Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38561/2013

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 11 March 2015	**On 8 April 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MAE DRAPER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Chelvan instructed by South West Law
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. The appellant is a citizen of the Philippines who was born on 20 October 1972. On 8 December 1995, the appellant married a British citizen, Kevin Draper, at the Register Office in Bristol. The appellant and Mr Draper have a daughter, Rhian who was born on 3 September 2000 in the UK. She is also a British citizen.

2. The appellant and Mr Draper lived in the UK between May 1995 and October 1996. In November 1996, they moved to Dubai where Mr Draper went to work. They lived there together until November 2011. It appears that the appellant and Mr Draper

returned to the UK regularly living on his narrow boat or with his mother. Of course, the appellant's daughter, Rhian was born in the UK on 3 September 2000. In March 2011, Mr Draper and Rhian returned to live in the UK. The appellant remained in Dubai until November 2011 when she returned to the Philippines to look after her father who was ill. The appellant's mother had died in July 2011.

3. It appears that the appellant visited the UK on a visit visa. Most recently on 31 January 2013, the appellant was granted entry clearance as a visitor valid until 31 July 2013. She arrived in the UK on 28 February 2013 using that entry clearance. On 23 July 2013, the appellant applied for a variation of her leave on the basis that she was the spouse of a British citizen in the UK. On 11 September 2013, the Secretary of State refused her application as a partner of a British citizen under Appendix FM of the Immigration Rules and on the basis of her private life under para 276ADE of the Immigration Rules. In addition, the Secretary of State concluded that there were no exceptional circumstances to justify a grant of leave outside the Rules under Art 8 of the ECHR.

The Appeal

4. The appellant appealed to the First-tier Tribunal. In her notice of appeal, the appellant requested that the appeal be determined on the "papers". As a consequence, the appellant's appeal was determined without a hearing. In a determination dated 24 February 2014, Judge Sangha dismissed the appellant's appeal under the Immigration Rules and Art 8 of the ECHR. The appellant sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal (Judge Cruthers) on 19 March 2014 but, following a renewed application to the Upper Tribunal, that Tribunal (UTJ Eshun) granted the appellant permission to appeal on 30 April 2014. The basis for the grant of permission was that:

> "It is arguable that the judge failed to carry out an Article 8 assessment having found that the appellant did not qualify to remain in the UK under the Article 8 provisions of the Immigration Rules."

5. The appeal before the Upper Tribunal was originally listed on 16 July 2014 when the appellant did not appear and was not represented. The Upper Tribunal (UTJ Poole) dismissed the appellant's appeal in a determination dated 23 July 2014. Thereafter, the appellant's (now) solicitors made an application to set aside the Upper Tribunal's determination under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) on the basis that the notice of the hearing had not been received by the appellant. On 14 January 2015, UTJ Southern granted the appellant's application and set aside the decision of the Upper Tribunal under rule 43.

6. The appeal was relisted for hearing before me on 11 March 2015.

The Submissions

7. At the hearing, I had the benefit of the grounds of appeal from the appellant, a rule 24 response dated 16 May 2014 from the respondent and a rule 25 reply from the appellant dated 9 March 2015. In addition, I heard detailed and careful submissions

from Mr Chelvan, who represented the appellant and Mr Richards who represented the respondent.

8. Mr Chelvan made two principal submissions. First, he submitted that the judge had failed properly to consider Art 8 outside the Immigration Rules. He submitted that the judge had put the "cart before the horse" by considering Art 8 (if at all) at paras 19 – 22 of his determination prior to considering an application of the Rules at paras 23 – 24. Mr Chelvan submitted that was a material error of law as the judge was required to first consider whether the appellant met the requirements of the Immigration Rules and then, if the appellant did not, to consider whether outside the Rules a breach of Art 8 had been established. Mr Chelvan relied upon the Court of Appeal decisions in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Singh and Khalid v SSHD [2015] EWCA Civ 74.

9. Secondly, Mr Chelvan submitted that the judge had approached the issue of whether the appellant could be expected to return to the Philippines to obtain entry clearance on a mistaken basis of fact. He submitted that in para 20 when the judge had considered whether the appellant would be able to meet the financial requirements of the Rules he had wrongly concluded on the basis of the application that Mr Draper (the sponsor) earned in excess of the required £18,600 gross per annum. Mr Chelvan accepted that the mistake was that of the sponsor, who had assisted the appellant in completing the application form, but he nevertheless submitted that this was a mistake of fact which flawed the judge's finding that the appellant could be expected to return to the Philippines to obtain entry clearance. Mr Chelvan relied upon the Court of Appeal's decision in E & R v SSHD [2004] EWCA Civ 49.

