IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003956

First-tier Tribunal No:
LH/02977/2023
HU/58657/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28th of November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

MA MORENA RESURRECCION
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L. Youseffian, Counsel instructed by Sabz Solicitors LLP
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

Heard at Field House on 9 November 2023

DECISION AND REASONS

Introduction

1. The Appellant appeals against the decision of First-tier Tribunal Judge Swinnerton (hereafter "the Judge"), promulgated on 12 August 2023, which dismissed her appeal against the Respondent's decision to refuse her human rights claim by way of a decision dated 2 November 2022.

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2. Permission to appeal was granted by First-tier Tribunal Judge Hollings-Tennant on 14 September 2023 with no limitation upon the grounds of appeal.

Relevant background

3. In brief, the Appellant entered the United Kingdom with a visit visa valid until 7 March 2021 on January 2021. It may well be that the immigration history at page 33 of the Upper Tribunal's stitched bundle is not wholly accurate but, in effect, there appear to have been a number of periods during which the Appellant was residing under the Respondent's *Exceptional Assurance* policy.

4. Eventually the Appellant applied under Article 8 ECHR on 14 December 2021 by reference to her relationship with her partner who is a British citizen.

5. In the refusal the Respondent disputed that the Appellant qualified as an eligible partner by reference to GEN.1.2. of Appendix FM (albeit that this was conceded by the Respondent's representative at the First-tier Tribunal hearing, see para. 4 of the Judge's decision).

6. The Respondent also asserted that the Appellant was residing in the "*UK on an extended visit visa due to Covid exceptions until 31 December 2021*" and therefore applied E-LTRP.2.1. against the Appellant. I will say more about this later on in this decision but the importance of this part of the refusal appears to have gone unnoticed by the representatives and the Judge.

7. In light of the Respondent's view of the relationship between the Appellant and her partner in the refusal (albeit later conceded at the appeal hearing) the Respondent declined to apply the *insurmountable obstacles* test in EX.1. and EX.2. of Appendix FM.

8. The Respondent also concluded that there were no *exceptional circumstances* and no *very significant obstacles* to the Appellant reintegrating into a private life in the Philippines.

The decision of the Judge

9. For the purposes of this decision, I highlight the following findings:

    a. The Appellant and her partner are in a genuine and subsisting relationship (para. 14).
    b. The Appellant's partner was registered blind in 1984 and experiences extreme pain in both eyes during the daytime. He also has type II diabetes, essential hypertension, bilateral carpal tunnel syndrome and problems with feeling in his hands, (para. 15).
    c. The Appellant's partner's son had been responsible for his informal care despite having his own family and working in a self-employed capacity (para. 16).

d. The Judge found the Appellant's partner to be very credible especially in his evidence that he would not miss the help of the Appellant but rather the relationship itself if she was to return to the Philippines, (para. 17).
e. At para. 18 the Judge concluded that there would not be very significant obstacles to the Appellant reintegrating into the Philippines as she had spent the vast majority of her life there and has work experience as a teacher in Dubai.
f. At paras. 19 & 20, the Judge found that there would not be insurmountable obstacles to the family life continuing in the Philippines on the basis that there was no reason why the Appellant and her partner could not travel there for a period of time during which the Appellant could finalise the annulment of her previous marriage and make an application from there to re-enter the United Kingdom. The Judge also found that there were no exceptional circumstances meaning that the decision under challenge did not lead to a disproportionate breach of the Appellant's (or her partner's) Article 8 ECHR rights.

The error of law hearing

10. The representatives joined the hybrid hearing remotely and I am satisfied that there were no technical difficulties such as to have inhibited either party's ability to understand or participate in the proceedings.

11. Mr Youseffian relied upon the Appellant's grounds of appeal as drafted on 25 August 2023 and in response, Mr Melvin submitted that it was not impermissible for the Judge to consider a semipermanent move by the Appellant and the partner to the Philippines as part of a lawful assessment of the insurmountable obstacles test.

