Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20153/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 August 2014	**On 27 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JEAN CONDEZ IMAN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms C Bexson, Counsel, instructed by Immigration & Work Permit Ltd
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Following an error of law hearing at Field House on 29 May 2014 I decided that the decision of First-tier Tribunal Judge Troup, allowing the appeal on Article 8 grounds, following a hearing in Newport on 13 February 2014, had to be set aside. My reasons

were set out in the following error of law decision and directions, sent to the parties on 7 July 2014.

ERROR OF LAW DECISION AND DIRECTIONS

1. This is an appeal that was allowed at the First-tier. The appellant before the Upper Tribunal is therefore the Secretary of State. For clarity and convenience, however, I will refer to the parties as they were for the First-tier appeal.

2. The appellant, a citizen of the Philippines, studied in the UK between 2008 and 2010, and was then given leave for post-study work (Tier 1) between November 2010 and 8 November 2012. Before the expiry of this leave she applied for indefinite leave to remain on human rights grounds. The factual history is complex. The application was initially put forward on grounds that had altered by the time of the appeal, and had altered again by the time of the hearing.

*3. The judge heard evidence from the appellant and her British fiancé. The judge found that the appellant could not succeed under the Immigration Rules, but he allowed the appeal on Article 8 grounds, with reference to the principle in **Chikwamba v SSHD [2008] UKHL 40**. The judge found that it was disproportionate, and not in the public interest, to require the appellant to return to the Philippines solely for the purpose of making an entry clearance application.*

*4. The grounds seeking permission to appeal referred to the cases of **Gulshan [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 720 (Admin)**. The complaint was that the judge had not identified any compelling circumstances which would render the appellant's removal unjustifiably harsh. The facts could be distinguished from **Chikwamba** because neither party had refugee status preventing family life from continuing abroad. The judge had no regard to the income threshold requirements of the Immigration Rules.*

*5. Permission to appeal was granted by Judge Pooler on 14 April 2014. The judge granting permission to appeal noted that no reference had been made to the principles considered in **Gulshan**, and the judge could therefore arguably have been said to have undertaken the type of free-wheeling Article 8 analysis, unencumbered by the Rules, which was said in that case not to be the correct approach.*

6. During the error of law hearing I raised, with both parties, an additional point. The judge, at paragraph 26 of the determination, had ended his consideration of whether the appellant could comply with the requirements of the Immigration Rules with the observation that she could not succeed as a fiancée or spouse, because she had no entry clearance. The point that had not been considered, and appears not to have been raised, was whether the appellant could nevertheless succeed under Appendix FM, through reliance on the exception (EX1), bearing in mind that reliance on the exception was not prohibited by the appellant having been in the UK as a visitor, or with a shorter period of leave. In order to succeed under the exception the appellant would have had to show that

she was in a genuine and subsisting relationship with a partner who was in the UK and was a British citizen, and that there were insurmountable obstacles to family life with that partner continuing outside the UK.

7. After an opportunity for the parties to consider this additional issue the representatives made submissions, which can be summarised as follows.

*8. Mr Tarlow, for the respondent, submitted that the insurmountable obstacles test was not to be regarded as a literal one, but nevertheless it was a high test, and a difficult one to meet. There was nothing to show that this appellant could come over that threshold. The judge had not been required to deal with the point since it had not been raised before him. The appellant was legally represented, and this was not a **Robinson** obvious point.*

9. Ms Bexson, for the appellant, accepted that the appellant's representatives had not raised the point, but submitted that it should nevertheless have been considered. There had been lots of evidence relevant to the issue of insurmountable obstacles. The appellant's partner could not leave his job or his parents. The couple were in the process of trying for a family.

