



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005358

First-tier Tribunal No: HU/50361/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE RINTOUL

Between

AIMEE FABORADA BUNAYOG
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Hodson, instructed by MBM Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 19 July 2023

DECISION AND REASONS

1. The appellant is a citizen of the Philippines born on 24 May 1977. She appeals, with permission, against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse her application for entry clearance under Appendix FM on the basis of her family life with her partner and child.
2. The appellant initially came to the UK on a student visa in October 2006 and extended her stay further to enable her to work in the UK. She met her partner, Mr Derek Allan Styles, a British citizen, on-line and began a relationship with him in 2008. They saw each other regularly but did not cohabit. The appellant became pregnant and gave birth to their daughter, Allana, a British citizen by birth, on 13 September

2010. On 10 December 2010 she returned to the Philippines with their daughter, having been refused a further extension to her visa. Her daughter was three months old at the time. Mr Styles remained in the UK. The appellant assumed sole parental responsibility for their daughter in the Philippines and Mr Styles sent money when he was able to and would chat to his daughter via video and mobile calls. In 2018 he told her that he was married to someone else, although he was going through divorce proceedings.

3. The appellant made various applications to return to the UK: for entry clearance as a visitor which was refused in January 2012, for an EEA family permit which was refused in May 2012 and as a family visitor which was refused in January 2020.

4. On 28 August 2021 the appellant applied for entry clearance as a partner, to join Mr Styles in the UK as his unmarried partner. In that application she stated that she first met Mr Styles in February 2007, that her relationship began in July 2007 and that she last saw him on 12 December 2010. She also stated that she had never lived with Mr Styles and that she was not intending to get married to him. She stated that she intended to travel to the UK with their daughter and that they would all be living together in the UK in Mr Styles' accommodation.

5. The appellant also applied for family settlement as the parent of a British child, submitting an Appendix 1 (VAF4A) form, as well as applying on an Appendix 5 (VAF4A) form as the parent of a child in the UK, stating that she did not have sole parental responsibility for her child but had direct access rights to her child in the UK. It is not clear when those forms were submitted.

6. The respondent refused the appellant's application on 11 January 2022. With regard to the application made on the Appendix 5 (VAF4A) form as the parent of a child in the UK, the respondent considered that the appellant did not qualify for entry clearance under the parent route of Appendix FM as her daughter was not living in the UK. The respondent went on to assess the appellant's application for entry clearance as a partner and concluded that she did not meet the requirements of the immigration rules in that regard. It was considered that the appellant did not meet the eligibility relationship requirement in paragraphs E-ECP.2.1 to 2.10 and that the sponsor did not meet the definition of 'partner' in GEN.1.2 because they had not previously lived together in a relationship akin to marriage for at least two years. The respondent was not satisfied that the appellant was in a genuine and subsisting relationship with her daughter's father or that it was her intention to live with him permanently in the UK. The respondent considered further that the appellant was unable to meet the eligibility financial requirements of paragraphs E-ECP.3.1 to 3.4 as she was not satisfied that the appellant and/or her sponsor had held at least £62,500 in cash savings for six months prior to her application and noted that there was no proper evidence of the sponsor's personal finances. In addition, the respondent was not satisfied that the appellant met the eligibility English language requirements of paragraphs E-ECP.4.1 to 4.2. The respondent considered that the appellant had failed to show that there were any exceptional circumstances which could render refusal a breach of Article 8.

7. The appellant appealed against that decision. The appeal was listed for hearing in the First-tier Tribunal on 18 July 2022.

8. In the meantime, Mr Styles travelled to the Philippines and met with the appellant and their daughter, and then brought their daughter back to the UK with him, on 11 March 2022.

9. The appellant's solicitor, Mr Magsino of Queen's Park Solicitors, submitted a skeleton argument for the appeal, dated 4 April 2022, in which it was stated that the respondent had wrongly assessed the application as being an application as the partner of a British citizen, when in fact the appellant had applied as the mother of a British citizen child and had sought entry clearance under section EC-PT of Appendix FM. It was stated that the appellant had direct access to her child as set out in a Child Care Arrangement confirming that she was to take an active role in the child's upbringing, as she had done when the child was in the Philippines. It was stated that the appellant and Mr Styles were willing to work together for the best interests of their child and that Mr Styles was able to support the appellant and their child financially.

