



IAC-FH-CK-V1

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

Appeal Number: IA/42531/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 30 October 2014**

**Decision & Reasons
Promulgated
On 5 November 2014**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MRS LELIBETH ARCILLA CRUICKSHANK

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Yeo, Counsel instructed by Lawrence Lupin Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of the Philippines born on 26 September 1976, appeals, with permission, against a decision of Judge of the First-tier Tribunal Hanbury, who in a determination promulgated on 4 July 2014 dismissed her appeal against a decision of the Secretary of State to refuse her leave to remain as the spouse of a person present and settled in Britain.

2. In the notice of refusal dated 2 October 2013 it was pointed out that the appellant had entered Britain as a visitor and that she did not satisfy the language requirement. It was accepted that the appellant was married to Mr Roger Cruickshank with whom she had lived since September 2011 and whom she had married on 5 April 2012.
3. It was considered by the Secretary of State that the appellant could not meet the requirements of the Rules with regards to family life under Article 8 of the ECHR and that no exceptional circumstances existed for considering her case outside the Immigration Rules. It was not accepted that the sponsor would not be able to have medical treatment he might require in the Philippines.
4. At the hearing the appellant and her husband gave evidence stating that they had been attacked whilst in the Philippines and it was the appellant's evidence that foreigners were not well-treated in the area of the Philippines from which she came. The sponsor stated that his health was not good and that he had been told that he might require open-heart surgery but that he was doing well at the present time. He did not wish to be parted from his new wife.
5. In paragraphs 13 onwards of the determination the judge set out his conclusions. He noted the argument being forward that there were insurmountable obstacles to the appellant and the sponsor continuing their family life outside Britain because of the attack which they had suffered and the threats they had received. He referred to the judgment of Mr Justice Turner in **Zhang [2013] EWHC 891 (Admin)** which dealt with the issue of whether or not an applicant for leave to remain ought to return to his own country to apply for entry clearance as opposed to being allowed to "switch" immigration status from within the jurisdiction. He considered that the decision in **Zhang** could be distinguished. He accepted that the sponsor and the appellant were exercising private and family life in Britain but said that as far as the appellant's private life was concerned she had been here for a relatively short period and she had no children here. He accepted that an incident had occurred in the Philippines but said that it was "an incident of theft, such as occurs in many parts of the world". He accepted that what made it more serious was that that was accompanied by threats to kill but stated that he did not find it to be established that the appellant and the sponsor could not live in another part of the Philippines where they would not be known to the assailants. He stated that he acknowledged that that would cause them some hardship but it would not be an "insurmountable obstacle" to Mr Cruickshank returning to the Philippines with his wife should they wish to do so.
6. He therefore concluded that there were no insurmountable obstacles to the appellant and the sponsor continuing their family life in the Philippines and taking into account that the appellant could not qualify under the Immigration Rules he went on to make positive findings of fact. He stated:

“The appellant is not only married to a British national but has formed ties with the community in the relatively short period that she has been here. Many testimonials have been produced by friends and members of the church where she worships. There is no doubt the appellant and her husband are a loving couple who would adapt to married life in the UK. Mr Cruickshank told the Tribunal that he has a stable income from his employment. Additionally there are health benefits to them from having a stable family life. He has had heart problems and they undoubtedly have not been improved by having to travel to the Philippines where he would not be able to see his existing specialists and the healthcare system may not be as good.”

7. The judge added that it was a matter for the appellant and her husband to decide how to structure their lives in the future and whether or not Mr Cruickshank would decide to return with this wife to the Philippines or simply wait for her to make an application from the Philippines to join him in the UK as his spouse. He stated that this did not fall within any exceptional category of case and that the Immigration Rules were drafted to ensure a firm and fair system of immigration control. Respect for those Rules was important.

8. At paragraph 20 he said:

“I find there to be no insurmountable obstacles to the parties living in the Philippines if they desire it. I do not consider the period of separation to be material if it is decided that the appellant will simply apply for entry clearance from abroad. She has a good immigration history, is presumably secure financially from her husband and has family members in the Philippines to whom she can turn. Clearly, the appellant and her husband can stay in touch regularly, indeed, Mr Cruickshank may feel he is able to visit her if the period of absence is extended.”

9. He therefore concluded that the respondent’s decision was in accordance with the Immigration Rules and that the decision was not a breach of the appellant’s Article 8 rights.

