Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/34871/2013
IA/34888/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 28 April 2014	**On 28 May 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

C I (FIRST RESPONDENT)
C O (SECOND RESPONDENT)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: Mr S Jeshani instructed by Aston Brooke Solicitors

DETERMINATION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the

appellants. This direction applies to both the appellants and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

2. These are appeals by the Secretary of State against a determination of the First-tier Tribunal (Judge Archer) which allowed each of the claimants' appeals against decisions taken on 15 August 2013 refusing to grant each appellant leave to remain and to make directions for their removal to the Philippines under s.47 of the Immigration, Asylum and Nationality Act 2006.

3. For convenience, I will however refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The first appellant is a citizen of the Philippines who was born on 11 July 1979. The second appellant is her son and also a citizen of the Philippines who was born on 2 September 1997.

5. The first appellant entered the United Kingdom on 31 January 2009 as a student with leave valid until 20 October 2010. Subsequently, the first appellant's leave was extended as a Tier 4 (General) Migrant until 17 August 2012.

6. The second appellant entered the United Kingdom on 5 September 2011 as the dependant of his mother (the first appellant) who was at that time a Tier 4 (General) Migrant. He was granted leave in line with that of his mother until 17 August 2012.

7. On 14 August 2012, the appellants applied for leave to remain on the basis of private life which they had formed in the UK, including the first appellant's study and work as a part-time Health Care Assistant since 2009 at Four Seasons Healthcare, Gotton Manor. In addition, reliance was placed upon the fact that the second appellant would be starting to study for his GCSEs from September 2012. Reliance was placed upon Art 8 of the ECHR. On 15 August 2013, the Secretary of State refused each of the appellants' applications for further leave under para 276ADE and Appendix FM of the Immigration Rules (HC 395 as amended).

The First-tier Tribunal Decision

8. The appellants appealed to the First-tier Tribunal. The appeal was heard by Judge Archer on 21 November 2013.

9. Subsequent to the appellants' applications for leave, the appellants' circumstances (in particular those of the first appellant) had changed. In June 2013, the first appellant had begun a relationship with a British citizen, "NI" (the "sponsor"). Both appellants had moved in with the sponsor in August 2013 and, at the date of the hearing, the first appellant was eleven weeks pregnant.

10. Additionally, the second appellant had almost completed four of the six terms of his GCSE courses.

11. The judge was clearly impressed with the evidence of both the first appellant and sponsor. He made a number of positive findings concerning the genuineness of their relationship and that it was not in the second appellant's best interests to return to the Philippines before he completed his GCSE examinations in the summer of 2014. The judge made the following findings at paras 18-20 of his determination as follows:

> "18. The first appellant and the sponsor were credible witnesses. They are both employed and have opened a joint bank account. The first entered the UK on 31 January 2009 and was granted further leave to remain until 17 August 2012. She has completed NVQ level 4 in health and social care. She works at Four Seasons Healthcare as a care assistant. She began a relationship with the sponsor in June 2013 and is now 11 weeks pregnant. Both appellants moved in with the sponsor in August 2013. I have carefully considered the written and oral evidence from the appellant and the sponsor. I find that the relationship is genuine and that both parties planned to have a baby. The sponsor has three sons from his marriage and stated in oral evidence that he wants to have a daughter. He clearly adores the first appellant and wants both appellants to remain in the UK.
>
> 19. The first appellant is not in a position to marry the sponsor because she is not yet divorced from her husband in the Philippines. She stated in oral evidence that she believes that the divorce will come through in December 2013. The sponsor has three young boys from his first marriage but the mother has full custody. He started the relationship with the first appellant seven months after he separated from his wife (around November 2012). His divorce is 'going through' but is unlikely to be imminent. I accept Mr Jeshani's submission that it is highly unlikely that the appellants will make a successful fresh application to return to the UK before the baby is born, if they leave now.
>
> 20. The second appellant entered the UK on 5 September 2011. I also accept that the next seven months are crucial for the second appellant because he will sit his GCSE exams in the summer of 2014. It is clearly not in his best interests to return to the Philippines before then. He attends Bishops' Fox School in Taunton and is doing well at his studies. He has ambitions to become a surgeon. The first appellant and the sponsor have now provided him with a stable home environment and he is determined to do well. I find that return to the Philippines at this stage will severely damage his educational prospects."

