Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14171/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 20 January 2014	**On 11 February 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GENALYN BARRETT

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr R Ahmed instructed by Dias Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of Judge A D Baker promulgated on 17 October 2013 which allowed the claimant's appeal under the Immigration Rules and Art 8 of the ECHR.

2. For convenience, I will hereafter refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellant is a citizen of the Philippines who was born on 8 July 1974. She arrived in the UK on 20 May 2009 with leave as a student. That leave was extended and her most recent grant of leave was valid until 1 March 2013.

4. On 9 June 2012, the appellant married Shey Barrett, a British citizen. On 25 February 2013, she applied for leave to remain as a spouse under Appendix FM of the Immigration Rules (HC 395 as amended). On 16 April 2013, the Secretary of State refused the appellant's application. First, the Secretary of State was not satisfied that the appellant met the financial requirements in E-LTRP 3.1 in that she was not able to demonstrate on the basis of specified evidence that she and her husband had a combined annual income of at least £18,600. Secondly, the Secretary of State was not satisfied that para EX.1 applied. Although it was not disputed that her relationship with her husband was a "genuine and subsisting relationship", the Secretary of State did not accept that there were "insurmountable obstacles" to the appellant and her husband continuing their family life outside the UK. Thirdly, the Secretary of State was not satisfied that the requirements of para 276ADE of the Rules (concerned with the appellant's private life) were met in that she had not demonstrated that she had "no ties (including social, cultural or family)" with the Philippines.

The First-tier Tribunal's Decision

5. The appellant appealed to the First-tier Tribunal. At that hearing, it was conceded by the appellant's representative that she could not meet the financial requirements of the Rules by demonstrating the required income either at the date of her application or at the date of decision. However, the Secretary of State conceded before the judge that the appellant did meet the financial requirements of the Rule (namely demonstrating a combined gross annual income of at least £18,600) at the date of the hearing. Given that concession, Judge Baker allowed the appellant's appeal under the Rules.

6. In addition, Judge Baker also allowed the appellant's appeal under Art 8. At para 9 of her determination, Judge Baker noted that the respondent did not challenge the evidence concerning the appellant's health summarised at para 16 of the skeleton argument of the appellant, namely that: "She is pregnant with a child who will be a British national and as she has suffered a miscarriage she is considered a high risk pregnancy." Judge Baker concluded at para 10 of her determination that: "Taking all these factors into account I conclude first under the Immigration Rules and second under Art 8 of the ECHR that the appeal is to be allowed outright".

The Appeal to the Upper Tribunal

7. The Secretary of State sought permission to appeal to the Upper Tribunal. The grounds argued that the judge had erred in allowing the appeal under the Immigration Rules: first, by looking at the facts at the date of the hearing rather than at the date of the application; and secondly, in finding that the appellant met the requirements of the Rules without considering whether the evidence satisfied

Appendix FM-SE of the Rules. In addition, the grounds argued that the judge had failed properly to carry out the balancing exercise inherent in proportionality in finding in the appellant's favour under Art 8 of the ECHR.

8. On 5 November 2013, the First-tier Tribunal (Judge Brunnen) granted the Secretary of State permission to appeal. Thus, the appeal came before me.

The Submissions

9. On behalf of the Secretary of State, Mr Richards adopted the grounds of appeal.

10. First, he submitted that the judge had erred in law in allowing the appeal under the Immigration Rules on the basis of the income of the appellant and her husband at the date of the hearing. He submitted that under Appendix FM-SE the appellant could only establish that she met the requirements of the Rules by providing the "specified evidence" in Appendix FM-SE which required, inter alia, the submission of payslips covering a period of six months prior to the date of application. Mr Richards submitted that the financial requirements of Appendix FM could, therefore, only be met by evidence relating to that period prior to the date of application and the judge had, therefore, been wrong to allow the appeal under the Rules on the basis that the appellant could demonstrate she met the financial requirements of the Rules at the date of hearing.

11. Secondly, Mr Richards submitted that the judge had failed properly to engage in the balancing exercise under Art 8. She had made no reference to the Rules. He submitted that the judge had set out a number of facts on the side of the appellant including, as the Presenting Officer had accepted, that she was expecting a baby, a child who would be a British citizen and it was a high risk pregnancy if she was required to leave the UK. But, Mr Richards submitted the judge had not taken into account that the appellant could not meet the requirements of the Rules at the date of the application or indeed the Secretary of State's decision.

