Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11922/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11th June 2015

Determination Promulgated
On 6th July 2015

Before

UPPER TRIBUNAL JUDGE COKER
DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

YING NAM AMY WONG
(anonymity direction not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazini, instructed by E2W (UK) Ltd
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Court of Appeal remitted this appeal, by consent, to the Upper Tribunal by order dated 25th February 2015 for the Upper Tribunal to reconsider the appeal on the pleaded grounds. We did not have a copy of the statement of reasons but had a copy of the grounds pleaded to the Court of Appeal and the grounds originally pleaded requesting permission to appeal from the First-tier Tribunal to the Upper Tribunal.

2. It was agreed with the parties that we should proceed on the basis that the whole of Deputy Upper Tribunal Judge Parkes' determination should be ignored and that the issue before us was whether there was an error of law in the First-

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tier Tribunal determination of Judge Devlin, which had been heard on 19th August 2013, such that the determination be set aside to be remade.

3. At the commencement of the hearing we indicated that it appeared to us, subject of course to submissions, that there were concerns over the way in which Judge Devlin had apparently failed to factor into his consideration issue with regards to the sponsor’s citizenship and health matters; the involvement the sponsor and appellant have with the sponsor’s Down Syndrome nephew; issues of the sponsor’s potential employment and the consequent ability to meet the costs of accommodation, and the apparent import of the test of insurmountable obstacles into consideration of the proportionality of removal under Article 8. There were a number of other matters which are referred to in the grounds seeking permission to appeal to the Upper Tribunal which on their own would in all likelihood be insignificant but when considered as a whole we indicated that it did appear that the First-tier Tribunal judge had erred in law and the decision should be set aside to be remade. Mr Bramble very sensibly acknowledged these issues and took the view that these matters did indicate errors of law such that the decision be set aside to be remade.

4. We set aside the determination. Both parties agreed that we were able to proceed to remake the decision. The appellant had submitted an up to date bundle of documents and Mr Bramble confirmed that he only wished to cross-examine the sponsor, the other evidence being accepted. Mr Bazini referred to the length of the relationship between the couple. Mr Bramble correctly pointed out the finding by the First-tier Tribunal judge that the relationship had been one akin to marriage only from 2009 and that this finding had not been disputed in the grounds seeking permission to appeal. He however acknowledged the obvious point that the relationship must have commenced prior to 2009 even though it had not acquired ‘permanence’ until 2009. Mr Bazini did not pursue this issue. We then heard submissions.

Findings of fact preserved from the First-tier Tribunal determination and unchallenged or accepted factual findings before us

5.1. The appellant is a British National (Overseas), born 7th February 1971.

5.2. The decision the subject of appeal is a decision to remove the appellant pursuant to s10 Immigration and Asylum Act 1999 served 5th April 2013. Before us the appellant contends that she meets the requirements of the Immigration Rules and/or her removal would be in breach of Article 8.

5.3. The appellant first came to the UK on 23rd February 2004 as a visitor. She was granted successive periods of leave to remain until 30th November 2008.

5.4. The appellant met the sponsor in 2005. Between 9th and 13th June they spent a four day holiday together.

5.5. In July 2009 the appellant was hospitalised after a fall and a broken back and after her discharge went to stay with the sponsor from 23rd July 2009.

5.6. On 25th September 2009 the appellant was convicted of money laundering and sentenced to 10 months imprisonment. She was not recommended for deportation and the respondent did not consider whether to make a deportation order against her. The sponsor visited her 7 times whilst she was in prison and on her release it was agreed between them that she could use his address as her release address and was released to his Middlewich address. It is not clear when her temporary admission address was changed to the Ilkley address although it is accepted that they have been living there together since May 2011 when the sponsor found employment in that area.

5.7. On 9th April 2010 the sponsor asked the appellant to marry him; they were married on 15th October 2010 in church. Her application for leave to remain as the spouse of a British Citizen was refused on 29th March 2011 with no right of appeal. Following further submissions on 7th November 2012 and 17th December 2012 that the appellant met the requirements of the Rules for limited leave to remain and that her removal would be a breach of Article 8 she was served with the s10 removal decision.

