



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26670/2015

THE IMMIGRATION ACTS

Heard at Field House
On 23 August 2017

Decision & Reasons Promulgated
On 25 August 2017

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Secretary of State for the Home Department

Appellant

And

Analiza Vicente Azuero
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Armstrong, Senior Presenting Officer.

For the Respondent: Ms S Iqbal, of Counsel.

DECISION AND Directions

1. The Secretary of State has been granted permission to appeal against a decision of the Judge of the First-tier Tribunal Seelhoff who, following a hearing on 14 November 2016, allowed the appeal of Analiza Vicente Azuero (hereafter the “claimant”) against a decision of the Secretary of State of 21 April 2015 to refuse her application of 5 March 2015 for leave to remain in the United Kingdom as the civil partner of a Ms Anabel Alipio Martin (hereafter the “sponsor”), a British citizen. The judge allowed the appeal under Article 8 outside the Immigration Rules (hereafter the “Rules”).
2. The claimant is a female national of the Philippines, born on 27 February 1978. She arrived in the United Kingdom on 17 September 2009 with leave until 24 January 2010 as a domestic worker. She was subsequently granted a further five periods of leave to remain as a domestic worker until 30 May 2015.

Immigration history

3. The claimant first came to the United Kingdom as a domestic migrant worker on 17 September 2009. She was subsequently granted five extensions of leave to remain as a domestic worker with the last expiring on 30 May 2015. On 5 March 2015, she applied for leave to remain as the civil partner of the sponsor. This is the application that was the subject of the decision of 21 April 2015.

The Secretary of State's decision:

4. The claimant's application was refused under the 5-year partner route under the Rules for the following reasons:
 - i) The claimant had not submitted evidence that her civil partnership was valid. She had submitted a certificate stating that she and the sponsor had celebrated and registered their civil partnership at Hackney Town Hall but she had not submitted the official civil partnership certificate.
 - ii) She had not submitted the specified evidence to establish the sponsor's income. She had only provided payslips for the sponsor dated between September 2014 and February 2015 and bank statements dated between October 2014 and January 2015.
 - iii) She was required to submit, but had failed to submit, specified evidence that she had passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with an approved provider. The claimant had submitted a Trinity Entry Level certificate in ESOL International dated November 2012. However, Trinity qualifications were only valid for a period of 2 years for immigration purposes.
5. The claimant's application was refused under the 10-year partner route under the Rules because EX.1. of Appendix FM did not apply. This was because the Secretary of State had not seen any evidence that there were insurmountable obstacles to family life being enjoyed in the Philippines.
6. The application was also refused under para 276ADE(1) of the Rules because the claimant had not provided evidence to show that there were very significant obstacles to her reintegration in the Philippines for the purposes of 276ADE(1)(vi) and para 276ADE(1)(iii) and para 276ADE(1)(iv) did not apply.
7. The Secretary of State considered that the claimant had not raised any exceptional circumstances for the grant of leave under Article 8 outside the Rules.

The judge's decision

8. The claimant submitted a bundle of documents for her appeal before the judge. At para 12 of his decision, the judge said that this evidence was reviewed at the start of the hearing, that it was agreed that the mandatory documents in terms of income and the civil partnership certificate had been submitted and that it was open to him (the judge) to admit and consider those documents. The parties agreed before the judge that the sole outstanding issue in terms of compliance with the Rules was the fact that the claimant's English language test had expired before she had made her application and that she had not been able to sit another one.

9. At para 12, the judge also said he accepted on the basis of his own personal experiences as a lawyer in practice that it was not possible for the claimant to sit another English test as her passport was held by the Home Office and because the original and not a copy must be produced at a test centre.
10. As stated above, the judge had a witness statement from the claimant in which she explained that she had not realised that the English language certificate was only valid for two years because there is no expiry date listed on the certificate. She said that she had tried to take another English test since the refusal but that she cannot take a test without an original passport or identity card.
11. As stated above, the judge allowed the claimant's appeal under Article 8 outside the Rules. In reaching his decision on proportionality outside the Rules, he found, in relation to EX.1 of Appendix FM of the Rules, that it was "*appropriate and proportionate to find that the requirements of EX .1 are met in that there are insurmountable obstacles to family life continuing in the Philippines on a comparable footing to what is currently enjoyed in the UK*". He said that "*moving to the Philippines would represent a significant interference in the legal rights of the [claimant's] British sponsor*" and that "*the [Secretary of State] should have allowed the application on human rights grounds*" (para 22). Accordingly, he said that he considered that "*it was appropriate and proportionate to allow the appeal on human rights grounds*" (para 24).
12. The judge gave his reasons for his decision at paras 16 to 24 which read as follows:

