Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00562/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd June 2017	**On 20th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MS DONNA LYN CASLILA PASION
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan, Counsel
For the Respondent: Mr Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Philippines born on 14th July 1974. The Appellant first entered the United Kingdom on a multi-entry student visa on 18th January 2010 valid until 31st May 2011. Her immigration history thereafter is set out in a notice served by the Secretary of State on 30th

June 2015. On 29th April 2015 a decision was made to refuse an application for leave to remain on the grounds that removal would not place the United Kingdom in breach of its obligation under the Human Rights Act 1998 and to give directions under Section 10 of the Immigration and Asylum Act 1999 for the removal of the Appellant from the United Kingdom. That decision was confirmed by way of Notice of Refusal dated 16th May 2015.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Isaacs sitting at Hatton Cross on 12th September 2016. In a decision and reasons promulgated on 4th October 2016 the Appellant's appeal was dismissed both under the Immigration Rules and on human rights grounds.

3. The Appellant, on 18th October 2016 lodged Grounds of Appeal to the Upper Tribunal. On 9th February 2017 First-tier Tribunal Judge Andrew granted permission to appeal. Judge Andrew noted that the grounds complained as to the judge's decision in relation to Article 8 and that he was satisfied that there was an arguable error of law in that regard in that the judge did not consider the **Razgar** questions, did not consider Section 117B and he did not consider the question of proportionality. Further, in relation to EX.2 no consideration had been given as to whether there would be significant difficulties for the Appellant's partner in continuing family life outside the UK.

4. On 24th February 2017 the Secretary of State responded to the Grounds of Appeal under Rule 24.

5. The Appellant's appeal came before Upper Tribunal Judge Kekic sitting at Field House on 21st April 2017. In a decision and reasons dated 4th May 2017 Judge Kekic found that there were material errors of law in the decision, set aside the decision of the First-tier Tribunal with the decision to be remade by the Upper Tribunal at a later date.

6. The judge did not, I am advised by the legal representatives, in making the finding that there was a material error of law give any specific directions. However in reaching her decision Upper Tribunal Judge Kekic at paragraph 14 of her findings and conclusions on the error of law set out the basis upon which she set aside the decision of the First-tier Tribunal. What however appears to be accepted by the parties is that the factual matrix of this case remains the same in that the relationship between the Appellant and her Sponsor Mr Lawrence was genuine and subsisting since 2011 and that they enjoyed family life. The issue as Judge Kekic pointed out, was whether that family life could continue in the Philippines or whether there would be insurmountable obstacles so doing and reliance was placed on EX.1(b) and EX.2 of Appendix FM. However at paragraph 14 of her decision Judge Kekic concluded that the First-tier Tribunal Judge failed to take account of some of the factors listed in Mr Lawrence's witness statement which formed part of the evidence before her and that she had apparently failed to appreciate that Mr Lawrence had never lived outside

the UK, that his home was here, that he had a twin brother, that he had no connection with the Philippines, was unfamiliar with its culture and language and that as a middle aged man he is fearful of uprooting himself and starting a new life in a foreign country. Judge Kekic concluded that all those factors were set out at length in Mr Lawrence's statement and that the judge had also given no regard to the fact that the relationship was formed when the Appellant was lawfully in the UK.

7. Judge Kekic concluded that had the judge considered these matters and had she focused on whether Mr Lawrence would face very serious hardships in moving to the Philippines to continue his relationship and had she conducted a balancing exercise taking account of matters under Section 117B as she was required to do if she had proceeded to a second stage analysis, she may have reached a different outcome. For those reasons she found that her omissions were material and that they amounted to errors of law and set aside her decision.

8. It is on that basis that the appeal comes before me to reconsider. The Appellant appears by her instructed Counsel Mr Khan. Mr Khan is familiar with this matter having appeared before Upper Tribunal Judge Kekic at the last hearing. The Secretary of State appears by his Home Office Presenting Officer Mr Jarvis.

