



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/40120/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 10th July 2014

Determination

Promulgated

On 15th July 2014

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PINKY BABYEN-ON ARROYO

Respondent

Representation:

For the Appellant: Miss R Pettersen, Senior Presenting Officer

For the Respondent: Mr T Hussain, Counsel, instructed on behalf of Hussain
Immigration Law Limited

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Ince) who in a determination promulgated on 9th April 2014 allowed the Appellant's appeal against the decision of the

Respondent to refuse leave to remain in the United Kingdom on Article 8 grounds outside the Immigration Rules.

2. Whilst it is the appeal of the Secretary of State, for the sake of convenience I will refer to the parties as they were before the First-tier Tribunal.
3. The history of the proceedings is as follows. The Appellant is a national of the Philippines born on 17th February 1981. It is said that in or about 1985, the Appellant's mother, Teresita began going abroad from the Philippines to work as a nurse leaving the Appellant, then aged 4, with the Appellant's father and his family. At the age of 13, in or about 1994, her mother separated from her father, taking the Appellant with her. The Appellant remained in the Philippines and her mother worked abroad. In 2004, the Appellant's mother arrived in the UK and began work as a nurse. At all material times when she was abroad, the Appellant's mother sent money back to the Philippines for her support and upkeep and would return to the Philippines for holidays. She also paid for the Appellant to attend a practical nursing course in the Philippines.
4. In June 2009 the Appellant's mother was given indefinite leave to remain in the UK.
5. On 12th July 2009 the Appellant arrived in the UK to begin studying as a nurse. She had made three previous applications to come to the UK to study but had been refused. Her educational history is as follows; she began attending Precision College doing a BTEC in Health and Social Care Level 2. It appears the college closed without warning and she transferred to another college. She was given further leave to remain on 8th September 2011 until 6th January 2004 to enable her to continue her studies.
6. Since her arrival in 2009, the Appellant lived with her mother and the pair became very close catching up on the years lost when her mother had been working overseas. Her mother also supported her financially. It appears that the Appellant stopped attending her course in or about November 2011 but remained living with her mother in Bradford. She returned to the Philippines for a holiday, returning to the UK on a date that is not set out in the evidence and again remained living with her mother. In or about September 2012 she went to London to stay with her aunt and lived rent-free in church accommodation and kept in touch with her mother.
7. In October 2012 she met her partner, Mr Randall, on Facebook. They established a relationship and on 12th January 2013 she travelled to his home to meet him and his family. He has a disability following an assault in 2012. It is said the relationship blossomed and in March 2013 they began to live together at his home where he lives with his daughters and grandson. The Appellant is supported financially by her mother; Mr Randall is not employed.

8. The Appellant's leave to remain was set to be curtailed as from 14th July 2013. The Appellant lodged an application for further leave to remain prior to her leave ending on the grounds of her relationship with Mr Randall and on the grounds of her private life.
9. The Respondent refused the application in a decision dated 18th September 2013 stating that the Appellant did not meet the requirements of Appendix FM or the Article 8 requirements of paragraph 276ADE by reason of her length of residence. The refusal letter went on to state that even if the Appellant could satisfy the eligibility criteria, she could not meet the additional requirements of EX1(a) as the partner's children were over the age of 18 and it was further considered that she could not benefit from paragraph EX(b) relating to insurmountable obstacles. Reasons were given in the refusal letter as to why she could not meet the paragraphs 276ADE dealing with private life.
10. The Appellant appealed that decision and the matter came before the First-tier Tribunal (Judge Ince) on 20th February 2014. In his determination promulgated on 9th April, having heard the evidence of both the Appellant and her partner and having considered documentary evidence within the bundle and from the Appellant's mother, the judge allowed the appeal under the Immigration Rules and also under Article 8 of the ECHR (outside the Rules).
11. This application comes before the Upper Tribunal by reason of the grant of permission given on 14th May 2014 by the First-tier Tribunal (Judge Ford) on application by the Secretary of State. There are two grounds set out in the application. The first ground was that the judge made a material misdirection in law on the basis that he allowed the appeal under the Immigration Rules on the basis that she could satisfy the requirements and in particular EX1. It is submitted in the grounds that she could not meet the requirements as a partner and that was made plain at GEN1.2 and that the judge took into account a period of cohabitation that was too short to allow the Appellant to qualify for leave to remain as a partner and then proceeded to consider EX1 in reliance of that finding. In the alternative, it was submitted that by considering EX1 under the Immigration Rules as a standalone provision was also a material misdirection. The second ground was that the judge, in allowing the appeal outside of the Rules, misapplied the case of **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)**.
12. At the hearing before the Upper Tribunal Miss Pettersen appeared on behalf of the Secretary of State and Mr Hussain, who appeared at the court below, on behalf of the Appellant. Miss Pettersen relied upon the grounds as drafted and submitted that the judge proceeded to consider the Immigration Rules even though it was apparently conceded at [2] that she could not so meet the Rules. Thus the judge could not have concluded that the Appellant met the Rules. Furthermore the judge allowed the case by misapplying the decision of **Gulshan** and that he had to find that there