12. At para 21, Judge Archer noted that the appellants' claim to remain in the UK had changed "dramatically" since the applications were made in August 2013. He said:

> "The second appellant has completed another four terms of his GCSE courses. However, the pregnancy is at a relatively early stage. The unborn child will have a right to UK citizenship but will not be born until around May 2014. I find that the respondent's decision does not take any of these relevant factors into account. No one appears to have considered EX.1.(b) i.e. whether there are insurmountable obstacles to family life with the sponsor continuing outside the UK. I therefore find, taking all of these matters into account, that the decision is not in accordance with the law and that the appellants are still awaiting a lawful decision. The respondent may wish to consider granting a short period of discretionary leave to cover the pregnancy of the first appellant, progress towards the divorces and the exams of the second appellant. A further, fully informed, application for further leave to remain could be made by both appellants within the period of further leave."

13. As can be seen, the Judge allowed the appeal on the basis that the Secretary of State's decisions were not in accordance with the law.

14. At para 26 he stated that:

> "I allow the appeals under the Immigration Rules to the extent set out above."

15. At paras 23-25, Judge Archer went on to consider Art 8, as he put it, "outside the Rules". Having set out the five-stage approach in Razgar [2004] UKHL 27, at paras 24-25 he said this:

> "24. I find that there is evidence of development of private life in the UK; based upon my findings of fact above. The appellants' protected rights under Article 8 are engaged. The interference is in accordance with the law because the appellants are not currently asserting that they have a route to remain under the Rules (that may change when the unborn baby is born). The interference has legitimate aims because the maintenance of an effective system of immigration control is a legitimate aim. The issue is whether the interference is proportionate.
>
> 25. I find that removal of the appellants is currently not proportionate to the legitimate objective that is sought to be achieved; for all of the reasons set out above and those set out in paragraphs 34 and 39 of Mr Jeshani's skeleton argument. Again, the respondent may wish to consider granting a short period of discretionary leave to remain."

16. At para 27 the Judge allowed the appeals under Art 8 of the ECHR.

17. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the judge had been wrong to allow the appeal as being not in accordance with the law as s.EX.1 of Appendix FM was not a "stand-alone provision" and the relationship between the first appellant and sponsor did not fall within Appendix FM. Further, the Secretary of State argued, in essence, that the judge had failed to give proper weight to the fact that the appellants could not meet the requirements of the Immigration Rules and that their circumstances were not "exceptional" so as to result in an unjustifiably harsh outcome to warrant allowing the appeal outside the Immigration Rules.

The Appeal to the Upper Tribunal

18. On 9 January 2014, the First-tier Tribunal (Judge Keane) granted the Secretary of State permission to appeal to the Upper Tribunal. Thus, the appeals came before me.

19. The Secretary of State was represented by Mr Richards and the appellants by Mr Jeshani.

20. First, Mr Richards submitted that the judge was wrong to allow the appeal to the limited extent that he did under the Immigration Rules as Section EX.1 of Appendix FM was not a stand-alone requirement. The appellants simply could not meet the requirements of the Rules since the first appellant's relationship with the sponsor was not a relationship akin to marriage that had existed for at least two years at the date of application (see paras R-LTRP 1.1 and Gen 1.2(iv) of Appendix FM) and it

was, therefore, irrelevant that the Secretary of State had not considered under EX.1 whether there were "insurmountable obstacles" to the first appellant continuing her family life with her partner in the Philippines.

21. Secondly, Mr Richards submitted that in accordance with the grounds, the judge had failed to identify what were the exceptional circumstances that justified allowing the appellants' appeals outside the Immigration Rules.

22. Mr Jeshani sought to defend the judge's determination and his reasoning in paras 24 and 25 that it was not proportionate to remove the appellants.

Error of Law

23. At the conclusion of those submissions, I informed the representatives that the judge's decision to allow the appeals under Art 8 could not stand. My reasons are as follows.

24. First, Mr Jeshani accepted that the judge had erred in law in para 21 in allowing the appeal on the limited basis that the decisions were not in accordance with the law. That is entirely correct. Section EX.1 is not a 'stand-alone' provision: the appellant must also meet the requirements of R-LTRP 1.1, including that the sponsor qualifies as her 'partner' under Gen 1.2(iv) (see, Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC)). Since their relationship had not lasted for at least 2 years at the date of application, the appellant could not succeed under the 'partner' provisions in R-LTRP.

25. Therefore, to that extent the Secretary of State succeeds in these appeals. The Secretary of State's decisions were in accordance with the law and the Immigration Rules.

