Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17139/2016**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 23 January 2018	**On 15 February 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHELLE MAGHANOY DRILON

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer
For the Respondent: In person (with the Sponsor, Richard Button)

DECISION AND REASONS

Introduction

1. The respondent (whom I shall refer to as the "claimant") is a citizen of the Philippines who was born on 12 March 1988. She has on four occasions between August 2013 and October 2015 been granted entry clearance to the UK. In August 2013, September 2014 and 1 November 2015, she was granted entry clearance as a Tier 5 charity worker. She last entered the United Kingdom as a visitor on 31 October 2015.

2. On 12 January 2016, the claimant applied for leave to remain on the basis of her relationship with a British citizen, Richard Button. Her application was refused on 29 June 2016. The respondent was not satisfied that the relationship between the claimant and Mr Button was "genuine and subsisting" or had, in any event, been shown to be a relationship akin to marriage which had lasted for at least two years.

In addition, the Secretary of State concluded that, applying paragraph EX.1. of Appendix FM, the claimant had not established "insurmountable obstacles" to her family life with Mr Button continuing outside the United Kingdom in the Philippines.

3. The Secretary of State also concluded that the claimant could not succeed on the basis of her private life under paragraph 276ADE of the Immigration Rules (HC 395 as amended).

The Appeal to the First-tier Tribunal

4. The claimant appealed to the First-tier Tribunal. Having heard evidence from the claimant and Mr Button, Judge Rowlands was satisfied that their relationship was a genuine and subsisting one. In addition, he noted that since the Secretary of State's decision the claimant and Mr Button had married on 26 October 2016. Further, Judge Rowlands concluded, applying paragraph EX.1. that there were "insurmountable obstacles" to their family life being enjoyed outside the United Kingdom. As a result, Judge Rowlands was satisfied that the claimant met the requirements of the 'partner' provisions in Appendix FM, namely R-LTRP.1.1.(d)(i) – (iii) and he allowed the appeal under the Immigration Rules.

The Appeal to the Upper Tribunal

5. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the judge had, in effect, irrationally concluded that there were "insurmountable obstacles" to the claimant and Mr Button continuing their family life in the Philippines.

6. The grounds contended that the judge had found at paragraph 19 of his determination that:

> "The only real obstacle, it seems to me, is his apparent inability to get employment because of his lack of language and, arguably because of his lack of skills".

7. Nevertheless, the judge had also found at paragraph 18 that:

> "The [claimant] would be living in her home country and would be able to return to work in the profession that she is used to. They have family there and will be able to live with her parents at least in the short term if not longer."

8. The grounds contend that the judge's findings were not capable of amounting to "insurmountable obstacles" which imposed a stringent test set out in para EX.2. that:

> "'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 serious hardship for the applicant or their partner."

9. On 23 August 2017, the First-tier Tribunal (Judge Grant-Hutchison) granted the Secretary of State permission to appeal.

10. At the hearing before me, the Secretary of State was represented by Mr Richards. The claimant appeared in person together with her husband, Mr Button. The claimant also submitted a short skeleton argument.

The Submissions

11. Mr Richards maintained the grounds of appeal and submitted that the judge had erred in law in concluding that there were "insurmountable obstacles". He submitted that the totality of the circumstances were incapable of meeting the high threshold required. However, he acknowledged that the claimant now met the entry requirements of the Rules as a 'partner' in Appendix FM if she were to make an entry clearance application. There were no issues concerning financial support and it was confirmed that Mr Button earned in excess of £20,000. I drew to Mr Richards' attention the decision of the House of Lords in Chikwamba v SSHD [2008] UKHL 40. Mr Richards acknowledged that the rationale in Chikwamba applied to the claimant's circumstances and that, even if she could not succeed under the Immigration Rules, he did not seek to argue that her appeal should not be allowed under Art 8 of the ECHR. Mr Richards accepted that if the claimant succeeded under Art 8 then she would be at no disadvantage in the grant of leave to her, and in any future application for settlement, compared to the situation if she had succeeded under the Immigration Rules as a partner.

12. In the light of this, I explained to the claimant and Mr Button the position taken by Mr Richards. They agreed that, if the claimant would not be disadvantaged if her appeal were allowed under Art 8, they were content that the appeal should be allowed on that basis.

Discussion

13. As a consequence, I can give my reasons for the disposal of this appeal relatively briefly.

14. Judge Rowlands accepted that the relationship between Mr Button and the claimant was a genuine and subsisting one. They are married; their marriage having taken place on 26 October 2016. As a result, the claimant met the suitability and eligibility requirements for leave to remain as a partner, apart from E-LTRP.2.1 as the claimant is in the UK with leave as a visitor (now extended by s.3C of the Immigration Act 1971). The appeal should have been dismissed under the Rules on that basis.

15. However, Judge Rowlands went on to consider whether the claimant had, as a result of R-LTRP.1.1.(d)(iii), satisfied the requirements of paragraph EX.1. That required her to establish that: "there are insurmountable obstacles to family life with [her] partner continuing outside the UK."

