Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00107/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th October 2017	**On 20th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MISS MUNKHTSETSEG SANJAA
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Record, Counsel
For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Mongolia who applied for leave to remain in the United Kingdom as the partner of Mr Andrew Harland, a British citizen. The Respondent refused the Appellant's application. The Appellant appealed to First-tier Tribunal Judge Rastogi who in a decision promulgated on 4th July 2017 dismissed her appeal.

2. It is helpful to set out some of the judge's material findings. In paragraph 3 she noted that the Appellant was unable to meet the eligibility requirements under

Appendix FM because she was here as an overstayer and as such was in breach of the immigration rules. The judge explained that if the Appellant was unable to satisfy the Rules then she had to decide if there were any circumstances which were sufficiently compelling to justify a grant of leave outside the Rules. In paragraph 13 of the decision the judge noted that she came here on 26 May 2007 on a student visa and has been here ever since. She met and formed a relationship with Mr Harland in 2009 and they have been living together since 2012. They are engaged to be married. Mr Harland is a British citizen and all his family live here.

3. In paragraphs 13 – 17 the judge set out the Appellant's case noting that in 2015 the Appellant was diagnosed with breast cancer and she had to undergo a mastectomy provided to her on the NHS. As her cancer was serious there was a high risk that it will return. The Appellant accepted that her life expectancy was reduced and claimed that her prospects of remaining free from cancer for any significant period would be significantly reduced if she returned to Mongolia. She noted that Mr Harland was a chef earning £3,500 per month and so is easily able to support the Appellant and continue to pay for the medication.

4. The judge heard submissions from both parties and set out her findings of fact and issues commencing at paragraph 20 of the decision. In paragraph 27 she said that as to the availability of medication in Mongolia Mr Harland had stated that Tamoxifen is readily available worldwide. He explained he was unable to find out about Goserelin as it is difficult to carry out this research. The judge noted (paragraph 28) that the Appellant was only required to take Goserelin for a two year period and she commenced the treatment in September 2015. As such she is due to complete the course by September 2017. The judge was satisfied on the basis of the evidence of Mr Harland that Tamoxifen was available in Mongolia. In paragraph 29 the judge noted that the Appellant's evidence revealed that they considered the main barrier to Mr Harland relocating to Mongolia to be the fact that he was unlikely to be able to work due to language barriers. He explained in his oral evidence that he had not researched what work may be available for him as he felt the language barrier would make work impossible. The judge noted that he is a chef. She had not been told anything more about his particular expertise. In the context of the catering industry where foreign travel was common place the judge noted that kitchens were commonly staffed by those from other countries often with limited language skills in the countries in which they work; as such the Appellant had failed to satisfy her that if Mr Harland relocated to Mongolia with her, he would be unable to earn a living as a chef. The fact that he cannot speak the language might make it more difficult, but certainly she did not find it to be a barrier that the Appellant and Mr Harland feared. In paragraph 30 the judge noted that the Appellant did not present any other evidence about obstacles to Mr Harland relocating to Mongolia. Obviously he was a British citizen and presumably he did not have an automatic right to reside there. She had not been presented with any evidence that he would be unable to do so.

5. The judge referred to **Agyarko v SSHD [2017] UKSC 11** and set out factors which, did not, on their own, amount to insurmountable obstacles and that included the fact of British citizenship, lifelong residence and a job in the United Kingdom, difficulties in and a reluctance to relocate.

6. In all the circumstances and on the evidence presented to her the Appellant had failed to satisfy her that there were insurmountable obstacles to her family life with Mr Harland continuing in Mongolia. Accordingly she did not find her able to meet the requirements of the Rules. The judge then referred to the **Razgar** question and to **Huang v SSHD [2007] UKHL 11**. She also referred to the commentary in the Supreme Court case of **MM (Lebanon) and Ors v SSHD [2017] UKSC 10**. The judge had no reason to doubt Mr Harland's credibility and in fact he was very candid about the availability of Tamoxifen in Mongolia. She did not find the public interest offended by the Appellant remaining here on financial grounds. In paragraph 45 the judge found that if the Appellant were to return to Mongolia to make an application for entry clearance, providing this was after September 2017 she would have available to her Tamoxifen which Mr Harland could pay for on her behalf. She reminded herself of the opinion of the Supreme Court in **Agyarko** as to the need for the Respondent's decision to result in unjustifiably harsh consequences for the Appellant or her spouse, even if they fall short of amounting to insurmountable obstacles before a decision to remove the Appellant would breach her protected rights.

7. In paragraph 49 the judge considered whether the temporary separation of the Appellant was a disproportionate breach of their rights in respect of their right to family life but did not find that to be so. In paragraph 50 the judge said that she could only attach little weight to the family life between the Appellant and Mr Harland and that she should attach significant weight to the fact that the Appellant was unable to meet the requirements of the Rules, and finally that the Appellant's relationship was formed while her stay here was unlawful.