12. On behalf of the appellant, Mr Ahmed submitted that there was nothing in the Rules to require an assessment of the appellant's financial situation as at the date of application. In any event, he referred me to wage slips and other employment documents in the appellant's bundle at pages 29-50 and at page 71 relating to the sponsor's employment and at pages 145-152 in relation to the appellant's employment. Although Mr Ahmed acknowledged that in relation to both the appellant and sponsor there was one document missing in the required sequence, on instructions he told me that these had been sent to the Home Office and the documents in the bundle were the only ones that had been returned. He submitted that on a sensible view, at the date of the hearing the appellant had demonstrated that she met the financial requirements of the Rules.

13. Mr Ahmed also relied upon the health of the sponsor and appellant. As regards the sponsor, he suffers from epilepsy and he referred me to a number of documents in relation to his health at pages 267-271 of the bundle. In addition, by way of further evidence, he relied on a discharge summary dated 31 December 2013 which showed

that the sponsor had been admitted to the accident and emergency department of a hospital in Exeter on 30 December 2013 having suffered three seizures and, indeed, suffered a further seizure whilst in hospital.

14. In relation to the appellant's health he referred me to the evidence in the bundle at pages 251 *et seq* showing that the appellant had suffered a miscarriage in June 2012 and is currently pregnant again. I was told that she is six months pregnant at present. The appellant suffers from a condition known as Turner Syndrome which is caused by chromosomal abnormality. An explanation of the condition is set out in the letter from a Consultant Clinical Geneticist, Dr C Brewer in her letter to the appellant and her husband dated 7 January 2013 at pages 259-260 of the bundle. That letter indicates that the appellant suffers from "a partial, or mild form of Turner Syndrome".

15. Mr Ahmed submitted that, on the basis of the evidence, all that was required of the judge was to give somewhat fuller reasoning under Art 8 and the appeal was properly then allowed. He submitted that it would clearly be disproportionate or there would be insurmountable obstacles under EX.1 to the appellant and her husband continuing their family life in the Philippines.

16. Mr Ahmed submitted that the judge's decision should be upheld but, if there were any error of law, he invited me to allow the appeal under Art 8 on the facts.

17. In relation to that last matter, Mr Richards indicated that he was content for me to remake the decision on the basis of the evidence before me.

Discussion and Findings

18. The evidence in this appeal is uncontested. The evidence of the appellant is set out in her statement dated 24 September 2013 at pages 3-7 of the bundle and the evidence of her husband is set out in his statement dated 24 September 2013 at pages 9-12 of the bundle. In addition, the bundle contains a number of supporting documents dealing with the parties' financial position and also their health.

19. I deal first with the Immigration Rules. The appellant's eligibility for limited leave to remain as a partner is found in Section R-LTRP. By virtue of that provision, the appellant was required to establish either that she satisfied the financial requirements in E-LTRP.3.1 or, if she could not, that she met the requirement in para EX.1 (see R-LTRP.1.1(c) and (d)).

20. For a couple, E-LTRP.3.1 requires that:

> "The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2 of
>
> (a) a specified gross annual income of at least
>
> (i) £18,600 ..."

21. By virtue of E-LTRP.3.2 the only relevant sources of income that may be taken into account are the "income of the partner from specified self-employment" and "income of the applicant from specified employment".

22. Appendix FM-SE sets out the "specified evidence" which must be produced to establish the requirements of Appendix FM. Paragraph A of Appendix FM-SE states:

> "This Appendix sets out the specified evidence applicants need to provide to meet the requirements of the rules contained in Appendix FM…."

23. Paragraph D of Appendix FM-SE states:

> "(a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision-maker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraphs (b) or (e) applies."

24. Sub-paragraphs (b)-(d) and (f) then set out circumstances in which the decision-maker may request further documents from an applicant. None are relevant here. Sub-paragraph (e) allows for the non-application of the requirement to provide a specified document in certain circumstances. That has no relevance here.

25. Appendix FM-SE deals with proof of the financial requirements, as relevant for this appeal, at paras A1 and 2. Paragraph A1 states:

> "A1. To meet the financial requirements under paragraphs .... E-LTRP.3.1 ..... of Appendix FM the applicant must meet:
>
> (a) the level of financial requirement applicable to the application under Appendix FM; and
>
> (b) the requirement specified in Appendix FM and this Appendix as to:
>
> (i) The permitted sources of income and savings;
> (ii) The time periods and permitted combinations of sources applicable to each permitted source relied upon; and
> (iii) The evidence required for each permitted source relied upon."

