



The Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal number: IA/14177/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On January 29, 2015

Determination Sent  
On February 3, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FRANKLYN COLICO DOMINGO  
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Shiliday (Home Office Presenting Officer)

For the Respondent: Ms Appiah, Counsel, instructed by Vine Court Chambers

**DETERMINATION AND REASONS**

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant is a citizen of the Philippines. The appellant was granted leave to join his parents and his visa was valid between March 7, 2008 and September 30, 2009. On September 21, 2009 he applied outside of the Immigration Rules and this was

granted until April 23, 2010 and allowed him to remain until October 29, 2011. On October 27, 2011 he again applied to for leave to remain outside of the Immigration Rules but this was refused on February 28, 2012. He appealed that decision and the appeal came before Judge of the First-tier Tribunal Coutts on May 14, 2012. He dismissed the appeal because he was satisfied there was no decision to appeal because the appellant already had indefinite leave to remain.

3. On June 12, 2012 he submitted an application to remain but the respondent refused the application on June 27, 2013 and on December 23, 2013 he was served with form IS151A as an overstayer.
4. On January 21, 2014 he submitted an application on Form FLR(M) to remain as the partner of a person present and settled in the United Kingdom. The respondent refused the application on March 6, 2014 and on March 25, 2014 the appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
5. The matter came before Judge of the First-tier Tribunal Onoufriou (hereinafter referred to as the "FtTJ") on October 15, 2014 and in a decision promulgated on October 24, 2014 he dismissed the appeal under the Immigration Rules but allowed it under Article 8 ECHR.
6. The respondent lodged grounds of appeal on October 29, 2014. She submitted the FtTJ erred by allowing the appellant's appeal on the basis that Article 8 is a general dispensing power.
7. Judge of the First-tier Tribunal Foudy granted permission to appeal on December 10, 2014 stating there was an arguable error in law based on the grounds.
8. The appellant was in attendance in court and was represented as set out above.

#### **ERROR OF LAW SUBMISSIONS**

9. Mr Shiliday submitted paragraph [17] of the FtTJ's determination was crucial as the FtTJ had treated Article 8 as a general dispensing power and that was wrong in law. The FtTJ failed to have regard to proportionality and the fact the appellant could not satisfy the Immigration Rules and he failed to consider that they could live in the Philippines. The appellant could have left and applied for entry clearance and there was no basis in law to allow the appeal on Article 8 grounds as there were no exceptional circumstances that would result in an unjustifiable harsh outcome.
10. Ms Appiah agreed the key paragraph of the determination was paragraph [17] but she submitted the FtTJ did consider everything in that paragraph. The FtTJ took into account the appellant's family's immigration history and made findings open to him. Even if the FtTJ erred in his approach it was not material for the reasons given by the FtTJ.

11. Mr Shiliday maintained the error was material and the decision should be remade and dismissed. Ms Appiah agreed that if there was an error in law then the decision could be remade today without any further submissions or evidence.
12. I reserved my decision and indicated I would give a written decision in the next few days.

### **ERROR OF LAW ASSESSMENT**

13. The appellant had applied to remain as a partner of a person present and settled in the United Kingdom. His application was made outside of the Immigration Rules. The FtTJ had the appellant's and respondent's bundle of documents and contained within those bundles were the determination of Judge of the First-tier Tribunal Courts and the accompanying letter attached to this application.
14. At paragraph [4] of the appellant's representative's letter dated January 20, 2014 the representative criticised the Home office for not appealing or clarifying the Tribunal decision of Judge of the First-tier Tribunal Courts. The reality is Judge of the First-tier Tribunal Courts erred in his approach in finding the appellant had indefinite leave but he dismissed the appeal albeit for the wrong reason. If anyone should have appealed it should have been the appellant as it was his application that had been dismissed.
15. Nevertheless the matter came before the FtTJ and he noted the immigration history and also recorded in his findings that the appellant did not meet the Immigration Rules. Clearly in his mind was the fact the appellant had been misled but I am satisfied Mr Shiliday's submissions have some force. At no point did the FtTJ carry out a proportionality assessment in paragraph [17] of his determination and consider whether there were exceptional circumstances that would result in an unjustifiable harsh outcome. That is a material error as it fundamental to any assessment and I therefore set aside the original decision.

### **REMAKING OF DECISION**

16. The appellant, it seems, came to the United Kingdom as a minor albeit by the time his application was allowed he was over the age of eighteen. His leave was limited and the respondent extended that leave until October 29, 2011. According to the appellant's own witness statement that application was submitted on the basis he was his mother's dependent and his father also submitted a spousal application. The appellant accepted that the respondent granted him leave in line with his father's leave and that was until October 29, 2011. His father only had limited leave to remain so I find it strange that the appellant would have believed he had indefinite leave bearing in mind his leave was for a fixed period.
17. The appellant then applied to extend that leave but this was refused and for the reasons set out above it came before Judge of the First-tier Tribunal Courts. The appellant did not appeal that decision but according to his statement believed he had

indefinite leave to remain but the Home Office did not agree with what the appellant thought and did not issue him with the documentation he sought.

18. There appears no dispute that his situation has changed since he first came to this country. He came as a dependant and whilst here he met his partner with whom he now lives. She is also from the Philippines but has status here due to her parent's former status as domestic workers and she is now a British citizen.
19. I have before me a statement from his partner and she states that since July 30, 2013 they have lived together in their own home. She is employed and provided evidence of her income that shows she is paid an annual salary (grossed up) of £22,414. The appellant does not appear to work presumably because of his status.
20. The respondent considered family life under the Immigration Rules in her refusal letter and concluded he could not succeed under paragraph EX.1 because there were no "insurmountable obstacles" to family life continuing in the Philippines. His claim under paragraph 276ADE was rejected because he could not show he did not have any social, cultural or family ties to the Philippines. Ms Appiah did not disagree with this in the First-tier or before me.
21. Following a long line of cases a Tribunal should consider the claim outside of the Immigration Rules if ultimately there are exceptional circumstances that would result in an unjustifiable harsh outcome.
22. I have to have regard to the fact the appellant's mother lives here as does the appellant's partner and her family. They are all entitled to live in the United Kingdom because they either have indefinite leave to remain or are now British citizens. I also have regard to the fact that the appellant is in a subsisting relationship.
23. The FtTJ failed to consider the respondent's arguments when allowing the appeal under Article 8 ECHR. These arguments can be summarised as follows:
  - a. The appellant has lived the majority of his life in the Philippines.
  - b. His partner is also from the Philippines but came to this country as a dependant of her parents.
  - c. Both have extended family that live in the Philippines.
  - d. The appellant did not meet the Immigration Rules.
  - e. He became an overstayer once his appeal rights were exhausted in May 2012.
  - f. Even if there was some confusion the appellant was aware that he had not been granted indefinite leave as the authorities refused to issue him with the appropriate paperwork and Judge of the First-tier Tribunal Coutts dismissed his appeal in any event in 2012.

- g. The appellant has continued his relationship despite the precarious nature of his status.
  - h. It was open to him to make the appropriate application for entry clearance and as long as he satisfied the requirements of Section EC-P of Appendix FM he would be granted entry clearance.
  - i. There was nothing exceptional about his case that would mean removal would lead to unjustifiably harsh consequences.
24. The situation is unfortunate for the appellant as I agree with the FtTJ that the appellant has not set about staying here illegally. I find that he has not sought to hide from the authorities but has in fact sought to regularise his status. A logical conclusion of that finding is he was aware he did not have indefinite leave to remain.
25. The positive aspects of his case are as set out by Ms Appiah in her arguments made both to the FtTJ and myself. I also have looked at Section 117B of the 2002 Act (as inserted by Section 19 of the Immigration Act 2014). In particular I have regard to the following:
- a. The maintenance of immigration control is in the public interest
  - b. The appellant's partner can support him as she earns over £18,600 and consequently he would not be a burden on the tax payers.
  - c. The relationship began when he was here legally. They met in May 2009 and began living together at his mother's flat in July 2009. The appellant was lawfully here until his rights of appeal were exhausted in May 2012.
  - d. Since May 2012 his status has been precarious as evidenced by the fact he has made two applications outside of the Rules to try and stay here.
26. If the appellant had demonstrated insurmountable obstacles or shown that he did not have any social, cultural or family ties to the Philippines then he would have succeeded under the Rules. Article 8 is not meant to be a short cut or a direct alternative to the Rules. The appellant has to demonstrate that removal would lead to unjustifiably harsh consequences and I am not satisfied this is the case. The appellant has ties to the Philippines and his partner is also from that country. The consequences of removal would be that the appellant would have to make an application for entry clearance and if he meets the Rules his appeal would be allowed. There is nothing exceptional about the appellant's circumstances and I dismiss the appeal under Article 8 ECHR.

### **Decision**

27. The decision of the First-tier Tribunal did disclose an error in law. I set aside the decision allowing the appeal under Article 8 ECHR. I remake that decision and dismiss the appeal.

28. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order was made in the First-tier and I see no reason to amend that order.

Signed:

Dated: **February 3, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I uphold the original decision on fees.

Signed:

Dated: **February 3, 2015**

Deputy Upper Tribunal Judge Alis