8. She then went on to dismiss the appeal.

9. Grounds of application were lodged. It was said there were insurmountable obstacles for both the Appellant and her partner were she to be returned to Mongolia. The Appellant's partner, Mr Harland, had given evidence that he was British, could not speak the language and that if he lived in Mongolia he would not be able to work. The issue in the case was whether it was proportional for the Appellant to be separated from her partner and make an entry clearance application, the Respondent's position being that the Appellant should apply to return to the UK from Mongolia. The grounds narrate the evidence of Mr Harland. If the Appellant were to be returned to Mongolia there would be an interruption in her treatment which was currently being paid for by him. The Appellant spoke English, was supported by her partner's earnings and the NHS bill was now paid and they had a genuine relationship. Applying **Agyarko** the court was invited to find that the judge erred in failing to find an insurmountable obstacle in the case. Furthermore, it was said the judge erred in considering Article 8 and that removal was unjustifiably harsh given the couple's circumstances.

10. Permission to appeal was granted principally on the basis that judge may have been looking at the issue of insurmountable obstacles not at the date of the hearing but at a future date. The Secretary of State lodged a Rule 24 notice submitting that the judge took into account the Appellant's ties to Mongolia and the Sponsor's skills as a chef.

It was further argued that the judge made very meticulous and reasoned findings in relation to the Appellant's Article 8 rights outside the Rules and found that the interference would not be disproportionate. As such the Respondent submitted that the judge had directed herself appropriately.

11. Thus the matter came before me on the above date.

12. For the Appellant Ms Record said that if an application for entry clearance by the Appellant was refused, it might take up to two years before she could get back to the United Kingdom. She was under an ongoing review from her doctor in relation to her cancer. It was odd of the judge to conclude, as she did, that the Respondent should not take any steps to remove the Appellant from the United Kingdom until the end of September 2017, which suggested that there were insurmountable obstacles to her returning there.

13. This was an Article 8, not an Article 3 case. The decision should be set aside and remitted to the First-tier Tribunal.

14. For the Home Office Ms Ahmad submitted that the judge had fully considered all the material issues. In particular, at paragraph 28 the judge noted that the Appellant was only required to take Goserelin for a two year period and as such she was due to complete the course by September 2017. She was satisfied on the basis of the evidence presented to her that Tamoxifen was available. As such the judge had made it clear that the Appellant would continue to receive appropriate medical treatment. Furthermore, she had noted that Mr Harland had skills as a chef. While another judge might have come to a different conclusion, there was no error or material error in the judge's findings and the decision should stand.

15. I reserved my decision.

Conclusions

16. I have set out the judge's decision in some detail as she gave clear reasons why there were no insurmountable obstacles to her family life with Mr Harland continuing in Mongolia. Those reasons include the fact that she was only required to take certain medication, namely Goserelin for a two year period which would expire in September 2017, and after that the medication she required to take, namely Tamoxifen, was available – based on the evidence of Mr Harland which she accepted. None of this is disputed and the judge was not speculating into the future but looking at the position as at the date of the hearing. While Mr Harland claimed he would be unable to earn a living as a chef, the judge accepted that because he could not speak the language that would make the task of obtaining employment more difficult, but that factor did not amount to an insurmountable obstacle. The judge applied the relevant case law – it is not suggested otherwise. Accordingly, it seems to me that the judge fully assessed the Appellant's case under insurmountable obstacles and, for the reasons stated, found that the Appellant was not able to establish that there were such obstacles.

17. She considered the Article 8 case in considerable detail referring to well-known case law. She considered the financial position of Mr Harland. In particular she noted that the Appellant accepted that at the time her relationship with Mr Harland was formed she was here as an overstayer and therefore here unlawfully and precariously (paragraph 42). In paragraph 45 she said it was clear that if the Appellant were to return to Mongolia to make an application for entry clearance she would have available to her Tamoxifen which Mr Harland could pay for on her behalf and which he could afford as he would still be working here. She had no evidential basis for finding that, were this to happen, the Appellant would nevertheless become unwell and she would then be deprived of Mr Harland's support through a very difficult time for her. Importantly she noted that the Appellant has extensive family ties in Mongolia and it was open to Mr Harland to visit.

18. She considered whether there were unjustifiably harsh consequences for the Appellant or her spouse, even if they fell short of amounting to insurmountable obstacles before a decision to remove the Appellant would breach her protected rights, which is the approach set out in **Agyarko**.

19. For reasons stated she did not find the consequences amounted to being unjustifiably harsh consequences for either the Appellant or Mr Harland. Her conclusion that the Appellant could apply for entry clearance is entirely rational and even if it is possible that there might be a delay of some kind that would be entering the realms of speculation.

20. It seems to me that the Appellant's case has been fully considered by the judge who did make very careful findings on all the material issues and it cannot be said that any of these findings are wrong or materially wrong in any way. It is true that another judge might have viewed the matter slightly differently (perhaps on whether there were insurmountable obstacles), but that is not remotely the same as saying there is any error or material error by the judge in this case. The arguments put forward on the Appellant's behalf are very much based on the proposition that on the agreed facts the judge could have allowed the appeal but while this is one of those cases where that may be so that does not establish an error in law by the judge.

21. I have therefore decided that because the reasons given by the judge are coherent, clear and open to her, that there is no error or material error in law. It follows that the judge's decision must stand.

Notice of Decision

22. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

23. I do not set aside the decision.

24. No anonymity order is made.

Signed *JG Macdonald* Date 19th October 2017

Deputy Upper Tribunal Judge J G Macdonald

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed *JG Macdonald* Date 19th October 2017

Deputy Upper Tribunal Judge J G Macdonald