



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

Appeal Number: HU/05137/2020
UI/2021/001690

THE IMMIGRATION ACTS

**Heard at Field House
On 11 August 2022**

**Decision & Reasons Promulgated
On 28 September 2022**

Before

**UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE STOUT**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS D

Respondent

Representation:

For the appellant: Mr Avery, Senior Home Office Presenting Officer

For the respondent: Mr Hawkin, instructed by Lambeth Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department (the Secretary of State) appeals against the decision of First-Tier Tribunal Judge C J Woolley (the FTTJ) promulgated on 27 October 2021, following a hearing on 19 October 2021. The respondent to the appeal is Ms D, but we will refer to her as 'the appellant' as she was below. The FTTJ allowed the appellant's appeal against the Secretary of State's decision of 11 March 2020 refusing her further leave to remain under Paragraph 276ADE of HC395, and outside the rules under Article 8 of the ECHR. Permission to appeal was granted by Tribunal Judge L K Gibbs on 18 November 2021.

Anonymity

2. An anonymity order was made in respect of the appellant by the FTTJ which has effect on the terms set out at [61] of the FTTJ's decision. No application was made to us to amend or vary that order and we have not considered it appropriate to amend or vary it of our own motion.

Background

3. The appellant is an Indonesian national who has a husband, two sons and two grandchildren in Indonesia. She commenced working for Mr and Mrs B as a nanny in 2008. Mr and Mrs B have five children born between May 2006 and July 2016. The appellant has travelled out of the UK with Mr and Mrs B on a number of occasions. She has lived in the UK full time since 2016. She entered the UK on 30 August 2016 with entry clearance as a domestic worker, valid until 25 February 2017. She applied for further leave to remain which was refused. Since that refusal, the appellant has not been paid wages by the family, but has remained living with them, is supported financially by them and continues to look after the children, cook and perform other household duties. On 19 August 2019 she made the application for leave to remain on private life grounds that is the subject of this appeal. The application was refused by the Secretary of State on the basis that there would not be very significant obstacles to her integration into Indonesia and there were no grounds for granting leave outside the rules under Article 8.

Mrs L's case

4. The appellant is one of two nannies who work with the family. The other is Mrs L, who is also an Indonesian national and whose applications for leave to remain as a domestic worker and on private life grounds were also refused by the Secretary of State. Mrs L's appeal to the FTT was dismissed by FTTJ McCall on 22 October 2020, *inter alia* because FTTJ McCall concluded that Mrs L did not enjoy a family life with Mr and Mrs B and their children as it was in essence a commercial relationship. A subsequent appeal to the UT, for which permission was granted by UTJ Plimmer on 27 January 2021, was dismissed by UTJ Hanson in a decision and reasons promulgated on 11 November 2021 following a hearing on 22 September 2021. At first instance in the present case, the FTTJ directed himself that the principle in Deevaseelan could not apply in view of the then outstanding appeal in Mrs L's case and that he should deal with the appellant's case without any further reference to Mrs L's. On this appeal, neither party invited us to take any different approach in the light of Mrs L's appeal having now been finally determined. Nor did we consider it

would be appropriate for us to do so given that we are here concerned only with whether there is an error of law in the decision of the FTTJ.

The FTTJ's decision

5. In this case, the FTTJ heard oral evidence from the appellant, Mrs L, other employees of the B family and also Bee Tussaoud, a Psychodynamic Psychotherapist who had provided a Psychological Report dated 4 October 2021. After setting out the applicable law, the evidence received, dealing with some preliminary issues, and recording the submissions of the parties, the FTTJ set out conclusions and reasons, which may be summarised as follows:
 - (i) there would not be “*very significant obstacles*” to the appellant’s reintegration to Indonesia ([28]-[32]);
 - (ii) the appellant has both a private ([36]) and a family life ([37]-[40]) in the United Kingdom;
 - (iii) removal from the United Kingdom would constitute an interference with those rights sufficiently serious as to engage Article 8, albeit that it was in accordance with law in principle and necessary for the maintenance of immigration control ([41]-[45]);
 - (iv) the best interests of the children for the purposes of s 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA 2009) were for the appellant to remain at the present time in the United Kingdom, particularly for the younger children, but also for the older children given their vulnerabilities ([47]-[55]);
 - (v) at [56]-[57] the FTTJ undertook a wider proportionality assessment, applying a balance sheet approach;
 - (vi) at [58] the FTTJ concluded that the appellant had produced a “*very strong or compelling case*” (per *Agyarko*), that refusal of leave to the appellant was disproportionate to the legitimate aim of maintaining immigration control and that a lesser measure could have been deployed, namely the grant of a limited period of leave outside the rules to allow the children in her care to transition to a state of independence from her;
 - (vii) at [59] the FTTJ gave an indication that the appropriate period of leave might be ‘no more than 5 years’, although acknowledged that this was entirely a matter for the Secretary of State.
6. In reaching his conclusions, the FTTJ took into account the report and evidence of Mrs Tussaoud (especially at [40] and [48]) and the report of Dr Middleton (Consultant Psychologist) dated 15 June 2020 ([49]-[50]), having given a self-direction that they were not to be treated as expert reports as they lacked the necessary statement of understanding that their duty was to the court.