5.8. The appellant has one brother, two sisters and one brother in law in the UK. Her parents, other brothers and sisters and a daughter from her previous marriage live in Hong Kong. Her parents live in a three bedroom, 1 sitting room, 1 shower and 1 kitchen flat. Also living there are her father’s older and younger brothers; the appellant’s older sister and the appellant’s daughter from her earlier marriage; the appellant’s younger sister and her husband and son; the appellant’s brother and his wife (11 people in total). There is insufficient room for the appellant and her husband to also live there. The family would only be able to offer emotional support, not financial or other practical support. They are in contact via Skype and telephone

5.9. The sponsor is part of a close knit family with a brother, sister, three nephews, three nieces, a great niece, two aunts and uncles and several other cousins. He sees his brother, sister and their children every six weeks or so. All the children are adults but one of them (aged 28) has Down Syndrome. He lives in sheltered accommodation suitable for his needs with full time carers.

5.10. In 2009 the sponsor was made redundant from his then employment. After discussions with a friend he made some plans to travel to New Zealand where there was a possibility of a 12 month contract for a job with Air New Zealand. He did not intend to emigrate to New Zealand permanently and in the event the job possibility did not materialise; he went for a trip/holiday in any event.

5.11. The sponsor is employed (and has been since May 2011) as a maintenance control manager for Jet2.com and is responsible for 11 staff charged with the day to day maintenance of 44 aircraft. He is only permitted 2 consecutive weeks leave at any one time because of his onerous responsibilities. From his P60 he earned almost £71,000 for the year 2014/15. From enquiries made of similar job opportunities in Hong Kong available at the moment with airlines based in Hong Kong he does not meet the requirements either because he does not speak Chinese (written and spoken) or does not have the required licences. He owns a house in Middlewich, which is subject to a mortgage of £345 per month and

rented out at a rent of £550 per month. He and the appellant live in rented accommodation paying rent of £550 per month.

5.12. The appellant and her husband made enquiries as to accommodation availability in Hong Kong in the area where most expatriates live. From the undisputed evidence a one bedroom flat would be in the region of HK$16500 to HK$50000 (£1367 - £4143 approximately) per month depending on the area.

5.13. The appellant is involved in various community activities and has a great deal of support from friends in the area.

5.14. The sponsor has a heart problem – he had a stroke in 1988 which resulted in damage to his mitral valve which was replaced in 1999. In 2006 that valve was again replaced. He takes warfarin and three other medications which are checked monthly by way of blood tests and has an annual hospital check-up. He does not pay for this in the UK, such treatment being provided by the NHS.

5.15. 'Platinum' medical insurance covering both inpatient and outpatient treatment in Hong Kong is available at the approximate cost of £300 to £550 per month. Pre-existing conditions ie cardiovascular disease/disorder or any associated conditions are excluded. The cost of treatment on an incident by incident basis for diagnostic services was not provided but an outpatient consultation would be in the region of HK$680 to HK$2160 per attendance (which would presumably be the equivalent of the annual check up). Community health services for eligible persons (which the sponsor is not) are HK$64 per treatment.

6. It is plain that the sponsor would not be able to obtain employment in Hong Kong at a commensurate level to that in the UK although it was accepted by Mr Bazini that it is likely that he would find some kind of employment; we were not provided with any detail of the likely income he could expect from such employment. It does not appear that the appellant has worked whilst in the UK but she has studied and speaks English. It is not clear what employment she undertook whilst in Hong Kong, if any, although because she was able to fund her trip to the UK and fund studies in the UK it is reasonable to assume (given her evidence that her family in Hong Kong are unable to provide any financial assistance) that she had some kind of employment. Furthermore it is reasonable to assume that having gained qualifications in the UK she will be able to find some employment. It does not appear that the couple have any savings.

7. It is clear that the sponsor requires medical treatment on a regular basis. Although it was submitted that there was considerable concern about the risk from infection that may need intensive treatment, there was no evidence that this had occurred during the past few years and it is difficult to extrapolate from that generalised un-evidenced concern to a finding that these kinds of incident would be more likely to occur in Hong Kong. We have disregarded that submission in reaching our conclusion but in any event we consider that it carries little weight given the lack of any supporting medical evidence. Although the sponsor cannot be described as a fit young healthy man, it is plain that his health is managed and the need for medical treatment on an intensive and on-going basis is not acute. On the other hand it is correct that he would have to

pay for all treatment received in Hong Kong arising out of his heart problems. Although evidence of the diagnostic costs was not produced, it appears that community health services for eligible persons are HK$64 per treatment. It is not possible from the evidence produced to assess how much monthly diagnostic blood tests would cost but it seems to be safe to assume his monthly costs could be (generously) in the region of HK$1000 (approximately £85) per month. To conclude otherwise would require evidence, which has not been produced.