Error of Law Decision

*10. Having considered the matter I have decided that the judge did err in law in a manner material to the outcome. Although the current state of the law on Article 8 is far from clear, with arguable conflicts between decisions of the Supreme Court, in **Patel**, and those of the Upper Tribunal and High Court in **Gulshan** and **Nagre**, nevertheless the structure of any consideration of Article 8 is clear to the extent that a full examination of whether an appellant can meet the requirements of Appendix FM and paragraph 276ADE is now required. It is also true that the case law of **Gulshan** and **Nagre** requires consideration by a judge who allows an appeal on Article 8 grounds, having decided that the requirements of the Immigration Rules are not met. It may be that there remain legal arguments as to whether **Gulshan** and **Nagre** can be said to have changed the law set out in **Huang**, **Razgar**, and most recently, **Patel**, but I accept that a judge allowing an appeal on Article 8 grounds in these circumstances can be said to have erred in law by not considering **Gulshan** and **Nagre**.*

11. On this basis I have decided that the judge's decision allowing the appeal on Article 8 grounds must be set aside.

12. The normal position in such appeals would be that the Article 8 aspect would need to be remade, but not that under the Immigration Rules. As became clear during the hearing, however, this appeal is somewhat different. It appears to me that the judge's finding that the appellant could not meet the requirements of Appendix FM cannot be preserved, because no consideration was given to EX1. In remaking the decision, therefore, it will be necessary for the parties to address Appendix FM first, with particular reference to EX1, before making submissions on Article 8.

> *13. The parties both agreed that it would be appropriate for any remaking to be conducted in the Upper Tribunal, although Ms Bexson had no objection to a remittal. I have considered the Practice Direction, and noted that the normal course is for decisions to be remade in the Upper Tribunal. I note that the facts are not disputed. For the most part the issue involves the application of the law to those facts, although there may be some matters relevant to the insurmountable obstacles point on which limited further evidence may be appropriate. Given the agreement of the parties I will therefore remake the decision at a resumed hearing.*
>
> ***Decision***
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> *14. My decision is that there was a material error of law disclosed by the determination, and the judge's decision allowing the appeal on Article 8 grounds is set aside. The decision will be remade following a resumed hearing in the Upper Tribunal.*

The Hearing

2. At the start of the hearing there was a discussion of the issues. It was agreed that the first issue was whether the appellant met the requirements in the exception in Appendix FM. It was agreed by Ms Bexson, for the appellant, that it would only be necessary to give consideration to Article 8 if I found in the respondent's favour on the Appendix FM exception point.

3. There was a brief discussion of whether the insurmountable obstacles test in the exception should be approached on the basis that it was concerned with permanent relocation of the couple outside the UK, or whether it could be concerned with a temporary relocation for the purposes of entry clearance. For the purposes of this appeal it was agreed between the parties that the insurmountable obstacles test was concerned with the question of permanent relocation, rather than with entry clearance.

4. It was also agreed between the parties, following my introduction of the potential relevance of changes to Appendix FM on 28 July 2014 brought about by HC 532, that those changes would be considered and addressed in submissions. Neither side had prepared the point, but I provided the new definition of insurmountable obstacles inserted into the Rules as EX.2. Without having prepared the point the parties agreed to proceed on the basis that they would refer to the new definition. Ms Bexson, for the appellant, had no objection to me taking that definition into account, whether or not the changes were applicable to the current appeal.

5. The appellant and her husband both gave evidence at the hearing and were cross-examined.

6. For the remaking hearing the appellant's representatives had prepared an additional bundle of documents (25 pages). This included a joint letter from the appellant and

her husband, and various letters of support, including a joint letter from the appellant's parents-in-law. There was also medical evidence about the appellant's parents-in-law, and a letter from a Catholic priest of the Oratory in London, confirming that the couple were to have their marriage blessed at a service due to take place on 20 September 2014. The bundle also contained various financial documents, including tax documents confirming the appellant's husband's income for the tax year to 5 April 2014, which was just short of £34,000. Various utility bills in joint names, or in the appellant's name, were also provided to establish that the couple were living together at their home in Croydon. The appellant's husband's job is as an English teacher at a sixth form college in Croydon.

7. The evidence of the appellant and her husband at the hearing was concerned with the issue of whether they could relocate to the Philippines. The main reasons that they both put forward for this being very difficult were the appellant's husband's job and career, his responsibility as an only child to his elderly parents, the appellant's conflicts with relatives in the Philippines, including threats from her uncle, and the desire of the couple to start a family in the future, and for this to be in the UK.