9. At paragraph 15 of her findings in the Upper Tribunal Judge Kekic firstly commented that further oral evidence and submissions would be of assistance when determining whether the Rules had been met and whether or not family life could be continued in the Philippines and secondly that the matter should be relisted for hearing before her at a date to be arranged. Two matters flow from those findings. Firstly this matter is listed before me and not Judge Kekic. It is the view of both legal representatives that I should hear the appeal and secondly they are both satisfied this matter can be dealt with by consideration of documents within a supplementary bundle, which I have given due consideration to, and by taking on board submissions made by both legal representatives. Mr Khan indicated he does not wish to call for further oral testimony from the Appellant or the Sponsor and Mr Jarvis indicates he has no further basis upon which he wishes to cross-examine them. I am consequently satisfied that the appeal can therefore proceed before me on a rehearing and be by way of submission only and that the factual matters agreed previously are ones which will stand and which I will take into account.

Submissions/Discussions

10. Mr Jarvis submits the legal test to be considered is one of insurmountable obstacles to family life continuing outside the UK and he acknowledges that the law is now to be found in *R (on the application of Agyarko) v Secretary of State for the Home Department [2017] UKSC 11*. He acknowledges that if an Appellant fails to meet the requirements under the Immigration Rules of paragraph EX.1 then he/she may still succeed if there are compelling circumstances. He reminds me of the view

expressed at paragraph 48 of *Agyarko* that the public interest is in the removal of persons who are in the UK in breach of immigration laws in all but exceptional circumstances sufficiently compelling to outweigh the individual's interest in family life with a partner in the UK unless there are insurmountable obstacles to family life with that partner continuing outside the UK. He points out that the insurmountable obstacles test is a demanding one and submits that in this case it has not been breached. He acknowledges that the parties are devoted to each other and that there would be disruption to family life but that none of these factors show that in this case that the test has been met. Further so far as considering the case outside the Rules he submits that it is very difficult to see how the Appellant can win and the approach adopted in *Agyarko* indicates this. Further he contends that reliance upon Section 117B does not assist the Appellant even if she is financially independent in that it does not add to her claim to private life or detract from the public interest and he submits that the section does apply because since 2012 the Appellant has not lawfully been in the UK. It is consequently his argument that the Appellant does not meet the required threshold and that this is not a *Chikwamba* case because the Immigration Rules are not met. He asked me to dismiss the appeal.

11. Mr Khan in response submits that the Supreme Court has not addressed the issue of compelling circumstances in *Agyarko* and refers me to the requirements to be met for entry clearance as a partner under Immigration Rule EC-P.1.1 and that the Appellant meets the suitability requirements for entry clearance to be found at Section S-EC and the financial requirements set out at paragraph E-ECP.3.1. In support of that he takes me to the documents in the Appellant's supplemental bundle to be found at pages 20 to 40A. Further he contends that the Appellant meets the English language requirements referring me to the English language certificate to be found in the supplementary bundle and points out again that the subsisting relationship between the Appellant and the Sponsor is not challenged. Therefore, he submits, that the Appellant is bound to succeed providing she can overcome the insurmountable obstacles test. He submits that if I give due consideration to paragraphs 32 to 41 of *Agyarko* that there will be no public interest to be achieved in refusing the appeal and therefore it should succeed. His argument therefore is that given that the appeal could succeed under entry clearance it would not be proportionate to remove the Appellant from the UK and that she should consequently succeed outside the Rules although the main thrust of his argument is that the Appellant actually succeeds under the Rules relying on the test of compelling circumstances.

12. Mr Jarvis in response submits that reference to the compelling circumstances test is incorrect and that the view expressed by Mr Khan is inconsistent with the law in that providing a sensible reason has been given as to why an appeal might not succeed then the correct approach is to move away from *Chikwamba* and it follows that Mr Khan's arguments are both wrong and would negate public interest under the Rules.