8. The sponsor owns a house which is currently rented out. Although his evidence was that it would be difficult to sell because of the current market, it is currently producing an income and there is no reason to suppose that it would not continue to do so. The costs of continuing to hold that property in the UK would not therefore fall upon him if he were to leave the UK and there would be a small income from the rent, as now.

9. Although the sponsor and the appellant see his family fairly regularly it is plain that the ties that exist are no more than the normal family ties. Although it is accepted that the sponsor's intended employment in New Zealand was not intended to be permanent and, from the documentation it appears it would have been for a maximum of a year, there was no indication that the scarcity of visits over that period would have caused undue upset for his family (or indeed that the lack of free medical cover caused anxiety). In so far as the Down Syndrome child is concerned, there are other family members who clearly see him as frequently as do the appellant and her husband – if not more so. Neither the appellant nor the sponsor play any role in his day-to-day care; their contact is restricted to social family visits. It was said that the child (or young man as he now is) would not understand why he was no longer seeing them but this does not seem to have concerned the family when the sponsor was considering travelling abroad for a year. There was no indication in the papers that having travelled to Hong Kong, the sponsor at least would not be able to return for visits during the year. There was no evidence of the particular level of disability or learning disability that this young man suffers from. There was only an assertion that he would not understand. Without more evidence we cannot accept either that the appellant and her husband play anything other than an occasional social role in his life or that he would be particularly affected by their absence.

10. Although we note that the couple live in a two bedroom rented flat at present, we were given no information why it would be necessary for such accommodation in Hong Kong. From the evidence produced they would be able to find suitable one bedroom accommodation in an area of Hong Kong that 'ex-pats' live in at a minimum of £1400 rent per month.

Discussion

11. The appellant submits that she meets the requirements of the Immigration Rules but if not then she falls to be successful on Article 8 ECHR grounds. It was submitted that she would not meet the requirements for entry clearance under the Immigration Rules as a spouse because of her criminal conviction; that if she were to be removed that would in practice mean the termination of

her and her husband's relationship because he could not go to Hong Kong with her: firstly because there were insurmountable obstacles because of his health and the financial difficulties and secondly that in any event because all the factors in their circumstances rendered such relocation disproportionate.

12. It is clear that the most significant factor in this appeal is the sponsor's general health requirements which have to be met through payment in Hong Kong and yet are provided free of charge in the UK. There was no suggestion that the level of treatment he would receive in Hong Kong was substandard or not at the standard he could expect in the UK. This together with the financial difficulties the couple may have on relocating to Hong Kong, a country with which the sponsor has no link or knowledge other than through his wife and where it is likely that he would have some difficulty obtaining employment although he would be likely to find something, combine and factor into the health issues. The other factors set out above in paragraphs 5 to 10 above are obviously relevant for consideration in the round but the identifying features that put this case in a different position to those generally are those noted in this paragraph. We have noted that the couple's relationship started whilst the appellant was lawfully in the UK but that at that time it was not a relationship that appeared to be with a focus of it being long term. Her lawful leave had expired by the time the couple started living together in a relationship akin to marriage and subsequently married.

Under the Immigration Rules

13. There was no challenge to the ability of the appellant to meet the generality of the Immigration Rules. The issue was whether she meets paragraph EX.1. which reads as follows, where relevant:

> '(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 significant hardship for the applicant of the partner.'

14. There was no dispute but that the couple have a genuine and subsisting relationship, meet the financial and accommodation requirements and the only question was whether there were "insurmountable obstacles" to family life continuing outside the UK.

15. We have taken very great account of the medical issues in this case including the sponsor's age and general level of health and the financial constraints the couple will be likely to face at least when they initially return to Hong Kong. Although we appreciate and acknowledge that these would amount to difficulties we cannot accept that they would entail very significant or even significant hardship for the appellant or her partner. Our assessment of this does not include the fact that as a British Citizen he is entitled to free medical treatment but the likely reality of the situation they would face in Hong Kong –

smaller accommodation, lower standard of living and having to pay for health care. We find that there would not be insurmountable obstacles to the couple continuing their family life outside the UK and thus find that the appellant does not meet the requirements of the Immigration Rules.

