Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43689/2013

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

On 15 April 2015 **On 23 April 2015**

Before

LORD BANNATYNE
UPPER TRIBUNAL JUDGE GLEESON

Between

LOREDINE CASTRO LEONCIO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Collins, Counsel
For the Respondent: Mr Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. This is an appeal against the decision of the First-tier Tribunal made on 17 September 2014 refusing an appeal against a decision of the respondent refusing an application for leave to remain in the United Kingdom based on the appellant having established family life in the United Kingdom.

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Background

2. The findings of the First-tier Tribunal are helpfully summarised in Mr Collins' grounds of appeal and are as follows:

"(i) The Appellant is 42 years of age and has resided in the United Kingdom for some 14 years.

(ii) The Appellant's partner, Lee Job is a British citizen

(iii) The couple have been trying to have a baby for the past two years and have been referred for IVF treatment cf paragraph 10 of the Determination.

(iv) The relationship is a genuine and subsisting one cf paragraph 25 of the Determination.

(v) … the Appellant '… through her partner meets all of the maintenance and accommodation requirements as specified in the Immigration Rules' cf paragraph 25 of the Determination.

(vi) The Appellant meets the requirements of s117B(2) and (3) of the Nationality, Asylum and Immigration Act 2002 as inserted by s19 of the Immigration Act 2014 cf paragraph 28 of the Determination.

(vii) In the past previous legal representatives, not apparently a firm of Solicitors, submitted documents on behalf of the Appellant which contained false endorsements. The Appellant was unaware of this until she was notified by the authorities and thereafter she assisted the authorities in bringing the perpetrators to justice cf paragraph 32 of the Determination.

(viii) The Appellant's parents are present and settled in the United Kingdom and the Appellant 'substantially assists in caring for them' cf paragraph 33 of the Determination.

(ix) The Appellant's partner would face numerous problems if he moved to the Philippines and it was unreasonable to expect him to do so cf paragraphs 18 and 19 of the Determination.

(x) That the instant case was one where there 'are arguably good grounds for considering Article 8 outside the Rules' cf paragraph 41 of the Determination".

3. For the purpose of the appeal before us the following paragraphs of the determination of the First-tier Tribunal were also of materiality:

"48. The evidence of the relationship between the appellant and her partner is that they met on 22 February 2009. They, however, only started cohabiting in December 2010. I reiterate that all the appellant's appeal rights had been exhausted by 4 May 2010 and the appellant and her partner began starting living together in December 2010, becoming

engaged in December 2011. It was only almost three years after the appellant's appeal rights had become exhausted that the current application was made. The appellant was clearly in a relationship with a qualifying partner that was established by the appellant at the time the appellant was in the United Kingdom unlawfully. This aspect is not disputed by the appellant's representative and it is common cause that Section 117B(4)(b) is a factor which requires consideration.

49. I emphasise that this is a specific requirement of primary legislation. It specifically states that little weight should be given to a relationship formed with a qualifying partner that is established by a person at the time when the person is in the United Kingdom unlawfully. The appellant's circumstances clearly fall within this provision.

50. I have already stated that it is common cause that the appellant's appeal turns solely on the relationship between the appellant and her partner. In order for the appeal to succeed it is clear that I would need to accord very considerable weight to the relationship between the appellant and her partner. In terms of the primary legislation to which I have referred I am specifically required to give little weight to this consideration.

51. In giving little weight to this consideration, as I am specifically required to by primary legislation, I do not consider that it can be stated that the interference in the appellant's family life caused by her removal would be disproportionate to the respondent's legitimate interest in protecting the economic wellbeing of the United Kingdom by maintaining a consistent and effective immigration policy. I reiterate that the key aspect in this decision is the public interest consideration specified in Section 117B(4)(b).

52. I do not find it easy to make such a decision, as on a personal level I have considerable sympathy with the appellant and her partner. I could, however, only allow the appeal by giving considerable and substantial weight to the relationship between the appellant and her partner – and this would be contrary to the specific requirement of the primary legislation which I have referred to.

53. In these circumstances the appeal on Article 8 grounds must be dismissed".

Submissions on behalf of the Appellant

4. Mr Collins' position was that the First-tier Tribunal had erred in law in various respects.

5. First, he referred to the following finding at paragraph 42 of its determination where the First-tier Tribunal said this:

> "… applying the approach to Article 8 outside the Rules, that it would be unreasonable to expect the appellant's partner to travel to the Philippines for family life to continue."

Mr Collins submitted that it was from this point in its determination that the First-tier Tribunal had erred. It was his position that having found that it would be unreasonable or put another way disproportionate for the appellant's partner to have to move to the Philippines then logically the appeal would have to be allowed under Article 8 ECHR. However, what the First-tier Tribunal thereafter went on to do was to direct its attention to Section 117B of the Nationality, Immigration and Asylum Act 2002 which provided among others that little weight should be accorded to a relationship formed when one party was in the United Kingdom unlawfully, as was the situation in the instant case. He submitted that that was putting the cart before the horse. He contended that the foregoing provision should be considered first and then having given the relevant relationship little weight, findings made and on the basis of those findings an assessment of proportionality should be made. He thus submitted that the First-tier Tribunal's approach was flawed.