were “exceptional circumstances” but the factors identified were not so compelling to warrant a grant of leave outside of the Rules.

13. Mr Hussain, conceded from the outset that the case was not being advanced on the basis of her being able to meet the Immigration Rules as set out at [2] and to that extent the grounds at (1) was right however, he submitted that the judge did not only allow the appeal under the Immigration Rules but also under Article 8 “outside the Rules” and that was plain from reading the determination and in particular by having consideration to paragraph [54]. In this context he submitted that the judge properly considered the law in relation to whether there were “arguably good grounds” for going outside of the Rules and thereby did not misapply **Gulshan** and gave adequate and sustainable reasons as to why he found there were insurmountable obstacles for the couple to enjoy their family life in the Philippines together. It is plain from [61] that the judge in his findings under Article 8 also took into account the finding that he made as to insurmountable obstacles earlier in the determination and that therefore when read together there were sufficient reasons given by the judge to support his decision. He reminded the Tribunal of the Court of Appeal decision in **Adedoyin [2012] EWCA Civ 939** at paragraph 30 when it is stated that there was a generous ambit of discretion and that there must be evidence capable of justifying the conclusion. In this case he said there was evidence to justify the conclusions reached by the judge and the grounds were simply a disagreement with those findings.
14. Miss Pettersen by way of reply submitted that he had not dealt with what the exceptional circumstances were and that was a misdirection.
15. As to the re-making of the decision, if an error of law was found, Miss Pettersen invited the court to satisfy the decision and reverse the decision made by the judge. Mr Hussain submitted that there would be other evidence to take into account and in particular most recent evidence and a significant development relating to the grandchild of Mr Randall who lived with the parties who had recently been diagnosed with cancer.
16. I reserved my determination.
17. There are two grounds before the Tribunal advanced on behalf of the Secretary of State. In respect of the first ground it is submitted that the judge made a material misdirection in law in regards to Appendix FM and EX1. It has been properly conceded by Mr Hussain on behalf of the Appellant that the judge, insofar as he purported to allow the appeal under the Immigration Rules at paragraph [53] and in the decision itself, that was an error of law. It is plain from reading the determination as a whole and by considering the Immigration Rules that it was properly conceded before him that the Appellant could not succeed under the provisions of Appendix FM (see [2] where that concession was properly made). As the grounds are set out, the Appellant on the factual basis of this claim could not meet GEN1.2 where the definition of a partner is set out; the Appellant, whilst the judge found they were in a genuine and subsisting

relationship had not cohabited for a period of two years and therefore did not fall within the definition of GEN1.2 as a partner and therefore EX1 could not be considered in isolation. As the grounds submit, EX1 is not a standalone provision but supplements the provisions of the Rules and thus does not form an independent basis for an appeal to succeed. Thus in those circumstances it is unarguable that the decision of the judge that the Appellant could meet the Immigration Rules was an error of law.