26. So far as relevant to this appeal para 2 of Appendix FM-SE (as at the date of decision) states that:

> "2. In respect of salaried employment in the UK, ….all of the following evidence must be provided:
>
> a. Wage slips covering:
>
> (i) a period of 6 months to the date of application if the person has been employed by their current employer for at least 6 months…."

27. It is, of course, well-known that in R(MM) v SSHD [2013] EWHC 1900 (Admin), Blake J held, in effect, that the financial requirement in Appendix FM could be a

disproportionate interference with the family life of a couple under Art 8 of the ECHR. Blake J, however, did not conclude that the financial requirements in Appendix FM were, in themselves, unlawful. Consequently, they remain in force.

28. In my judgment, it is clear that the effect of requiring an individual to establish the financial requirements in E-LTRP.3.1 by reference to, and only by reference to, the "specified evidence" set out in Appendix FM-SE, the appellant could not, and cannot now, succeed under the Immigration Rules. That is because she was required to show on the basis of payslips covering a period of six months prior to the date of application that she and her husband had a joint gross annual income of £18,600 (see SSHD v Raju and others [2013] EWCA Civ 754).

29. Further, s. 85(4) of the Nationality, Immigration and Asylum Act 2002 cannot assist the appellant. That allows the First-tier Tribunal to consider:

> "…evidence about any matter which it thinks relevant to the substance of the decision, *including evidence which concerns a matter arising after the date of decision*." (emphasis added)

30. The emphasised words have to be read in the context of what precedes them, namely that it has to be evidence relevant to "the substance of the decision". That, of course, is whether the appellant meets the financial requirements of Appendix FM on the basis of the "specified evidence" which – and this is the crucial point – must relate to the 6 month period prior to the application. Financial evidence relevant to any later period cannot assist the appellant to establish the requirements of the Rules.

31. It was conceded by the appellant at the hearing that the evidence did not establish that she met the financial requirements for a period of 6 months prior to her application. At best, she could show that at the date of decision she had a joint income of £13,000 (see para 8 of the judge's determination). The Rules were simply not met by showing that at the date of the hearing the appellant and her husband had a gross annual income of at least £18,600 although, of course, that might be relevant in assessing proportionality under Art 8. Although, as I have indicated, in the course of his submissions Mr Ahmed drew my attention to the wage slips and other financial documents in the appellant's bundle, he did not resile from the concession made at the First-tier Tribunal hearing that this documentation could not (at the date of the appellant's application) demonstrate that she met the financial requirements of the Rules.

32. To that extent, therefore, the judge erred in law in allowing the appellant's appeal under the Rules.

33. However, even if the appellant could not succeed in showing she met the financial requirements, she could succeed (despite that) if para EX.1 of Appendix FM applied. So far as relevant para EX.1 is in the following terms:

> "EX.1 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 .... and there are insurmountable obstacles to family life with that partner continuing outside the UK."

34. In her decision letter, the Secretary of State concluded that the requirement to demonstrate "insurmountable obstacles" had not been satisfied.

35. It does not appear that the appellant relied upon para EX.1 before the judge. The skeleton argument only deals, insofar as the Rules are relied upon, with the financial requirement in E-LTRP.3.1. No reference is made to any argument that the appellant was entitled to succeed under the Rules on the basis of para EX.1. Judge Baker makes no reference to para EX.1 and that does not appear to have been the basis upon which she allowed the appeal under the Immigration Rules.

36. In the light of that, the judge's decision to allow the appeal under the Immigration Rules cannot stand. It remains to be decided whether para EX.1 applies to the appellant. As I have indicated, Mr Ahmed submitted that it did. I will deal with this issue in the context of Art 8 to which I now turn.

37. Having set out the appellant's financial circumstances at para 8, the Judge dealt with Art 8 at paras 9-10 as follows:

> "9. I also note and again this was specifically not challenged, the Home Office Presenting Officer (*sic*) invited to state whether any challenges at all to the factual content in the skeleton argument in opening, that at paragraph 16 it is identified that the appellant is pregnant with a child who will be a British national and as she has previously suffered a miscarriage she would be considered a high risk pregnancy were she required to leave the UK.
>
> 10. Taking all these factors into account I conclude first under the Immigration Rules and second under Article 8 of the ECHR that the appeal is to be allowed outright…."

38. I accept Mr Richards' submissions that the judge failed adequately to deal with the issue of proportionality. The judge's reasons given in paras 9-10 of her determination were not, in my judgment, adequate to engage with the issues under Art 8. Leaving aside that no findings are made on whether Art 8 is engaged, the Judge has not undertaken the 'balancing exercise' required to determine whether the appellant's rights are outweighed by the public interest. I set that decision aside and turn to remake it in the light of the Immigration Rules, including the application of para EX.1.

