



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/43051/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27 November 2014

Determination Promulgated
On 5 December 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Rhaciél Rivac Garcia
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr M Chowdhury, instructed by UK Legal & Immigration Experts
For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Rhaciél Rivac Garcia, date of birth 18.1.87, is a citizen of the Philippines.
2. This is her appeal against the determination of First-tier Tribunal Judge Wellesley-Cole promulgated 3.9.14, dismissing her appeal against the decision of the respondent, dated 3.10.13, to refuse her application for leave to remain in the UK outside the Immigration Rules. The Judge heard the appeal on 24.7.14.
3. First-tier Tribunal Judge Nicholson granted permission to appeal on 21.10.14.

4. Thus the matter came before me on 27.11.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Wellesley-Cole should be set aside.
6. The relevant background can be briefly summarised as follows. On 8.8.11 the appellant was granted leave to remain in the UK until 24.8.13 as a Tier 4 General student. Two days before the expiry of that student leave, she sought variation of leave to remain outside the Rules. It was never contended that she could meet any of the Immigration Rules for leave to remain. As made, her application for leave to remain was based on the fact she wanted to be registered as a nurse. It was refused because the reason did not disclose any genuine compassionate reasons for the Secretary of State to exercise her discretion to grant leave to remain. She could return to the Philippines and make application for entry clearance under Tier 2 of the Points Based System.
7. By the time the matter came on appeal before the First-tier Tribunal the basis of the appellant's case had dramatically changed. She now asked to be allowed to stay on the basis of a relationship with a British man, whom she hoped to marry (which did not take place until 10.11.14) and that she was 29 weeks pregnant carrying their child. As they had cohabited only a short period of time, she could not meet the requirements of Appendix FM, or indeed any other provision of the Immigration Rules. Their child was born 24.9.14.
8. The grounds of application for permission to appeal are rather difficult to follow, but in the main they contend that the judge erred in:
 - (a) following Gulshan [2013] UKUT 640 and seeking only compelling and compassionate circumstances instead of making a proportionality assessment;
 - (b) failing to determine whether it was reasonable to expect Mr Minter to relocate to the Philippines;
 - (c) failing to consider the effect of the decision on Mr Minter.
9. In granting permission to appeal, Judge Nicholson observed that the judge did not specifically consider whether it would be reasonable to expect Mr Minter to relocate, or the effect on him of the decision to remove his partner and unborn child. "It is arguable that, having embarked on a proportionality assessment outside of the immigration rules, the judge should have considered these issues in line with Huang and Kashmiri v SSHD [2007] UKHL 11 and Beoku-Betts (FC) v SSHD [2008] UKHL 38. Permission is therefore granted on these grounds. I do not refuse permission on the remaining grounds although some lack merit."
10. The Rule 24 Response, dated 14.11.14, submits that the judge directed herself appropriately. "The judge finds that the appellant would not face insurmountable

obstacles to continuing her family life with her partner outside the UK. This was a finding open to (her) on the facts and is adequately reasoned. That being the case it is difficult to see how the appellant could succeed either under the rules or article 8 outside the rules.”

11. The judge was not obliged to have regard to what was then a yet unborn child. Only on birth could that properly be taken into consideration. However, it was referenced by the judge at §14 of the decision in relation to whether the appellant would be required to leave at her advanced stage of pregnancy. I am satisfied that to the degree to which the child could be taken into consideration the judge did so.
12. There is no merit in the grounds complaining by reference to §16 of the decision that there was no proportionality assessment. It is clear from §14 that the judge made it clear that she was carrying out the proportionality balancing exercise, following the Razgar steps. It is thus incorrect to submit that the judge confined herself to seeking compelling and/or compassionate circumstances; a full article 8 ECHR assessment was undertaken. The judge noted that family life has been established at a time when the appellant’s immigration status was precarious, even though legally present. The judge also found that the evidence fell well short of showing that there were insurmountable obstacles to Mr Minter relocating to the Philippines to continue family life there.
13. It had already been conceded that the appellant could not meet the requirements of the Rules for leave to remain. The judge found that Mr Minter failed to demonstrate that there would be any insurmountable obstacle to the couple relocating to the Philippines, which would have been the test under EX1 of Appendix FM. In VW (Uganda) v SSHD [2009] EWCA Civ 5, the Court of Appeal held that in assessing proportionality under article 8 and whether an appellant’s family should return to his country of origin with him, the test is not whether there are insurmountable obstacles to prevent their going but whether it is reasonable to expect them to go. If there are insurmountable obstacles they will succeed but if there are not they will not necessarily fail. Pursuant to MA (Pakistan) v SSHD [2009] EWCA Civ 953 is only necessary to ask whether the family can reasonably be expected to relocate.
14. In Chikwamba v SSHD [2008] UKHL 40, the House of Lords held that an appeal based on the Article 8 right to respect for family life against a refusal of asylum should not be dismissed routinely because policy required the Appellant to leave the country to apply for entry clearance abroad. On the facts of that case the enforced return of the Appellant to Zimbabwe, leaving behind her husband and child, and to remain there in harsh and unpalatable conditions for some months to await entry clearance and return at her own expense would have gravely disrupted her family life.
15. I find, considering the decision as a whole, that there was a full reasonableness assessment in relation to Mr Minter and the question of the effect on his rights to respect for family life under article 8 ECHR if the appellant were to be removed to the Philippines. At §14 the judge noted that if she were removed he would continue to support her and their child and even support her application for entry clearance. The judge was entitled to take into account that they entered into their relationship

when her status in the UK was precarious, and went on to decide to have a child when she had been refused leave to remain. They had only cohabited as a couple for 8 months, although the relationship dates back to October 2012. Mr Chowdhury was unable to point me to any feature of the relationship between the appellant and Mr Minter that the judge had overlooked.

16. Mr Minter told the judge he had not ruled out doing so, perhaps at a later stage. The judge considered the practical possibilities of relocation. In the absence of insurmountable obstacles, the appellant had to show that removal would be unjustifiably harsh as being disproportionate to the rights of both the appellant and Mr Minter. Mr Minter was not required to leave the UK, but he must be taken to have considered at the time of entering into a relationship with the appellant and in fathering a child that his partner may well have to leave the UK and indeed could have had no legitimate expectation of being able to settle in the UK just because that was her desire or that she had entered into a relationship with a British citizen. This is not a Chikwamba case, as it is far from clear at this stage whether the appellant would be able to meet the requirements of the Rules for entry clearance as a partner under Appendix FM. However, the appellant may consider a fresh application under Appendix FM on the basis of their child being a British citizen and the best interests of that child under section 55. That was not a matter which the First-tier Tribunal Judge could have considered at that stage, and it is not a matter which was before the Secretary of State when she made her decision.
17. Considering the decision of the First-tier Tribunal as a whole, I find that the judge had properly considered the right question, which was framed at the end of §13: “would it be reasonable to expect the appellant and Mr Minter to relocate to, in this case, the Philippines? That is one the matters that I now seek to address.” The assessment followed at §14 onwards.

Conclusions:

18. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.



Signed:

Date: 4 December 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.



Signed:

Date: 4 December 2014

Deputy Upper Tribunal Judge Pickup