



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/06727/2015

THE IMMIGRATION ACTS

Heard at Field House
On 8th January 2016

Decision & Reasons Promulgated
On 1st June 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR. ANDREW PRINCE CAFE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everritt; Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Landes promulgated on 28th September 2015 in which he allowed an appeal

against a decision made by the Secretary of State on 25th March 2015 to refuse an application made by Mr. Andrew Café, in the form of representations, for leave to remain in the UK on Article 8 grounds.

2. The appellant before me, is the Secretary of State for the Home Department and the respondent to this appeal, is Mr. Andrew Cafe. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to Mr. Cafe as the appellant and the Secretary of State as the respondent.
3. The appellant is a national of the Philippines. The background to the decision of the First-tier Tribunal is set out at paragraphs [1] to [9] of the decision of the First-tier Tribunal Judge. At paragraphs [10] to [18] of her decision, the Judge refers to the matters raised at the hearing before her. The Judge's findings and reasons are to be found at paragraphs [23] to [71] of her decision.
4. Permission to appeal was granted by First-tier Tribunal Judge Baker on 14th October 2015. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge Landes involved the making of a material error of law, and if so, to re-make the decision.
5. The respondent submits that the in allowing the appeal under paragraph EX.1(b) of Appendix FM of the Immigration Rules, the Judge made findings that are irrational to the extent that they amount to a material error of law. The respondent submits that the Judge found at paragraph [59] that the appellant's close family support him and therefore the couple would have some assistance re-adapting, or in the case of Mr Preston adapting, to life in the Philippines. The respondent submits that the Judge's subsequent finding at paragraph [60] of her decision that there are insurmountable obstacles to family life continuing in the Philippines, was not properly and rationally open, to the Judge on the evidence before her. The respondent submits that a finding that the situation in the Philippines may be less favourable than in the UK cannot lead to the conclusion

that there are insurmountable obstacles to family life continuing outside the UK. Similarly, in an 'inter-national marriage', it is inevitable that one partner will be living away from close family with whom they have a close relationship and thus it is irrational for the Judge to have found that the difficulties that Mr Preston will face in leaving his mother and his siblings, to whom he is very close, and the difficulties he is likely to experience in carrying on his career, can amount to insurmountable obstacles to family life continuing outside the UK.

6. Ms Everritt adopts the grounds of appeal and submits that at paragraph [60] of her decision, the Judge does not give adequate reasons for her finding that the 'insurmountable obstacles test' is met by the appellant. She submits that whilst it is understandable that the appellant and his partner would not wish to live together in the Philippines, none of the factors relied upon by the the Appellant and his partner, are insurmountable.
7. In reply, the appellant submits that both he and his partner would face considerable hardship in the Philippines because their marriage would not be recognised and that in itself is an insurmountable obstacle to their living together outside the UK. He submits that he and his partner would have to live discreetly and would face discrimination. The appellant submits that the Judge carefully considered all of the evidence, and accepted the considerable hardship that the appellant and his partner would face if excepted to live outside the UK.

Discussion

8. The issue for me to decide is whether or not the Judge was entitled to conclude that there are insurmountable obstacles to the appellant and his partner continuing their relationship in the Philippines.
9. In that respect I follow the guidance of the Court of Appeal in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**. The Court of Appeal held that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or

unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. A finding that is "perverse" embraces findings that are irrational or unreasonable in the *Wednesbury* sense, and findings of fact that are wholly unsupported by the evidence. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really could not understand the original judge's thought process when he was making material findings. I apply that guidance to my consideration of the decision in this appeal.

10. I have also had regard to the decision of the Upper Tribunal in **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 IAC** where it was stated in the head note that:

"Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."

11. It is useful to set out the requirements of paragraph EX.1.(b) of Appendix FM insofar as it is material to this appeal.

EX.1. This paragraph applies if

....

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. 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.

12. The phrase "insurmountable obstacles" as used in EX1 of the Rules has been described as significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside of the UK. The phrase "used in the Rules" is to be interpreted in a sensible and practical way rather than an overly literal way and in the decision of **Gulshan (Article 8 - new**

Rules - correct approach) [2013] UKUT 640 it was held that the term "insurmountable obstacles" in provisions such as EX1 are not obstacles which are impossible to surmount and that they concern the practical possibilities of relocation (*see MF (Article 8 - new Rules) Nigeria [2012] UKUT 393 and Izuazu (Article 8 - new Rules) [2013] UKUT 45.*

13. At paragraphs [37] and [38] of her decision, the Judge refers to paragraph EX.1(b) of Appendix FM and at paragraphs [40] to [42], the Judge sets out the evidence of Mr. Preston in particular. The Judge found the appellant's partner, Mr. Preston to be a very credible witness on most points. At paragraphs [48] to [58] of her decision, the Judge carefully considers the objective evidence and background material that was before her concerning homosexual marriages in the Philippines. At paragraph [60] she found that whilst the discrimination does not appear to be very severe and the couple would in practice be able to live together in the Philippines, they would not be able to be officially recognized as a family as there is no public recognition of their union.
14. The Judge's findings at paragraph [60] have to be read as a whole. In my judgment, there can be a world of difference, depending on the particular case, between expecting a foreign national, albeit now settled here, to return with his family to his country, and as here, expecting a British citizen who has lived here all of his life and has an inalienable right of abode here, to live and work and find accommodation in a foreign country or forfeit his marriage. The Judge found that upon the particular facts and circumstances of the appeal before her, Mr. Preston would not be recognised as the appellant's family member, he has not had previous experience of society in the Philippines, he would be likely to encounter discrimination and he would be leaving family to whom he is close in the UK.
15. In my judgment, the findings made by the Judge were all open to her on the evidence and when properly read, it cannot be said that the findings and conclusions reached by the Judge at paragraph [60] of her decision are perverse,

irrational or unreasonable in the *Wednesbury* sense, or findings that were wholly unsupported by the evidence.

16. As set out at paragraph [39] of the decision, it was accepted by the Presenting Officer that at if the appellant met the requirements of EX.1, then he would succeed. Having found that the requirements of EX.1(b) were met there was no need for the Judge to carry out an assessment of the Article 8 claim outwith the rules.
17. Accordingly the appeal is dismissed and the decision of the First-tier Tribunal stands.

Notice of Decision

18. The appeal is dismissed and the decision of the First-tier Tribunal stands.
19. No anonymity direction is made.

Signed

Date 1st June 2016

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

As no fee has been paid, there can be no fee award

Signed

Deputy Upper Tribunal Judge Mandalia