



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-005046

First-tier Tribunal No: HU/53344/2021
IA/12956/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 March 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

CHERRYLL AGAPITO GECA
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Appiah, Counsel

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 15 February 2023

DECISION AND REASONS

1. The appellant is a citizen of the Philippines born on 10 November 1966. She appeals, with permission, against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse her human rights claim.
2. The appellant first entered the UK as a visitor in June 2007, after successfully appealing a decision to refuse her entry clearance. She overstayed her visa, on 5 June 2007, and applied on 5 November 2010 for leave to remain as an unmarried partner. Her application was refused on 14 January 2011 and she was served with a liability to removal notice. She made a further application for leave to remain on 4 April 2015, on family and private life grounds, but that was also refused on 7 August 2015. The

appellant appealed against that decision but her appeal was dismissed on 23 August 2016. She became appeal rights exhausted on 6 April 2017 after being refused permission to appeal to the Upper Tribunal and she voluntarily departed the UK on 2 June 2017.

3. On 7 September 2017 the appellant applied for entry clearance as a spouse/civil partner in a same sex relationship. She was granted entry clearance and she re-entered the UK on 13 March 2018 with leave to enter as a spouse/civil partner until 5 December 2020.

4. The appellant claims that her relationship with her spouse/civil partner broke down and she subsequently formed a new same-sex relationship. She made an application for leave to remain as an unmarried partner, on 30 September 2020, on the basis of her same-sex relationship with her new partner Remedios Sheldrake, a British citizen.

5. The appellant's application was refused on 22 June 2021. The respondent did not accept that the appellant met the definition of partner as defined in GEN.1.2 as she had not provided evidence that she and her sponsor had lived together in a relationship akin to marriage for two years. The appellant claimed to have started living with her partner in June 2018 but there was limited evidence of that relationship, no evidence that her previous relationship with her spouse had broken down and no evidence that her new partner was widowed as claimed. The respondent did not accept that the appellant's relationship with her sponsor was genuine and subsisting. The respondent considered therefore that the appellant did not meet the eligibility relationship requirements in Appendix FM. In addition the respondent did not accept that the appellant met the eligibility financial requirements in Appendix FM and did not accept that there were insurmountable obstacles to the appellant continuing her family life with her partner outside the UK. The respondent considered that the appellant could not, therefore, meet the requirements of Appendix FM on the basis of family life in the UK. The respondent concluded further that there were no very significant obstacles to the appellant reintegrating in the Philippines and that the requirements of paragraph 276ADE(1) of the immigration rules were not met. The respondent concluded further that there were no exceptional circumstances outside the immigration rules.

6. The appellant appealed against the decision and her appeal came before First-tier Tribunal Judge Wylie on 8 July 2022. The appeal was heard remotely, via CVP. The appellant gave oral evidence before the judge, as did her five witnesses, namely Remedios Sheldrake (her partner), Menchie Aligue (her sister's friend), Adrian James Abella (her newhew), Michael Brendan Coogan (her sister's partner) and Cecilia Agapito (her sister). The appellant's evidence was that she had been in a same sex relationship with Carolina Aquino Mostoles from 2006, she had entered into a civil partnership with Ms Mostoles on 12 January 2013 and she had been granted entry clearance to the UK as the spouse of Ms Mostoles, returning here on 13 March 2018. She said that Ms Mostoles had met a new partner when she, the appellant, was away from the UK from 2 June 2017 to 13 March 2018, and so when she returned to the UK she went to stay with her friend Ms Sheldrake since Ms Mostoles did not want her to go to her home. The appellant's evidence was that Ms Sheldrake's husband had died in April 2017 and the appellant's civil partnership with Ms Mostoles was dissolved on 16 February 2022. It was argued before the judge that at the time the application was made by the appellant in September 2020 she had been in a two-year relationship with Ms Sheldake, beginning in June 2018, and the relationship was currently of four year duration. It was argued further that there was nothing in the immigration rules

preventing a genuine relationship from commencing whilst a party was still married or in a civil partnership with a previous spouse/partner.

7. The judge found that whilst there was evidence that the appellant and Ms Sheldrake resided at the same address, there was limited documentary evidence to support their claim to be durable partners. There was no evidence of any joint financial engagement. The photographs which had been submitted did not show that the appellant and Ms Sheldrake were in a relationship of more than friendship. The judge considered that the appellant's evidence was inconsistent with that of her sister and noted that there was little direct evidence of cohabitation. She considered that the objective evidence went no further than showing a close personal friendship between two women who shared the same address and was not satisfied that there was sufficient reliable evidence of a genuine and subsisting same-sex relationship between the appellant and the sponsor. The judge considered that there was sufficient evidence of earnings to meet the minimum income requirement, but that that did not have to be considered in any event as the relationship requirement was not met. The judge considered there to be no very significant obstacles to the appellant's integration in the Philippines and did not find there to be any exceptional circumstances such that it would be unduly harsh for the appellant to be required to leave the UK. She concluded that it was proportionate for the appellant to return to the Philippines and she accordingly dismissed the appeal on human rights grounds.

8. The appellant sought permission to appeal to the Upper Tribunal against Judge Wylie's decision on four grounds. Firstly, that the judge had erred by considering whether the relationship was genuine on the basis of matters which were not put to the appellant or sponsor and which were in any event unreasonable; secondly, that the judge had failed to assess the evidence of, and give weight to, the witnesses; thirdly, that the judge had erred by finding the evidence of the appellant's sister to be inconsistent with that of the appellant; and fourthly, that the judge had erred by finding there to be little direct evidence of cohabitation when there was such evidence.

9. Permission was granted in the First-tier Tribunal in particular with regard to the second ground. The respondent provided a rule 24 response opposing the appeal. The matter then came before me for a hearing and both parties made submissions.

Discussion

10. It was Ms Isherwood's submission that the appellant's grounds of challenge were simply a disagreement with the judge's findings. However it seems to me that there is merit in the grounds which go beyond mere disagreement. It is indeed the case that the documentary evidence before the judge only went so far in supporting the appellant's claim to be in a same-sex relationship with Ms Sheldrake, as opposed simply to being close friends living together. The photographs the appellant produced neither supported nor undermined the appellant's claim in regard to the nature of her relationship with Ms Sheldrake. The bank statements and utility bills showed that the appellant and Ms Sheldrake had been living in the same house since June 2018, as the appellant claimed, but again did not demonstrate in themselves that their relationship went beyond friendship.

11. However there were five witnesses who attended the hearing in person in addition to providing witness statements/ supporting letters, as well as four further witnesses who provided letters but did not attend the hearing. I accept Ms Isherwood's submission that the evidence from the witnesses was concise and that their statements and letters were short and lacked detail. However, despite the brevity of

their evidence, the witnesses all attested to the fact that the appellant and Ms Sheldrake were in a relationship and the judge did not make any findings to the extent that their evidence was unreliable. She made some observation at [52] about the appellant's sister's evidence being inconsistent with that of the appellant, but it does not seem to me that what she described as an inconsistency could necessarily be identified as such. In any event, as Ms Appiah submitted, whilst referring to the evidence of the witnesses, at no point did the judge actually undertake any assessment of their evidence or give any indication as to the weight she accorded to it. She made no credibility findings, adverse or otherwise. In circumstances where the respondent had previously accepted the appellant's account of being in a same sex (albeit different) relationship, where the respondent's concerns about the lack of evidence of the dissolution of the appellant's previous marriage and of Ms Sheldrake's husband being deceased seemed to have been addressed, and where the documentary evidence before the judge was simply neutral, it was unclear from the judge's decision why she declined to place any weight upon the evidence of the witnesses. It may be that there were valid reasons for her to conclude as such, but she did not provide them, and as a result her decision and conclusions were not clearly explained and reasoned.

12. For all of those reasons it seems to me that the judge's findings and conclusions on the appellant's relationship are materially flawed. With regard to the disposal of the appeal, it was Ms Isherwood's case that there had been no challenge in the grounds to the judge's decision on paragraph 276ADE(1) of the immigration rules and the issue of exceptional circumstances outside the immigration rules. However, as Ms Appiah said, it had been accepted before the judge that there was no real case to be argued under paragraph 276ADE(1) and the question of exceptional circumstances was inextricably linked to the findings on the appellant's relationship with Ms Sheldrake, so that the focus of this appeal was the appellant's relationship. In the circumstances the most appropriate course would be for the matter to be remitted to the First-tier Tribunal to be heard again before a different judge.

Notice of Decision

13. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, with no findings preserved, pursuant to section 12(2) (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Wylie.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 February 2023