



IAC-FH-AR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/46692/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2 November 2015**

**Decision & Reasons Promulgated
On 10 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

**RUBY PAIGALAN PANES
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Iqbal, Counsel, instructed by Chris Raja Solicitors

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The Appellant, a citizen of the Philippines, appealed against a decision of the Respondent curtailing her leave to remain in the UK, which had originally been granted to her as a Tier 4 Student. Her ensuing appeal was heard by Judge Hussain sitting at Hatton Cross on 20 May 2015. Both parties were represented. In a decision

of 30 May, promulgated on 3 June, 2015, the appeal was allowed on Article 8 human rights grounds.

2. Permission to appeal was granted to the Respondent on 17 August 2015 by Judge Nicholson in the following terms:
 - “1. First-tier Tribunal Judge Hussain allowed this Appellant’s appeal against refusal of leave to remain and removal to the Philippines in a decision promulgated on 3 June 2015.
 2. The judge found that there was a disproportionate interference in the Appellant's private life because of the effect of the Appellant's removal on Ms Staines, who suffers from motor neurone disease and who employs the Appellant to care for her.
 3. The grounds contend that the judge’s assessment was flawed as it was open to Ms Staines to employ another carer. The grounds also contend that the judge wrongly found that the Appellant was financially independent because the Appellant was working without a lawful basis to do so. Finally the grounds contend that Section 117B of the 2002 Act did not support the contention that the Appellant's circumstances outweighed the public interest in effective immigration control.
 4. There is no arguable merit in relation to the contention that this Appellant was not financially independent. The judge found at paragraph 52 that she had a monthly income of £1,000 and that this was a factor which ‘weighed in her favour’. It is arguable that a person reliant on unlawful employment is not financially independent for the purposes of Section 117B. Moreover, in **AM (Section 117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that an Appellant can obtain no positive right to a grant of leave to remain from Section 117B(3), whatever the strength of her financial resources.
 5. Permission to appeal is therefore granted on this ground. I do not refuse permission on the remaining grounds.”
3. The Appellant submitted a lengthy Rule 24 response, prepared by Miss A Walker, of Counsel, who had represented the Appellant at the hearing.
4. The Appellant attended the error of law hearing. So did Mrs Lynn Staines, for whom the Appellant is a carer, accompanied by two ladies, one from the Motor Neurone Disease Association. The hearing took the form of submissions, which I have taken into account, together with the permission application and the Rule 24 response. I reserved my determination.

Determination

5. The essence of the permission application, summarised by Judge Nicholson, is that Judge Hussain did not find the existence of exceptional circumstances, and should

not therefore have undertaken a freestanding Article 8 proportionality assessment, and, alternatively, that the assessment which was undertaken was flawed.

6. Judge Hussain stated the burden and standard of proof (paragraph 44). He noted that the Immigration Rules do not provide for people to remain in the UK as carers. He therefore concluded that the application should be assessed under conventional Article 8 principles [45]. He followed the Razgar paradigm [46ff]. He considered the degree of dependence of Mrs Staines upon the Appellant [47], and found, based upon authority about the impact of a decision on third parties, that Mrs Staines' private life was engaged [48]. He found that her private life was substantial and that interference with it would have grave consequences [46, 50].
7. The judge considered a number of factors, including those in Section 117B of the 2002 Act [51ff]. The Appellant was a fluent English speaker. She had a monthly income which the judge assessed to be adequate. This finding is challenged on the basis that it derived from unlawful employment and could not therefore establish financial independence. In any event, though, it was one factor in the complex of factors.
8. The judge bore in mind that effective immigration control was in the public interest. Since the Appellant was in the UK unlawfully, immigration control would normally demand her exclusion [53]. However, she was unlikely to have recourse to public funds and speaks English fluently [54]. Mrs Staines was substantially dependent upon the Appellant, and the semblance of normality in her life was only possible because of the care provided by the Appellant [55]. The Respondent argued that another carer could be engaged [56]. However, there was no evidence of the availability of another 24 hour carer at the Appellant's rate of remuneration, and Mrs Staines' brother had not managed to find any [57]. No social services review had been conducted [58]. Mrs Staines did not wish to live in a nursing home, and having to do so would have a very negative effect on her emotional health [59]. There was medical evidence of the serious health problems of Mrs Staines' brother, which prevented him acting as her carer [60]. One aspect of the public interest is the economic wellbeing of the UK. If Mrs Staines had to go into a nursing home the cost to the state was likely to be much more than it was at present [61].
9. The case had not been an easy one to decide. The judge had to balance the need of immigration control to remove people unlawfully in the UK against any adverse impact on that individual and on others whose lives are touched by them. His best judgment was that on balance the Appellant's exclusion from the United Kingdom would not be proportionate [62].
10. In a scenario not provided for by the Immigration Rules it was entirely appropriate for Judge Hussain to undertake an Article 8 proportionality assessment. The assessment took into account the factors prescribed by Section 117B of the 2002 Act. It addressed the point raised by the Respondent that Article 8 does not confer a choice of care provider and is not a general dispensing power. Whilst there may be some merit in the Respondent's objection to the judicial conclusion about financial independence, this is but one factor in the analysis, and does not detract from the

conclusion that the Appellant is unlikely to have recourse to public funds. The Article 8 proportionality assessment was impeccably conducted, and does not disclose any error of law.

Decision

11. The original decision does not contain an error of law, and is upheld.
12. No anonymity direction is made.

Signed

Dated: 9 November 2015

Deputy Upper Tribunal Judge J M Lewis