10. In addition, Mr Chelvan made reference to the fact that the judge did not appear to have fully considered the "best interests" of Rhian although, in response to a question from me, he indicated that there was little material before the judge on this issue.

11. Mr Chelvan also drew my attention to a bundle of documents which he indicated he sought permission to admit in the Upper Tribunal proceedings under rule 15(2A). He indicated that there was a considerable amount of fresh material relevant to the Art 8 issue which had not been submitted by the appellant in person to the judge.

12. On behalf of the respondent, Mr Richards submitted that the judge had properly considered Art 8. The appellant could not succeed under the Immigration Rules and had regard to all the salient facts at paras 19 – 22. He submitted that the judge was entitled to find that the appellant could be expected to return to the Philippines to seek entry clearance. Mr Richards submitted that there was no mistake of fact amounting to an error of law. The judge was entitled to believe the evidence put forward by the appellant, and presented to him, in her application.

Discussion

13. I have considerable misgivings about the judge's approach to the appellant's claim under Art 8.

14. Looking first at Mr Chelvan's first principal submission, it is not suggested that the appellant could currently succeed under the Immigration Rules as she is unable to

"switch" from her visitor leave under Appendix FM to leave as a partner. There was, therefore, no real issue for the judge as to whether the appellant met the requirements of the Immigration Rules. At paras 23 – 27 he made that finding as follows:

> "23. In considering this case I have take into account the case of Gulshan [2013] UKUT 00640 (IAC). The guidance in Gulshan is that the Rules are the starting point for consideration of Article 8 of the ECHR. I have taken full account of the Respondent's view of the State's obligations under Article 8 of the ECHR set out in the Rules and in particular Appendix FM and Paragraph ADE of the Rules.
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> 24. In my assessment of the evidence it is clear that the Appellant does not meet the requirement of Appendix FM and Paragraph 276ADE of the Rules. Whilst the Appellant has a genuine and subsisting relationship with a partner and a child in the UK, both of whom are British citizens, the Appellant does not meet the eligibility requirements of the Rules and as held in Sabir (Appendix FM – EX.1 not free-standing) [2014] UKUT 00063 (IAC) paragraph EX.1 in Appendix FM is not a free-standing "magic bullet" for determining Article 8 claims. EX.1 is not a free-standing provision and therefore the Appellant cannot benefit from it. Nor does the Appellant benefit from the provisions of Paragraph 276ADE of the Rules. There is nothing, in my assessment, to prevent the Appellant from returning to the Philippines in order to apply for entry clearance to join her husband and daughter in the UK in the normal proper manner."

Mr Chelvan's argument was that these two concluding paragraphs of the judge's determination should have preceded any consideration of Art 8 rather than, as appears to have been the case, to have been placed subsequent to that consideration in paras 19 – 22.

15. Before dealing with that submission, I should set out the judge's reasoning at paras 19 – 22 where he said this:

> "19. In my assessment of the evidence it seems that the Appellant has blatantly ignored the Immigration Rules. Despite the fact that when the Appellant applied for entry clearance as a visitor and was asked why she was not applying for settlement and having stated that she had a 78-year old father to look after who suffered with depression and that she would only be visiting the UK for 2 months to visit her daughter, she then, in blatant disregard of the Immigration Rules, submitted an application in July 2013 for Leave to Remain here.
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> 20. In my assessment of the evidence there is nothing to stop the Appellant from returning to the Philippines and applying for entry clearance to join her husband and her daughter, both British citizens, in the UK for settlement. From the information provided it would seem that the Appellant's husband would satisfy the financial requirements of the Immigration Rules as he earns more than £18,600 per annum and indeed he is in business and that his income from self-employment is over £50,000 per annum as he is a Managing Director of Christian Grant Ltd, a property development company. It would appear that the Appellant also has considerable cash savings and therefore there is no reason why if the

Appellant were to return to the Philippines she could not apply for entry clearance to join her husband and daughter in the UK.

21. If she chooses to do that she would only suffer a temporary separation from her husband and child from whom she was separated in any event between 2011 and 2013. There is nothing to stop her from maintaining contact with her husband and child through modern channels of communication whilst she returns to the Philippines in order to apply for entry clearance in the proper manner, just like many thousands of other Immigrants choose to do in order to join their spouse and family in the UK. In my assessment there is no evidence before me to show that there are any insurmountable obstacles for the Appellant herself returning to the Philippines in order to apply for entry clearance. Whilst I note that the Appellant's husband's mother is 91 years of age and the Appellant's husband is her registered carer that can continue. There is no question of the Appellant's daughter having to leave the UK and she can continue at school and carry on at the Bristol Adventure Sea Cadets as she is doing now.

22. In the circumstances I come to the conclusion that it would be appropriate in the circumstances of this case for the Appellant to return to the Philippines in order to apply for entry clearance to rejoin her husband and child in the UK. I have come to the conclusion that there are no exceptional circumstances in this particular case why the Appellant cannot return to the Philippines in order to apply for entry clearance in the normal manner. There does not appear to be any unjustifiably harsh consequences for either the Appellant, her husband or the child of the family why the Appellant cannot return to the Philippines in order to apply for entry clearance in the normal manner and nor that it would be disproportionate to do so in the circumstances of this particular case. I say this particularly in view of the fact that the Appellant when she was interviewed for her entry clearance visa as a visitor said that she was only coming here for a period of 2 months."

16. The structure of decision making under Art 8 as a result of the "new Rules" and the new Part 5A of the Nationality, Immigration and Asylum Act 2002 is that: (1) a judge should first decide whether an individual meets the requirements of any of the relevant Immigration Rules. If he does, then the individual succeeds under the Rules; and (2) if the individual does not succeed, the judge should go on to consider whether the individual succeeds outside the Immigration Rules on the basis of Art 8. That structure of decision making is sanctioned by the Court of Appeal in MF (Nigeria) and in Singh and Khalid. Engaging in, what might he called, that second stage, there is no "threshold" requirement of arguability (see MM (Lebanon) v SSHD [2004] EWCA Civ 985 at [128] and R (Aliyu and Aliyu) v SSHD [2014] EWHC 3919 (Admin)). In every case there must be a consideration of the individual claim outside the Rules although the extent of that consideration will depend upon particular circumstances, for example the extent to which the factors relied upon by an individual have already been considered under the Rules (see, for example Aliyu and Aliyu at [59]).

17. Consequently, in carrying out the assessment at the second stage, a judge must already have completed the first stage and determined that the individual does not meet the requirements of the Rules.

18. Although Judge Sangha's consideration of Art 8 in fact occurs in the four preceding paragraphs (19 – 22) to his explicit consideration of the Rules at paras 23 – 24, that in itself is not fatal to his Art 8 assessment providing that in determining the proportionality question he had in mind that the appellant did not meet the requirements of the Rules. If - and I emphasise the word "if" - Judge Sangha had fully considered the issue of proportionality in paras 19 – 22 of his determination, I would not be persuaded that the mere fact that he turned to his finding on the Rules at paras 23 – 24 (which was inevitably on the facts) that the appellant could not meet the requirements of the Rules, meant that on a fair reading of his determination he did not have that finding in mind when reaching his adverse conclusion on proportionality.

19. The difficulty with Judge Sangha's determination is, in my view, that paras 19 – 22 are not a full and proper consideration of Art 8. Although Mr Chelvan's principal oral argument was that the judge had put "the cart before the horse", both the grounds and his oral argument touched upon, and raised, the more general legal point (albeit with less specificity) that the judge had not properly considered Art 8 outside the Rules. That general point, as I have already noted above, was indeed the basis upon which UTJ Eshun granted permission.

20. The reason why, in my view, Judge Sangha's Art 8 assessment at paras 19 to 22 is inadequate in law is that the judge nowhere decides whether the appellant's removal to live in the Philippines would breach Art 8. The only issue which the judge determined was that her "temporary separation" from her husband and child in order to gain entry clearance would not breach Art 8.

21. That issue only arose, in my judgment, if it would otherwise be a breach of Art 8 to remove the appellant to live in the Philippines. That question would involve, for example, whether the appellant's British citizen husband and child could reasonably be expected to live there with her or, if they could not, whether the necessary separation was a sufficiently serious interference with her family life to breach Art 8. I cannot detect any findings in the judge's determination on that issue.

22. If, however, that would breach Art 8 the subsidiary question arises whether to require the appellant to "temporarily" return to her own country to obtain entry clearance – potentially a lesser interference with her family life – would be proportionate and, therefore, no breach of Art 8 established. That latter issue, (sometimes referred to as the Chikwamba [2008] UKHL 40 point), was the sole issue considered by the judge in paras 19 – 22.

23. It is clear that it will be a disproportionate interference with an individual's private and family life simply to return them to their own country to obtain entry clearance unless there is some "sensible reason" for doing so (see SSHD v Treebhowan; and Hayat v SSHD [2012] EWCA Civ 1054 at [30]). It will, therefore, generally be wrong to dismiss or refuse an Art 8 claim simply on the procedural ground of requiring an individual to seek entry clearance. In this case, it is far from clear to me that the

judge approached the Chikwamba issue on a proper basis. At para 22 he appears to conflate the issue of whether there were any "exceptional circumstances" or whether there would be "any unjustifiably harsh consequences" – tests relevant to the ultimate issue of whether Art 8 is breached – with the question of whether the appellant could be required to return to the Philippines to seek entry clearance. What the judge should have considered was, instead, whether there was any "sensible reason" for doing so. It is true that at para 19, the judge refers to the appellant as having "blatantly ignored" the Immigration Rules and having come to the UK as a visitor "in blatant disregard of the Immigration Rules", submitted an application to remain. It is entirely unclear to me upon what basis that finding is made and what evidence there was to support it. At one point in his submissions, Mr Richards referred to the judge as having found that the appellant had practised a "deception". He did not pursue that point and was, in my judgment, right not to do so. The only evidence before the judge was that the appellant had come to the UK to visit her family and then, having been here for two months, made an application to remain under Appendix FM. In doing so she neither blatantly ignored the Immigration Rules (as she sought to change the lawful basis on which she is in the UK) nor was it in blatant disregard of the Immigration Rules since nothing prevented her from seeking to vary her leave albeit without any prospect of success under the Immigration Rules. It cannot, in my judgment, be properly regarded as a blatant disregard or ignorance of the Immigration Rules to seek to remain under Art 8 in these circumstances. Nothing in the evidence entitled the judge to infer that the appellant had deliberately come to the UK as a visitor while secretly intending to seek to remain or settle as the partner of her spouse. That is tantamount to an allegation of fraud and would require cogent evidence which I am wholly unpersuaded was before the judge.

24. Consequently, in my view, the judge has erred in law by failing properly to consider Art 8 both in reaching a view on whether the appellant's removal to the Philippines would, in itself, breach Art 8 and, if it would, whether it would nevertheless be proportionate to expect the appellant to seek entry clearance.

25. That is sufficient to legally flaw the Judge's decision under Art 8.

26. Mr Chelvan also relied upon the mistaken basis upon which the judge had concluded that the separation would only be "temporary" because the appellant would succeed under the Immigration Rules, in particular because she would meet the financial requirements of the Rules. Mr Chelvan submitted that that was in fact not the case and the mistake arose because of the way in which the sponsor had unintentionally completed the application form misunderstanding the financial requirements of Appendix FM based on his business income and assets. Whilst I accept that a mistake of fact is capable of being an error of law, I am far from satisfied that the mistake in this case qualifies. In E & R the Court of Appeal set out the requirement at [66]. Carnwath LJ said this:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular issue. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been

> responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

27. It seems to me that the third requirement that the mistake must not be the responsibility of the appellant cannot be satisfied in this case despite Mr Chelvan's spirited submission that the appellant and sponsor were legally unrepresented and did not understand what was required of them in the application form. Whilst the Court of Appeal in E & R recognised that a certain degree of flexibility is required in international protection cases, in my view, a judge is entitled to rely upon evidence put forward by an appellant (particularly in a "paper" appeal where there is no possibility of further enquiry by the judge of the appellant) and the risk lies with the appellant if inaccurate or mistaken information is provided. In my judgment, nothing in E & R requires that I take a different view.

28. In any event, since for the reasons I have already given the judge's decision under Art 8 cannot stand, there will be opportunity to correct the mistake when the appeal is reheard.

Decision and Disposal

29. For these 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 cannot stand and is set aside.

30. Given the extent and nature of the fact-finding required in relation to Art 8, and having regard to para 7.2 of the Practice Statements of the Senior President, it is appropriate to remit this appeal to the First-tier Tribunal, as I understand it, was also the view of both representatives if the appellant's appeal in the Upper Tribunal was successful. None of the findings will be preserved.

31. Accordingly, the appeal is remitted to the First-tier Tribunal for an oral hearing *de novo* by a judge other than Judge Sangha.

Signed

A Grubb
Judge of the Upper Tribunal