39. The primary facts are not in dispute. The appellant has been in the UK since 2009 as a student. On 9 June 2012, she married the sponsor, Mr Barrett. It has not been suggested that their relationship is other than genuine and subsisting. That is reinforced by the evidence that the appellant and her husband are seeking to have a child together. The appellant sadly lost her first baby on 1 June 2012 but is now some six months pregnant.

40. The parties' financial position was not called into question by Mr Richards. The appellant works as a carer for Devon County Council. Since her course ended, she has worked full-time. Mr Richards did not challenge the appellant's evidence, which Mr Ahmed indicated was supported by the documents in the bundle, that the appellant earns now approximately £1,800 per month. The appellant's husband now works for a company called MITIE Ltd as a manager, earning £16,000 per annum. He also works part-time for KFC, earning an additional £1,000 per year. Clearly, and it was not disputed by Mr Richards, the gross annual income of the parties now, but not at the relevant time under the Rules, meets the financial requirement in E-LTRP.3.1. It, of course, exceeds by some way the lower level of gross annual income identified by Blake J in MM of £13,400.

41. The appellant and her husband currently live with the appellant's sister in her house in which they have exclusive occupation of a bedroom. They are trying to save to obtain a home of their own.

42. I accept that the appellant and her husband have established a "family life" in the UK together and a private life not least with her husband's family and friends. Both also regularly attend a Catholic church together.

43. As regards the parties' health, I accept that the sponsor suffers from epilepsy and currently receives medication for his condition. He most recently suffered seizures on 30 December 2013 when he was admitted to the accident and emergency department of a hospital in Exeter. During that seizure, the sponsor bit his tongue in several places, leaving significant bruising. That report notes, however, that the likely trigger for his seizures was the fact that, as the sponsor informed the hospital, he had drunk a bottle of wine the previous day. The sponsor was advised to reduce his alcohol intake.

44. As regards the appellant, she suffers from "a partial, or mild form of Turner Syndrome" (see letter dated 7 January 2013 from Dr C Brewer, Consultant Clinical Geneticist). The "main effect" on the appellant is that she is "shorter than most of [her] relatives". Dr Brewer's letter clearly indicates that there is a risk of transmission of the chromosome abnormality described as Turner Syndrome to the appellant's children. Dr Brewer notes that "many babies with Turner Syndrome miscarry early on". Dr Brewer notes that if the appellant has a child who is a girl with Turner Syndrome then it is likely that she "will do very well indeed, although she will probably be short and may have fertility problems".

45. The starting point must be the Immigration Rules themselves (see Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) at [27] *per* Cranston J).

46. It is accepted that the appellant could not meet the financial requirements of the Rule at the date of her application. Likewise, it is now not challenged that the parties' financial position has changed such that in substance the appellant has the required income of at least £18,600 gross annual income and, I did not understand it to be challenged by Mr Richards, this was demonstrated by the necessary "specified

evidence" if an application were made today. In short, I did not understand it to be challenged that if an application were made today by the appellant she would meet the requirements of the Rule, even without reliance upon para EX.1. That, however, does not allow the appellant to succeed under the Immigration Rules in this appeal which has to be determined on the basis of the evidence at the date of her application.

47. What, then, about the application of para EX.1? The requirement to demonstrate "insurmountable obstacles" was considered by the Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192. There, the court concluded that, "insurmountable obstacles" should not be understood in a literal sense as being obstacles which it is impossible to surmount (see [49] approving Izuazu (Article 8 – new Rules) [2013] UKUT 0045 (IAC) at [53]-[59]). In Gulshan, the Upper Tribunal summarised the position as follows at [24(c)]:

> "The term 'insurmountable obstacles' in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Nigeria); they concern the practical possibilities of relocation."

48. In Gulshan, the Upper Tribunal went on to say that:

> "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: Nagre."

49. I have carefully considered all the evidence to which I was referred. What, if any, are the "practical possibilities of relocation"? There is, of course, no impossibility in the appellant and her husband living in the Philippines. There are, however, practical difficulties in them doing so.

50. At para 10 of her witness statement, the appellant says this:

> "I would not be able to move back to the Philippines: my husband Shey and I have fully established a life here in the UK. If he were to relocate to the Philippines with me he would not be able to communicate with anyone due to the language barrier thus inhibiting his ability to find employment there. In addition, to this I am afraid that Shey's condition may get worse if we were forced to relocate. I have a good job here in the UK; I feel like I have the opportunity to help people in their lives. It would be unreasonable for the SSHD to separate me and my husband; we are both currently working. We can support ourselves here in the UK."