Findings

16. It is accepted that the [claimant] and her partner are in a genuine relationship and that they meet the financial requirements under the Immigration Rules. The [claimant] has a good immigration history in that she has lived in the UK for nearly 7 years now with no suggestion that she has ever breached the Immigration Rules. The [claimant] has been in the UK as a migrant domestic worker which is a Visa route that is designed to lead to settlement but I note that it is not suggested that she met the requirements for settlement in that capacity.
17. The [claimant's] partner is a British national and together the couple earn approximately £50,000 a year which is well in excess of the amount required under the Immigration Rules. All evidence specified under Appendix-FM of the Immigration Rules in respect of the Sponsor's income has been provided.
18. The sole reason for which the application fails is that the [claimant] does not hold a valid English certificate. It is accepted that the [claimant] has previously passed a qualification which met the required standard but that certificate is deemed to have expired before this application was made. I note that the Trinity language certificate it does not contain an expiry date on the certificate itself and that it is perhaps easy to understand how the [claimant] made the mistake she did.
19. I have considered the question of whether there are significant obstacles to the [claimant] and her partner enjoying family life in the Philippines. Civil partnerships and marriages between persons of the same gender are not recognised in the Philippines and there is some documentary evidence before me to suggest that there is discrimination against those who are LGBT. I feel able to find that the [claimant] and her partner would not be able to enjoy the same level of family life in the Philippines on account of the relationship between them having no legal status and certainly having significantly less rights associated with it than the couple currently enjoy in the UK through their civil partnership.
20. In assessing whether the legal obstacles represent insurmountable obstacles to family life continuing in the Philippines I have taken account of the [claimant's] immigration history and all the factors set out in section 117B of the 2002 Nationality Immigration and Asylum

act. Whilst the [claimant] has never met the requirements for settlement, but for an oversight in respect of the English certificate she would meet the requirements of the rules for leave under appendix FM even without relying on Ex .1. In all the circumstances I consider that the [claimant] and her partner are entitled to have some weight attached to their private and family life even taking into account section 117B and the comments on family life in Rajendran (s117B - family life) [2016] UKUT 00138 (IAC).

21. I have considered whether it is reasonable to expect the [claimant] to return to the Philippines and apply for entry clearance. I do consider that the [claimant] would probably only be out of the UK for 3 to 4 months whilst she submitted her application to return. I do not consider it likely that the [claimant] would have any problems in meeting the requirements of appendix FM and returning to the UK however I do note that we are talking about asking the [claimant] to pay Visa fees and travel costs which are likely to total in excess of £3000 in order to make this further application.
22. In all the circumstances of this case I do consider it appropriate and proportionate to find that the requirements of EX .1 are met in that there are insurmountable obstacles to family life continuing in the Philippines on a comparable footing to what is currently enjoyed in the UK. I note that moving to the Philippines would represent a significant interference in the legal rights of the [claimant's] British sponsor. In these circumstances I find that the [claimant] and her partner do meet the requirements of EX .1 of the Immigration Rules which means that I am satisfied that the Respondent ought to have allowed the application on human rights grounds.
23. I note that because the application was lodged in May 2013 it is subject to the new provisions in respect of appeals and the current version of section 82 of the 2002 Nationality Immigration and Asylum Act, I can only allow an appeal in so far as I find that the decision is not compatible with human rights. I have taken account of a number of tribunal cases including the case of Mustafa to which I was referred which reminds me that whilst demonstrating that the requirements of the rules are met is not determinative of an article 8 appeal it is a weighty factor to take into account.
24. The right to an appeal on human rights grounds makes no sense if it is not open to the tribunal to allow an appeal where an [claimant] can demonstrate that they meet the requirements of the rules in a category which is deemed to be a human rights category. It is important to note that the full title of the Visa route in Appendix FM of the Immigration Rules is "family life as a partner". Further I note that appendix AR of the Immigration Rules confirms that applications under Appendix FM are deemed to be human rights applications. In the circumstances of this case and in light of the fact that there are significant obstacles to family life continuing in the Philippines I find that it is appropriate and proportionate to allow the appeal on human rights grounds."

The Secretary of State's grounds and submissions

13. The Secretary of State's written grounds of appeal raise two grounds, i.e. grounds 1 and 2 below. At the hearing, Mr Armstrong applied for permission to rely upon two further grounds (grounds 3 and 4). Ms Iqbal did not object. I granted permission. I raised two points of my own which, given my conclusions on grounds 1 and 2, I did not find it necessary to consider.
14. I therefore summarise the issues and the Secretary of State's submissions as follows:
 - i) (Ground 1) The judge failed to apply the high threshold applicable in deciding whether there are insurmountable obstacles to family life being enjoyed in the Philippines. The phrase "*comparable footing*" in para 22 of the judge's decision shows that the judge applied the wrong threshold. Reliance is placed on paras 20-24 of the judgment of the Court of Appeal in R (Agyarko) v SSHD EWCA Civ 440, which read:

21. The phrase “insurmountable obstacles” as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.
22. This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase “insurmountable obstacles” has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see e.g. *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34, para. [39] (“... whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them ...”). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by *Jeunesse v Netherlands* (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).
23. For clarity, two points should be made about the “insurmountable obstacles” criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in *Jeunesse v Netherlands* at para. [117]; also the observation by this court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544, at [49] (although it should be noted that the passage in the judgment of the Upper Tribunal in *Izuazu v Secretary of State for the Home Department* [2013] UKUT 45 (IAC); [2013] Imm AR 453 there referred to, at paras. [53]-[59], was making a rather different point, namely that explained in para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).
24. Secondly, the “insurmountable obstacles” criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8: see paras. [29]-[30] below.”
- ii) (Ground 2) The judge erred in his approach in his consideration of whether there were insurmountable obstacles. Instead of reaching a finding on whether there were insurmountable obstacles to family life being enjoyed in the Philippines and then taking that finding into account when assessing proportionality outside the Rules, he decided the issue of insurmountable obstacles *as part of* the proportionality balancing exercise.
- iii) (Ground 3) At para 21, the judge erred by speculating when he said that, if the claimant were to return to the Philippines to make an entry clearance application, she would only be out of the United Kingdom for 3 to 4 months. There was no evidence before the judge to this effect. In fact, the evidence (obtained by Mr Armstrong post-hearing) is that all applications are decided within 60 days and may take less time. Mr Armstrong submitted that any separation would be for a short period in any event.
- iv) (Ground 4) In reliance upon R (Chen) v SSHD [2015] UKUT 00189 (IAC), Mr Armstrong submitted that the judge did not properly assess whether it would be disproportionate to expect the claimant to make an entry clearance application. There was no evidence before the judge, as Ms Iqbal confirmed, of the impact upon the claimant and the sponsor of temporary separation. Mr Armstrong

submitted that, given the short duration of any separation, any discrimination in the Philippines of limited significance.

The claimant's Reply and submissions

15. In the claimant's Reply lodged under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Rules"), it is submitted that ground 1 overlooks the fact that the judge considered proportionality outside the Rules and he was therefore entitled to take into account all relevant factors on the issue of proportionality. He found that there were insurmountable obstacles to family life continuing in the Philippines "*on a comparable footing*". Ms Iqbal submitted that this was a summary of the judge's earlier assessment and therefore the judge had not applied too low a threshold.
16. Ms Iqbal submitted that the judge reached his view that there were insurmountable obstacles to family life continuing on a "*comparable footing*" because he had background material before him that showed that there was discrimination against members of the LGBT community in the Philippines when compared with heterosexual married couples. He took into account the fact that the sponsor was a British citizen and found that there would be significant interference in her legal rights.
17. Ms Iqbal submitted that the judge took into account other relevant factors in the balancing exercise outside the Rules, as follows:
 - i) The claimant and the sponsor were in a genuine relationship.
 - ii) The judge applied s.117B of the Nationality, Immigration and Asylum Act 2002. In applying s.117B, the judge took into account Rajendran [2016] UKUT 00138 (IAC) and found that the claimant and the sponsor were entitled to have some weight attached to their private and family life.
 - iii) The claimant met the financial requirements under the Rules because the joint earnings of the claimant and the sponsor were approximately £50,000. The claimant had provided at the hearing specified evidence to establish the sponsor's income.
 - iv) The claimant had a good immigration history. She had lived in the United Kingdom for 7 years with no breach of the Rules.
 - v) Although the claimant's English language test certificate had expired, it did not contain any expiry date. As a lawyer in practice, the judge considered that it was not possible for the claimant to sit another English language test as her passport was held by the Home Office and the original was required at the test centre.
18. Ms Iqbal considered the above factors and said at para 18 that the sole reason for which the claimant's application failed was that she did not hold a valid English language test certificate. He said that it was easy to see how the claimant made the mistake she made given that the Trinity language certificate did not contain an expiry date on the certificate itself and that she could not obtain an English language test certificate because the Home Office held her passport.
19. Ms Iqbal submitted that the judge took into account that the claimant could have satisfied the requirements for leave to remain under the 5-year route but for the fact that the Secretary of State held her passport. The judge took into account that the

claimant satisfied the requirements for leave to remain under the 10-year route because there were insurmountable obstacles to family life continuing “*on a comparable footing*” to what is currently enjoyed. He took into account the cost of the claimant returning to the Philippines and making an entry clearance application.

