



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17270/2019

THE IMMIGRATION ACTS

Heard at Field House
by Skype for Business
On 16 April 2021

Decision & Reasons Promulgated

On 04 May 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ALECITA YU
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Lindoven Magsino, legal representative with Queen's Park Solicitors

For the respondent: Mr Stephen Walker, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision on 15 October 2019 to refuse her leave to remain on human rights grounds pursuant to Article 8 ECHR, as the carer of a British citizen, pursuant to paragraph 276CE with reference to paragraph 276ADE(1)(iii), (iv), (v) and (vi) of the Immigration Rules HC 395 (as amended) and

paragraph GEN.3.2 of Appendix FM, or outside the Rules. The appellant is a citizen of the Philippines.

2. **Mode of hearing.** The hearing today took place remotely by Skype for Business. There were no technical difficulties. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.
3. The appellant and Mrs Hannie Silas, her 82-year old employer, were present on the call, as was Mrs Silas' son, who arranged the employment of the appellant as her live-in carer. Mrs Silas has spino-cerebellar ataxia (SCA6), caused by the SCA6 gene, which runs in the Silas family and is increasingly disabling over a long period.

Background

4. The appellant was born in 1963 in the Philippines and is now 58 years old. She is a highly qualified and experienced nurse, having qualified in the Philippines. The appellant's husband and two adult children have remained in the Philippines throughout. In 2008, she came to the United Kingdom for further studies. She departed on 31 December 2010 at the end of her studies, having achieved a BSc in nursing and a BSc in Health and Social Care. The appellant has worked as a nurse in both countries.
5. On 23 July 2011, aged 48, the appellant returned to the United Kingdom as a Tier 1 (Post Study) Migrant, and had leave to remain in that capacity until 22 July 2013. On 19 July 2013, she made a Tier 2 (Skilled Worker) application, which was unsuccessful: the appellant exercised an in-country right of appeal on which she was appeal rights exhausted on 20 December 2013. She did not embark for the Philippines, remaining unlawfully in the United Kingdom.
6. The appellant has not had any kind of extant leave since December 2013. She has, however, worked unlawfully as a live in carer for most of that time. From February-April 2015, the appellant worked as a live-in carer for the parents of Mrs Laura Weaver, who gave her a glowing reference. From April-August 2015, the appellant worked looking after Mrs Juliet Althaus, who had advanced Alzheimer's disease and vascular dementia. Mrs Althaus' daughter gave a very warm reference regarding the appellant's care up to the death of her mother.
7. On 14 February 2017, the appellant made a 10-year long residence application, which was refused and certified clearly unfounded: the appellant had an out of country right of appeal which she did not exercise. Instead, the appellant remained in the United Kingdom without leave.
8. The appellant continued working for other members of the Jewish community in Essex. Mrs Silas had been widowed in March 2007, her consultant rheumatologist husband having died of motor neurone disease. He made very good financial provision for his widow, who had been ill with SCA6 since the 1970s, and to whom while alive he gave wonderful loving care and support.

9. The couple had two sons: one brother, Mr Douglas Silas, is already disabled and a wheelchair user. The other brother, Mr Adrian Silas (Mr Silas), has a family of his own but took on responsibility for his mother, the sponsor, having promised his father to look after her. Mr Silas was able to manage the sponsor's care with the help of non-resident carers until 2017. He also has the SCA6 gene, such that his health has deteriorated gradually from diagnosis soon after his father's death, with the part time day carer increasing her hours, until at the end of 2017 his mother was too dependent, and Mr Silas too unwell, for that to continue and the family looked for a live-in carer, seeking recommendations among the Jewish community, a factor which was important to them.
10. On 22 August 2017, the appellant made further submissions for leave to remain on the basis of her private life, which were refused. The respondent did not consider the further submissions to amount to a paragraph 353 fresh claim and they attracted no right of appeal. The appellant issued a Pre-Action Protocol letter, and the respondent agreed to reconsider.
11. The appellant was known to Mr Silas' partner, having looked after the father of a close friend of hers until his death at the end of 2017. The timing was perfect: an interview between the appellant and Mrs Silas went well and in January 2018, the appellant began to work as Mrs Silas' live in carer. Mrs Silas was then in her early 80s and Mr Silas his late 50s.
12. Mrs Silas has made progress with the appellant's help and is now physically and mentally better than when the appellant was appointed: she has recovered some mobility and is able to walk short distances again. The appellant calls Mrs Silas 'Mummy'. The arrangement is very successful and the appellant, known to the Silas family as 'Alice' is highly valued by both Mrs Silas and her son.