16. In his decision, Judge Rowlands found in the claimant's favour for the reasons set out at paragraph 19 of his determination as follows:

> "19. The only real obstacle, it seems to me, is his apparent inability to get employment because of his lack of language and, arguably because of his lack of skills. Although I have not been presented with any evidence to this effect, I am prepared

> to accept that jobs for unskilled foreign workers would be hard to get in the Philippines. I accept that he could learn the language but that would take some significant time. I do not however see how, with his lack of qualifications, he could make himself employable within a reasonable time. I suppose he could improve and obtain some qualifications but that would require him to learn the language such that he could do so in college. With these two things are added together I believe that they do amount to insurmountable obstacles to their family life being enjoyed outside the United Kingdom and that she therefore fulfils the requirements under the 10 year partner route."

17. Paragraph EX.2. defines insurmountable obstacles as meaning:

> "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 serious hardship for the applicant or their partner."

18. In R (Agyarko) and another v SSHD [2017] UKSC 11 the Supreme Court concluded that the requirement in the Rules mirrored that required by the Strasbourg case law in relation to Art 8. In particular at [43], Lord Reed stated that:

> "It appears that the European Court intends the words 'insurmountable obstacles' to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned."

19. Lord Reed went on to state that the Strasbourg Court understood the expression as imposing a 'stringent test'.

20. In this appeal, the only "real obstacle" – to use Judge Rowlands words – was the "apparent inability" of Mr Button to obtain employment in the Philippines due to his lack of language and, perhaps, lack of skills. However, the judge accepted that the claimant, who worked as a nurse both in the UK and previously in the Philippines, would be able to continue her employment there. The claimant had family in the Philippines and, despite the contrary being argued, there was no evidence of any danger to them in the Philippines where they had travelled on previous occasions (see paragraph 18 of the determination).

21. In my judgment, the mere difficulty in Mr Button obtaining employment when the claimant would be able to work and finance their living in the Philippines where her family lived, could not rationally amount to "insurmountable obstacles" in the sense set out in paragraph EX.2. that there would be "very significant difficulties" which could not be overcome or would entail very serious hardship for them.

22. As a result, I accept that the judge erred in law in reaching his finding that there were "insurmountable obstacles" to the family life of the claimant and Mr Button continuing in the Philippines. That issue could only reasonably be resolved against the claimant on the evidence.

23. Consequently, the judge erred in law in allowing the claimant's appeal under the Rules and, despite his positive findings in relation to their relationship, they did not meet the requirements of the Rules in order for the claimant to obtain leave to remain.

24. However, as Mr Richards acknowledged, there is no reason to believe that the claimant would not meet the requirements for entry clearance as a 'partner' to which the requirement in paragraph EX.1. has no application. I am satisfied that it is very, or highly, likely that the claimant, if she returned to the Philippines, would satisfy the Rules (including the financial and language requirements) for entry clearance as a partner. The sponsor has the required income and the judge did not call into question the claimant's facility in English. Mr Richards accepted that the rationale in Chikwamba applied. In that case, the House of Lords accepted that it could be a disproportionate interference with an individual's family life to require them to leave the UK to seek entry clearance. To do so, could in itself amount to a disproportionate interference with an individual's family life, particularly where to require the individual to leave the UK would only be to enforce the need to seek entry clearance as a procedural requirement.

25. In my judgment, Mr Richards' acceptance that Chikwamba applied to the claimant is well-founded. Given the very likely outcome of her application for entry clearance, and given that the claimant is lawfully in the UK and that requiring her to go to the Philippines to seek entry clearance will necessarily impact upon her relationship with Mr Button, it would, in my judgment, be pointless to require her to do so. It would, in my judgment, be requiring her to leave the UK simply to comply with the procedural requirement of seeking entry clearance from abroad. There is every reason to believe – and Mr Richards did not seek to contend otherwise - that she meets the substantive requirements of the Rules which would allow her entry as a partner of Mr Button.

26. In Agyarko, Lord Reed at [51] reaffirmed that:

> "If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal."

27. Lord Reed stated that the point was illustrated by the decision in Chikwamba.

28. In my judgment, the public interest in effective immigration control set out in s.117B of the Nationality, Immigration and Asylum Act 2002 is weak in this case. The claimant is not dependent upon the state financially and speaks English. Section 117B(2) and (3) are not, therefore, engaged against her. Whilst I accept that her family life was formed when her immigration status was precarious (though not unlawful), the precise weight to be given to it must depend upon the circumstances. Here, in the realm of Chikwamba, the weight to be given to it must be seen in the context of the interference by requiring the claimant temporarily to leave the UK in order to seek entry clearance as a procedural requirement. Taking into account all the circumstances, I am satisfied that the claimant's removal in order to seek entry clearance (which she is very likely or highly likely to obtain) as a partner, would result in a disproportionate interference with her family life with Mr Button. Consequently, and for these reasons, I find that the Secretary of State's decision breaches Art 8 of the ECHR.

Decision

29. Consequently, the decision of the First-tier Tribunal to allow the claimant's appeal under the Immigration Rules involved the making of an error of law and is set aside.

30. I remake the decision dismissing the appeal under the Immigration Rules but allowing the appeal outside the Rules under Art 8 of the ECHR.

Signed

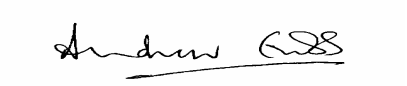
A Grubb
Judge of the Upper Tribunal

13, February 2018

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal under Art 8 but this has been as a consequence of matters arising since the decision and in the light of that I do not consider it appropriate to make a fee award in the claimant's favour.

Signed



A Grubb
Judge of the Upper Tribunal

13 February 2018