8. There were no credibility challenges in relation either to the oral evidence or any of the documentary evidence. Mr Walker, for the respondent, accepted the difficulties put forward, with reference to the appellant's parents-in-law and their health difficulties, and with reference to the appellant's husband's career. He made no submission that the couple could not meet the insurmountable obstacles test. Ms Bexson, for the appellant, referred to the new definition of insurmountable obstacles introduced by HC 532. The appellant and her partner would face very significant difficulties, and these could not be overcome, or would entail very serious hardship for the appellant or her partner.

Decision and Reasons

9. In remaking the appeal I have decided that it falls to be allowed under the Immigration Rules, with reference to the exception in Appendix FM.

10. With reference to EX.1(b) there is no dispute in this case that the appellant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen. The couple are married, and are living together. The remaining issue is whether there are "insurmountable obstacles to family life with that partner continuing outside the UK." As was in effect acknowledged at the hearing it appears to me clear that there are such insurmountable obstacles.

11. The definition of insurmountable obstacles provided by HC 532 may not apply directly to the current appeal, because the application predated it, but following the agreement of the parties I have nevertheless considered it. It is likely that the Secretary of State had this view of the insurmountable obstacles test before HC 532 was produced. The new definition may therefore be of some use in filling the relative vacuum that previously existed as to how the test should be approached.

With reference to the definition I accept the submission made on the appellant's behalf that the couple would face very significant difficulties in continuing family life outside the UK. These difficulties are primarily concerned with the appellant's husband. Although he has travelled and worked abroad in the past he has now obtained a permanent position of some responsibility, and clearly wants to continue with that employment, and to develop his career. Having to abandon it would clearly be a matter amounting to a very significant difficulty, that would entail very serious hardship for him, and for the appellant. The potential relocation would deprive the couple of their source of income.

12. In addition the appellant's parents-in-law, who are now 72 and 80, and have various health problems, now rely to a considerable extent on their son, and also on the appellant. Forcing the appellant's husband to leave the UK and abandon his parents, or facing a very difficult choice about either abandoning them or being separated from his wife, would also amount to very serious hardship.

13. For these reasons I have decided, on the particular facts in this appeal, that the appellant does meet the insurmountable obstacles test in EX.1(b).

14. It has not been suggested that there are any other aspects of Appendix FM that she cannot meet.

15. Although this was not raised at the hearing by either party I have taken note of the fact that section 19 of the Immigration Act 2014 came into force on 28 July 2014, and that it amended the Nationality, Immigration and Asylum Act 2002, inserting a new part 5A into that Act. In reaching the above decision I have taken account of the public interest factors at 117B. I note that none of the factors would appear to count against the appellant. The maintenance of effective immigration controls is in the public interest, but if the appellant meets the requirements of the respondent's own Immigration Rules, as I have found, then this is not an adverse point. The appellant speaks English; the couple are financially independent; and the only other point is about her immigration history, but this again is to be assessed in the context of the fact that she meets the requirements of the Rules.

16. As I understand it the consequence of the appellant succeeding only under EX.1, despite the fact that the couple can meet the income, English language, and all other requirements (apart from entry clearance) is that the appellant would be placed on a ten year route to settlement, with chargeable applications to be made at two and a half year intervals. As I suggested at the end of the hearing the appellant and her husband may wish to seek advice on the best way to proceed. Once the first period of leave is given there may be options, given that the financial and other requirements are met, for a potential transfer to a shorter route to settlement. This issue was not explored in any detail, but I repeat the suggestion that the matter should be given consideration, and the appellant and her husband should obtain advice on the point.

17. It was not suggested that there was any need for anonymity in this appeal, and I make no such order. The First-tier Tribunal Judge made no fee award, because the case presented at appeal differed from that made in the initial application. No submissions were made as to fee award. Despite having allowed the appeal I have decided to follow the same course as the First-tier Judge, for the same reasons, and I therefore make no fee award in this case.

18. In accordance with the agreement at the hearing, having reached the conclusion above in relation to the Immigration Rules, I have not gone on to consider Article 8.

Decision

19. The Secretary of State's appeal to the Upper Tribunal is allowed. Having set aside the decision allowing the appeal on Article 8 grounds the decision is remade as follows.

20. The appellant's appeal against the Secretary of State's decision is allowed under the Immigration Rules, with reference to the exception in Appendix FM.

Signed Date

Deputy Upper Tribunal Judge Gibb