Findings and Analysis of the Law

13. The Supreme Court in *Agyarko* considered whether the requirements that an applicant who formed a relationship with a British citizen whilst in the UK unlawfully must demonstrate "insurmountable obstacles" to be granted leave to remain in the UK under the Immigration Rules is compliant with Article 8 of the European Convention of Human Rights. The court held that the Secretary of State's decision to refuse the illegal Applicant's leave to remain despite their having British partners was lawful and the court viewed the test of there being "insurmountable obstacles" to a continuing relationship should the right to remain be refused to be a stringent one. However it did hold that the Immigration Rules are compatible with Article 8 of the ECHR as this provision requires there to be a fair balance struck between competing public and individual interests involved, applying a proportionality test and the policies adopted by the Secretary of State. In the same way the balance would involve the question of whether there are "exceptional circumstances" precluding refusal of the right to remain and that this is within the remit of the Secretary of State.

14. It is clear from *Agyarko* that interpretation of the phrases such as "insurmountable obstacles" both have to be looked at practically and realistically and that the test is a stringent one. Further precariously formed family life must be interpreted to mean that it will be likely only in exceptional circumstances that the non-national family member's removal results in a breach of Article 8 of the ECHR. It is against this background that it is necessary to look at the circumstances of this case. It is accepted that the Appellant and the Sponsor are in an ongoing relationship and have been for several years. It is accepted after some argument that the Sponsor meets the requirements for provision of financial support. The Secretary of State submits that there is no actual expectation that the parties should separate meaning that they would go to another country to live together. It is submitted by Mr Khan that the insurmountable obstacles test is met in that the Sponsor has his home here, that he is unfamiliar with the language of the country where he would be required to relocate to, that he has his parents and two brothers here, that he has spent all his life here, that his culture is here in the UK and that he would lose his job with little immediate prospect of obtaining further employment if he leaves the UK. The question is therefore whether family life can continue in the Philippines or whether there will be insurmountable obstacles to doing so and reliance is placed on EX.1(b) and EX.2 of Appendix FM. I agree with the view expressed by Upper Tribunal Judge Kekic when finding a material error of law in the decision of the First-tier Tribunal Judge namely that EX.1.(b) applies because the Appellant has a genuine and subsisting relationship with a British citizen. EX.2 of Appendix FM goes on to define insurmountable obstacles as being:

The very significant difficulties which will 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.

15. Each case is fact-sensitive. I take on board the issues listed in Mr Lawrence's witness statement namely that he had never lived outside the UK, that his home is here, that he has a twin brother, that he has elderly parents here, that he has no connection with the Philippines, that he is unfamiliar with its culture and language and that as a middle aged man he is fearful of uprooting himself and starting life in a foreign country. I acknowledge this is a case where the relationship was formed when the Appellant was lawfully in the UK. However I find myself despite all these factors constrained by an analysis of the case law. It is clear from many authorities reiterated *Agyarko* that the insurmountable obstacles test is a stringent one. I am not satisfied that the above reasons put forward both in witness statements and by applying a proportionality test that in this case circumstances in which refusal would result would be an unjustifiably harsh consequence to the Appellant.

16. Taking into account all these additional factors referred to by Upper Tribunal Judge Kekic I still find as a matter of law the decision reached by the First-tier Tribunal Judge, Judge Isaacs was correct and that this is a couple who are relatively free of practical ties to the United Kingdom. They have no children here. They have no adult dependants and they do not own a home. The Sponsor has, as Judge Isaacs concluded, training in a career which is flexible. In such circumstances taking into account all the other factors mentioned above I find that there are no insurmountable obstacles to them relocating to the Philippines and that the Appellant does not meet paragraph EX.1(b). Further I agree with the submission made by Mr Jarvis that this is not a *Chikwamba* scenario considering that the Immigration Rules are not met and I further conclude this is not a case amounting to exceptional circumstances which mean the Appellant's case should be considered outside the Rules.

Notice of Decision

The appeal is dismissed both under the Immigration Rules and under the European Convention of Human Rights.

No anonymity direction is made.

Signed Date: 17th July 2017

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris