Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14214/2019 (V)**

THE IMMIGRATION ACTS

Heard by Skype for business	**Decision & Reasons Promulgated**
On the 26 March 2021	**On 15 April 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

JOCELYN OBANDO BEGINIO
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K. Mc Carthy, Counsel instructed on behalf of the appellant.
For the Respondent: Ms R. Pettersen, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. This is the appeal of Ms Jocelyn Obando Beginio, who had made a human right claim on 13 December 2018 which was refused by the respondent in a decision taken on the 5 August 2019.

2. The appellant appealed that decision, and it came before the FtT (Judge Rothwell) on 23 January 2020. The judge heard evidence from the appellant, another family member, and also from Dr Patel,

consultant psychiatrist who had provided a report dated 6 August 2018.

3. Judge Rothwell dismissed her appeal against the respondent's decision to refuse her human rights claim in a decision promulgated on the 4 February 2020.

4. Permission to appeal was issued and on 13 May 2020 permission was granted by FtTJ Robertson.

5. On the 4 November 2020, the Upper Tribunal heard the parties' submissions and in a decision promulgated on 9 December 2020, the Upper Tribunal set out its reasons for reaching the decision that the decision of the FtTJ involved the making of an error of law and that the decision should be set aside.

6. This decision should be read on conjunction with the earlier decision made by the Upper Tribunal.

7. As to the remaking of the appeal, the Upper Tribunal considered that it was not a decision that could be remade without the necessity of further evidence. The appellant had provided a further witness statement and an updated report from Dr Patel. The evidence had significantly changed in the intervening period and thus it required further oral evidence and factual findings being made on that evidence.

8. Both advocates agreed that there would need to be a rehearing in the light of the new events and on the basis that the decision is to be remade on the basis of the evidence at the date of the hearing.

9. It has now been listed before the Upper Tribunal to re-make the decision.

10. The FtTJ did not make an anonymity direction and no submissions were made by Counsel on behalf of the appellant as to why one was necessary before the Upper Tribunal.

Background:

11. The background is set out in the decision of the FtTJ and the evidence in the bundle. The appellant is a citizen of the Philippines. She claims to have entered the United Kingdom on 9 February 2002. In a letter sent by her solicitors dated 3 December 2018, she could not remember on what basis she entered the United Kingdom or on what Visa.

12. She made an application for leave to remain on 24 July 2014 on the basis that she had the role of a career of her aunt, Ms V, which was refused on 21 October 2014 without a right of appeal. In or about May 2015, it is said that the appellant stopped caring for her aunt as a result of problems that she had with her.

13. The appellant began caring for aunt J in or about October 2017 and has been acting as a carer since that date.

14. On 13 December 2018 she made the current application for leave to remain that was refused in a decision letter of the 5 August 2019.

15. The application was made on the basis of her being a carer for a family relative who I will refer to as “aunt J”, who suffers from dementia, diabetes, arthritis, increased cognitive decline and self-neglect, hypertension, and other connected illnesses. There is a carer who attends her four days a week for a period of only 30 minutes. The appellant provides all the personal and daily care for aunt J. Her evidence was that she left the house daily to do the shopping and is out from 11 AM until about 12:30 PM. She cares for aunt J with daily assistance from her aunt E who comes every afternoon whilst the appellant goes to work from 2.00pm-2.30pm- 4.00pm – 4:30 PM.

16. The basis of her case was that aunt J could not properly be cared for at home if the appellant were not there to undertake her care and that she could not be cared for in a care home because of the cultural issues.

17. In her application she also raised the issue of her own parents who live in the Philippines who are also unwell as they have suffered from strokes and cannot work. The appellant has been providing financial support to her parents as well as working as a cleaner.

The decision letter:

18. The respondent refused that application in a decision of the 5 August 2019. Her application was considered under “private life”. It was not accepted that she could meet the requirements of paragraph 276ADE, either on the basis of her length of residence since 2002 or whether there were very significant obstacles to her integration. It was considered that in her application she had said she spoke the language that was widely spoken in the Philippines and that this would help her to adapt to life there, both socially and culturally. She had parents and siblings remaining there also and there was no evidence that her family would not be able to assist her or accommodate on return. Additionally, she resided in the Philippines up to the age of 33, which included her childhood, formative years, and a significant portion of her adult life. It is therefore considered that she would have retained knowledge of the life, language and culture and thus would not face significant obstacles to reintegrating into life into the Philippines once more.

19. Under the heading “exceptional circumstances” it was considered whether refusing her application would breach article 8 because it would result in unjustifiably harsh consequences for the appellant or another family member.

20. The respondent considered her claim that if she were not in the UK to look after her family relative then her health would deteriorate badly as she required 24/7 support. The decision letter noted that the appellant stated she used to care for another auntie until May 2015 as she was facing problems. Her aunt was aggressive and abusive, and she did not feel safe in the house and thus she stopped caring for her other aunt. It is now stated she cared for aunt J.

21. The respondent considered that there would be sufficient and appropriate alternative care available for aunt J in the United Kingdom.

22. Consideration was given to a GP's letter dated 18 April 2018 in which it was stated that the relationship built up with her niece provided psychological and social support. "This in itself is helping to keep her functionally stable. The lack of the support could lead to a more rapid decline in her condition."

23. The respondent took into account the appellant's claim that carers came in on certain days to see her aunt and that she had asked these carers for a full-time help on multiple occasions, but they have told that it is not possible. The GP makes reference to social workers being involved. The respondent considered that the local authority and social services would be under a duty to provide suitable care for people with whom they have community care functions for and it was noted that aunt J was already receiving care and assistance from social services and was under the care of the memory clinic it was considered that the appellant was not required to remain in the UK to arrange alternative care she was already receiving support. The respondent considered that the appellant had provided little in the way of evidence on whether alternative care provision had been sought for aunt J or such support have been denied and that there has been sufficient time since entry to the UK to seek alternative care provision for her aunt. As a British citizen she would be entitled to receive an appropriate level support from the NHS or social services as their care needs dictate and it be nothing to prevent them from seeking private care provision thus the secretary of state was not satisfied that the appellant met the requirements of the concession relating to carers and refuse the application on that basis also.

24. The decision letter went on to consider return to the Philippines. However, the respondent considered that she could return and gain legal employment there. It was concluded that there were no exceptional circumstances in her case and a refusal to grant leave outside the rules would not result in unjustifiably harsh consequences. Thus, the application was refused.

<u>The hearing before the Upper Tribunal:</u>

<u>The evidence:</u>

25. The hearing took place on 24 March 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face -to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The appellant gave evidence remotely as did Dr Patel.

26. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied that the witness evidence was given clearly and without difficulty. In the end, there was very little oral evidence given. Both advocates were able to make their respective cases by the chosen means. I am grateful for their clear and helpful submissions.

27. The evidence before the tribunal can be summarised as follows:

    (1) The bundle of evidence before the FtTJ (which included witness statements from the appellant dated 11/11/20 19, witness statement from Ms EB dated 11/11/19; medical report from Dr R dated 18/4/18 and report from Dr Patel dated 6/8/18.

    (2) A supplementary bundle which included the witness statement of the appellant dated 1/10/20, updated witness statement of Ms E, Bueno, and medical report of Dr Patel dated 24/8/20.

    (3) In a second supplementary bundle there was an updated independent psychiatric report of Dr Patel dated 23/3/21.

    (4) The respondent's bundle contained a copy of the application form, a letter from the appellant's representatives dated 3/12/18, witness statements of the appellant and Ms EB, of the appellant and aunt J, patient medical records for aunt J and report of Dr Patel dated 6/8/18, the decision letter.

    (5) Documents in relation to the error of law hearing, included the decision of FtTJ Rothwell propagated 4/2/20, error of law grounds dated 14th every 2020, grant of permission promulgated 13/520, directions of the tribunal and counsel's witness statement dated 19th – H 20 pending councils contemporaneous record of the hearing of 23 January 2020.

    (6) I was also provided with a skeleton argument in behalf of the appellant dated 25 March 2021.

28. I heard oral evidence from the appellant. In evidence in chief she confirmed that the contents the witness statements filed and dated 3/12 2018, 11/11/2019, and updated witness statement dated 1/10/2020 were true and that she wished to rely upon them as her evidence in chief. There were no further additional questions asked by counsel.

29. In cross-examination Ms Pettersen asked the appellant to confirm the date that she ceased caring for her aunt M and she confirmed that that was May 2015. Questions were asked to establish what the appellant had done since that date. The appellant confirmed that she

began caring with for aunt J in 2017 after her diagnosis of dementia and that she moved in to look after her in 2019. In her oral evidence she stated "I went to (aunt J's home) to sleep but was not there permanently. In 2019 she had frequent falls and then I stayed there for days and nights."

30. The appellant was referred to the medical notes for aunt J in the respondent bundle and at page 151 was asked to identify Samuel Diaz. The appellant stated that it was a name of the person in the surgery.

31. The appellant was also referred to page 152 and that there was reference to a review of the care plan. The appellant was asked if she was present when the care plan was reviewed. The appellant replied, "I don't know about the care plan". She confirmed in evidence that she had never seen a care plan for aunt J.

32. In respect of her most recent witness statement (paragraph 8) she was asked to confirm whether carers were still coming to see aunt J. The appellant stated "yes – they coming to see her and was sent by the agency. I don't have the right to send them away. They will come 30 minutes to see if she is taking a medication but I will have already done this. They then sit down and wait for their time to finish and then they leave."

33. No further questions were asked in cross-examination.

34. In re-examination, the appellant was asked by counsel how far her address was from that of aunt J's. The appellant replied: "it is a five minutes' walk."

35. I asked the appellant to explain the accommodation of aunt J. She confirmed that she lived in a form of sheltered housing but that there was no one permanently on site to provide assistance but that the aunt J had an emergency cord. In her evidence she stated that she would not be able to pull such accord herself as a result of her medical conditions. She stated that because of the current pandemic the manager did not always come to the property that was there approximately every two or three days.

36. The tribunal heard evidence from Dr Patel, consultant psychiatrist. For the purposes of these proceedings he has provided three reports. They are dated as follows:

    (1) 6/8/2018 (page 352 respondent's bundle)

    (2) 24/8/20(page 5 – 13 of the appellant supplementary bundle;

    (3) 23/3/21 (page 1 to 4 of appellant's second supplementary bundle).

37. Dr Patel confirmed the contents of his three reports. In his oral evidence in chief he was asked about the position of care homes during the current pandemic and whether the pandemic affected his

advice on whether patients should go into care homes or not. Dr Patel stated " I would say that it would work out as a death trap for anyone to be placed in a care home. I am referring to the risk that she (aunt J) might be exposed to. In care homes there are approximately 30 to 40 residents and lots of interactions with care and staff members compared with being in her own home where she has fairly limited exposure from other individuals. It would be a dangerous situation for everyone." In his evidence he also stated that there would be restrictions as to visits made by family members going into care homes.

38. In cross-examination, Dr Patel was asked if he had seen a care plan in respect of aunt J. In his evidence he confirmed that he had access to some reports from aunt J's GPs (diagnosis with physical issues) and also including the diagnosis of the GP concerning her Alzheimer's disease but he did not have access to the care plan. When asked if one existed, Dr Patel stated that there was a care plan for everyone linked to social services. He stated that it would consist of visits, who would go and how frequently. He further stated that when there were serious concerns and it was a progressive disease such as Alzheimer's or there were behavioural problems associated such as trying to leave the accommodation and wandering into the streets, but only then a GP or the community health team would become involved. He confirmed that this had not happened in this case. Further confirm that the committee health team was not involved with aunt J to his knowledge but he was not sure.

39. In his evidence he further stated that if aunt J did not receive the care from the appellant visiting and caring for her, then it is likely that she would have been out of control but at present aunt J was "well contained and was doing well in that regard".

40. There was no further cross-examination and no re-examination.

<u>The submissions:</u>

41. At the conclusion of the oral evidence, I heard submissions from each of the advocates.

42. I shall summarise the submissions made by Ms Pettersen on behalf of the respondent.

    (1) She relied upon the decision letter which I have summarised earlier in this decision.

    (2) She submitted that the argument advanced on behalf of the appellant is that she provides care for aunt J that could not be provided or was not available by any other person and thus this amounted to family life as a result of the dependency upon her by aunt J.

    (3) She submitted that there appeared to be gaps in the evidence concerning where the appellant was living between 2015 and

2019. Whilst the appeal must be determined as at the date of today's hearing, in 2018, the appellant was working elsewhere two hours per day and continued to do so up until March 2020 when her employer decided it was not safe to continue to attend the property according to her witness statement (dated October 2020).

(4) Ms Pettersen submitted that the appellant could not meet all of the respondent's carers policy and that initially a grant of leave would be for three months and at 17.4 it sets out the requirements of further leave to remain and there are a number of detailed reports that the respondent would require information. In particular a care plan but in this appeal neither Dr Patel nor the appellant had seen a care plan. In the light of the appellant's evidence, carers do come in and while she stated she was not authorised to tell them not to come, the true picture of the care that aunt J requires has not been formally assessed. She submitted that this was important when considering the carers policy.

(5) As to the issue of family life, she submitted that aunt J is a fairly distant relative, and that dependency upon the appellant has grown over the past few years. She accepted that family life was established.

(6) The issue was that of proportionality.

(7) Taking account of the public interest considerations set out under section 117A-D, the appellant had been in the United Kingdom since 2002 and it was not known on what basis she entered the United Kingdom but it is accepted that she did not attempt to regularise her leave until 2014 when she had applied for leave to care for a further relative.

(8) The public interest of effective immigration control under section 117(1) applied. While she spoke English (S117B(2), there was no evidence that she was financially independent although she has had some employment in the past; it was not clear how she supported herself in 2002 until the present day. Even if she was receiving money from aunt J or other family members it is not clear what those funds were. She submitted that her private life was established was in the UK unlawfully and aunt J was not a qualifying partner and that any strong private life had only developed in recent years. In terms of section 117B (5), her status has been precarious since 2002 and she could have no expectations of remaining in the United Kingdom. S117B(6) does not apply there are no children involved.

(9) She submitted that even taking into account aunt J's medical condition, there was not a full picture of her background and there was no copy care plan available. There was no evidence one way or another from social services as to her circumstances and the position of the appellant was not there to assist aunt J.

(10) In terms of proportionality Dr Patel's evidence stated that there would be poor conditions in a care home in the event of the appellant leaving the UK but there was no care plan show that the appellant would fall within the policy. Given the lack of evidence the appellant's removal from the United Kingdom was therefore proportionate.

43. Ms McCarthy on behalf of the appellant had provided a detailed 16 paged skeleton argument dated 23/3 21. It is not necessary to set out that document and it is a matter of record.

44. Ms McCarthy supplemented her written submissions with oral argument as follows.

(1) Addressing the oral submissions made by Ms Pettersen, there were no gaps in the appellant's chronology demonstrated by the evidence. The appellant lived with her previous aunt until she was forced to leave that property as a result of abuse and then moved to her current address which is five minutes' walk from aunt J. When caring for aunt J initially in 2017, she went to and fro and sometimes stayed overnight but since 2019 after aunt J had fallen, she moved in to live with her as set out in her recent witness statement.

(2) It appears that there is a care plan as someone is sending in carers or it may be that this was arranged before the appellant became involved and therefore was a system still in place. She conceded that it was not ideal but that the current care provided is to send carers three or four times for a limited period. It is also the position that the care plan is not adequate because the appellant has become more involved in the care of aunt J. Dr Patel's evidence is that the care she requires is more extensive than the short visits undertaken by the current carers. He further sets out the decline in aunt J's medical condition and sets out his advice for her full-time care and supervision. As explained by Dr Patel, the care aunt J needs is not simply checking that she is taking her medication but that she needs assistance with intimate care and that aunt J is unhappy for this being carried out by someone else. Reference been made for the need to wear a nappy she has had accidents and this has an impact on her dignity. She is comfortable with the care from her niece who provides a degree of intimate care for her. That "she will inevitably become completely dependent on others. It is not possible to give a timeline about a future decline in her ability to manage herself with support from others." Furthermore she established a good rapport with her and is able to speak tag along (evidence of Ms EB).

(3) She submitted that the medical evidence was that the ongoing stimulation and care the appellant was currently providing helped keep aunt J stable and living within her own home and therefore had a "protective quality" for her care rather than a stranger undertaking such care. In this context the evidence of

Dr Patel refers to dementia patients and their carers which is seen as “frightening” there are often clashes and aggression and fear because the patient is unfamiliar and is unable to communicate thus a high level of distress can occur.

(4) Ms McCarthy highlighted the extracts in the skeleton argument relating to the nature of the diagnosis of aunt J and that this was a progressive illness.

(5) Dr Patel set out the type of care that she would need and that he is very clear that the type of companionship and care given by the appellant cannot be replicated by an unfamiliar environment and stranger care. The ongoing care for her is her best option.

(6) As to alternative care, there is no care plan but it can be said that any care plan there was was not adequate for aunt J given the evidence. There is no other family member who can provide for her care. The appellant has a good rapport and understands aunt J and has a close relationship. The carers come in for a very short period and Dr Patel’s evidence is that her care needs have increased significantly. Dr Patel’s evidence was that a care home would not provide for continuity of care, she would have a fear of other people, not being able to connect with them and also issues of dignity as her intimate care would be carried out by others that she did not know.

(7) As to the issue of family life, Ms McCarthy referred to the skeleton argument and that applying a “fact sensitive approach” here something more than emotional ties existed and that aunt J is dependent upon the appellant and that she is her main family tie and has no one else. Dependency is clarified in the decision of Kugathas referred to “real and effective support” and that looking at the evidence, the appellant had provided care for aunt J since 2017 the care met the threshold and had been living with her undertaking her care since that time. When considering the quality of the relationship it is family life rather than a form of private life and is relevant to the proportionality assessment.

(8) When considering the public interest considerations, the factors treat family life and private life as qualitatively different and more protection is given to family life ties. However the form of family life here is not addressed in section 17 and only looks at a qualifying partner. However looking at the decision in Rajendran it confirms that this is the only family life expressly referred to in the section but that under the provisions of article 8 case law, it should be taken into account. She submitted that the Strasbourg case law (Jeunesse) looked at the time when family life is created and were unaware that the immigration status was precarious and that in that case it was stated that it was likely that both parties realised that the relationship was established in precarious terms and that it was only in exceptional circumstances the removal of the appellant would be a violation of article 8. However she submitted the present case was an exception to the test is when family life was formed and

deepened between the appellant and aunt J, the appellant out was already suffering from dementia and was not aware that she was forming family life which was precarious. Now her cognitive decline was such that she could not be aware that such circumstances applied. She has very strong family ties to the appellant and that is her main family life and she would find the appellant's loss to be distressing and would have a very significant impact on her wider health and care. Thus it cannot be said that she took a risk when establishing family life.

(9) Notwithstanding the weighted limited to the other factors, the strength of family life is so great on the particular factors that outweigh the weight which should be attached to the appellant's unlawful presence and some unlawful employment. As to financial dependence, the witness evidence demonstrated that Ms Buemo provided money for the appellant and was happy to continue to do this and also that aunt J gave her some money. Her presence did not draw additional funds.

(10) In summary she submitted that the family life was of such a strong nature that the loss of the appellant to her aunt J would demonstrate a significant effect to her well-being. The evidence of Dr Patel is at the current care provided would not be adequate for R and J's knees and there will be problem of intimate care in the conflict identify between a dementia patient and care given by strangers. Thus his evidence was analysis of the evidence and findings of fact that she was well cared for now by the appellant and that other options available would not meet her needs. She submitted that the proportionality assessment felt in favour of the appellant.

45. At the conclusion of the hearing I reserved my decision.

Findings of fact and analysis of the evidence:

46. There has been little challenge to the factual evidence before the tribunal. I also take into account that there has been no challenge raised to the contents of the reports of Dr Patel, a psychiatrist who has submitted reports having carried out clinical assessments of aunt J.

47. I shall set out the factual findings that are necessary for considering this appeal.

48. There is no dispute that the appellant is a national of the Philippines who first entered the United Kingdom on 9 February 2002. In a letter sent by his solicitors dated 3 December 2018, the appellant could not remember on basis she entered the United Kingdom or on what visa. Whilst it cannot be substantiated the basis upon which she entered the United Kingdom it is reasonable to infer that this was likely to be of a temporary nature and it is accepted on her behalf that she had

overstayed her leave and had remained unlawfully in the UK after 2002.

49. There is little detail as to how the appellant lived in the United Kingdom from 2002. However, it is the case that she lived with her maternal aunt (Aunt M) and acted as her carer until about May 2015. In July 2014, the appellant made an application for leave to remain on the basis that she had the role of the carer of her aunt but was refused without a right of appeal .It is said that Aunt M suffered from a number of illnesses including being registered as blind and having undergone a kidney transplant. It is said that as a result of the illnesses she had, her behaviour was aggressive towards the appellant as set out in her first witness statement at paragraphs 3 – 5. Therefore from approximately May 2015 the appellant ceased caring for her aunt and undertook some employment.

50. Whilst Ms Pettersen submitted that there were gaps or some uncertainty as to what happened after this date, in my judgement it is clear from the evidence that the appellant has given a consistent picture of the care that she began to undertake in or about October 2017 for aunt J. Whilst the appellant refers to her as auntie, it is common ground that the direct family connection is that the appellant's and Aunt J's great-grandparents were siblings. They are therefore distantly related.

51. I am satisfied from the evidence that the appellant began to care for aunt J in or about October 2017. She had been diagnosed with dementia and that prior to the appellant undertaking her care, aunt J was struggling to care for her herself. She was not washing, changing her clothes, or cleaning house and that the property become infested with bedbugs. The appellant's home is five minutes' walk from aunt J's home. Following aunt J's cognitive decline in 2019, the appellant has stayed overnight at Aunt J's home to undertake her care. While she has maintained a home address, I am satisfied that this was to collect post and that the evidence set out in the most recent statement is that she has been living at the home of aunt J to ensure her care needs are being met.

<u>Aunt J's medical condition and care needs:</u>

52. There is no care plan from the local authority in the evidence before the tribunal which sets out a summary of aunt J's care needs. However there are four medical reports, three that have been written by consultant psychiatrist Dr Patel who set out aunt J's medical condition and future prognosis.

53. There has been no challenge to these medical reports on behalf of the respondent save for that I have identified in the oral submissions above.

54. I shall therefore summarise that evidence.

55. Aunt J has been registered with her practice since 1994 and Dr R summarises her medical condition in a report dated 18 April 2018 (p43-74 RB) as follows; she has Alzheimer's and dementia with increased cognitive decline and self-neglect, ICD 10 mental behavioural disorder, diabetes, has suffered from recurrent falls, has arthritis in her left knee, suffers from hypertension, and has suffered from a dislocation of her shoulder and a stroke. The report summarises her condition as having "significant cognitive decline with three major chronic diseases. Her healthcare is complicated by psychological, emotional, and social factors affected by her progressive dementia. In addition she is unable to mobilise well.". Reference is made to her being unable to currently self-care, showing increase of cognitive decline, and a poor compliance with medication for her conditions. Reference being made to the medication that she is prescribed and that she is under the care of a memory clinic. In terms of general care that she requires, she has a poor compliance with medication for her conditions, she needs help with washing, dressing, eating personal hygiene and toileting. She is unable to do her own shopping, cooking, or washing in the appellant undertakes those tasks for her as well as providing her with conversation in Tagalog (her first language) and familiar foods from the Philippines.

56. In 2018 he reached the conclusion that she would continue to decline cognitively and that she current required full-time 24-hour care. The support given by the appellant was keeping her "functionally stable" and that the "lack of the support could lead to a more rapid decline in her condition."

57. There are three reports from Dr Patel. In his first report he sets out his qualifications and experiences in general adult psychiatry. He confirms in the first report (dated 6/August/18) that it was prepared on the basis of an examination of aunt J and was compiled after interview and examination. For the second report dated 24/8/20, Dr Patel confirmed that he had examined aunt J for the purposes of the report but did so remotely using a video method and it was not performed face-to-face as it took place during the covid- 19 pandemic. Similarly the short addendum report dated 23/321 was conducted in similar circumstances. However Dr Patel makes it plain that notwithstanding the remote consultation, the steps that he undertook to ensure that he was able to carefully listen and assess the circumstances of the consultation (I refer to page 7 of the supplementary bundle).

58. Having read the reports and having heard him give brief oral evidence, I am satisfied that he is clearly an experienced psychiatrist with particular expertise in the field relevant to the factual circumstances of this appeal.

59. Dr Patel provides further evidence concerning aunt J's medical condition. As I have stated it is not in dispute between the parties.

60. Dr Patel confirms the diagnosis set out in the earlier medical report and that she suffers from "multiple complex medical illnesses for many years. These include strokes, arthritis in both knees, high blood pressure (hypertension), high cholesterol levels, diabetes mellitus Type II, recurrent falls, and right shoulder distillation. She was diagnosed with dementia and Alzheimer's disease with late onset (ICD – 10 category F0 0.1) in October 2017. Dr Patel considered that it was a "progressive and irreversible mental illness" and that in her case she is "grossly disorientated in time and place but not persons. She is regarded at an early stage of the condition. It produces appreciable decline in intellectual functioning. It usually interferes with activities of daily living such as washing, dressing, eating, personal hygiene, excretory and toilet activities. This is accompanied by deterioration in emotional control, social behaviour or motivation" (at p 355RB).

61. In terms of her condition, he found that her ability to look after herself had "significantly deteriorated over the past two years. Her dementia appears to have started 2 to 3 years ago but was diagnosed in October 2017. She is unable to do her shopping, cooking, or washing. She is unable to perform her activities of daily living without support from her carers." He found that her condition was a "progressive and irreversible disease of the brain" and that her prognosis is "sadly very grim". He expected her condition to deteriorate progressively over the years and that there was no effective treatment to halt it and thus her care needs and to increase progressively. He identified in 2018 that she would need 24/7 care in the near future.

62. In the updated report (dated 24/8/20; supplementary bundle 5-13) Dr Patel stated that from his review and consultation in his opinion her cognitive functions had deteriorated significantly since his previous assessment in 2018. Thus her condition and diagnosis of dementia in Alzheimer's disease with a late onset (ICD – 10 category F0 0.1) has significantly deteriorated over the past two years. In particular he observed a severe decline in her communication skills due to worsening cognitive functions and hearing loss. His conclusion was that aunt J was "suffering from a progressive neurodegenerative disease namely dementia in Alzheimer's disease for which there is no cure. Her care needs will grow steadily over the years and if she lives long her condition will necessitate 24/7 care in the future."

63. In his report of 23 March 2021, Dr Patel observed a further deterioration following his consultation. He stated "her mental functions of deteriorated further since I first examined on 31/7/2018. She has become less spontaneous and more forgetful. Her physical health has also deteriorated, her mobility is reduced, and she's become more dependent on her carers."

64. Dr Patel's report also set out aunt J's care needs and the type of care required. In the report dated 24/8/20 "current care needs", he states the following:

    (1) a severe decline in her communication skills due to worsening cognitive functions and hearing loss.

    (2) She slower while eating a needs frequent prompting.

    (3) She needs reminders to attend toilet otherwise an office will get wet.

    (4) The appellant attends every day and put her to bed around 11 PM.

    (5) The different carers come only three times a day at unpredictable times. Each carer visits spends very little time and they do not communicate with her. When they do communicate, aunt J does not understand what they are saying.

    (6) Aunt J can no longer use of phone.

    (7) It takes up one hour to wake up in the morning and get ready for the day. She spends most of the time dozing on and off while sitting in the chair.

    (8) He concludes at p9 that "her care needs of significantly increased which are met by carers and her niece who provides personal care. Aunt J would not like the carers to provide personal care due to embarrassment."

65. Dr Patel's recommendation is set out at paragraph 3.5. He sets out that aunt J "encounters different carers in a different name to speak different accidents. She finds it very difficult to remember their names, recognise and establish good rapport with them as they keep changing. Such arrangement creates its own problems for her, anxiety stress confusion, lack of continuity and consistency of care provided. Even people without any health problems that alone dementia will struggle to manage under the circumstances. As against this, her niece is able to provide loving and high quality care to (aunt J). Both of them talking their language and this is very vital for (aunt J) to communicate her needs. Familiarity, trust, emotional attachment, and cultural awareness cannot ever be replaced by independent carers in advancing years. Miss Beginio cooks Filipino food for her aunt which she prefers at any time. It is universally accepted that most elderly people prefer to live and receive care in their own home. It is also highly cost-effective for the families and the Exchequer compared with care and nursing homes. Living in their own home provides freedom to enjoy the comfort of familiar surroundings. Any move to a care home will unsettle and stabiliser. This might lead to a devastating blow to her. Care homes will inevitably increase risk of cross infections due to communal living and physical altercations with other residents which will shorten her life expectancy further."

66. At page 11, he expressly considers the Covid-19 pandemic and that this has "exposed the risks associated with care and nursing homes."

Reference is made to different care homes interpreting the rules differently and that many GPs and families have been kept away from care homes for a long time leading to the widespread isolation of residents. The despair of isolation he considers to be as dangerous as Covid 19 or cancer. As his recommendation he states, “I would strongly emphasise social services cannot take control of this patient in a care because she needs 24/7 care.” He considers that it is of “paramount importance that ((aunt J) continues living in her own home with the support and care from Ms Beginio”.

67. Dr Patel’s evidence as to her long-term prognosis states that she will inevitably become completely dependent on others and that the illness is that she have “predispose her to serious consequences and increased risk of mortality.” Dr Patel is not possible to give a timeline about her future decline in her ability to manage herself with support from others but again notes that as she is suffering from a progressive neurodegenerative disease it is one for which there is no cure.

68. In summary, Dr Patel is of the opinion that her care needs have grown steadily over the years that if she leaves longer her condition will necessitate 24/7 care in the future (see conclusion at paragraph 4.0 p11AB supplementary bundle). It is his view that her care needs are met by her living in their own home and with her care being provided by Ms Beginio (see updated report 23/3/21).

69. The evidence before the tribunal also sets out the nature of the care tasks undertaken by the appellant. They are set out in the appellant’s witness statements, the supporting witness evidence of Ms EB and the report of Dr Patel. Again there is no dispute about the nature of the care undertaken by the appellant.

70. In her most recent witness statement the appellant confirms that her role as a carer include the following:

- in the morning she wakes around and assists with toileting, bathing, and dressing.
- She cooks all her meals for her as she cannot stand for too long due to her arthritis and recurrent falls.
- She sorts and administers her medication throughout the day;
- she provides her personal care and dressing her;
- she accompanies her to GP and hospital appointments;
- she attends to her throughout the night and in emergencies;
- household tasks are performed;
- she provides stimulation and companionship by talking to her in tagalong and watching television with her;
- she undertakes her shopping.

71. There is no care plan in the papers before me but from the evidence that I have both read and heard the nature of the outside agencies in the care that they provide can be established from the evidence as follows. A carer nominated by an agency visits three times a day with each carer spending approximately 20 minutes to 30 minutes at the home. Thus the total amount is approximately one hour and 10 minutes. The carers are there to see whether medication has been given although from the summary of the care provided by the appellant, that was a task that she undertakes. The appellant's evidence is that she has to tell the carer which medicine aunt J is due to take. The only other practical care is to hand over a parcel of food. The carers who come are different ones and do not have much conversation with aunt J.

72. Previously aunt J received assistance by way of "meals on wheels" but that has stopped as a result of the lack of resources (see witness statement of Ms EB 11/12/19 AB25).

73. Having summarised the evidence, both the witness evidence of the appellant and that of Dr Patel, there is no dispute between the parties that aunt J has significant care needs as a result of her medical conditions and most notably her diagnosis of dementia and Alzheimer's for which there is no cure. It is also not in dispute that her condition has deteriorated since 2018 and that as a result care needs have increased and will continue to do so.

74. I am also satisfied from the evidence before me that those demanding care needs are currently met by the appellant and that the nature of the care that is provided by others as described above, is of a shorter and less effective type of care than that undertaken by the appellant.

75. I am also satisfied that the evidence demonstrates that the assistance has been reduced due to lack of resources (meals on wheels).

76. Furthermore, in terms of other family members who could provide assistance and the care of aunt J, I am satisfied that there is no other family relative who could undertake aunt J's care. The evidence of Ms EB, which is unchallenged, is that as a result of her age and her own medical circumstances, she is unable to provide ongoing care beyond that of innocence sitting with her for one hour when the appellant leaves the property to undertake shopping.

77. I am satisfied from the evidence that she requires a full-time live-in carer and that this is currently being carried out by the appellant and the type of care that she provides is unlikely to be replicated by someone who does not have the type of relationship established between the appellant and aunt J.

Discussion:

78. Against that factual background, I now undertaken analysis of the legal issues in the appeal.

79. This is a human rights claim and the only ground of appeal available to the appellant was that the respondent's decision was unlawful under s6 of the Human Rights Act 1998.

80. The relevant law in respect of establishing “family life” for the purposes of Art 8 was helpfully summarised in the Court of Appeal’s decision in Rai as referred to in the skeleton argument.

81. The decision in Rai involved a claim by an adult child of a former Ghurkha soldier who sought to join his family in the UK relying on Art 8. Therefore, the factual circumstances are dissimilar. However, the principles are of relevance. In that case, drawing on the earlier case law of the Court of Appeal, Lindblom LJ (with whom Beatson and Henderson LJJ agreed) said this at [16]–[20]:

> “16. The legal principles relevant to this issue are not controversial.
>
> 17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents … the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors … include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not … essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".
>
> 18. In *Ghising (family life – adults – Gurkha policy)* the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in *Kugathas* had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence

of exceptional dependence". It went on to say (in paragraph 61):

> "61. Recently, the [European Court of Human Rights] has reviewed the case law, in [*AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. ...".

The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances, "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life – adults – Gurkha policy)*, including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

20. To similar effect were these observations of Sir Stanley Burnton in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

> "24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he

> turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

82. As will be clear, the need to establish "family life" is a fact-sensitive issue. It will not be presumed to exist between adults. What must be established is "more than normal emotional ties". There must be "support" which is "real" or "committed" or "effective".

83. In Uddin v SSHD [2020] EWCA Civ 332, the Senior President of Tribunals (Sir Ernest Ryder, with whom Bean and King LJJ agreed), having set out extracts from the decision in Kugathas, said this at [31]:

> "Dependency, in the *Kugathas* sense, is accordingly not a term of art. It is a question of fact; a matter of substance not form. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed".

84. I have also considered the decision of Lama (video recorded evidence – weight – Article 8 ECHR) [2017) UKUT 00016 at paragraphs 30 – 33. It states as follows:

> "32. Strikingly, in PT (Sri Lanka) the Court of Appeal highlighted the need for a " *fact sensitive approach*": see [26]. Notably, the Court quoted without demur the assessment of "dependency" in Kugathas at [17], referring to the argument that a finding of family life does not entail an absolute requirement of dependency:
>
> > "*That is clearly right in the economic sense. But if dependency is read down as meaning 'support', **in the personal sense**, and if one adds, echoing the Strasbourg jurisprudence, 'real' or 'committed' or 'effective' to the word 'support', then it represents in my view the irreducible minimum of what family life implies.*"
>
> [my emphasis]
>
> Thus, at its heart, family life denotes real or committed personal support between or among the persons concerned. Such persons need not necessarily be related by blood and, in that sense, are not a family in the traditional or conventional senses. However, they are readily embraced by one of the dictionary definitions of "family", namely " *a group of things that are alike in some way*". Mere likeness is not, of course, sufficient for Article 8 purposes. The "likeness", in Article 8 terms, is constituted by committed support, emotional bonds and, very frequently, a strong sense of duty."
>
> 33. In harmony with my comment about Article 8 in [30] *supra*, the case law is replete with statements which are the antithesis of hardedged rules or absolute principles. This is illustrated by the terms in which Baroness Hale expressed herself in a short concurring judgement in Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39, at [4]:

> "*The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others,* ***normally*** *a spouse or minor children, with whom that family life is enjoyed.*"
>
> Thus, in the Strasbourg jurisprudence, family life has been extended beyond relationships of blood, marriage, and adoption (Clayton & Tomlinson, The law of Human Rights, 2 nd ed, 13.148)."

85. By applying that decision, whilst the appellant and aunt J are distantly related by blood because their great grandparents were siblings, it does not preclude a finding of family life as even unrelated people may share family life.

86. As set out above, paragraph 32 of the decision in Lama demonstrates that "at its heart, family life denotes real or committed personal support between or among the persons concerned. Such persons need not necessarily be related by blood and, in that sense, not a family in the traditional conventional senses. However, they are readily embraced by one of the dictionary definitions of "family", namely "a group of things that are alike in some way." That this is not, of course, sufficient for article 8 purposes. The "likeness" in article 8 terms, is constituted by committed support, emotional bonds and, very frequently, a strong sense of duty."

87. There is little dispute concerning the factual evidence. The appellant has cared for Aunt J since her diagnosis of dementia in October 2017 and since her fall in 2019 has lived with her although she still maintains her own property which is 5 minutes away from Aunt J's home. Whilst the evidence refers to other carers attending for short periods, the evidence demonstrates that the appellant undertakes the bulk of the duty of day-to-day care, including aunt J's personal and intimate care .The evidence also demonstrates that the appellant provides a cultural link for aunt J by conversing with her in Filipino and providing Filipino style food. Other evidence before the Tribunal demonstrates that the appellant provides not only the physical care for aunt J but also psychological support and social support which had the effect of keeping her functionally stable (see GP report 18/4/18).)

88. The evidence of Dr Patel was that the appellant provided the type of personal care that could not be replicated by someone who was not a family member. At page 7 of the report he stated that as the appellant was undertaking her care needs of washing, personal hygiene and toileting, aunt J did not have to suffer the indignity and embarrassment and cleaning up problems as the appellant had undertaken those tasks. He concluded that aunt J's needs would increase and would necessitate 24/7 care and that she was being cared for "outstandingly well" and that the appellant's care was "irreplaceable without life-threatening consequences and great cost". He made reference to her health deteriorating rapidly if the appellant was not available to care for her.

89. Against that background I am satisfied that the evidence demonstrates that the appellant's relationship with Aunt J is one of a family life relationship and properly considered goes beyond a relationship of patient and carer but is one of effective, real, and committed support. The evidence demonstrates significant dependency on the appellant. I observe that during her submissions Ms Pettersen accepted that family life had been established between the appellant and aunt J.

90. I move straight to the issue of proportionality (the questions of interference, accordance with the law, and legitimate aim, all being uncontroversial).

91. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life.

92. In assessing whether the decision strikes a fair balance a court or Tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see Hesham Ali v SSHD [2016] UKSC 60 and see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43].

93. A court must accord "*considerable weight*" to the policy of the Secretary of State at a "*general level*": *Agyarko* paragraph [47] and paragraphs [56] - [57]; and see also *Ali* paragraphs [44] - [46], [50] and [53]. This includes the policy weightings set out in Part 5A (sections 117A- 117D) of the Nationality, Immigration and Asylum Act 2002 (inserted by the Immigration Act 2014).

94. As provided by section 117A (1), Part 5A applies where a Court or Tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 and as a result would be unlawful under Section 6 of the Human Rights Act 1998. Section 117A (2) requires the Court or Tribunal, in considering whether an interference with a person's right to respect for private and family life is justified under article 8(2), to have regard in all cases to the considerations listed in section 117B.

Section 117B states as follows: -

> "**Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons

who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-"

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

95. I consider first the mandatory considerations set out in section 117B NIAA 2002, as amended. The public interest in maintaining effective immigration control is strong, mandated as it is by primary legislation.

96. As to the assessment of financial dependence upon the state, S117B(3) states that it is in the public interest and in the particular interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent because such persons, (a) not a burden on taxpayers and (b) better able to integrate into society. Whilst Ms Petterson submits that it is unclear on what basis she has been able to maintain herself, I accept the evidence in the witness statements that she has been provided with financial assistance from Ms EB and from aunt J and has also been in paid employment at times (albeit unlawfully) and thus has been financially independent, that is not reliant upon state benefits. However, even if I found that she was "financially independent" that was a neutral matter, alongside her ability to speak English, which did not militate positively in her favour in the scales of proportionality as set out in the decision of Rhuppiah at paragraph 57.

97. There is no clear evidence as the basis upon which she entered the UK. Ms McCarthy's skeleton argument refers to her entering on visit visa. Taking at its highest, it was only ever on a very precarious basis, namely as a visitor. Thus, the lawful presence here does not carry any significant weight in her favour.

98. The appellant has been in the United Kingdom unlawfully since a period from 2002. That is a significant majority of the time spent in this country. With reference to section 117B(4), there are no particularly compelling circumstances arising in her case which go to materially mitigate the reduction of weight to be accorded to her private life.

99. When addressing the S117 public interest factors, Ms McCarthy submitted that S117B does not expressly refer to forms of family life other than "a relationship formed with a qualifying partner". In the decision of Rajendran (S117B- family life) v SSHD [2016] UKUT 138, the tribunal confirmed that the "Little weight" provisions of s 117B (4) (a) and S117(5) are confined to "private life" established by person at a time when their immigration status is unlawful or precarious. However a court should not disregard "precarious family life" criteria set out in established article 8 jurisprudence.

100. Ms McCarthy submitted that one of the "precarious family life" authorities endorsed was Jeunesse, and the reference to the consideration as to 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 were from the outset would be precarious. Where that is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. On the facts of this case she argues that it falls within an exceptional case because family life was formed and deepened between the appellant and aunt J when aunt J was suffering from dementia and was not aware that she was forming family life which was precarious.

101. It is correct that the public interest considerations make no reference to other relationships than those with a qualifying partner or with a qualifying child. In my judgement it is not necessary to consider the ability of aunt J to be aware that she was establishing a family life with the appellant at a time when the appellant was in the United Kingdom unlawfully. That is because to ensure consistency with the HRA 1998 and the ECHR, section 117B must, however, have injected into it a limited degree of flexibility so that the application of the statutory provisions would always lead to an end result consistent with Article 8: *Rhuppiah* v SSHD [2018] UKSC 58 paragraphs [36] and [49].

102. In Rhuppiah the Supreme Court held that section 117A (2) features an inherent degree of flexibility. Lord Wilson put it this way, at [49]:

> "The effect of section 117A (2) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a straitjacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "Little weight" itself is a small degree of flexibility: but it is in particular section 117A (2) (a) which provides the limited degree of flexibility recognised to be necessary in paragraph 36 above. Section 117A (2) (a) necessarily enabled their applications occasionally to succeed. It is impossible to improve on how, in inevitably general terms, Sales LJ in his judgement describe the effect of section 117A(2) (a) as follows;
>
> > 53. Although a court or tribunal shall have regard to the consideration a little weight should be given to private life established in (the specified) circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question."

103. In my judgement it is not necessary to distinguish between the private life and the family life established by the appellant in the United Kingdom. Even by giving little weight to the appellant's private life established while she has been resident in United Kingdom unlawfully, the section 117 factors do not mean that weight cannot be given to the family life established between herself and aunt J. I would be prepared to place weight upon her relationship with Aunt J. Having said that, I find that the weight attributable to this factor would be significant and whilst the relationship was formed during her unlawful status, the relationship is based on a particularly significant dependency.

104. The list of relevant factors to be considered in a proportionality assessment is "not closed" and there is in principle no limit to the factors which might, in a given case, be relevant to an evaluation under article 8, which is a fact sensitive exercise and that this includes the nature of the family life established between the appellant and aunt J and on the basis of the dependency of that relationship as outlined in the evidence.

105. If Article 8 is engaged, as on the facts of this appeal, the Tribunal may need to look at the extent to which an appellant is said to have failed to meet the requirements of the rules, because that may inform the proportionality balancing exercise that must follow.

106. When undertaking an assessment under the Immigration Rules relating to private life under Paragraph 276ADE, there is no dispute that she cannot meet those requirements given her length of residence since 2002 nor has it been argued that there are very significant obstacles to her reintegration to the Philippines. It has not been argued that the appellant can meet Appendix FM.

107. I have been referred to the carer's policy set out in the Immigration Directorate Instructions; Chapter 17: Section 2: Carers (see Appendix A; skeleton argument submitted on behalf of the appellant).

108. The policy states that each case must be looked at on its individual merits but when considering whether a period of leave to remain shall be granted, the following points are amongst those that should be borne in mind by caseworkers; the type of illness/condition (it should be supported by consultant's letter): and the type of care required; and the care which is available (e.g. from the social services or other relatives/friends) and the long-term prognosis. Caseworkers should be aware that whilst most applications will come from carers who are in the U.K.'s visitors this will not always be the case.

109. Section 17.3 of the carer's policy provides that it would normally be appropriate to grant leave to remain for three months to care for a sick relative on the strict understanding that during this period arrangements will be made for the future care of the patient by a person who is not subject to Immigration Rules.

110. Section 17.4 of the policy states that where an application is received requesting a further period of leave to continue to care for a sick relative the applicant must produce, amongst other things, a letter from the local social services department where they are known to be involved, advising of their level of involvement, the perceived benefits of the presence in the UK of the applicant, and an explanation as to why suitable alternative care arrangements are not available, along with further evidence that alternative arrangements for the care of the patient have been, or are being, actively explored.

111. There is no dispute that the appellant cannot meet the requirements of the policy as the evidence that would support the application has not been forthcoming. I accept that there is a letter from a registered medical practitioner, in the form of a report from Dr R, but this is not from an NHS consultant. There are also three reports from Dr Patel, who is a consultant psychiatrist and has provided full details of her condition and the long-term prognosis. What is missing is any evidence from the local social services department advising of their level of involvement in the benefits of the presence of the applicant and also an explanation as to why suitable alternative care arrangements are not available. Allied to this, there is no evidence of alternative arrangements for the care of aunt J is being actively explored.

112. I accept the submission made by Ms Pettersen that this is a factor that weighs in the balance against the appellant.

113. However, I am satisfied that the reports of Dr Patel are sufficient in their contents to accurately describe and evidence the illness and condition of aunt J. It is supported by evidence from the local GP practice. I am also satisfied that his report as to her long-term prognosis sets out his opinion which is properly reasoned by

reference to her condition. No submissions have been made to undermine his opinion in this regard.

114. There is no care plan that has been made available to the tribunal. Furthermore, there is no supporting evidence from the social services department about their level of involvement. It has not been explained why that care plan has not been provided even taking into account the circumstances of the covid- 19 pandemic.

115. That said, it is possible to confirm at a basic level the level of involvement as this is consistent with the evidence given by the appellant as to the agency carers who come to the home approximately three times a day.

116. Whilst there is no evidence from social services as to the perceived benefits of the appellant's presence, I accept the opinion of Dr Patel as to the significant benefit the appellant provides for the care of aunt J. There is no dispute that aunt J's condition has deteriorated since 2017 but that the care provided by the appellant both in terms of physical and psychological and social support has the benefit of keeping aunt J's condition stable. Dr Patel's evidence is that the care provided by the appellant is" loving and high quality" and that the "familiarity, trust, emotional attachment and cultural awareness could not be replaced by independent carers". There has been a particular emphasis upon the intimate care given by the appellant which aunt J would not wish to have provided by a stranger. Further emphasis has been given to her cultural needs and that this has been carried out by the appellant in a practical way by providing familiar foods and also by conversing with her and communicating with her in Tagalog. The most significant benefit provided by the appellant is that aunt J can live in her own home being cared for by a familiar and loving carer.

117. Reference in the policy is made to whether private care has been costed and assessed or whether voluntary services/charities can assist. Based on the unchallenged evidence of the medical condition of aunt J, in my judgement it is unlikely that a voluntary service or a charity could assist in the type and nature of care that is required. I accept the evidence given by Dr Patel that without the care provided by the appellant, and the nature of the care which she receives and needs which is 24/7 care, the only alternative to this would be for her to live in a care home.

118. In my judgement it is a relevant factor to take into account that most people prefer to live and receive care in their own home as this can provide the lack of continuity and consistency of their environment. As Dr Patel noted, "living in their own home provides freedom to enjoy the comfort and familiar surroundings. Any move to a care home will unsettle and stabilise her. This might lead to a devastating blow to her". On the particular facts of this case, and in the particular circumstances of our current times, a move to such an environment would be likely to not only destabilise her but also inevitably increase

the risk of infection from covid 19. There is also the possibility of the appellant being unable to visit aunt J and for separation to take place between them as a result of the current pandemic. Whilst matters have improved since the initial lockdown in 2020 and the later one in 2021, there remain uncertainties for the future.

119. In summary, whilst the appellant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, it is capable of being a weighty factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. Thus in my judgment this is a weighty fact on the side of the respondent's side.

120. Whilst aunt J may prefer to receive care from a family member, I take into account that her wishes are not determinative. There are likely to be a number of people in the UK who require care, including care for intimate aspects of their personal care but receive care from the social services. That said, I accept that the care of the appellant is qualitatively different from the care that can be provided by alternative carers as this has been established by the evidence of Dr Patel which has not been challenged by the respondent. Thus whilst I take into account that the social services are obliged to provide such care as is required, the presence of the appellant in the same home is able to assist at times when a paid carer may not be able to do so.

121. The evidence, which was not challenged, is that she provides care for Aunt J which not only extends to her physical well-being but also her emotional well-being. There is no evidence before the tribunal that the type of physical care or importantly the emotional care undertaken by the appellant could reasonably or practically be provided by the state. It is not a matter of choice or of desire but in my judgement the evidence demonstrates that the care provided by the appellant for Aunt J is because she requires the physical and emotional care that the appellant can provide at a critical stage of her life.

122. Whilst it is not necessary to identify any "unique" or any "exceptional" factor (see Agyarko at [47], [60]), in my judgement the circumstances that relate to the appellant's and the care of aunt J are compelling on the evidence for the reasons already outlined. In my judgement those circumstances are of such weight to demonstrate that when the interference with the appellant's family and private life is balanced against the public interest, the consequences of removal are "unjustifiably harsh."

123. I have concluded on the particular facts of this unusual case that given the significant adverse consequences for the appellant's relative identified in the unchallenged evidence of Dr Patel, that the appellant has shown that if she were required to leave the UK this would have unduly harsh consequences for aunt J and that having undertaken the necessary balancing exercise, and having weighed up

all the competing factors, for and against the appellant, I have come to the conclusion that her return to the Philippines would be a disproportionate interference with the Article 8 rights of aunt J and the appellant. I am satisfied that the removal of the appellant would be a disproportionate breach of article 8 as at the date of the hearing on that factual basis.

124. The type and amount of leave granted will entirely be a matter for the respondent.

125. For the reasons previously given, I am satisfied that the decision of the FtTJ made an error on a point of law and the decision should be set aside. I remake the appeal: I allow the appeal on Article 8 grounds.

Notice of Decision.

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision of the FtT the decision should be set aside. I remake the appeal: I allow the appeal on Article 8 grounds.

Signed Upper Tribunal Judge Reeds
Dated 12 April 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.