Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21192/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	
On 5 April 2017	**On 13 June 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS NILDA VILLARIMO BERANO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant (Secretary of State): Mr Armstrong, Home Office Presenting Officer
For the Respondent (Ms Berano): Ms Bustani of Counsel

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Quinn in which the judge had allowed Ms Berano's appeal

against the Secretary of State's decision refusing to grant her leave to remain as the partner of a Mr Rogers, a UK citizen. For ease of convenience I shall throughout this decision refer to the Secretary of State, who was the original respondent, as "the Secretary of State" and to Ms Berano, who was the original appellant, as "the claimant".

2. The claimant is a citizen of the Philippines who was born on 27 December 1950. She entered the UK in July 2007 with entry clearance as a student which leave expired in May 2011. Prior to the expiration of this leave she had applied for leave to remain as a carer but this application was refused. She sought various reviews of this decision but then in September 2013 she applied for leave to remain on the basis of her relationship with Mr Rogers.

3. This application was refused and a further application was made in February 2014 which was also refused.

4. Then on 2 April 2015 the claimant applied again for leave to remain on the basis of her relationship with Mr Rogers and by this time this relationship had been ongoing for at least two years prior to the application. It is not suggested on behalf of the Secretary of State that it is not a genuine relationship and nor is it suggested that had the Rules been satisfied there would have been any other reason why the application should be refused.

5. This application was refused in May 2015 and it was in respect of this decision that the claimant appealed to the First-tier Tribunal which appeal was as I have already noted allowed by First-tier Tribunal Judge Quinn, who following a hearing at Hatton Cross on 1 September 2016 in a Decision and Reasons promulgated on 19 September 2016 allowed the appeal both under the Immigration Rules and under Article 8 outside the Immigration Rules.

6. It is common ground first that if paragraph EX.1 set out within Appendix FM of the Immigration Rules applied then the appeal could succeed under the Rules. It is not submitted on behalf of the Secretary of State that it would not have been open to the judge on the basis of the evidence before him to find that the requirements in EX.1 (which will be considered below) were satisfied. It is also common ground that the reasons given by the judge for allowing the appeal outside the Rules under Article 8 are not sustainable. However, for reasons which I will give below, that does not of itself mean that that aspect of the decision needs to be overturned.

7. Paragraph EX.1 of Appendix FM provides as follows:

> **"Section EX exceptions to certain eligibility requirements for leave to remain as a partner or parent**
>
> EX.1 this paragraph applies if
>
> (a) …

(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".

8. As I have already noted, it is not disputed that the claimant has a genuine and subsisting relationship with Mr Rogers who is a British citizen, settled in the UK, but it is contended on behalf of the Secretary of State that the judge failed to make an adequate finding as to whether there were "insurmountable obstacles to family life" continuing with Mr Rogers outside the UK. As will be discussed below, it is the Secretary of State's case that the judge applied the wrong test because he considered whether there were "very significant obstacles" to Mr Rogers returning with the claimant to the Philippines rather than whether there were "insurmountable obstacles" to his doing so.

9. It is important to have in mind also when considering paragraph EX.1, the provisions of paragraph EX.2 which provide as follows:

> "For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by 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".

10. The issue before this Tribunal is a very narrow one and turns upon the wording of paragraph 36 of Judge Quinn's decision, which is as follows:

> "36. Given the age of Mr Rogers and his medical condition and the uncertainty over treatment, accommodation and finance in the Philippines and the question of whether he would be allowed to live there in any event, along with his current means I was of the view that **there were very significant obstacles to him going to the Philippines and I did not think that it was an option for him** [my emphasis] ...".

11. The judge found that the decision was not a proportionate one in light of this difficulty. He then considered whether or not the appeal should also be allowed under Article 8 outside the Rules and it is fair to say that although he allowed the appeal under article 8 it is hard to square this finding with the reasons he gave. In the Rule 24 notice, which were settled by Ms Bustani, Counsel, who also appeared for the claimant at this hearing, it is candidly conceded (at paragraph 12) that

> "The fttj's finding that the circumstances were not exceptional or compelling so as to succeed under Article 8 [paragraph 39] do not sit well with the findings in the preceding paragraphs or the conclusion at paragraph 42 that returning the appellant to the Philippines would have a 'devastating effect' upon Mr Rogers".

However, as I have noted above, this does not in the light of the findings which I am about to make, necessarily mean that the conclusion that the appeal should be allowed under Article 8 as well as under the Rules should be set aside.

12. The issue is, as Mr Armstrong accepts a very narrow one which is whether or not there is any material difference between there being "insurmountable obstacles" rather than the "very significant" obstacles which Judge Quinn found there would be. In this case it is clear that Judge Quinn considered all the factors very carefully indeed. He looked at the age of the claimant and her partner, his medical condition (he has prostate cancer), the uncertainty of the treatment which would be available to him in the Philippines, the accommodation which might be available to them (bearing in mind that the claimant herself had not lived in the Philippines for some 34 years), their finance, and whether Mr Rogers would be allowed to live there in any event. It is in my judgment significant that he did not just find that there would be "very significant obstacles" to Mr Rogers going to the Philippines with the claimant but went on to find in these circumstances that "I didn't think that it was an option for him". When considering this conclusion, I have in mind what is set out in paragraph EX.2 that when considering "insurmountable obstacles" that means "the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK" which "could not be overcome **or would entail very serious hardship for the applicant or their partner** [again my emphasis]".

13. I have in mind also what was said by Sales LJ giving the judgment of the court in *Agyarko and Others v SSHD* [2015] EWCA Civ 440, at paragraph 23 (which judgment was subsequently upheld by the Supreme Court) as follows:

> "23. For clarity, two points should be made about the 'insurmountable obstacles' criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interrupted in a sensible and practical rather than a purely literal way …".

14. Sales LJ then set out the relevant jurisprudence, but the point that is being made, which is entirely consistent with paragraph EX.2 is that one has to understand the term "insurmountable obstacles" as meaning obstacles that are sufficiently serious that they would entail significant hardship to the parties returning. In this case, the judge clearly found that the hardship would be sufficiently serious as to render the option of Mr Rogers returning with the claimant unavailable to him; in the judge's words, "I did not think that it was an option for him".

15. As I do not consider in the circumstances of this case that there is any meaningful difference between the expression "insurmountable obstacles" and the "very significant obstacles" such that going to the Philippines was not an option for Mr Rogers, while it would have been preferable had the

judge used the expression "insurmountable obstacles" his failure to do so was not a material error, but was a matter of linguistics rather than substance. It follows that the Secretary of State's challenge to the decision of the judge to allow the appeal under the Immigration Rules must be dismissed.

16. Although this is not of significance now, that does still leave the question of whether the appeal could properly be allowed outside the Rules under Article 8. Although as I have indicated it is common ground that the reasons given by the judge for allowing the appeal outside the Rules under Article 8 are not sustainable, in light of my decision that the judge was entitled to allow the appeal under the Immigration Rules, in these circumstances it cannot be proportionate to return the claimant to the Philippines. It follows that to do so would be to breach her Article 8 rights and accordingly the decision that the judge made allowing the appeal under Article 8 also is sustainable.

17. It follows that the Secretary of State's appeal against the decision of the First-tier Tribunal Judge must be dismissed on all grounds and I will so find.

Decision

The Secretary of State's appeal against the decision of First-tier Tribunal Judge Quinn, in which Judge Quinn had allowed the claimant's appeal is dismissed, and Judge Quinn's decision is affirmed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 7 June 2017