Refusal letter

13. On 15 October 2019, having reconsidered, the respondent again refused the appellant's application, with an in-country right of appeal which she has exercised. That is the decision under challenge. In her refusal letter, the respondent set out the history and rejected her Article 8 ECHR claim within the Rules, with reference to paragraph 276ADE(1)(vi) on the basis that there were no very significant obstacles to her reintegration in the Philippines.
14. The respondent considered whether there were exceptional circumstances under paragraph GEN.3.2 of Appendix FM, given the appellant's employment by Mrs Silas from January 2018 as a live in carer. The respondent did not accept that the appellant had family life with Mrs Silas. Nor did she consider that the appellant was irreplaceable in Mrs Silas' life, or that the appellant's wish to remain in the United Kingdom and continue working to fund her daughter's studies in the Philippines amounted to exceptional circumstances for her to be granted leave to remain. The appellant could seek and secure employment in the Philippines: her son and husband were both already in employment and could assist in supporting her daughter too.

15. The respondent refused leave to remain and the appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

16. The First-tier Judge accepted the vulnerability of Mrs Silas and her wish and desire to retain a trusted and loving employee with whom she had formed a bond, but not that such bond amounted to family life on *Kugathas* principles. The appellant is not Mrs Silas' biological daughter, and has family life with her husband and children in the Philippines, while Mrs Silas had had non-resident carers in the past. The appellant's wages were sent back to the Philippines to benefit the economy there, not that of the United Kingdom.
17. Mr Silas and his family were clear in their evidence: they were never going to rely on the public health system and would always seek a private solution to the care of Mrs Silas, because they could afford to do so. Mr Silas senior had made good financial provision for his widow, who was a proud woman and would not wish to rely on public services. There was no question but that the Silas family could afford to hire another carer, if the appellant had to return to the Philippines and resume her family life there. The appellant's status in the United Kingdom had always been either precarious or unlawful and she could have had no realistic expectation that she would be able to settle here.
18. The First-tier Judge dismissed the appeal and the appellant appealed to the Upper Tribunal.

Permission to appeal

19. Upper Tribunal Judge Owens granted permission to appeal on the basis that the First-tier Judge had arguably failed correctly to apply the *Kugathas* dependency tests and the principles set out in the Upper Tribunal's decision in *Lama (video recorded evidence – weight -Article 8 ECHR) Nepal* [2017] UKUT 16 (IAC) that:

- “(iii) *There are no hard and fast rules as to what constitutes family life within the compass of Article 8 ECHR.*
- (iv) *A person's value to the community is a factor which may legitimately be considered in the Article 8 proportionality balancing exercise.*”

20. Judge Owens noted that the appellant's representative must be prepared to deal with the materiality of the error if found.

Rule 24 Reply

21. The respondent filed a Rule 24 Reply to the grant of permission, which so far as relevant is in the following terms:

- “4. The judge's self-direction in respect of family life expressly referred to the relevant authorities, including *Kugathas* and *Lama* at [48]-[51].

5. Given the employer/employee nature of the relationship between the appellant and sponsor, the First-tier Judge was fully entitled to reach the conclusion that there was not family life between them at [53].
6. The judge in any event conducted a free-standing Article 8 balancing exercise in the alternative at [55] onwards. Indeed, at [59], the judge noted the threshold for engaging Article 8 family life was a low one.
7. Importantly, it would appear there was little factual dispute and the judge largely accepted the evidence before him. Ultimately, it was open to the judge to conclude that in the event the appellant was required to leave, the sponsor would seek alternative private care, as had happened before – see [60].
8. If family life has been established, given this has been in clearly highly precarious circumstances, this further heightens the need for the appellant to show exceptional circumstances, which with respect are simply not apparent here.
9. Ultimately, where the appellant could not meet the Rules, she would have to show refusal of leave to remain would lead to unjustifiably harsh consequences, which connotes an obviously elevated threshold.
10. On the facts, given the appellant has been here without valid leave for a number of years and has a family and home to return to, it could not possibly be said to be unjustifiably harsh on her. Similarly from the sponsor’s perspective, she clearly has financial provision to source private care and could find someone else in the alternative, and she could, if she so wanted, rely on the NHS or local authority, but declines to do so out of personal choice (see [52]). Understandably, she and the appellant have built a close bond but in the circumstances, it could not possibly be said to result in unjustifiably harsh consequences for her if the appellant was required to leave.”

22. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

23. For the respondent, Mr Walker relied on the Rule 24 Reply and it was not necessary to ask him to expand in detail on the respondent’s case.
24. Mr Magsino prepared a skeleton argument for the hearing. He argued that the appellant’s case was on all fours with that of the appellant in *Lama* and that like cases should be decided alike. The appellant in *Lama* was also a paid carer, albeit not a live-in carer like this appellant. The late Dr Silas would not have wanted his widow to be treated as ‘someone insignificant’ and his only wish had been that she be properly cared for after his death.
25. Mr Magsino acknowledged that the Article 8 ECHR case ‘may face an uphill struggle given [the appellant’s] immigration status when she became Mrs Silas’ carer’ but argued that Mrs Silas had become ‘uniquely emotionally and physically dependent on the particular company and care provided by the appellant’. He argued that the appellant’s case outside the Rules had not been considered by the First-tier Judge and that exceptional circumstances might avail her, on the facts.
26. As to the consideration of proportionality, the question for the Tribunal was whether, considering all relevant factors, it would be unreasonable to remove the appellant. The appellant accepted that the respondent had purported to carry out the exercise of

discretion, but her focus was too narrow, being limited to exceptional circumstances rather than 'compelling circumstances'.

27. Mr Magsino admitted that alternative arrangements were 'plausible' but that the sponsor's family members were 'promoting...the quality of care that Mrs Silas will receive having regard to their previous bad experiences from carers despatched by previous care agencies'. He also acknowledged that the local authority and social services had a statutory duty to provide suitable care, and had not been remiss in this case, 'but one should consider the human aspect in this case', in this case the private life of both the appellant and sponsor.
28. The consequence of the decision to disrupt the ongoing stable care which the appellant provided for the sponsor, who was a British citizen, elderly and frail of health, would be disproportionate. The appellant was seeking leave to remain only while she remained Mrs Silas' carer, not beyond that date, and could return to the Philippines if the appeal failed. There was a public interest in Mrs Silas not expending scarce public funds on her care.
29. In oral submissions, Mr Magsino covered the same points, relying significantly on the *Lama* decision.

Analysis

30. The appellant's private life is not sufficient for her to succeed in this appeal: the First-tier Judge was obliged by section 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (as amended) to give it little weight. The appeal can succeed only if she can show family life with the sponsor, and/or exceptional or compelling circumstances for which leave to remain should be granted outside the Rules.
31. President McCloskey's decision in *Lama* emphasised that there are no hard and fast rules as to what constitutes family life: it is always a finding of fact specific to the circumstances of the individual appellant. The appellant in *Lama* had always been in the United Kingdom lawfully, and had got to know the sponsor, a well known actor, over a period of nearly a decade, initially as a tenant, then working to support his professional and backstage life as an actor, despite the sponsor's disability. He also supported the sponsor's.
32. There was evidence in *Lama* from Mr Tim Pigott-Smith, also a well known actor, and a letter of support signed by about 100 people, emphasising that in addition to intimate, personal and home care, the sponsor was totally dependent on the appellant to enable him to continue to act, the appellant having developed 'an understanding of the unusually high, specific demands of acting work' and that without him, the sponsor's acting career would undoubtedly be over.
33. The contrast with the circumstances of this appeal is stark. This appellant is a highly qualified, experienced nurse, but she has disregarded the immigration laws of the United Kingdom for over 7 years, since the failure of her Tier 2 skilled worker application on which she was appeal rights exhausted in December 2013.

34. The appellant carried on working as though she had the visa, taking employment as the paid live in carer for a number of older disabled people in the Jewish community, for which she was appreciated and financially rewarded, and sending money back to her own family in the Philippines, to enable her daughter to complete her education there. It is not clear whether that education is now complete: the appellant's husband and son are in employment and are presumably also contributing. The First-tier Judge did not err in finding that the appellant, who lived in the Philippines until she was in her late 40s, would be able to reintegrate without difficulty on return.
35. I remind myself of the narrow circumstances in which it is appropriate for an appellate or reviewing Tribunal to interfere with a finding of fact by a First-tier Judge who has heard the parties give oral evidence: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 and *R (Iran) & Others v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90] in the judgment of Lord Justice Brooke, with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed.
36. In the present appeal, no such circumstances exist. The First-tier Judge accepted the appellant's core account and gave proper, intelligible and adequate reasons for finding that there is no family life between this appellant as Mrs Silas' paid carer, albeit one who is affectionately regarded by the family, and the sponsor. The exceptional circumstances advanced are that Mrs Silas loves and depends on the appellant, and that the appellant supports her daughter's education in the Philippines. The First-tier Judge did not err in regarding those circumstances as neither exceptional nor compelling.
37. Accordingly, it is not open to the Upper Tribunal to substitute its own findings of fact for those which were properly made in the First-tier Tribunal and this appeal must fail.
38. The appeal is dismissed.

DECISION

39. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 28 April 2021