The Grounds of Appeal

7. The grounds of appeal as set out in the notice of appeal were, first, that the FTTJ had erred in law in finding that exceptional circumstances exist in this appeal and had not adequately considered the mandatory requirements of the Nationality, Immigration and Asylum Act 2002 (the NIAA 2002), ss 117A-D; secondly, that the FTTJ had given undue weight to Mrs Tussaud's report; thirdly, that the FTTJ had failed to take into account and/or resolve conflicts of fact or opinion on material matters.

The parties' submissions

8. At the hearing, Mr Avery made compendious submissions on all grounds. Concerning the FTTJ's approach to the evidence of Mrs Tussaud and Dr Middleton, Mr Avery submitted that at [48] the FTTJ placed a lot of weight on this evidence. Although the FTTJ rightly acknowledged that the evidence was not expert evidence and could only be considered as the evidence of "*an informed and professional*" witness, the FTTJ still treated the evidence as if it was expert evidence. The judge needed to treat the reports with much more caution given that they are effectively private individuals supporting the family's stance. The judge's conclusions in relation to Article 8 are founded on this evidence and the Secretary of State submits that the conclusions on Article 8 are fundamentally flawed because of the uncritical reliance on this evidence. Mr Avery submitted that the FTTJ appeared to have given undue weight to UTJ Plimmer's decision granting permission in Mrs L's case because the judge in that case had arguably erred in failing to give weight to the reports of Mrs Tussaud and Dr Middleton and thus fell into the opposite error.
9. As to the general assessment on Article 8, the Secretary of State submitted it may be difficult to replace the appellant, but it was perverse to conclude there were not alternative people who could do the job. The family has written a job description based on this individual. Mr Avery also submitted that the judge had not engaged sufficiently with the s 117B elements, in particular the appellant's lack of English. He added that the parents are still playing an active role in the children's lives and can provide the stability for the children if the appellant leaves. In short, he submitted that the problem lies in the 'family life' finding and the way that feeds in to the overall assessment of Article 8.
10. Mr Hawkin for the appellant submitted that the decision was a thoughtful and detailed one that runs to 25 pages and 60 paragraphs. He submitted that the arguments made by Mr Avery today were not the arguments set out in the Grounds of Appeal. In particular, the Grounds did not include an argument that the FTTJ was wrong to place any reliance on the evidence of Mrs Tussaud and Dr Middleton and if that was to be argued now,

permission was required. The FTTJ was entitled to place weight on Mrs Tussaud's and Dr Middleton's evidence and to take it into account with the other evidence. The FTTJ's assessment of why the appellant has family life in the UK at [37]-[40] was made with reference to the relevant authorities, and reached a properly reasoned conclusion based on all of the evidence. The original second ground of appeal was only a disagreement with that assessment. The argument made at the hearing today about Mrs Tussaud and Dr Middleton's evidence was in any event not meritorious. The FTTJ was plainly entitled to give that evidence some weight, and he has not placed undue reliance on that evidence. It must also be remembered that Mrs Tussaud gave oral evidence and was cross-examined at the hearing so her evidence was tested. The other arguments raised today about why the FTTJ should have reached a different conclusion on the replaceability of the appellant are just attempts to reargue the merits. The arguments were made to the FTTJ, but not accepted. The FTTJ's wider proportionality assessment at [56]-[58] impeccably assesses all the relevant factors, including the mandatory considerations in section 117B. The FTTJ concludes that what matters is the impact on the children. Further, the FTTJ made balanced recommendations as to the period of leave that might be appropriate, taking into account the relevant factors and striking a proportionate balance between the private and public interests at stake.

11. In summary, as to the first ground, the Secretary of State has not identified any basis for the assertion that it was an error of law to find that exceptional circumstances exist. As to the second ground, the FTTJ's proportionality findings are detailed and properly apply the statutory provisions in s 117B. There is a proper legal direction at [45] and then detailed consideration at [56]-[57]. This includes proper consideration of the appellant's lack of knowledge of English, which is noted to be a factor against her. As to the third ground, this does not actually identify any failure to take into account or resolve conflicts of fact or opinion, but just reargues the case and does so inaccurately as it is asserted that the appellant is being paid to work for the family when that has not been the case since she was refused leave to remain. The FTTJ considered all the matters properly in the decision and properly concluded that in this exceptional case Article 8 requires the grant of leave outside the Rules.
12. Mr Avery in reply submitted that this is a long decision, but it reads as if the FTTJ is seeking to justify the decision rather than adjudicate on an appeal. He submitted that a recommendation for a period of leave in [59] showed the judge stepping outside the judicial role.

Conclusion

13. In our judgment, this is a careful and well-reasoned decision that contains no error of law. The Secretary of State has not identified any misdirection of law in the decision, and we can see none.

14. So far as the FTTJ's finding that the appellant enjoys family life with the B family is concerned, the Secretary of State does not argue that this conclusion was not open to the FTTJ as a matter of law. The Secretary of State rightly accepts, in the light of Lama (video recorded evidence - Art 8 ECHR) [2017] UKUT 16 (IAC) that in principle family life may exist between domestic workers and their employers. The Secretary of State's argument is that the FTTJ has erred in relation to aspects of the factual assessment as to whether family life exists in this case, and thus has given undue weight to that family life when conducting the proportionality assessment.
15. However, we can see no error in the FTTJ's approach to the factual assessment. There is no dispute that the FTTJ was entitled to rely on the evidence of Mrs Tussaud and Dr Middleton, provided that the FTTJ recognised (as he did) that their evidence was not to be treated as expert evidence and weighed that evidence together with the other evidence. The FTTJ in this case has not treated the views of Mrs Tussaud and Dr Middleton as determinative either on the question of family life (at [40]) or as to the best interests of the children (at [48]-[55]), but has taken their evidence into account alongside other evidence and formed his own view. Moreover, the FTTJ had the benefit of oral evidence from Mrs Tussaud and thus the opportunity to assess in person her credibility and professionalism. Since no question mark as to either arises in this case, there was no reason for the FTTJ not to give the weight to her evidence that he saw fit (and the similar evidence of Dr Middleton), notwithstanding that they were witnesses for the appellant rather than professedly impartial experts.
16. Likewise, the FTTJ carefully considered the Secretary of State's arguments as to the importance of: (i) the appellant having family in Indonesia (which he deals with in detail when concluding that as a result there are no significant obstacles to her returning, and also alludes to when addressing family life as he notes at [37] that she has "*no blood relatives in the UK*"); and, (ii) her relationship with the B family being in origin a commercial one and thus that she was replaceable. However, he concluded, for cogent reasons, that these factors did not mean that she was not in a close personal relationship with the family that amounted to family life for the purposes of Article 8 ([37]-[40]). The Secretary of State's repetition of those arguments in the grounds of appeal is an attempt to reargue the merits, and discloses no error of law.
17. As to the proportionality assessment, the FTTJ has followed the balance sheet approach with impeccable clarity, giving reasons for his conclusions both in relation to each individual factor (at [56]) and as to where the overall balance lies in this case (at [57]-[58]). So far as the requirements of NIAA 2002, ss 117A-D are concerned, the FTTJ has properly identified the relevant statutory provisions and has addressed each relevant mandatory consideration, in particular that the appellant's private and family life was established while her leave was precarious ([56(i)]), that she is financially independent, albeit only as a result of Mr and Mrs B's support ([56(ii)]) and that she had "*showed no knowledge of English*",

which the FTTJ properly notes as a factor to take against her ([56](ii)). The Secretary of State submits that the FTTJ should have given more weight to that latter factor, but the weight to be given to the factors is a matter for the judge and in this case there were several factors identified by the FTTJ as weighing in favour of the appellant which it was open to him to regard as outweighing the negative factors.

18. Finally, we observe that no criticism can be levelled at the FTTJ for concluding that the proportionate response in this case would have been the grant of a limited period of leave, rather than refusal. As a matter of general principle, it is a necessary element in any proportionality assessment that consideration be given to whether the legitimate aim could be served by a measure that has less impact on the individual affected. As such, there was also nothing inappropriate about the FTTJ going on to give a view as to what an appropriate period might be. Given the time that the FTTJ had spent considering the case, that was a helpful indication. The FTTJ properly made clear that his view was not binding on the Secretary of State.

Notice of Decision

19. The appeal is dismissed.

Signed: H Stout

Date: 16 August 2022

Deputy Upper Tribunal Judge Stout