellant are summarised by the judge at paragraph 14. These are that the relationship commenced in 2008, that the appellant's 70 year old partner is British, that the couple married in January 2013 a year after the appellant divorced her previous husband, that her current spouse is self employed and feared he would not obtain employment in the Philippines. In the spouse's witness statement there is reference to children and grandchildren he has in the UK. The appellant herself has children in the Philippines. The judge also took into account the oral evidence of the appellant and her spouse and the documentary evidence provided in support of the appeal (paragraph 13). He noted that the factual circumstances were not challenged by the respondent and indeed broadly accepted the factual evidence as presented (ibid). His conclusion which is based on that evidence was that those facts did not give rise to arguably good grounds for consideration of article 8 outside the rules and that even if they had, they did not justify a finding that the refusal of further leave was disproportionate (paragraph 15). In reaching that conclusion he sets out the step by step approach of Razgar [2004] UKHL 27, cites from Huang [2007] UKHL 11 and notes the principles of Beoku-Betts [2008] UKHL 39, Chikwamba [2008] UKHL 40, MA (Pakistan) [2009] EWCA Civ 953 and Shahzad [2014] 00085 (paragraphs 9-12).

28. The judge then considers the terms of section 117B. Under subsections (4) and (5) he is obliged to give little weight to a relationship formed at a time when an applicant is in the UK unlawfully or has a precarious status. Notwithstanding other positive findings, he properly finds that the appellant was in such a position (at paragraph 16).

29. The judge then proceeds to make observations on the skeleton argument. His reference to the insurmountable obstacle test raised therein is particularly criticised; however, he properly describes that phrase as

meaning that the appellant and her partner should face very significant difficulties in continuing their family life outside the UK or that they would face very serious hardship in doing so. This is in accordance with the approach taken in Gulshan.

30. The final criticism of the determination is that the judge having found that "*the appellant is able to satisfy the Immigration Rules in respect of entry clearance*" (paragraph 17), erred in not following the Chikwamba approach. It is argued that no purpose would be served in requiring the appellant to return to the Philippines simply in order to make a visa application. I would state, first of all, that there is no clarification of the factors the judge considered when making this finding. It is wholly unreasoned and unsupported by any reference to the evidence. There is no reference to which rule the judge had in mind, to the provisions the appellant had to meet or to any evidence which showed that the requirements were met. For this reason I cannot attach any weight to Mr Sowerby's submission or indeed to the judge's finding. The second point to make is that Chikwamba was an unusual case. Subsequent cases confirm this point. There are no children involved here and the appellant is a long term overstayer who has worked here without authority and abused the laws of the UK. Further, the law has moved on since the days of Chikwamba. We are now made aware of the view Parliament takes towards relationships formed during a period of unlawful stay. It is difficult to see why a blind eye should be turned to a long period of overstaying and a blatant disregard for the immigration rules of this country. The appellant's history and conduct cannot just be overlooked because of her relationship. She can legitimately and reasonably be expected to return to the Philippines where she has close family in order to make an entry clearance application. Her spouse, who has indicated in his witness statement that he would be prepared to accompany her, has the choice of so doing or of supporting her application from the UK.

31. I therefore conclude that the judge reached sustainable findings and conclusions on article 8 within the rules and that he was entitled to find that there were no compelling circumstances which would warrant consideration outside the rules. The criticisms of his determination do not justify it being set aside although I readily agree that it lacks clarity in certain areas as I have set out above. However despite its shortcomings, the outcome is the only possible one in all the circumstances. I concur with Mr Melvin's view that a review by another Tribunal would not result in a different decision.

Decision

32. The First-tier Tribunal Judge did not make an error of law. I uphold his decision to dismiss the appeal.

Signed:

Dr R Kekić
Judge of the Upper Tribunal
20 January 2015