26. Secondly, the judge failed properly to direct himself in relation to the effect of the appellants being unable to satisfy the requirements of the Immigration Rules. It was accepted in these appeals that the appellants could not do so on the basis either of Appendix FM because the first appellant's relationship with the sponsor (though genuine) was not of a sufficient duration. The case law is clear that the fact that an appellant cannot meet the requirements of the new Art 8 Rules is an important and significant factor to be taken into account, and to be given proper weight to, in assessing the public interest when carrying out the proportionality exercise under Art 8 (see, for example, MF (Nigeria) v SSHD [2013] EWCA Civ 1192; R (Nagre) v SSHD [2013] EWHC 720 (Admin) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)). Although in para 24 Judge Archer refers to the fact that the appellant cannot currently succeed under the Immigration Rules, in assessing proportionality in para 25 he fails to give any explicit weight to the fact that the appellants cannot meet the requirements of the Rules.

27. thirdly, the case law also makes clear that it will only be in "exceptional" or "compelling" circumstances that, where an appellant cannot meet the requirements of the new Art 8 Rules, that a grant of leave under Art 8 outside the Rules would be

justified (see MF (Nigeria), Nagre and Gulshan). Only if the individual's removal would have unjustifiably harsh consequences (see Gulshan) will an individual's removal breach Art 8. Indeed, unless it is arguable that an individual's circumstances are non-standard and will result in such consequences, it is not necessary for a judge to consider an individual's claim under Art 8 outside the Rules (see Gulshan).

28. Judge Archer did not come to his decision under Art 8 outside the Rules applying the approach I have set out. Further, it is not clear upon precisely what basis he allowed the appellants' appeals under Art 8. His reasoning is brief and does not convey to the reader the underlying basis for his conclusion. He refers to (and adopts) paras 34 and 39 of Mr Jeshani's skeleton argument. Those paragraphs, in particular para 34, seek to argue that it would be disproportionate to remove the appellants to the Philippines and, in particular, in order that the first appellant should seek entry clearance. That does not seem to be, however, the basis upon which Judge Archer allowed the appellants' appeals under Art 8. In the final sentence of para 25 he commented that: "the respondent may wish to consider granting a short period of discretionary leave to remain." That would appear to be a reference back to what he had said in para 21 of his determination that the respondent might wish to grant a short period of discretionary leave to cover the period of the first appellant's pregnancy and in order to allow the second appellant to complete his GCSE exams in the summer of 2014.

29. If that was the basis upon which Judge Archer allowed the appeal, it is difficult to see how he could have based that upon the submissions made at para 34 of Mr Jeshani's skeleton which were not tailored to that limited basis for allowing the appeal under Art 8.

30. For these reasons, Judge Archer failed to give sufficient and proper reasons for reaching his finding under Art 8 that the appellants' removals would be disproportionate.

Re-making the Decision

31. At the hearing, I heard submissions from Mr Jeshani on behalf of the appellants and Mr Richards on behalf of the Secretary of State on remaking the decision under Art 8 of the ECHR.

32. Mr Jeshani informed me that the due date for the birth of the first appellant's child with the sponsor, NI is 12 June 2014 and he also handed up up-to-date evidence concerning the progress of the second appellant at school. Mr Jeshani relied upon his skeleton argument and the bundle of documents before the First-tier Tribunal (resubmitted in an Upper Tribunal bundle). That bundle contained a witness statement from each of the appellants and also from NI, the sponsor.

33. The principal facts are not in dispute. They are contained in paras 18-20 of Judge Archer's determination which I set out above.

34. The first appellant has been in the UK since 31 January 2009 and undertook studies, successfully completing an NVQ level 4 in Health and Social Care in April 2012. She has not been a student since that time. She has, since May 2009, worked as a Health Care Assistant at the Four Seasons Healthcare, Gotton Manor.

35. In June 2013, she began a relationship with the sponsor, NI who is a British citizen. She and the second appellant moved in with the sponsor in August 2013. Both the first appellant and sponsor are married to other individuals. At the time that the first appellant met the sponsor, the sponsor was separated from his wife with whom he has three sons who live with their mother. The sponsor is divorcing his wife. He is the father of the first appellant's child which is due to be born in June 2014. The sponsor is employed as a Manager in a company with a monthly salary of £1,625 plus bonuses. From 1 May 2014, the sponsor's income is due to increase as a result of promotion to about £23,000 plus bonuses.

36. The first appellant had hoped to switch from her Tier 4 category into the Tier 2 category as a Senior Carer. However from April 2011 that possibility was removed due to a change in the Rules.

37. Turning to the second appellant, he came to the UK in September 2011 and has been studying at school, beginning his GCSE courses in September 2012. He is due to complete the two years of those courses and take the final examinations shortly in the summer of this year. There is supporting documentation concerning his progress and wellbeing from the school at pages 63-83 of the bundle.