12. Having heard those submissions, I indicated to the representatives that I found that the Judge had materially erred in law at para. 19.

Findings and reasons

13. In my view, this is a clear material error of law at para. 19 of the decision. In that paragraph, it is apparent that the central reasoning deployed by the Judge in concluding that there would be no insurmountable obstacles to the Appellant and her partner continuing their family life in the Philippines revolved around the fact that they would only have to travel to that country for a period of time in order for the Appellant to finalise the annulment of her previous marriage and to make an application for re-entry to the UK as his partner. No other reasoning is given by the Judge for that conclusion.

14. In my judgement, this reasoning is clearly contrary to the wording of the insurmountable obstacles test as expressed in EX.2. of Appendix FM and as explained by the Supreme Court in Agyarko and Ikuga, R (on the

applications of) v Secretary of State for the Home Department [2017] UKSC 11, see paras. 42 - 48.

15. It is plain that, contrary to Mr Melvin's submission, the assessment of insurmountable obstacles is one which considers the hypothetical scenario of the Appellant and their partner relocating permanently and does not allow for a consideration of a temporary or semipermanent situation.

16. The question of a temporary separation is manifestly one which can be considered when a full Article 8(2) ECHR assessment is carried out (if necessary), as per Younas (section 117B (6) (b); Chikwamba; Zambrano) Pakistan [2020] UKUT 129 (IAC) but it was impermissible for the Judge to transpose that question into the different legal issues relating to insurmountable obstacles.

Notice of Decision

17. On the basis that the question of insurmountable obstacles must be considered in this appeal whether the Appellant has direct access to EX.1. read with EX.2. of Appendix FM or not, I conclude that the entirety of the decision should be set aside.

Remittal to the First-tier Tribunal

18. In respect of where the remaking decision should be made, I have concluded that it should be remade in the First-tier Tribunal. That is not only because I have set aside the Judge's decision in its entirety but also because the Judge did not assess in any detail the impact upon the Appellant's partner of his relocation to the Philippines despite his serious disabilities and the background evidence/submissions relied upon in the Appellant's skeleton argument.

DIRECTIONS

19. Of my own motion, I raised with the representatives whether the Respondent was right to say in the refusal letter that the Appellant was residing in the UK on an "extended visit visa" at the time her human rights application was made on 14 December 2021. I raised this firstly because the immigration history listed appeared to suggest that at least one of the Exceptional Assurance requests had been rejected by the Respondent and secondly even if the refusal was right to say that the Appellant was covered by an Exceptional Assurance at the time she made her application on 14 December 2021, the wording of the Exceptional Assurance policy prima facie suggests that any such application of the policy does not constitute a grant of leave to remain.

20. Both parties will therefore be expected to provide the First-tier Tribunal with full oral submissions on:

a. A precise timeline of any applications for Exceptional Assurance and granted periods of Exceptional Assurance after the expiry of the Appellant's visit visa on 7 March 2021.

b. Whether an Exceptional Assurance constituted an extension of the Appellant's visit visa bearing in mind the wording of the policy itself and indeed, the definition of a visitor in para. 6 of the Immigration Rules.

21. At the error of law hearing, Mr Youseffian indicated that his instructing solicitors had not been able to locate a version of the Exceptional Assurance policy. In order to assist both the Respondent and the Appellant I provide a link to the national archive version of the policy as at 14 December 2021: https://webarchive.nationalarchives.gov.uk/ukgwa/20211214182516/https://www.gov.uk/guidance/coronavirus-covid-19-advice-for-uk-visa-applicants-and-temporary-uk-residents

22. I should make it clear that it is for the parties at the next First-tier Tribunal appeal to clarify if that is the correct and applicable version of the Exceptional Assurance policy.

23. The next appeal is to be heard in the First-tier Tribunal (by a judge other than Judge Swinnerton) with a time estimate of 3 hours.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 November 2023