51. In his statement, the sponsor deals with these matters as follows at para 7:

> "It would severely disrupt our life if [the appellant] had to leave the UK and go to the Philippines. I do not know how we would be able to carry on our lives together. I have a stable job here in the UK and would not know if I would be able to work in the Philippines. I do not know if I would be able to communicate there, let alone find employment. It is unreasonable and unjust that the Secretary of State would put us in such a position that would jeopardise my relationship with my wife. I know that my family would be upset if she were not allowed to remain in the UK; they have accepted her as part of the family. Furthermore, [the appellant's] family who are present and

> settled in the UK would be upset as well. I love [the appellant] and cannot imagine a life without her."

52. In relation to the parties' health, the appellant in her witness statement at para 7 says this:

> "I would first like to point out that Shey is a sufferer of epilepsy. This condition seems to worsen during stressful periods; he had suffered seizures after the loss of our child and he has also suffered a seizure leading up to my hearing date. I am afraid that if Shey were to be forced to move from the UK to be with me his condition could worsen. Furthermore, since losing our first child I have discovered that I too have a condition called Turner Syndrome which makes it more difficult for me to bear children; although we want to have a child through natural means we have been told that I would need close monitoring throughout the pregnancy. I believe that moving from the UK could make our already difficult position much harder. I am currently two months pregnant and I would not want to risk the health of my unborn child."

53. Of course, at the date of the hearing, the appellant it is accepted is six months pregnant.

54. It is also not challenged by Mr Richards that the appellant, as she had previously suffered a miscarriage, was to be considered "a high risk pregnancy".

55. In her decision letter, the Secretary of State makes the bare assertion that:

> "You have not demonstrated any insuperable obstacles that would prevent you from continuing your family life outside the UK".

56. The refusal letter provides no further elucidation of why that conclusion was reached. Likewise, Mr Richards did not directly address me on this issue. The matter is, in my judgment, finely balanced in this appeal. Although in reaching my conclusion I have considered the appellant's circumstances cumulatively, it is her health and current pregnancy which stands out as taking this case out of the 'run of the mill' cases.

57. The evidence of the appellant and her husband as to the practical difficulties he may face in seeking employment in the Philippines is not challenged. He suffers from epilepsy and currently receives medication. The problems with his health are, nevertheless, a factor to be considered where it is suggested that a British citizen who has lived his entire life in the UK is asked to live abroad.

58. As regards the appellant's health, the evidence does not suggest that as a person with Turner Syndrome she suffers from any health disadvantage apart from problems of fertility and risk of miscarriage. The appellant is currently six months pregnant. She suffered a miscarriage previously in June 2012. Mr Richards did not challenge the characterisation of the appellant's pregnancy as a "high risk pregnancy". That, in my judgment, follows from the evidence concerning the heightened risk of miscarriage where a mother has Turner Syndrome.

59. Nothing in para EX.1 requires the "insurmountable obstacles" to exist permanently so as to prevent the parties carrying on their family life abroad. Here, in my

judgment, the appellant's pregnancy creates a real and significant practical difficulty to her returning to the Philippines at least for the duration of her pregnancy and equates to "insurmountable obstacles".

60. Even if I am wrong about that, those circumstances are "compelling circumstances" such that removal would be "unjustifiably harsh" sufficient, when taken together with all the circumstances of the appellant and the sponsor, to outweigh the public interest in effective immigration control. In reaching that conclusion, I take into account what is accepted before me that the appellant meets the financial requirement of the Rules at the date of the hearing. The appellant has always been in the UK lawfully.

61. It has to be asked: what purpose is served by requiring the appellant either to make a new application either in country or by returning to the Philippines? In my judgment, no purpose whatsoever is served by imposing such a procedural requirement.

62. I accept that the appellant has established private and family life in the UK and that if returned to the Philippines there will be an interference with that private and family life so as to engage Art 8.1. Any such interference would be in accordance with the law and for a legitimate aim. However, having regard to all the circumstances and for the reasons I have set out above, the public interest in effective immigration control is outweighed by the appellant's right to respect for her private and family life.

63. For these reasons, the appellant has established that she meets the requirements of the Immigration Rules, applying para EX.1 of Appendix FM.

64. Further, the appellant's removal would breach Art 8 of the ECHR.

Decision

65. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal under the Immigration Rules and Art 8 involved the making of an error of law. Those decisions are set aside.

66. I remake the decisions allowing the appellant's appeal under the Immigration Rules and Art 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal