Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18878/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 September 2019	**On 28 October 2019**

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

ARLENE [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, Counsel instructed by Law Lane Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of the Philippines born on 28 January 1980. She entered the UK in September 2011 as the fiancée of her former husband. Following entry to the UK, the appellant married her former husband and was granted leave to remain as his spouse until 27 February 2014. The relationship broke down and the appellant was not granted further leave. She appealed and her human rights claim was

dismissed by the First-tier Tribunal on 27 May 2015. She became an overstayer on 15 June 2015.

2. In October 2016 the appellant commenced a relationship with Mr M, who is a British citizen, and they began living together in March 2017.

3. On 10 July 2018 the appellant applied for leave to remain in the UK on the basis of her family life with Mr M. On 30 August 2018 the application was refused on the basis that the appellant had only been residing with Mr M for 15 months and therefore the definition of a partner in Appendix FM (which requires 2 years cohabitation) was not met and that, in any event, it would not be unjustifiably harsh for Mr M to relocate with her to the Philippines. The respondent acknowledged the concern raised by the appellant as to the risk to foreign nationals in the Philippines but stated that if there are areas of the Philippines that are dangerous the appellant and Mr M could relocate to another part of the country.

4. The appellant appealed to the First-tier Tribunal where her appeal was heard by Judge of the First-tier Tribunal Judge Griffith ("the judge"). In a decision promulgated on 5 April 2019 the judge dismissed the appeal. The appellant is now appealing against that decision.

Decision of the First-tier Tribunal

5. It was not in dispute, and the judge accepted, that the relationship between the appellant and Mr M was genuine and subsisting and that they had (as of the date of the hearing) been cohabiting for more than two years such that the definition of partner in Appendix FM was met.

6. The judge directed herself that the relevant issue under the Immigration Rules was whether there would be insurmountable obstacles to the appellant's family life with Mr M continuing in the Philippines (paragraph EX.1(b) of Appendix FM).

7. In considering "insurmountable obstacles" the judge had regard to Mr M's professional qualifications and capacity to obtain work in the Philippines (paragraph 58 of the decision); the security situation as described by the Foreign & Commonwealth Office (paragraph 59); an article concerning the death of the mayor in the region in which the appellant's brother and parents live (paragraph 60); and the ability of the appellant and Mr M to reside in a part of the Philippines which has not been identified as dangerous to Westerners (paragraph 60). Although the judge recognised that there may be challenges to living in the Philippines, she concluded that these did not amount to "insurmountable obstacles". She found that the appellant had not shown that there would be very significant difficulties in continuing her family life with Mr M in the Philippines that could not be overcome or would entail very serious hardship for them.

8. The judge then considered Article 8 outside the Immigration Rules. She found that the appellant was not a "particularly impressive or reliable witness" and found that although she had been aware that she had overstayed in June 2015 she had not

disclosed this to her partner. The judge found that the appellant's relationship with Mr M began when she was in the UK unlawfully and therefore little weight should be attached to it. The judge stated that it was for Mr M to decide whether to relocate with the appellant to the Philippines or remain in the UK without her. The judge concluded there were not compelling reasons to allow the appeal outside the Immigration Rules.

9. The judge also considered whether it would be disproportionate to require the appellant to leave the UK for the sole purpose of making an entry clearance application from the Philippines. She stated at paragraph 65 that but for the appellant's immigration history, which meant that she would fall foul of paragraph 320(7B) of the Immigration Rules, it was likely she would meet the requirements for entry clearance. The judge found at paragraph 66 that given the relationship had been relatively short lived, the couple have no children and the appellant has family in the Philippines, it would not be disproportionate for her to return to the Philippines in order to make an entry clearance application.

Grounds of Appeal and Submissions

10. Although there are four grounds of appeal, the grant of permission to appeal indicates that only the first two are arguable; and at the hearing before us Mr Karim only made submissions in respect of these grounds. We will therefore only consider the first two grounds of appeal.

11. The first ground of appeal argues that it was an error of law for the judge to find that an application for entry clearance from the Philippines might not succeed because of the operation of paragraph 320(7B) of the Immigration Rules when paragraph A320 makes clear that paragraph 320(7B) is not applicable in an application for entry clearance as a family member under Appendix FM.

12. Mr Karim argued that this error was material because the judge found at paragraph 65 (and the evidence before the First-tier Tribunal demonstrates) that it was likely the appellant would meet the eligibility and financial requirements for entry clearance. Therefore, submitted Mr Karim, had this error not been made the judge would have found that, on the balance of probabilities, it was certain that the appellant would be granted entry clearance upon making an application from the Philippines.

13. The second ground of appeal maintains that the assessment of insurmountable obstacles was flawed because (a) reliance was placed on a Foreign and Commonwealth Office Report ("the FCO report") concerning the risk to British visitors to the Philippines when Mr M would be relocating permanently to, and not merely visiting, the Philippines; and (b) the judge failed to engage with the news articles submitted by the appellant showing the level of terrorism, violence and risk to foreigners throughout the Philippines. Mr Karim also advanced the argument that the judge failed to adequately consider of the risk factors identified in the FCO report, including in particular the reference to there being a state of emergency in the Philippines.

14. Mr Avery acknowledged that the judge fell into error by finding that paragraph 320(7B) would be relevant to an entry clearance application by the appellant but argued that the error was not material because it was not certain that she would succeed in an entry clearance application and the judge had made a sustainable (and unchallenged) finding that temporary relocation to the Philippines would not be disproportionate.

15. With respect to insurmountable obstacles, Mr Avery argued that the judge had adequately considered the evidence before her and that the evidence supported her conclusion that there are parts of the Philippines where it is not unsafe for a foreigner. He also argued that Mr M would have the benefit of local knowledge, as he would have the assistance of the appellant and her family.

Error of Law

16. Paragraph 320(7B) of the Immigration Rules provides that, inter alia, entry clearance is to be refused where an applicant has previously breached the U.K.'s immigration laws by overstaying. However, by operation of Paragraph A320, Paragraph 320(7B) is not applicable to an application for entry clearance as a partner, which is the application the appellant would make from the Philippines.

17. Although the parties agreed that the judge made an error of law by finding that Paragraph 320(7B) would affect an application for entry clearance by the appellant, they did not agree as to whether this error was material.

18. It is well established that there might be no public interest in removing a person from the UK, even if that person is residing in the UK unlawfully, if it is certain they would be granted leave to enter from outside the UK. This was the finding in *Chikwamba v Secretary of State* [2008] UKHL 40 and it has recently been confirmed by the Supreme Court in *R (on the application of Agyarko) v Secretary of State* [2017] UKSC 11, where it was stated at paragraph 51:

> "Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. 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 was made from outside the UK, then there might be no public interest in his or her removal.** The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*." (Emphasis added)

19. In order to succeed in an application for entry clearance from the Philippines, the appellant would need to satisfy the eligibility and financial requirements under section EC-P of Appendix FM, which require her to meet both suitability and eligibility requirements. The judge found, at paragraph 65, that it is likely the appellant would meet the eligibility and financial requirements for entry clearance. Having reviewed the documents that were before the First-tier Tribunal (and noting

that in the respondent's refusal letter of 30 August 2018 it is acknowledged that the appellant did not fall for refusal under the similar suitability requirements that apply in an application for leave to remain), we are satisfied that the judge was correct to find that it is likely the eligibility and financial requirements would be met. This, therefore, as submitted by Mr Karim, is a case in which (on the balance of probabilities) it is certain the appellant would be granted entry clearance from the Philippines. Had the judge appreciated that her findings regarding the eligibility and financial requirements meant that an application for entry clearance would succeed, her assessment of the proportionality of temporary separation in order to make an application may have reached a different outcome. We therefore agree with Mr Karim that the error in respect of Paragraph 320(7B) was material.

20. We now turn to consider whether the judge erred in her assessment of whether there would be "insurmountable obstacles" to the relationship continuing in the Philippines.

21. The judge correctly recognised that the only viable route open to the appellant under the Immigration Rules would be to establish that EX.1(b) applied because there are insurmountable obstacles to the relationship with Mr M continuing in the Philippines. The judge also correctly recognised that EX.2 provides that:

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

22. The appellant's argument that there would be insurmountable obstacles, as defined by paragraph EX.2, relies on being able to establish that the objective evidence shows that it would be unsafe for Mr M to reside with the appellant in the Philippines. It is clear from the decision that the judge appreciated this issue lay at the heart of the appellant's case. It is also clear, from a review of paragraphs 58 – 60 of the decision, that the judge considered the evidence before her concerning the risk to Westerners in Philippines.

23. Mr Karim submitted that the judge erred by relying on the FCO report because it related only to visitors. We disagree. Although the FCO report is aimed at visitors, much of its content is equally relevant to the safety of British citizens residing permanently in the Philippines. Although Mr Karim is now saying that the judge should not have relied on the FCO report, it is apparent from Mr Karim's skeleton argument before the First-tier Tribunal (see paragraph 13 of the skeleton argument, which refers to the FCO report) that he sought to have it relied upon.

24. The appellant adduced various articles about the current security situation in the Philippines. However, it is clear that the FCO report was by far the most authoritative and comprehensive evidence that was before the First-tier Tribunal about the level of risk to Westerners in the Philippines (which is no doubt why Mr Karim referred to it in his skeleton argument) and the judge cannot be faulted for placing significant reliance upon it.

25. Mr Karim is correct that several significant observations in the FCO report were not mentioned in the decision (such as the reference to there being a state of emergency in the Philippines) but a judge is not required to mention every relevant point in a report and there is nothing in the decision that would indicate the report has not been adequately considered. Mr Karim submitted that the judge's reference to British nationals not normally being targeted at paragraph 59 of the decision is not consistent with the statement in the FCO report that foreigners are targeted. However, the judge's statement about British nationals is an accurate recording of the content of the FCO.

26. In any event, it was consistent with both the FCO report and the news articles that were before the First-tier Tribunal for the judge to find that there are parts of the Philippines that are not considered unsafe for foreigners. It clearly will likely cause difficulty and hardship to Mr M to relocate to the Philippines, given the implications for his work and family life in the UK and that he would be relocating to a country where there is a state of emergency and problems with violence, kidnapping and terrorism. However, given that the objective evidence that was before the First-tier Tribunal supports the view that there are parts of the Philippines that are relatively safe, the judge was entitled to conclude that relocation to one of those areas would not entail the degree of hardship necessary to support a finding of insurmountable obstacles under EX.1.(b) as defined in EX.2.

Remade Decision

27. The remaking of the decision is limited to the question of whether article 8 ECHR would be infringed by removing the appellant from the UK given that (as found at paragraph 19 above) she would, on the balance of probabilities, be certain to be granted entry clearance upon making an application under Appendix FM from the Philippines.

28. Where a person is certain to be granted leave to enter, the issue to be addressed is whether there is a public interest in her temporary removal in order to make an entry clearance application from outside the UK. The Supreme Court made clear in *Agyarko* (following *Chikwamba*) that there might not be a public interest in a person's removal even if they have been residing in the UK unlawfully if it is certain they would be granted leave to enter. See paragraph 51 of *Agarko* (cited above at paragraph 18).

29. In considering whether there is a public interest in the appellant's temporary removal, our starting point is that there is a public interest in the maintenance of immigration control. The importance of this is made clear by Section 117B(1) of the Nationality Immigration and Asylum Act 2002. As a general matter, the maintenance of immigration control is undermined by allowing a person in the UK unlawfully to circumvent Immigration Rules that would require her to leave the UK in order to make an application. However, this general statement must be considered in light of *Chikwamba* and *Agyarko*, where it is clearly envisaged (see paragraph 51 of *Agyarko* cited above) that there may be no public interest in removing a person seeking leave to remain in the UK as a family member under Appendix FM if that person is certain

to be granted entry clearance under Appendix FM "even if [the person] is residing in the UK unlawfully".

30. It has not been argued (and there is no evidence to suggest) that there is a relevant public interest arising from a factor other than the appellant's immigration history of being an overstayer since June 2015. The question to be addressed, therefore, is whether, because of the appellant's immigration history, the public interest is served by her being required to temporarily relocate to the Philippines in order to make an entry clearance application that is certain to be allowed.

31. Having carefully considered the appellant's immigration history, we are satisfied that there is no such public interest. When the appellant entered the UK in 2011 she did so as the fiancée of her former husband. This is not, therefore, a case of someone entering the UK unlawfully or through an immigration route (such as a visitor or student) where she could have no legitimate expectation of permanent settlement and then seeking to switch to the partner route once in the UK. On the contrary, the appellant came to the UK (legitimately) as a family member under Appendix FM. Given that we have found that it is certain she would be granted leave to enter the UK from the Philippines as Mr M's partner, we can see no public interest in her temporary removal even though she became an overstayer in 2015. This appears to be precisely the type of case the Supreme Court had in mind at paragraph 51 of *Agyarko*. The appeal is therefore allowed under article 8 ECHR.

DECISION

32. The decision of the First Tier Tribunal is set aside on the basis that it contains a material error of law. We remake the decision and allow the appeal.

Signed

Deputy Upper Tribunal Judge Sheridan Dated: 25 October 2019