10. The appellant appealed stating that the judge erred in asking whether the potentially temporary separation was reasonable. It was claimed that that was not a relevant question under EX.1. Moreover, it was claimed that the judge had wrongly applied an asylum-style “internal relocation” reasonableness test which is not appropriate for a British citizen expected to relocate abroad to a foreign country. It was claimed that the judge had failed to take into account the subjective consideration of the appellant’s and sponsor’s fears of a repeat of the violent attack which they had suffered. It was claimed that the judge had failed to give any proper consideration to whether the case could or should succeed outside the Immigration Rules and that he had given no lawful reasons for distinguishing **Chikwamba** [2008] UKHL 40 and **Zhang**.

11. Permission to appeal was granted by Judge of the First-tier Tribunal Davidge on 4 September 2014.
12. At the hearing of the appeal before me Mr Yeo accepted that the appellant could not meet the requirements of the Rules relating to marriage applications as the appellant had entered Britain as a visitor. He stated, however, that the position was that the sponsor's income was well in excess of the income requirements and further that the appellant has obtained the necessary English language certificate since the date of hearing. He argued that it was not necessary or proportionate for the appellant to go back to the Philippines to make an application. He referred to the circumstances which had caused the appellant and her husband to leave their home in the Philippines and return to Britain. He asked me to find that it was not proportionate to expect them to return to the Philippines while the appellant made an application to return to Britain.
13. He asked me to find that this was not a case of the appellant attempting to "jump the queue" nor indeed had she ever been in Britain without leave to remain. He referred to the sponsor having grandchildren here and the difficulties the sponsor would have in returning to live in the Philippines. He emphasised that he was not arguing that this was a "near miss" case but arguing that the decision was disproportionate.
14. In reply Mr Nath stated that the conclusions of the judge were fully open to him. This was a balanced determination where the judge had given adequate reasons for his conclusions and that he had made no error of law in the determination.

Discussion

15. At the date of hearing the appellant could not meet the requirements of the Rules because she had entered Britain as a visitor and moreover she did not have the necessary certificate of proficiency in English. The question was therefore whether or not there were insurmountable obstacles to the appellant living in the Philippines or returning to make an application for leave to enter as a spouse there. The judge found that there were not.
16. Although Mr Yeo asked me to find that the judge had applied a test of internal relocation which was only suitable in an asylum appeal the reality is that the appellant and her husband did live in the Philippines for two years and they were only unsettled by the incident which occurred shortly before they left. There does not seem any reason why they could not choose to live in a safer neighbourhood should they wish. However, the reality is that it appears that the appellant would be likely to make an application in the Philippines which would be successful.
17. Surprisingly, Mr Yeo was unable to tell me how long the application would take if it were to be made in the Philippines. I note that the appellant's

mother and her son, who was aged 14 at the date of the application, live in the Philippines. I do not consider that it would cause undue hardship for her to make an application to enter Britain as a spouse from there. It is her own country where she has family. The Judge was correct to state that the sponsor could visit her there if the application took any length of time but there is nothing to indicate that a properly made application could not be dealt with quickly.

18. Moreover, I consider that the Judge was correct to point out the necessity of ensuring fair and firm immigration control: those who enter Britain as visitors are effectively asserting that they will return to their own countries at the end of the visit and there is nothing untoward about expecting them to do so. There are no exceptional factors in this case which mean that the rules should not be followed. The facts in Zhang were properly distinguished by the Judge - the appellant in that case had lived and worked in Britain with leave to do so for many years. Moreover, the facts in Chikwamba are easily distinguished: The appellant in that case had married here at a time when there were no removals to Zimbabwe and it was accepted that Zimbabwe was inhospitable, particularly towards those who had claimed asylum abroad. She had a child here who could not be expected to travel with her - this appellant has a child in the Philippines. Chikwamba is certainly not authority for stating that the rules should not be applied or respected: of particular relevance is paragraph 34 of the speech of Lord Brown of Eaton-under-Heywood where he stated:

“I do not accept Mr Fordham’s submission that a section 65 appeal can never be dismissed on the basis that the appellant ought properly to leave the country to apply for entry clearance abroad. As Ms Carss-Fisk QC points out, that is not to deny the appellant his or her right to an in-country right of appeal but rather to dispose of it in a manner intended to promote immigration control.”

18. In all I consider that the conclusions of the judge were fully open to him on the evidence before him and that he made no error of law in his decision.
19. I therefore find that his decision dismissing this appeal shall stand.

Signed

Date

Upper Tribunal Judge McGeachy

3 November 2014