6. Secondly, Section 117B made it clear that little weight should be given to such a relationship, what it did not say was that no weight whatsoever should be given to the relationship and it was his position that when the determination of the First-tier Tribunal was examined that was the approach which it had taken.

7. Thirdly he argued this: it was wrong to state as the First-tier Tribunal did at paragraph 50 of its determination: "In order for the appeal to succeed it is clear that I would need to accord very considerable weight to the relationship between the appellant and her partner". He went on to submit that if that was correct then in no case such as the instant one could an appellant ever be successful under Article 8 ECHR no matter how compelling the facts. He submitted that on a proper construction that was not what the legislation said or intended.

8. In development of his said third argument Mr Collins went on to say this: It would be entirely open to the First-tier Tribunal to give the relationship little weight, as it must do, but on the basis of the facts as found, in particular that the appellant was 42, had been trying for children for two years and was awaiting IVF treatment together with the accepted fact that it was unreasonable to expect her partner to relocate to the Philippines it would be disproportionate to remove the appellant and separate the couple. That he submitted was the heart of the appellant's case.

9. Mr Collins found some support for the position he was advancing in terms of his third argument in the case of Dube (SS.117A - 117D) [2015] UKUT 0090 (IAC). In this case the Upper Tribunal considered the proper approach to Sections 117A – 117D of the said Act. In particular, as we understood his submission, Mr Collins found support for the position he was advancing in what was said at paragraph (c) of the headnote which was as follows:

> "(c) Whilst expressed in mandatory terms, the considerations as specified are not expressed as being exhaustive: note use of the phrase 'in

> particular' in Section 117A(2): 'in considering the public interest question, the court or Tribunal must (in particular) have regard – '."

Reply on behalf of the Secretary of State

10. Mr Avery's reply was brief, there was no error in the way that this matter had been approached by the First-tier Tribunal. There were, he submitted, no exceptional features in this case which would have entitled the First-tier Tribunal to find in favour of the appellant in terms of an Article 8 consideration outwith the Rules.

Discussion

11. We are satisfied that there is no error in the way that the First-tier Tribunal has approached this matter.

12. In considering the First-tier Tribunal's approach it is essential to have regard to the basis on which it was asked to consider Article 8 outside the Rules and that is set out succinctly at paragraph 50 of its determination:

    > "I have already stated that it is common cause that the appellant's appeal turns solely on the relationship between the appellant and her partner".

    Accordingly, where it was agreed that the appeal turned on this single question the First-tier Tribunal must be correct when it goes on to say at paragraph 52:

    > "I could, however, only allow the appeal by giving considerable and substantial weight to the relationship between the appellant and her partner – and this would be contrary to the specific requirement of the primary legislation which I have referred to".

    This case it is clear from paragraph 50 entirely turned on the relationship between the appellant and her partner and thus the First-tier Tribunal was entitled to decide the case by identifying what weight it could give that factor and in doing so had to have regard to the said provisions which stated that that factor should only be given little weight. It thereafter weighed that agreed sole factor against the respondent's legitimate interest. There were no further factors in the circumstances of this case to be considered in the proportionality assessment. We do not find that the case of Dube advances the appellant's position given the particular circumstances of this case as above described, namely: the appellant's appeal turned on the relationship between the appellant and her partner and that alone.

13. With respect to whether the First-tier Tribunal gave no weight whatsoever to the relationship we are satisfied that on a proper consideration of the determination as a whole that that is not the case. The First-tier Tribunal has clearly had at the forefront of its mind the terms of the statutory provision, namely: that little rather than no weight should

be attached to this factor. When commencing its consideration of this issue it refers to "little weight" being given to the relationship (see: paragraph 49). The requirement of giving little weight to the relationship is expressly repeated at paragraph 50. We are unable to identify any basis upon which it could be contended that no weight was given to this factor by the First-tier Tribunal.

14. Moreover, there is nothing compelling in this case outwith the Rules. All that was relied on before the Tribunal was first that the appellant was awaiting (not undergoing) IVF treatment and so far as we can identify there was no evidence as to whether this treatment could not equally well be undergone in the Philippines. Secondly reference was made to the finding that it would be unreasonable for the appellant's partner to relocate to the Philippines. Again there is nothing compelling or exceptional in the above factor. In any event both of these factors are merely elements of the relationship between the appellant and her partner.

15. So far as the stage in its determination at which the First-tier Tribunal looked at the above statutory provisions it is our clear view that there was no error of law in relation to this. The provisions were looked at in terms of the proportionality exercise and on a proper understanding of the provisions that was the appropriate point at which the terms thereof should be considered.

16. For the foregoing reasons we find that there has been no error of law. We accordingly dismiss the appeal.

17. No anonymity direction is made.

Signed   Date

Lord Bannatyne
Sitting as a Judge of the Upper Tribunal