18. However the issue that I have to decide is whether or not it was material or to put it another way, whether that error should result in the determination being set aside in the light of the judge having found in the alternative that the appeal should be allowed on Article 8 grounds (outside of the Rules). It is plain from reading the determination that whilst the judge was in error allowing the appeal under the Rules, that he properly had regard to the decision in **Gulshan** (as cited) and at [35] and [36] properly set out the analysis that he should adopt, namely that he should first of all consider the Appellant's position "under the Immigration Rules" and then at [36] set out the decision of **Gulshan** and also at [38], [39] and [40]. The judge had regard in those paragraphs not only to the decision of **Gulshan** but the guidance applied by the Secretary of State when dealing with those cases that do not meet the Rules. In particular at [38] he made reference to "insurmountable obstacles" and how they were dealt with at paragraph 3.2.7C of the guidance and also at [39] and [40] gave consideration to the issue of "exceptional circumstances" and the factors set out in the guidance. In this respect the judge considered the evidence that he had heard from all the parties. It is right to observe at this stage that at [31] the judge reached the conclusion that the Appellant and the witnesses before him had told him the truth about their circumstances, he found their accounts were generally consistent and were corroborated by what he described as "unchallenged documentation" and thus he saw no reason not to accept the evidence set out in the chronology in the determination.
19. It is further plain from the determination that having considered the evidence before him from all the parties he reached the conclusion that there were insurmountable obstacles to family life continuing in the Philippines with Mr Randall and the Appellant. Whilst he considered that in the context of the Immigration Rules, it is plain from reading [61] that his consideration of insurmountable obstacles summarised what he described as "the relevant factors in this case" and thus whilst his determination lacked some clarity, it is plain that what the judge was seeking to say was that when considering whether there were arguably good grounds for granting leave to remain outside of the Rules he considered that those circumstances were compelling and therefore demonstrated that the decision to remove was disproportionate.
20. Whilst it is submitted that the reasons given by the judge were insufficient, I consider that that submission is simply a disagreement with the reasons amply given by the judge as to why he reached the conclusion on the evidence before him that there were insurmountable obstacles to the

parties establishing their family life outside of the United Kingdom. In this context it cannot be said that the judge failed to properly consider or apply the concept of insurmountable obstacles. At [41] he reminded himself of the guidance in this respect set out at [38] and at [42] he set out the test that he should apply. It cannot be said that the test he applied was in any way improperly carried out or not in accordance with the guidance. He then proceeded to carry out a balance between the factors which he thought would show that it was “practically possible” for the Appellant and Mr Randall to go to the Philippines but at [44], [45], [46] and [47] put the balance on the other side of the scales reaching the conclusion as a whole at [47] and [48] that those factors cumulatively would present a very high degree of hardship to Mr Randall and to his own family such that it amounted to an “insurmountable obstacle”. Those factors concerned issues of where they would reside, and income; the Appellant having never worked in her home country which she believed would be more difficult for her to obtain given her age and her past employment record and also in respect of Mr Randall who had a disability would also not be able to work. There was a question as to where they would live, there was no family home for them to go to [45] but also the judge took into account the effect of Mr Randall leaving the UK as a British citizen and upon other members of the family with whom he was concerned. In this case the judge found that he was particularly close to his daughters and grandchild and not only would there be disruption to him but also to their family life with him and the Appellant. In particular, it was noted by the judge that should he leave his house, this would also affect his daughter who was pregnant who would in effect be homeless.

21. In those circumstances, it has not been demonstrated that there was any misdirection in law as to the interpretation to be given to the term “insurmountable obstacles” and that it was open for him to find the practical difficulties with the Sponsor relocating as he had described in his determination as amounting to insurmountable obstacles. In his analysis further in the determination, he gave proper consideration to the public interest but having balanced the factors together he reached the conclusion that the removal of the Appellant would not be proportionate and therefore allowed the appeal under Article 8. Therefore any error that he made in relation to his conclusion that the Appellant could meet the Immigration Rules does not affect the outcome of the decision as it was open to the judge to allow the appeal for the reasons that he properly gave under Article 8 outside of the Rules applying the requisite jurisprudence.
22. In those circumstances, I find no error of law in respect of the judge’s decision relating to Article 8 of the ECHR.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law, I do not set aside the decision; the decision shall stand.

Signed

Date 13/7/2014

Upper Tribunal Judge Reeds