38. Judge Archer found (at para 20 of his determination set out above) that it was not in the second appellant's best interests to return to the Philippines before completing his examinations. He found that for him to return at this stage would "severely damage his educational prospects". Mr Richards accepted those findings stood.

39. I approach this appeal on the basis that neither appellant can satisfy the requirements of the Immigration Rules. The contrary was not suggested by Mr Jeshani. That is a factor which must, therefore, weigh heavily in any Art 8 assessment.

40. I remind myself of the five-stage test in Razgar at [17].

41. I am satisfied that the appellants have established that Art 8.1 is engaged. Judge Archer accepted, and it was not disputed before me by Mr Richards, that the first appellant's relationship with the sponsor was a genuine one. I am satisfied that they live together with the second appellant as a family unit. Both the witness statement of the sponsor and second appellant demonstrate that the relationship between the sponsor and second appellant is one of a de facto stepfather and I am satisfied that family life exists between them. Of course, family life exists between the appellants.

42. Further, I am satisfied that both the first and second appellants have established private life in the UK. The first appellant has a job and the second appellant is a student at school. Both of those circumstances reflect, in my judgment, a continuing private life in the UK.

43. I am satisfied that if the appellants are removed to the Philippines (apart from the family life between the appellants), there will be an interference with their private and family life such as to engage Art 8 of the ECHR.

44. Secondly, there is no doubt that the respondent's decisions were in accordance with the law, namely the Immigration Rules.

45. Thirdly, the decisions further the legitimate aims set out in Art 8.2 of furthering the economic well-being of the country or for the prevention of disorder or crime.

46. Fourthly, the crucial issue is one of proportionality. That entails a balancing exercise weighing the public interest against the particular circumstances of the individuals and the effect upon their private and family life if removed (see Razgar *per* Lord Bingham at [20]). It is in this context that the issue of whether there are "exceptional" or "compelling" circumstances such as to give rise to unjustifiably harsh consequences is engaged in order that proper weight is given to the public interest reflected in the fact that the appellants cannot meet the requirements of the Immigration Rules (Gulshan and case cited therein).

47. Mr Jeshani submitted that there were "exceptional" circumstances. He relied upon the fact that the sponsor had three sons in the UK, aged 12, 8 and 4 respectively, who live with their mother and if the sponsor were required to live in the Philippines there would be an interference with the family life with his children. As regards finances, Mr Jeshani submitted that the sponsor earned around £20,000 which, although less than required by the Rules for a couple with a child, namely £22,400, was above the figure suggested by Blake J in R (MM) v SSHD [2013] EWHC 1900 (Admin). He submitted that the sponsor was a British citizen who had lived all his life in the UK. It would not be reasonable to expect him to leave the UK and give up his relationship with his own children whom he sees once a week. Mr Jeshani submitted that there was no point in requiring the first appellant to return to the Philippines in order to make an entry clearance application and he relied upon Chikwamba [2008] UKHL 40. He reminded me that the first appellant and sponsor would shortly have a British citizen child.

48. As regards the first appellant's private life, he relied upon her work as a Care Assistant and that the Rules had changed to prevent her carrying on as a Tier 2 Migrant from April 2011 because she did not have a degree or an NVQ at level 6.

49. Further, he relied upon the "best interests" of the second appellant. He submitted that the second appellant was undertaking his GCSE studies and was taking the examinations in May and June of this year. He referred me to the documents showing that the second appellant was making progress. He accepted that the best interests of the second appellant were to be with the first appellant but it was not reasonable to expect him to return at this moment in the middle of his GCSEs.

50. Mr Jeshani also relied upon the fact that the appellant is pregnant and will shortly give birth. It was not, he submitted, proportionate to remove her at this point.

51. Mr Jeshani invited me to allow the appeal under Art 8.

52. Mr Richards submitted that the appellants did not qualify under the Rules and their circumstances were not exceptional to justify the grant of leave outside the Rules. He submitted that the first appellant's pregnancy was something which she and the sponsor had brought upon themselves. He submitted that she had no expectation of remaining now that her studies had concluded. He submitted that it was reasonable to expect her to return to her home country and apply for entry clearance under the Immigration Rules in the same way as everyone else.

53. I accept that the appellants cannot meet the requirements of the Immigration Rules. They can do so neither on the basis of their family life under Appendix FM or on the basis of their private life under para 276ADE. In assessing proportionality, that fact weighs heavily as representing the public interest. It will only be in exceptional circumstances or where there are compelling circumstances which result in unjustifiably harsh consequences that that public interest will be outweighed by the impact upon the appellants or others.