Article 8 and proportionality

16. It was not disputed that we should undertake a more wide ranging assessment of proportionality than under the Rules. There were issues that were not adequately covered by the First-tier Tribunal judge in such a “Rules based” consideration including the sponsor’s health, his age and financial issues. Our consideration of this is guided by Strasbourg jurisprudence and s117B of the Nationality Immigration and Asylum Act 2002. Although the public interest is statutorily enshrined in s117B these factors are not the only factors to be considered but they form a bedrock for consideration. There is no “exceptionality test” but there is a requirement to carry out a balancing exercise where an individual cannot meet the requirements of the Immigration Rules. The public interest will generally only be outweighed if an applicant can show that “compelling circumstances” exist – see [40] to [42] of **SS (Congo) [2015] EWCA Civ 387**. The test is, we agree, at a lower threshold than that set out in paragraph EX.1.(b) and does not require that there be insurmountable obstacles.

17. In considering the balancing exercise the Tribunal is required to consider s117B of the 2002 Act. There is no dispute but that the appellant speaks English and is financially independent. S117B requires that little weight should be placed upon a relationship formed with a qualifying partner that is established while the applicant is unlawfully in the UK. This appellant was lawfully in the UK when their ‘relationship’ commenced in the sense that they knew each other. By the time the relationship commenced in terms of her husband being a qualifying partner, however, she was unlawfully in the UK; thus as required by statue we must place little weight upon that relationship.

18. Mr Bazini submitted that the appellant would not, if removed from the UK be able to successfully apply for entry clearance because of her criminal conviction. Although that is correct as of the date of hearing before us, the eligibility criteria in the Rules being that the applicant would not meet the criteria until five years have elapsed after the conclusion of her sentence ie July 2016 (paragraph S-EC.1.4(c)) and it would “only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors”. Obviously we cannot speculate as to the appellant’s financial and accommodation status at that time in the future but it is not the fact that there is a likely long term bar to her re-entry in the event that she otherwise meets the Immigration Rules. We note in reaching our conclusion that during this period the couple would be able to meet up although the sponsor cannot take more than two weeks holiday at anyone time. One week’s holiday appears to equate to four shifts and he is entitled to a total of 28 shifts per annum holiday, to include public holidays. This amounts to 7 weeks holiday.

19. We have also noted that the respondent did not consider deportation proceedings against the appellant although we also note that the respondent

wrote to her on her release from imprisonment and informed her that she should seek to regularise her stay or she was expected to provide details of an application for leave to remain having been made.

20. Mr Bazini submitted that unless the appellant had an appalling immigration history then there was no reason why she should leave the UK in order to apply for entry clearance – **Chikwamba [2008] UKHL 40** which in paragraph 44 held "… Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad …". In **Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC)** the Upper Tribunal held

> "The significance of Chikwamba v SSHD [2008] UKHL 40 is to make it plain that, in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the immigration rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance. The Chikwamba principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the United Kingdom."

21. In **R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)**, albeit a judicial review, the Upper Tribunal held:

> "Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40."

22. Although some considerable time has elapsed since the respondent was made aware of the relationship between the appellant and her husband, this is not such as to impact either in favour or adversely upon our decision.

23. We have considerable sympathy for the appellant and her husband in this appeal. We do not accept that the lack of an 'appalling' immigration history on the part of the appellant renders her removal disproportionate. Consideration of the proportionality of removal requires all factors to be taken into account. There are factors that militate against her not least that her relationship commenced when she was unlawfully in the UK and her criminal offence which, although considered insufficient to cause the instigation of deportation proceedings is still a factor to be weighed against her. We do accept that her husband will have some difficulties in Hong Kong and that as a British Citizen he would be prevented from utilising the NHS for required treatment whilst he was there but

we do not accept that these difficulties are such that they render the appellant's removal disproportionate.

24. We have carefully considered all of the factors both for and adverse to the appellant and weighed these in the light of the public interest on removal. We find that her removal is not disproportionate and dismiss her appeal.

Conclusions:

The First-tier Tribunal erred in law such that the decision is set aside to be remade.

We re-make the decision.

The appeal against the decision to remove is dismissed.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. There was no application for one and we see no reason why one should be made.

Date 1st July 2015

Upper Tribunal Judge Coker