**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/14267/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 22 March 2019** | **On 02 April 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PEART**

**Between**

**MISS LADDAWAN TOONGKABUREE**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Reza, Solicitor
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Thailand. She was born on 5 April 1970. The appellant appealed against the respondent's refusal to grant her application for leave to remain in the UK dated 19 June 2018. In a decision promulgated on 3 October 2018, Judge Kaler (the judge) dismissed the appeal under the Rules and Article 8, finding the respondent's decision was proportionate.

2. The grounds claim that the judge erred by failing to properly assess the appellant's case in light of the evidence at the hearing.

3. The judge referred to paragraph 276ADE of the Rules and said that the criteria (1)(i)-(v) were not met. The judge then tried to assess whether (vi) applied although she did not refer to it and then attempted to link it to EX1 of the Rules. The grounds claim that the appellant did not rely upon paragraph 276ADE. Her case was based on Appendix FM and also in particular, paragraph EX1 of Appendix FM. In her assessment, the judge did not make reference to paragraph EX1.

4. The grounds claim that the judge's assessment at [23] of her decision was flawed. The judge said she had no information about the appellant's English language skills. The grounds claim that just because the appellant chose to give evidence through the assistance of an interpreter did not "*… … automatically give rise to the inference that her language skills are so poor as to engage s.117B(2)*". The judge failed to take into consideration that in the appellant's bundle her degree certificate from Thailand and a letter from UK NARIC were included. The NARIC letter confirmed that the appellant's degree was equivalent to a British degree therefore implying that she satisfied the English language requirements.

5. At [22] the grounds claim the judge accepted the appellant and her partner had established a family life but that the judge erred in her consideration of insurmountable obstacles in family life continuing outside the UK. The grounds claim "*… … it can never be reasonable to expect a British citizen to leave the UK*" and "*… … the judge failed to give due weight to the fact that the couple have been together for eight years.*" The grounds claim the length of relationship should have been considered as a weighty factor as compared to a relationship still in its primary stage. Further, it was unreasonable to expect the appellant's sponsor to sell his house, leave his career and go to Thailand.

6. The grounds claim the judge's consideration of the appellant's case outside the Rules was flawed. The judge should have only considered the issue of insurmountable obstacles or "hardship" as one of the factors and not the determinative factor.

7. As regards [29] the grounds claim the judge's decision was flawed because the appellant only recently became an overstayer. She came as a student and then switched to the family member of an EEA national. She made her current application within fourteen days of being appeal rights exhausted. The appellant entered a relationship with her partner in 2010 at a time when she had a visa. S.117B(4) refers only to establishing a private life or a relationship when the person was in the United Kingdom unlawfully. The appellant established her family life when she had leave so the judge should have given it more weight.

8. The appellant did not depend on public funds. She had established her own successful business.

9. Leaving aside the issue of "maintenance of immigration control" none of the negative factors in s.117B applied to the appellant.

10. The judge was provided with evidence of the appellant's English language skills in terms of a degree certificate, together with confirmation from NARIC. The sponsor's

income was more than £18,600. The judge had documents relating to the sponsor's house and proof of cohabitation. It was argued that

> *"… … if the appellant had leave on the date of the hearing, she could have been successful in her leave to remain application as a spouse under Appendix FM. This evidence was not challenged. It was argued before the Tribunal that this is a case where* ***Mostafa*** ***(Article 8 in entry clearance) [2015] UKUT 00112 (IAC)*** *is applicable".*

11. Further, the appellant relied on **Hesham Ali [2016] UKSC 60**. The judge erred by failing to take the ability of the appellant to satisfy the requirements of entry clearance as a spouse into the balancing exercise.

12. Judge Baker granted permission on 5 November 2018 as follows:

> *"1. The appellant's application is for permission to appeal the decision of First-tier Tribunal Judge Kaler, who dismissed her appeal against refusal to grant indefinite leave to remain on the basis of ten years' lawful residence. The appellant who was represented had submitted further grounds of appeal, not considered in the refusal decision, on the basis of her longstanding relationship with her British partner. The respondent did not object to this also being considered on appeal at the hearing.*
>
> *2. The grounds in summary assert the relationship was incorrectly found to have been started when the appellant had no leave to remain. There is merit in that. The appellant was entitled to remain and was not in breach of immigration control, not divorced from her Italian spouse when the relationship with her British sponsor started. The judge as the grounds assert thus arguably erred in concluding the immigration status of the appellant was precarious, when the relationship with her British national partner commenced, prior to her decree absolute from her Italian spouse. The skeleton argument acknowledges that she could apply from Thailand for entry clearance, paragraph 26(j) and (k) that that should be a weighty factor in the Article 8 assessment, taking into account* ***Chikwamba*** *and* ***Mostafa****. Further, that because the appellant has never relied on public funds and had established a successful business in the UK, the only issue is maintenance of immigration control in assessing Article 8. Paragraph 10 of the grounds assert that evidence was supplied of her English language ability, of her sponsor's income of more than £18,600 per annum, of accommodation, that it was argued that had the appellant had leave she would have succeeded in a leave to remain application (as a spouse) and that the evidence lodged was not challenged. The judge did not make findings on all relevant factors, although it appears to be correct that the evidence lodged showed income, over a year, of the sponsor of over £50,000 per annum and of their accommodation, of her business and of his work in the UK. There is merit in the grounds that the assessment under Article 8 is arguably materially in error, having regard to the above".*

13. The Secretary of State responded under Rule 24. He submitted inter alia that the judge addressed herself properly to the evidence and reached adequately reasoned findings:

14. It was clear from [15] of the decision that the judge was considering EX1 of Appendix FM. The test in paragraph 276ADE(1) of the Rules was "very significant obstacles" while the test in EX1 was "insurmountable obstacles".

15. It was open to the judge on the evidence before her to accept at [23] of her decision that the appellant spoke "some English" but to have "concerns" about whether she met s117B(2).

16. As regards [22], the respondent submitted that amounted to no more than a disagreement with the judge's findings on "insurmountable obstacles" which were open to her on the evidence.

17. It was clear that the judge properly applied the five step **Razgar** test and s.117B in her consideration of the appeal under Article 8 outside the Rules. The absence of "insurmountable obstacles" was not the determinative factor.

18. As regards [29] the Supreme Court confirmed at [49] of **Agyarko** that

> "… … *an important consideration when assessing the proportionality under Article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be 'precarious'".*

19. At [25], [26] and [29] of the decision the judge applied the principles emerging from **Agyarko**. The appellant's status here has always been precarious in that the residence/leave granted to her has not been indefinite".

20. The judge did not find that the appellant was not financially independent for the purposes of s.117(3). Further, at [57] of **Rhuppiah** the Supreme Court found that where s.117B(2) and (3) were met, it was wrong to argue that there was a public interest in favour of the claim. The respondent also noted that the appellant had not challenged the judge's negative finding at [21] that the appellant had applied for an EEA permanent residence card at a time that her marriage was no longer subsisting. That negative finding strengthened the public interest side of the proportionality balancing exercise.

21. The appellant could not have met the requirements of Appendix FM on the date of the hearing because she had not made a valid application for leave to remain as a partner. See R-LTRP.1.1(b) of Appendix FM.

**Submissions on Error of Law**

22. Mr Reza relied upon the grounds. The judge erred in failing to take account of the evidence from UK NARIC which confirmed that the appellant's degree was

equivalent to a British degree and so satisfied the English language requirements. As regards insurmountable obstacles, the judge treated this as the determinative factor as opposed to only one of the factors. Since the appellant established family life with her current partner when she had leave, the judge should have given more weight to the appellant's circumstances.

23. Mr Melvin relied upon the Rule 24 response.

**Conclusion on Error of Law**

24. Issues of weight to be given to the evidence were for the judge. As regards the appellant's English language ability, Mr Reza would have me accept that because the letter from UK NARIC said the appellant's Thai degree was equivalent to a British degree, then there was an implication that she satisfied the English language requirements. The judge did not err inviting concerns regarding the level of the appellant's English. The evidence from UK NARIC was inconclusive in terms of the appellant's English language ability. There was no implication that because the appellant's Thai degree was equivalent to a British degree meant that the appellant satisfied the language requirements, particularly because the judge saw no English language certificate. The judge did not err at [26] in finding that the appellant had precarious status. See **Agyarko [2017] UKSC 11** and **Rhuppiah** at [43]. At [29] the judge found that the family life the appellant had established with her partner had been nurtured and developed at a time when both of them knew that her status was precarious. The judge was entitled to come to that conclusion bearing in mind **Agyarko**, **Rhuppiah** and **TZ and PG [2018] EWCA Civ 1109**.

25. The judge carried out an appropriate analysis under the Immigration Rules and then considered the appellant's circumstances and those of the sponsor outside the Rules in terms of Article 8. The judge carried out a comprehensive assessment at [10]-[34] of her decision. She found there were no insurmountable obstacles to the appellant and the sponsor living in Thailand and that the respondent's decision with the legitimate aim of maintaining a fair but firm system of immigration control was proportionate. They were findings that the judge was entitled to come to on the evidence before her.

**Decision**

26. The judge's decision reveals no material error of law and shall stand.

No anonymity direction is made.

Signed Date 22 March 2019

Deputy Upper Tribunal Judge Peart