54. Where a couple have formed a genuine relationship and the resulting family life has been developed when one of the couple's immigration status is "precarious", both the domestic and Strasbourg case law recognise that usually the individual's removal will be proportionate and the couple will have no right to maintain their family life in the country of their choosing (see Nagre at [38]-[42], citing the relevant Strasbourg case law).

55. If it were not for two particular features of these appeals, I would be in no doubt that it was proportionate (not being exceptional) that the appellants should return to the Philippines and, at the very least, the first appellant seek entry clearance in order to return as the partner of the sponsor. It would not be unduly harsh, in my judgment, for the first appellant to be separated from the sponsor for a period of time in order to seek entry clearance or, in the alternative, for him to accompany her to the Philippines in order to do so, despite the impact that would, in the short-term, have on his contact with his own three sons and their 'best interests' on which I was not addressed and no evidence was presented. Whether or not she would be successful is not a relevant consideration (see SB (Bangladesh) v SSHD [2007] EWCA Civ 28).

56. Indeed, despite the impact upon the sponsor's three sons, given that the appellants cannot meet the requirements of the Immigration Rules I see nothing exceptional or compelling or giving rise to unjustifiably harsh consequences which would require that the first appellant be permitted to carry on her family life in the UK. Bearing in mind that "insurmountable obstacles" refers not to impossible obstacles but requires consideration of the practical implications (see Gulshan), I would be satisfied that the sponsor could reasonably be expected to relocate to the Philippines and live with the first appellant there. I reach that conclusion bearing in mind that this would inevitably restrict the contact between the sponsor and his children.

57. That assessment is, however, on the facts of these appeals hypothetical. That is because there are two particular features which lead me to conclude that removal would be disproportionate. They are: (1) the first appellant is pregnant and her child is due in June 2014; (2) the second appellant is completing the second year of his GCSE studies with his exams due this summer.

58. I doubt whether it is possible to remove the first appellant given the stage of her pregnancy but, in any event, it would be wholly unreasonable to do so at this stage of the pregnancy and indeed thereafter for a period following the birth of the child.

59. Further, in assessing proportionality, the best interests of the second appellant are a primary consideration (see ZH (Tanzania) v SSHD [2012] UKSC 4). I agree with Judge Archer that the best interests of the second appellant are, in principle, to live with his mother wherever she resides. However, that is subject to this: it would not be in the second appellant's best interests to disrupt his education whilst he is completing his GCSE courses and taking the examinations this summer. As Judge Archer found, returning him to the Philippines "at this stage will severely damage his educational prospects" (see para 20 of the determination). I fully agree with that conclusion. It may well be that the fact that he is embedded in school in the UK also means that his "best interests" would not be served by preventing him carrying on to take his A level exams. I am not able to say whether that is the case on the evidence before me and I heard no submissions from Mr Jeshani on that issue. Given the conclusion that I reach, that can be a matter which can be explored further at a subsequent time.

60. Having regard to these two factors, I am satisfied that despite the fact that the appellants cannot meet the requirements of the Immigration Rules, their circumstances fall within the category of "exceptional" or "compelling" circumstances such that their removal at this point from the UK would produce unjustifiably harsh consequences and so their removal would be disproportionate.

61. My conclusion is based upon the present circumstances of both appellants. It is not based upon any long-term projection of their circumstances and whether, when the features I have identified above cease, it would be disproportionate to remove them. It simply is disproportionate at this point in time. On the circumstances as they appertain now, the removal of the appellants would breach Art 8 of the ECHR and on that basis I allow both appeals.

62. It would, in my judgment, be appropriate for the Secretary of State to grant a period of leave (perhaps of six months) in order to reflect the continuation of the compelling circumstances which prevent the appellants' removal. Thereafter, it will be a matter for the Secretary of State, perhaps in response to any further applications made by the appellants based upon their circumstances at that time including the birth of the child due in June 2014, to decide whether any further period of leave would be appropriate.

Decision

63. The decision of the First-tier Tribunal to allow the appellants' appeals on the basis that the Secretary of State's decision was not in accordance with the law and under Art 8 of the ECHR involved the making of an error of law. I set those decisions aside.

64. I re-make the decisions as follows:

    (a) the decisions were in accordance with the law and Immigration Rules;

    (b) the decisions breached Art 8 of the ECHR and on that basis the appeals are allowed.

    (c) I direct that a short period of leave (six months) be granted to the appellants to reflect my decision.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

Like Judge Archer, I have allowed the appeals on the basis of the totality of the evidence presented at the hearing and consequently I do not consider it appropriate to make a fee award.

Signed

A Grubb
Judge of the Upper Tribunal