10. In her Respondent's Review of 19 April 2022, the respondent maintained that the appellant's application fell for refusal under paragraph EC-PT.1.1(d) (E-ECPT.2.3 and E-ECPT.2.4).

11. The appellant's solicitor, Mr Magsino, then filed a supplementary skeleton argument dated 17 July 2022, stating that if the appellant could not meet the definition of 'Partner' she may be able to meet the meaning of a 'Person who has direct access rights to a British child living in the UK'. Reference was made to the appellant and Mr Styles having signed a Child Care Agreement on 11 April 2022. It was submitted that the Home Office position created an arbitrary division within a family unit so that applicants could only rely on their relationship with their partner or child and not both, and that it was not in the best interests of the child to be deprived of having her mother in the UK.

12. The appellant's appeal came before First-tier Tribunal Judge Povey on 18 July 2022 and was heard remotely by CVP. The respondent did not attend the hearing. The appellant and Mr Styles attended, with the appellant joining from the Philippines. Judge Povey pointed out that there was no consent from the Filipino state for the appellant to give evidence in the proceedings from the Philippines and Mr Magsino accordingly confirmed that she would not be called to give evidence. Judge Povey did not consider it appropriate or necessary for the appellant's daughter, who was 11 years of age, to give evidence and the appeal proceeded with Mr Styles giving evidence before the judge. The judge recorded that Mr Magsino made it clear, at the beginning of the hearing, that the appeal was not being pursued on the basis of the appellant's daughter's presence in the UK but solely on the basis of the appellant's alleged relationship with Mr Styles and that, to the extent that his skeleton argument suggested otherwise, those aspects of his submissions were retracted. It was therefore agreed that the issues to be determined were whether the appellant met the requirements of Appendix FM in respect of her relationship with Mr Styles and whether the respondent's decision was an unlawful interference with the rights of the appellant, Mr Styles and their daughter under Article 8 of the ECHR. The judge noted that the appellant's case, as presented by Mr Magsino, was that she and Mr Styles had been in a genuine and subsisting relationship akin to marriage from at least August 2021. He noted that Mr Styles' oral evidence went further, as he was claiming that the relationship had subsisted from 2008 onwards, even though they had had no in-person contact since December 2010.

13. Judge Povey did not accept that the appellant and Mr Styles had remained in a genuine and subsisting relationship following the appellant's return to the Philippines in December 2010, noting that the appellant's evidence in her witness statement had focussed on their daughter and the appellant's wish that she had the opportunity to spend time with her father. The judge had regard to the child care arrangement document which included an agreement by the appellant and Mr Styles to live apart if

the appellant came to the UK and for arrangements to be made for the child to live with the appellant during the week but to spend weekends with Mr Styles. The judge noted further that Mr Styles, in his oral evidence, had said that if and when the appellant arrived in the UK, she would initially live with him and then they would arrange for her to rent a property of her own, which the judge considered to be an arrangement limited to raising their daughter together, and that Mr Styles then changed his evidence when that was put to him. The judge considered further that a sponsorship undertaking signed by Mr Styles on 15 July 2022 confirming that he would be responsible for the appellant's maintenance and accommodation and care in the UK was at odds with his oral evidence that arrangements would be made for her to rent her own accommodation, and was also inconsistent with a letter from the appellant's cousin signed on the same date offering accommodation and financial support for the appellant. He considered the latter to be consistent with a relationship of two parents seeking to raise their daughter whilst not being in a relationship themselves.

14. Judge Povey concluded that the sole purpose of the relationship between the appellant and Mr Styles was the upbringing of their child and that their own relationship had ended in 2010. He found that the appellant could not, therefore, meet the requirements of the immigration rules in Appendix FM under the Partner route and that there was no family life between the appellant and Mr Styles for the purposes of Article 8 outside the immigration rules. He found further that even if proportionality was considered, it could not be said that currently being unable to be with both parents in the UK was contrary to the child's best interests, such as to render the respondent's decision to refuse the appellant's application for entry clearance premised upon her relationship with Mr Styles unlawful. The judge concluded that the respondent's decision was therefore not a breach of the appellant's rights under Article 8 or a breach of the rights of her daughter or Mr Styles and he accordingly dismissed the appeal.

15. On behalf of the appellant, Mr Magsino sought permission to appeal to the Upper Tribunal on the grounds that there had been inappropriate judicial conduct on the part of Judge Povey and an appearance of bias such that the appellant felt that there had not been a fair hearing.

16. Permission was refused in the First-tier Tribunal, where it was noted that the allegation of misconduct had not been supported by a statement from the representative at the hearing.

17. The appellant then renewed the application to the Upper Tribunal in grounds prepared by a different legal representative, Mr Hodson. The grounds relied upon the previous ground of procedural unfairness but included a further ground, namely that the judge had failed to consider the best interests of the child as a primary consideration when assessing proportionality under Article 8.

18. Permission was granted in the Upper Tribunal, but limited to the first ground only in relation to procedural unfairness, and with the proviso that the appellant would have to ensure that she applied for a transcript of the hearing and that the grounds were to be sent to the judge for his comments.

19. Judge Povey was then invited to respond to the grounds of appeal which he did in a statement dated 5 June 2023. He confirmed that his own enquiries had concluded that there was no recording of the hearing as the video hearing system had malfunctioned. That is confirmed in the case notes in the Tribunal's records.

20. Directions were made by the Upper Tribunal on 3 July 2023 for the respondent to file a Rule 24 response and for witness statements to be provided by Mr Magsino as well as the appellant and sponsor.

21. The respondent filed a rule 24 response on 10 July 2023 opposing the appeal. On 13 July 2023 the appellant's representatives filed a bundle of documents containing statements from Mr Magsino and the appellant and sponsor. Judge Povey's own typed record of proceedings was produced as well as Mr Magsino's notes of the hearing.

22. The matter then came before us for a hearing. It was common ground that permission had been granted on one ground only, namely the procedural unfairness/ bias ground, and not on the second ground. Although he did not accept that permission should have been refused on that second ground, Mr Hodson accepted that there was only the one ground before the Tribunal. Both parties made submissions before us and we address those in our discussion below.

Discussion

23. The starting point in cases such as this, when considering the question of apparent or perceived bias, is the test set out in Magill v. Porter [2001] UKHL 67, at [103]: "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*"

24. The House of Lords considered the characteristics of the fair-minded observer in Helow v SSHD [2008] UKHL 62 at [2] -[3]:

"2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

25. Mr Hodson's case is that the fair-minded and informed observer, would conclude that there was apparent/ perceived bias on the part of the judge, despite the shortcomings in the way in which the case proceeded.

26. It is not a matter of dispute that the appellant's case took an entirely different course, at the hearing, from that indicated by the documentary evidence and skeleton arguments previously produced, given that prior to the hearing the appellant was

relying upon her relationship with her British child, whereas at the hearing itself that was abandoned and the case proceeded on the basis of her relationship with Mr Styles.

27. In the first skeleton argument prepared by Mr Magsino it was specifically stated, at [6], that the application was not being made by the appellant as the partner of a British citizen, namely Mr Styles, but as the mother of a British child, and the respondent was criticised as having erred in law and fact by considering the application on that wrong basis. Reliance was placed upon a child care arrangement in that skeleton regarding access to the child and it was made clear that that was the sole basis for the application having been made and that there was no relationship between the appellant and Mr Styles other than as parents to the child. The second skeleton argument, dated only a day before the hearing, was made on the same basis, but with reference to additional evidence including a signed child care agreement dated 11 April 2022.

28. However, at the outset of the hearing, Mr Magsino made it clear that the appeal was being pursued on the basis of the appellant's ongoing and subsisting relationship with Mr Styles and not in relation to their daughter, and Mr Magsino went on to retract those parts of the skeleton arguments suggesting otherwise.

29. In addition to that turnaround of events there were also significant inconsistencies in the evidence at the hearing, most significantly the case presented by Mr Magsino that the relationship had been genuine and subsisting from at least August 2021, in contradiction of Mr Styles' evidence that he had been in a continuous relationship with the appellant since 2008. Even more surprisingly, there was a request by Mr Magsino to the judge to ignore that aspect of Mr Style's evidence and to give no weight to a document previously relied upon by the appellant, namely the child care arrangement letter of 11 April 2022.

30. In such circumstances, as is accepted by Mr Hodson, it was not at all unreasonable for the judge to have experienced some astonishment at the turn of events, and frustration at the way in which the case was put to him. Indeed, Mr Hodson made various concessions. He accepted that there was nothing unfair in the judge putting questions to the sponsor about the documentary evidence, and putting his concerns to the appellant's solicitor, when there were clearly difficulties with the evidence. He accepted that the judge may have been astonished that the solicitor was maintaining that the relationship between the appellant and the sponsor was genuine in the face of the child care agreement. He accepted that it was difficult to see how the judge would not have had a pre-conceived idea about the genuineness of the relationship when all the evidence was put together. He also accepted that it would be extraordinary if the judge did not have a sense that this was an unarguable case.

31. It was Mr Hodson's submission, however, that procedural unfairness arose from Judge Povey's failure to conceal his preconceptions, from his antagonistic approach to Mr Magsino's submissions and from the perception of bias to which that gave rise, which then led the appellant to believe that she had not been given a fair hearing of her appeal.

32. We do not agree that there was any such unfairness.

33. We turn to the evidence produced to us for this hearing in the appellant's bundle, submitted on 13 July 2023, which consists of statements from Mr Magsino, the appellant and the sponsor, as well as the typed notes of Judge Povey and Mr Magsino

from the hearing on 18 July 2022. We assume those were contemporaneous notes from both parties - certainly Judge Povey's notes are dated 18 July 2022, whereas Mr Magsino's notes are undated. It is most unfortunate that there is no recording of the hearing and there was no Home Office Presenting Officer at the hearing.

34. We observe that the typed notes of the hearing make no reference to any heated exchange between the judge and Mr Magsino. Mr Magsino's notes make no reference at all to any intervention by the judge other than some questions put to the sponsor in clarification of his evidence. Mr Hodson suggested that it would have been difficult to make notes at the same time as having a heated exchange, but we see no reason why Mr Magsino would not have made a note of such an exchange at the end of his contemporaneous notes had that been a matter of particular significance at the time. Likewise, the record of proceedings from Judge Povey does not suggest any such exchange, but rather records attempts by the judge to seek clarification from Mr Magsino about aspects of the evidence (last three short paragraphs of page 5).

35. In his statement of 12 July 2013 Mr Magsino makes his main complaints about the judge at paragraphs 3 to 8, which can be summarised as follows: that Judge Povey always cut him off, did not give him a chance to explain, never let him finish, hinted that the case had no chance of success, shouted "Bloody hell, Mr Magsino" when he was making his final submissions, screamed at him whilst all his clients were listening, shouted with anger, looked at him angrily, asked questions like cross-examination, did not make sufficiently lengthy notes and intervened in a hostile and unfair manner, and that his clients felt discriminated against and humiliated. The appellant, in her statement of 13 July 2023, referred to Judge Povey intimidating her solicitor, interrupting him with anger and discontentment, and shouting "Bloody hell, Mr Magsino".

36. What is apparent from both statements is that, aside from the reference to the judge shouting "Bloody hell, Mr Magsino" both Mr Magsino and the appellant make generalised statements without providing any examples. Mr Magsino's assertion that Judge Povey always cut him off, did not give him a chance to explain and never let him finish are not supported in any way by the notes of the hearing from either himself or Judge Povey. His assertion that Judge Povey shouted with anger and looked at him angrily was unspecific and subjective. As for his reference to Judge Povey's notes not being 'substantive enough', it is unclear how he was able to view the judge's notes or why he was doing so and how that was relevant. With regard to his assertion that his clients felt "discriminated against and humiliated", that was not supported by their statements and certainly not by the sponsor who was the only witness actively participating in the proceedings.

37. It is relevant to note that the appellant, in her statement, expressed her feelings of intimidation and worry in terms of the fact that neither she nor her daughter were permitted to give evidence, whereas those were matters of appropriate judicial direction rather than adverse conduct on the part of the judge. Indeed the appellant's own inability to give evidence was due to the failure by her own representatives to follow proper procedures requiring consent from the Philippines, as clearly set out in the judge's decision at [5] and clarified in his statement at [7] to [11]. It is apparent from [5] of the decision, taken together with Judge Povey's statement at [9], that the judge actively encouraged Mr Magsino to advise and take instructions from the appellant on that point when he was otherwise intending to continue without doing so. The appellant's statement is otherwise little more than an expression of her discontent at the judge's decision. The same can be said of the sponsor's statement of 12 July 2023 which, significantly, makes absolutely no reference to the judge's conduct

towards Mr Magsino. The appellant's and sponsor's statements therefore provide little assistance in support of what are serious allegations made by Mr Magsino.

38. We turn finally to the statement of Judge Povey who, at [16], refers to a number of features of Mr Magsino's submissions which he found surprising, including Mr Magsino's request that he accord little weight to a document which had been produced in the appellant's own appeal bundle and Mr Magsino's request that he ignore part of the sponsor's oral evidence which was at odds with his own view of the appellant's relationship. At [17] Judge Povey expressed the view that such an approach seemed to be cavalier and that Mr Magsino responded to his queries on those matters with little or no consideration for the evidence or the interests of his client. He pointed out that Mr Magsino did not choose to re-examine the sponsor, despite the inconsistencies in his evidence, and he did not request time to take further instructions before making his submissions, and he recalled being "particularly taken aback by Mr Magsino's seemingly off-hand treatment of Mr Style's oral evidence". Judge Povey denied being angry with Mr Magsino, shouting at him or displaying hostility, aggression or sarcasm and said that he was, at most, surprised and astonished by Mr Magsino's submissions. He clarified that any interventions he made were by way of questioning the evidential bases for a number of submissions being made by Mr Magsino, to afford Mr Magsino an opportunity to clarify and address any queries raised, which he considered served to further enhance openness, transparency and fairness. Judge Povey stated further that he did not recall having said "Bloody hell, Mr Magsino" but he acknowledged that it was not appropriate language and stated that if he had said it, it would have been an instinctive unguarded reaction to the manner in which Mr Magsino was presenting his client's case.

39. We take a step back and look at the evidence in the round. It is clear that Judge Povey was taken by surprise at the turn of events and the way in which the appellant's case was being argued. On the one hand Mr Magsino had asked him to admit a supplementary bundle of documents and skeleton argument produced only the preceding day in which the appellant's case was put on the basis of her relationship with a British child and her access to that child, yet at the hearing Mr Magsino said that the appeal was not being pursued on that basis but on the basis of there being a genuine and subsisting relationship between the appellant and sponsor, a matter which was contradicted by the evidence. It is also clear that Judge Povey had serious concerns about the manner in which Mr Magsino was presenting the case in relation to his treatment of his clients and their oral and documentary evidence. He was astonished that Mr Magsino did not seek to take his client's instructions in light of the inconsistencies in the evidence and that he proceeded to make submissions in the manner that he did. Indeed, Mr Hodson accepted that he would not have felt comfortable himself as a representative and would have considered withdrawing from the case. In such circumstances it is entirely understandable that any judge would have felt frustrated and would wish to clarify matters and intervene at points in the proceedings. It is relevant to note that there is nothing in Mr Magsino's statement challenging any of the observations made by Judge Povey about his own conduct in the hearing, other than stating, at [3], that "*I, as the legal representative, have the right to address Judge Povey the way I understood my case...*". However the judge was perfectly entitled to expect a legal representative to act in a competent manner and in accordance with his duty to his clients and to the Tribunal.

40. If it is the case that the judge used inappropriate language in his frustration, that is clearly to be deprecated. However we find that the evidence simply does not support a claim that the judge acted inappropriately. Whilst his frustration with Mr Magsino may have been apparent, it is clear that that frustration was directed only at Mr Magsino

himself and not at the appellant or sponsor and we do not accept that his behaviour entered into the realms of anger, intimidation and bullying. On the contrary the evidence indicates that the judge was concerned for the appellant and the sponsor and that any interventions made were to ensure that Mr Magsino was presenting their case in an appropriate manner. As Mr Hodson acknowledged, the judge was faced with a hopeless case with no prospect of success. However he did not prevent Mr Magsino from proceeding and intervened only in order to clarify the evidence. We find no basis for concluding that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that Judge Povey was biased. We therefore reject the assertion in the grounds that there was any unfairness in the hearing.

41. In the circumstances we find that the sole ground of appeal is not made out. We observe that even if there was a question of unfairness, which we have found there was not, there was no possibility of the appeal succeeding in any event given the nature of the evidence. Be that as it may, we find there to be no material error of law arising from the proceedings or from Judge Povey's decision and we accordingly uphold his decision.

Notice of Decision

42. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeal accordingly stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 July 2023