Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09935/2013

THE IMMIGRATION ACTS

Heard at: Columbus House, Newport **Decision promulgated**
On: 20 April 2015 **On 7 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

KEN KAH LOW
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr G Hodgetts, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Buckwell in which he dismissed the appeal of the Appellant, a citizen of Malaysia, against the Secretary of State's decision to refuse leave to remain.

2. The application under appeal was made on 15 October 2013 and was refused on 30 October 2013 on asylum grounds by reference to paragraph 336 of the Immigration Rules (HC395)

and removal directions were given. The Appellant exercised her right of appeal to the First-tier Tribunal. The appeal came before Judge Brennells on 31 March 2014 and was dismissed. The Appellant's application for permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Grubb on 6 June 2014. At a hearing before the Upper Tribunal on 29 October 2014 Mr Justice Davis and Upper Tribunal Judge Eshun upheld the decision to dismiss the appeal on asylum grounds but found that the First-tier Tribunal erred in law in its application of paragraph EX.1 of Appendix FM of the Immigration Rules and set aside the decision in this respect to be reheard by the First-tier Tribunal. This is the appeal which came before Judge Buckwell on 4 December 2014 and was dismissed on human rights grounds and by virtue of the Immigration Rules. The Appellant applied for permission to appeal to the Upper Tribunal. The application was granted by Designated First-tier Tribunal Judge French on 27 January 2015 in the following terms

> The grounds are lengthy and detailed. It is first said that the judge misdirected himself in treating the appeal as based only on Article 8 ECHR grounds when the terms of remittal made it clear that the issue was whether the appellant succeeded under Appendix FM EX1. It is also said (ground 5) that the judge did not address the issue raised in the decision on remittal as to where the burden of proof lay in considering the existence of 'insurmountable obstacles' to the appellant continuing her family life with her partner in Malaysia. Both points have arguable substance.
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> It is argued that the judge when considering Article 8 failed to apply the 'Two stage approach' of first considering the rules, which would have led him first to EX.1. This may be an ancillary point entwined with the other issues but it is arguable in the circumstances.
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> It is further contended that to the extent that the judge did consider EX.1, he failed to take account or give weight to relevant factors including the inability of the partner to meet the requirements for permanent settlement and he erred by giving weight to the appellant's unlawful presence in the UK and finding that it would be reasonable to expect the couple to behave in their personal lives in such a way that they would not come to the attention of the authorities. The latter point is also taken up at ground 4, which is a criticism of the proportionality assessment under Article 8. These grounds also are arguable.

3. At the hearing before me Mr Hodgetts appeared on behalf of the Appellant and Mr Richards represented the Respondent. Mr Richards revealed that in a Rule 24 response dated 12 February 2015, which had not come to the attention of either the Appellant's representative or the Tribunal, the Respondent had conceded that the decision of the First-tier Tribunal contained an error of law.

Background

4. The history of this appeal is detailed above. The facts, not challenged, are that the Appellant came to the United Kingdom as a visitor on 21 October 2008 and when her leave to remain expired in April 2009 she stayed in the United Kingdom without leave and did not come to attention until her detention on 10 October 2013. Having been detained the Appellant claimed asylum. The basis of the Appellant's claim for asylum was her homosexuality and the Appellant also claimed that her removal would be in breach of the Immigration Rules and her protected right to a family and private life under Article 8 ECHR.

5. The basis of the Appellant's claim to a protected family and private life is her relationship with her partner. In 2009 the Appellant met a British citizen, Sarah Morgan. They commenced a relationship in 2011 and began living together. This relationship is continuing. The Appellant's asylum claim having been dismissed it is this relationship that remains the only basis of her claim to remain in the United Kingdom. The Respondent accepts that this is subsisting relationship that has endured for more than five years.

