



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00616/2015**

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 8 October 2015**

**Determination Promulgated
On 13 October 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MELISA MAGTOTO-BUTLER

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms Iqbal, Counsel

For the Respondent: Mr McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of First-tier Tribunal Judge Wedderspoon dated 11 June 2015 in which she dismissed the appellant's appeal against a decision dated 17 December 2014 to remove her.

Immigration history

2. The appellant entered the UK as a visitor in 2000. She admits to overstaying her leave. She met her current spouse (the sponsor) in 2002 and began cohabitating with him shortly afterwards. The appellant submitted an application for leave to remain in 2010, which was refused. She married the sponsor in 2011.
3. It is therefore not in dispute that the appellant has remained in the UK

for a lengthy period albeit the vast majority of that time she was here unlawfully.

Grounds of appeal

4. The appellant has been granted permission to challenge Judge Wedderspoon's decision on the basis of four grounds of appeal. At the hearing before me Ms Iqbal relied upon and amplified the grounds of appeal. Mr McVeety relied upon the Rule 24 notice and invited me to dismiss the appeal.
5. After hearing from both parties I reserved my decision, which I now provide by reference to each of the grounds of appeal.

Ground 1 - insurmountable obstacles

6. I am satisfied that the Judge has taken all relevant matters into account before deciding that there are no 'insurmountable obstacles' to family life continuing in the Philippines. Indeed the grounds of appeal acknowledge at paragraph 4 that the judge recorded "*all the factual matters pertinent to both the appellant and her husband's circumstances*". There is no reason to believe that the judge failed to take all relevant matters into account. The judge has clearly accorded weight to each relevant matter. Weight is a matter for the fact-finding judge.
7. Ground 1 amounts to no more than a disagreement with the judge's findings of fact regarding 'insurmountable obstacles'. The Judge properly directed herself having considered the submissions on the issue [14 and 15]. The Judge considered all relevant matters [18 and 19]. The Judge accepted that the sponsor might find living in the Philippines "*challenging*" but was entitled to find that there are no insurmountable obstacles. There is nothing within the grounds or the decision to suggest that the judge approached this in a purely literal way. The judge clearly considered the relevant circumstances in a sensible and practical manner.

Grounds 2 and 4 - Article 8

8. Ground 2 submits that there were arguably good grounds for granting leave to remain outside the Rules and the judge was obliged to go on to consider whether or not there were compelling circumstances not sufficiently recognised under the Rules to justify leave being granted pursuant to Article 8.
9. Although the Judge might have approach Article 8 in a more structured manner, I am not satisfied that she has committed a material error of law. The Judge clearly went on to consider Article 8 [22-24].
10. The judge considered section 117B of the Nationality, Immigration and Asylum Act 2002 [22]. The judge did not explicitly acknowledge the parties' financial independence or the fact that the appellant speaks English under section 117B. However the judge was aware that the parties are financially independent [9 and 18]. In any event

as pointed out in AM (S 117B) Malawi [2015] UKUT 0260 (IAC) an applicant can obtain no positive right to remain or enter from sections 117B (2) or (3), whatever the degree of her fluency in English or the strength of her financial resources. As little weight should be given to the appellant's relationship (because it was established when she was in the UK unlawfully - section 117B(4)) it would have made no difference if the judge had expressly considered sections 117B(2) and (3). I therefore do not consider that the judge has committed a material error of law in the manner alleged at ground 4.

11. The judge directed herself to SSHD v SS Congo and others [2015] EWCA Civ 387. This makes it clear at [29] that as family life was established with knowledge that the appellant had no right to be in the UK and was therefore precarious in the relevant sense, it is only if the case is exceptional that a violation of Article 8 will be established. This principle is repeated in R (Agyarko) v SSHD [2015] EWCA Civ 440 at [28]. When the decision is read as a whole it is clear that the judge did not regard there to be a breach of Article 8(1) or the case to be exceptional as she believed that family life could continue in the Philippines.
12. The judge did not conclude that it followed from her finding as to a lack of insurmountable obstacles that the appeal under Article 8 must fail. Contrary to the submissions at ground 2, the Judge considered Article 8 but found there would be no breach because family life could take place in the Philippines [23 and 24].
13. In these circumstances the Chikwamba point as explained in R (Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC) did not arise. The judge clearly considered that there did not need to be temporary separation because the sponsor could join the appellant whilst she applied for entry clearance.

Ground 3

14. The judge was well aware of the impact of the decision upon the sponsor [19]. Indeed that was one of the issues she specifically considered when considering whether the insurmountable obstacles test was met. The Judge expressly considered the wider family life enjoyed by both the appellant and the sponsor [18]. I do not accept the submissions in ground 4 that the judge failed to take into account the sponsor's private life or the wider family life. When the decision is read carefully, it is clear that the judge considered both matters.

Decision

15. The decision of the First-tier Tribunal did not involve the making of a material error of law and I do not set it aside.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
9 October 2015