20. Ms Iqbal submitted that the judge's decision that the Secretary of State's decision was not proportionate was reasonably open to him.

Assessment

21. There was no dispute before the judge that the claimant could not satisfy the requirements for leave to remain as the partner of the sponsor under the 5-year route as she did not have the required English Language test certificate. This was because the certificate she submitted had expired. It was not disputed that the certificate she submitted was only valid for a period of 2 years for immigration purposes.
22. Accordingly, the claimant had to rely upon EX.1 of Appendix FM and, if she failed to satisfy EX.1., she had to rely upon an assessment of her Article 8 claim outside the Rules. EX.1 and Ex.2. of Appendix FM provide as follows:

EX.1. This paragraph applies if

(a) ...

(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.

23. In R (Agyarko) v SSHD [2017] UKSC 11, the Supreme Court held that the phrase “*insurmountable obstacles*” and the definition of “*insurmountable obstacles*” in Ex.2 were consistent with Strasbourg jurisprudence (paras 43 and 44). It is a stringent test. The European Courts intended the words “*insurmountable obstacles*” to be understood in a practical and realistic sense, rather than as referring to obstacles which make it literally impossible for the family to live to in the country of the non-national concerned (para 43 of the judgment).
24. At para 43, Lord Reed referred, by way of example, to the facts in Jeunesse v Netherlands (application no. 12738/10) (2015) 60 EHRR 17. In that case, the European Court of Human Rights held that there were no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all of their lives, had never visited Suriname, and would experience a degree of hardship if forced to move and the applicant's partner was in full-time employment in the Netherlands. This example serves as a reminder of the high threshold for a finding that there are insurmountable obstacles to family life continuing in the country of the non-national.
25. It is necessary to apply the high threshold so as to ensure that due weight is given to the Secretary of State's policy on immigration as expressed in the Rules and approved by Parliament.

26. In a case in which reliance is placed upon EX.1. and there being insurmountable obstacles to family life continuing outside the United Kingdom, the correct approach was explained by Lord Reed at para 48 of the Supreme Court's judgment in Agyarko as follows:

"48 ... If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances...."

27. Plainly, the judge had to make a clear finding as whether there were insurmountable obstacles to family life between the claimant and the sponsor continuing in the Philippines, applying the correct threshold and, if not, consider whether there were "*exceptional circumstances*" i.e. whether the refusal of the application would result in unjustifiably harsh consequences such that refusal would not be proportionate.

28. There were therefore two stages that the judge was obliged to adopt. First, he had to consider the position under EX.1 and Ex.2 and, if there were no insurmountable obstacles, consider the position outside the Rules. This is the subject of ground 2.

29. Ms Iqbal did not address me specifically on ground 2. I have carefully considered the reasoning of the judge at para 16 onwards. It is plain, in my judgment, that he conflated his assessment of whether there were insurmountable obstacles to family life being enjoyed in the Philippines with the balancing exercise in relation to proportionality outside the Rules. This is particularly clear from his use of the phrase "*appropriate and proportionate*" in the first sentence of para 22 of his decision and the last sentence of para 24, phrases which he used in conjunction with "*insurmountable obstacles*" at para 22 and "*significant obstacles to family life*" at para 24.

30. However, it is also clear from the following:

- i) At para 16, the judge took into account that the claimant and the sponsor are in a genuine relationship. However, the fact that they are in a genuine relationship tells us nothing about whether they will experience insurmountable obstacles to their enjoyment of family life in the Philippines.
- ii) Likewise, the fact that the claimant meets the financial requirements under the Rules tell us nothing about whether she and the sponsor will experience insurmountable obstacles in the Philippines.
- iii) The same can be said of the fact that the judge considered it understandable that the claimant overlooked the fact that her English language test certificate had expired and that it is not possible for her to sit another English language test as her passport is being held by the Home Office.
- iv) The possibility of the claimant making an entry clearance application is not relevant to the issue of whether there will be insurmountable obstacles to family life being enjoyed in the Philippines.

31. The factors mentioned above are relevant to an assessment of proportionality outside the Rules but not relevant to an assessment of whether there are insurmountable obstacles to family life being enjoyed in the Philippines. The judge's consideration of

these matters and his use of the phrase “*appropriate and proportionate*” in the first sentence of para 22 of his decision and the last sentence of para 24, show that he conflated the balancing exercise outside the Rules with a proper consideration of whether there are insurmountable obstacles under EX.1.

32. I have therefore concluded that ground 2 is established and that the judge did err in law by conflating the issue of insurmountable obstacles under EX.1 with the balancing exercise outside the Rules.
33. I turn to consider ground 1, that the judge failed to apply the applicable high threshold in his consideration of whether there were insurmountable obstacles.
34. Ms Iqbal took me to page 127 of the claimant's bundle which concerned the situation for LGBTs in the Philippines. I have considered all of the documents at pages 125-130 of the claimant's bundle. Whilst there is some evidence of some killings of members of the LGBT community, the documents also mention that the Philippines is one of the most tolerant countries in Southeast Asia when it comes to LGBT issues and that “*(t)here is high tolerance [in the Philippines], there's not [sic] real acceptance*”.
35. In my judgment, on the basis of these documents, the judge was correct to find that there is discrimination, that the claimant and her partner would not be able to enjoy “*the same level of family life in the Philippines on account of the relationship between them having no legal status*” (para 19 of his decision”) and that they would not be able to continue their family life in the Philippines “*to a comparable footing to what is currently enjoyed*” in the United Kingdom. However, it is plain that he has not applied the high threshold. If he considered that the high threshold was met, he failed to explain why that was so, as it is simply impossible to understand from the material before him why the high threshold was met in this particular case. On any reasonable view, it simply cannot be said that the evidence and facts before him demonstrated that the high threshold, as indicated by the facts and the decision in Jeunesse by way of example, was met.
36. I have therefore concluded that ground 1 is established and that the judge did err in law by failing to apply the applicable high threshold to the question of whether there are insurmountable obstacles to family life being enjoyed in the Philippines.
37. The next question is whether these errors of law are material.
38. The judge considered proportionality outside the Rules. However, his approach was wrong. The correct approach, explained at para 48 of Agyarko, quoted at my para 26 above, required separate assessment of whether there are insurmountable obstacles to family life being enjoyed in the Philippines and, if not, whether the refusal of the application would result in unjustifiably harsh consequences such that refusal would not be proportionate or, put another way, whether there are “*exceptional circumstances*”. I am satisfied that the judge's error, in conflating the issue of insurmountable obstacles under EX.1. and the balancing exercise outside the Rules renders his errors material. In other words, the errors of law have led him also to materially err in his consideration of the balancing exercise by adopting the wrong approach to it.

39. Thus, the judge's assessment of proportionality outside the Rules cannot be relied upon to demonstrate that the errors identified at paras 21 to 36 above are not material.
40. I therefore do not need to consider grounds 3 and 4.
41. I therefore set aside the judge's assessment from paras 16 to 24 of his decision save that his findings that the claimant and the sponsor are in a genuine relationship and that the claimant meets the financial requirement for the grant of leave to remain as a partner under the Rules stand. I set aside his decision to allow the appeal.
42. Before turning to consider whether the appeal should be remitted to the First-tier Tribunal, I make one further observation. This concerns the fact that the judge took into account in his assessment of proportionality the fact the sponsor is a British citizen and that he said that there would be significant interference with her legal rights. If the claimant relies upon the fact that the sponsor is a British citizen, she will need to address paras 61 to 68 of the judgment in Agyarko.
43. In the majority of cases, the Upper Tribunal when setting aside the decision will be able to re-make the relevant decision itself. However, the Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal at para 7.2 recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
- “(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”
44. In the instant case, the decision is finely balanced. On the one hand, the re-making of the decision on the appeal is limited to the following discrete issues:
- i) whether there are insurmountable obstacles to family life continuing outside the United Kingdom.
 - ii) if not, whether refusal of the claimant’s application will result in unjustifiably harsh consequences such that refusal would not be proportionate.
45. On the other hand, the claimant succeeded in her appeal previously. Both Ms Iqbal and Mr Armstrong submitted that the claimant ought to have a further opportunity of having a decision on her Article 8 claim re-made before the First-tier Tribunal so that any adverse decision can be challenged to the Upper Tribunal. After much thought, I am just about persuaded, having regard to para 7.2 of the Practice Statement and the judgment of the Court of Appeal in JD (Congo) & Others [2012] EWCA Civ 327 that the decision on the appeal should be re-made by the First-tier Tribunal.

Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that it is set aside, to the extent explained at para 41 above.

This case is remitted to the First-tier Tribunal for a judge other than Judge of the First-tier Tribunal Seelhoff to re-make the decision on the claimant's appeal.

A handwritten signature in blue ink, appearing to read 'D.K.G.', is positioned above the printed name of the judge.

Upper Tribunal Judge Gill

Date: 24 August 2017