Submissions

6. For the Appellant Mr Hodgetts referred to the written submissions prepared for the hearing before the First-tier tribunal in December 2014. He also referred to the Angloinfo document giving details for the acquisition of permanent residency in Malaysia (a document that was before the First-tier Tribunal), the latest Home Office Guidance relating to paragraph EX.1., the Court of Appeal decision in YM (Uganda) [2014] EWCA Civ 1292, the Supreme Court decision in Quila [2011] UKSC 45 and the ECHR decision in Boultif v Switzerland [2001] ECHR 497. Mr Hodgetts submitted that the Angloinfo document demonstrates that the Appellant's partner would not qualify for admission to Malaysia to work under their points based system. She has insufficient skills or qualifications. Clearly, he said, she would not qualify for admission as a partner as homosexuality is illegal in Malaysia. There are therefore insurmountable obstacles in the way of her admission to that country. The Respondent's guidance as to the definition of 'insurmountable obstacles' shows that this means 'very significant difficulties … which could not be overcome or would entail very serious hardship for the applicant or their partner'. Assessment of these obstacles includes taking account of the ability to enter and stay in another country and cultural barriers. Boultif considers the practical possibility of living elsewhere.

7. Mr Hodgetts summarised. The Appellant's partner cannot be admitted to Malaysia as a spouse. She has no other basis for admission. Were she nevertheless to find some way to be admitted she and the Appellant would face societal discrimination and in this respect Judge Brennells had found that there had been threats from family members. There is the ongoing threat of criminalisation. In any event the Appellant's partner is British and she has never been to Malaysia.

8. For the Respondent Mr Richards said there seemed little reason to delve into the issue of burden of proof. This appeal is being dealt with on the basis that the First-tier Tribunal dealt with Article 8 when it was primarily an Immigration Rules matter. It is for the Appellant to show that she meets the requirements of the rules and that there are insurmountable obstacles to her family life with her partner continuing in Malaysia. The rules cannot be interpreted as shifting the burden of proof to the Secretary of State.

9. In respect of 'insurmountable obstacles' Mr Hodgetts has taken the Tribunal through the most relevant parts of the evidence and the authorities including the Secretary of State's guidance. Clearly it was wrong of the First-tier Tribunal Judge to expect the Appellant and her partner to disguise their sexuality or tone down their behaviour. Clearly there would be difficulties in Malaysia both in relation to meeting the requirements of the Immigration Rules for admission to that country and in facing societal attitudes to same sex relationships. The Tribunal needs to ask itself whether cumulatively the difficulties amount to insurmountable obstacles and if the answer is in the affirmative the appeal must succeed.

10. I reserved my decision.

Error of law

11. The Appellant asserts that the First-tier Tribunal Judge erred in law by approaching the appeal on the basis that it was an appeal on Article 8 ECHR grounds and that having done so he failed to apply the necessary two stage approach dealing firstly with the Immigration Rules. The Respondent concedes that the First-tier Tribunal erred in law in this respect.

12. It is a concession that is, in my judgement, properly made. In remitting the matter to the First-tier Tribunal the Upper Tribunal made it clear (paragraph 5) that that the First-tier Tribunal should first

> *"determine whether the appellant does indeed on the facts of the case satisfy Appendix FM".*

In his decision Judge Buckwell dealt with Article 8 ECHR (paragraphs 26 - 33) before adding towards the end of paragraph 33

> *"Equally in consideration of the exception EX.1 with respect to paragraph E-LTRP.2.2 of Appendix FM, I do not find that any potential inability of Ms Morgan to satisfy the Immigration Rules in Malaysia, for long term or permanent residence, can constitute insurmountable obstacles."*

There was both a failure to follow the two stage approach dealing firstly with the Immigration Rules and a failure to properly consider the application of the Immigration Rules with particular reference to EX.1 and indeed the purported consideration of EX.1 was informed by the findings already made in respect of Article 8. This is an error of law that was material to the decision to dismiss the appeal. I set the decision of the First-tier Tribunal aside.

Remaking the decision

13. In remaking the decision there is but a single matter to consider and that it whether the Appellant meets the requirements of the Immigration Rules and in particular paragraph EX.1. Paragraph EX.1 of Appendix FM states the following

> "This paragraph applies if … the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK"

14. The facts are not in dispute. The Appellant and Ms Morgan, who is a British Citizen, are in a continuing same sex relationship that has subsisted for more than 5 years. The Appellant is in the United Kingdom in breach of the immigration laws and therefore can only meet the requirements of the Immigration Rules, by virtue of paragraph EX.1 of Appendix FM, if there are insurmountable obstacles to family life with her partner continuing outside the UK.

15. The evidence put forward on behalf of the Appellant was not challenged by the Respondent before me. Firstly homosexuality is illegal in Malaysia. This not only precludes any admission to Malaysia on the basis of a same sex relationship but also means that if admission was gained by other means the continuation of the relationship in an open fashion would result in societal discrimination and potentially in prosecution. Secondly Ms Morgan is a person of little net financial worth and with no

qualifications whose employment experience consists of working in a fast food takeaway. As such there is no basis upon which she would meet the requirements for admission to Malaysia other than as a short term tourist.

16. The decisions made by both First-tier Tribunal Judge Brennells and First-tier Tribunal Judge Buckwell accepted that the Appellant and Ms Morgan were in a genuine and subsisting same sex relationship. Whereas both considered the issue of whether there were insurmountable obstacles to family life with her partner continuing outside the United Kingdom neither did so by reference to the Immigration rules or the guidance given in this respect by caselaw. Judge Brennells held adversely against the Appellant her partner's unwillingness to relocate to Malaysia whilst Judge Buckwell took adverse inference from the Appellant's immigration history and suggested that she and Ms Morgan could behave in their personal lives in such a way that they would not come to the attention of the authorities. Both of these approaches were wrong.

17. The various authorities quoted by Mr Hodgetts including Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC), MF (Nigeria) [2013] EWCA Civ 1192, Izuazu (Article 8 – new rules) [2013] UKUT 00045 and YM (Uganda) [2014] EWCA Civ 1292 all make it clear that the term 'insurmountable obstacles' does not mean obstacles that are literally impossible to surmount rather that the Tribunal is required to address the practical possibilities of relocation against the difficulties that are likely to be encountered. The Respondent's guidance IDI: Family Members Under the Immigration Rules follows the same approach

> "When assessing an application under paragraph EX.1.(b). in determining whether there are "insurmountable obstacles", the decision-maker should consider the seriousness of the difficulties which the applicant and their partner would face in continuing their family life outside the UK, and whether they entail something that could not (or could not be expected to) be overcome, even with a degree of hardship for one or more of the individuals concerned".

18. In these respects the Appellant submitted evidence to the First-tier Tribunal that was not challenged before me. Firstly an expert's report from Professor Harding showing that same sex relationships were not only unlawful in Malaysia and not a basis upon which entry clearance could be granted but also that persons in such relationships would be likely to suffer substantial societal discrimination. Secondly the same report shows that foreigners could not obtain permanent residence in Malaysia without a work permit. Thirdly the Angloinfo document detailing the requirements for permanent residence in Malaysia along with the point system calculator helpfully completed by Mr Hodgetts that demonstrated that Ms Morgan would not qualify for permanent residence.

19. Having considered Mr Hodgetts submissions and the written evidence I am satisfied that the Appellant has satisfied the burden of proof, and in this respect the burden falls upon her, of showing that the difficulties that she and Ms Morgan would face in continuing their family life in Malaysia are real and substantial and amount to insurmountable obstacles within the terms of paragraph EX.1 of Appendix FM. Indeed it is very clear from the evidence presented that these difficulties render the admission of Ms Morgan to Malaysia based upon the family life that she shares with the Appellant impossible and her admission in any other capacity in order to continue her family life so unlikely as to be to all practical purposes impossible. The difficulties are ones that cannot be overcome even with a reasonable degree of hardship but ones that upon the evidence and for all practical purposes cannot be overcome at all.

20. For all of these reasons it is my judgment that the Appellant meets the requirements of the Immigration Rules and her appeal is therefore allowed.

Summary

21. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision and remake it by allowing the Appellant's appeal by virtue of the Immigration Rules.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal