IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001113

First-tier Tribunal Nos: LH/00652/2022
HU/52643/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LALAINE MORENO SOLANO
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Nicholas Wain, Senior Home Office Presenting Officer
For the Respondent: Mr Paul Draycott, Counsel instructed by Douglass Simon Solicitors

Heard at Field House on 1 June 2023

Although this is an appeal by the Secretary of State, I shall refer to the parties as they were in the First-tier Tribunal.

DECISION AND REASONS

1. The Secretary of State appeals from the decision of First-tier Tribunal Judge Davey, promulgated on 6 March 2023 ("the Decision"). By the Decision, Judge Davey allowed the appeal of the appellant, an overstayer, against the decision of the respondent to refuse to grant her leave to remain as a partner of a British citizen under Appendix FM, or on the ground that she met the requirements of Rule 276ADE(1)(vi), or, in the further alternative, on the ground that there were exceptional circumstances in her case which would render a refusal a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for her or her family.

Relevant Background

2. The appellant is a national of The Philippines, whose date of birth is 18 November 1964. On 1 July 2012 the appellant entered the UK with a visa as a Domestic Worker in a private household, that was valid until 15 December 2012. On 18 May 2015 the appellant was granted leave to remain as an overseas Domestic Worker until 18 May 2016. On 5 May 2016 the appellant applied for further leave to remain in this category, and this application was refused on 6 July 2016.

3. On 23 August 2021 the appellant applied for leave to remain as a fiancée of a British citizen. On 30 March 2022 the respondent gave her reasons for refusing the appellant's application. She had been assessed as an unmarried partner, as she did not meet the fiancée requirements. It was not accepted that her relationship with her partner was genuine and subsisting. She also failed to meet the requirements of an unmarried partner, as she did not show evidence of cohabiting with her partner for at least 2 years.

4. She did not meet the eligibility immigration status requirement, because her previous leave had ended on 6 July 2016, and she had therefore been without valid leave in the UK since that date. Paragraph 39E did not apply. On the information that she had provided, she had formed a relationship with her partner in the knowledge that she did not have any valid leave to remain in the UK. It was reasonable to suggest that she was aware that their relationship may not be permitted to continue in the UK.

5. The respondent considered whether paragraph EX.1 applied. The respondent re-iterated that she had formed a relationship with her partner in the knowledge that she did not have any valid leave to remain in the UK, and so it was reasonable to suggest that she was aware that her relationship might not be permitted to continue in the UK.

6. In order to meet the requirements of paragraph 267ADE(1)(vi), an applicant had to show that there would be very significant obstacles to her integration into the country to which she would have to go if required to leave the UK. She had spent her formative years and a significant part of her adult life in The Philippines, and it was "*accepted*" that she would have retained knowledge of its life, language and culture, and that she would not face significant obstacles to re-integrating into life there once more. She stated that she had family members there. She had not provided any evidence to suggest that they could not support her and her partner, should he wish to leave the UK with her.

7. On the topic of exceptional circumstances, the respondent said that it was open to the appellant to return to The Philippines and obtain the correct entry clearance to join her sponsor in the UK. It was also open to her sponsor to relocate to The Philippines with her, where she would have family members residing who could support her upon her return.

8. Although it was claimed that her partner was a British citizen who had lived in the UK since birth, and had friends and family here, and had worked here and might not wish to uproot and relocate half way across the world, and it might be very difficult for him to do so, a significant degree or hardship or inconvenience did not amount to an insurmountable obstacle. Article 8 did not oblige the UK to accept the choice of a couple as to which country they would prefer to reside in.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. The appellant's appeal came before Judge Davey, sitting at Taylor House on 7 February 2023. The appellant was represented by Mr Draycott, and there was no appearance by a representative for the respondent. The Judge received oral evidence from the appellant and from her now-husband, Mr Wright.

10. At paragraph [19] of the decision, the Judge concluded that given the difficulties Mr Wright would have in finding any employment, the level of earnings likely to be achieved by the appellant would not enough to support them both and he bore in mind that the appellant also supported her son, Ivan, who was a medical student undergoing education, for whom the appellant paid the tuition fees during the currency of his course which had at least one year to run. At the moment, that support of his education was maintained with the help of Mr Wright and the appellant, who were remitting money on a monthly basis. The appellant simply could not see how she would be able to continue that support for his education. He accepted the evidence that Mr Wright had been the one who had had the income to enable that support to continue, but he saw no real prospect of him having (were he to move to The Philippines) the possibility of such an income to continue to do so.

11. At paragraph [20], the Judge said that he had also chimed in the with background evidence the true limitations there would be for the appellant as a Domestic violence/Worker on low-pay in The Philippines and the increased burden of her for providing for her family including Mr Wright and her son in The Philippines.

12. At paragraph [21] the Judge said:

> "It was clear that the appellant did not meet the Immigration Rules in their entirety in terms of her particular application. Insofar as it is necessary to do so, I concluded that Mr Wright has no real prospects of integrating into Philippines society at his age, with his language and employment skills. The appellant and Mr Wright produced a range of photographs, including their wedding, which I found consistent with her evidence that they are in a happy and genuine relationship."

13. At paragraph [22] the Judge said:

> "I therefore concluded for the appellant the burden upon her would give rise to a very significant obstacle to her integrating into a life in The Philippines as opposed to simply returning to The Philippines and no more. He concluded that the above circumstances of the appellant were in their nature exceptional, given the relationship established in her later years with Mr Wright, his age and his circumstances. I concluded on the evidence that the appellant's and Mr Wright's personal circumstances were exceptional, but the effect of the respondent's decision was an interference in the private/family life of the appellant and Mr Wright, as it was on all the evidence disproportionate. Accordingly, I concluded that whilst the appellant could not meet the exacting requirements of the Immigration Rules, the fact of the matter was that the respondent's decision was

> disproportionate to the objective of the maintenance of Immigration controls."

14. The Judge went on to allow the appeal under Article 8 of the ECHR.

The Grounds of Appeal to the Upper Tribunal

15. Mr Simon Armstrong, of the Specialist Appeals Team, settled grounds of appeal on behalf of the respondent. He submitted that the First-tier Tribunal Judge had failed to undertake a proportionality balancing exercise that had any regard to the statutory public interest factors outlined in section 117B of the Nationality, Immigration & Asylum Act 2002. It was noted that the FTTJ did not find that the appellant satisfied the requirements of the Immigration Rules. Reliance was placed on *Dube (SS117A-11D)* [2015] 00090, which referred to the statutory obligation on judges to have regard to the provisions in the legislation.

16. As the FTTJ had failed to have regard to these factors, it was submitted that the decision contained a material error in Law, as no regard had been given to the public interest when concluding that the refusal of leave to remain would result in unjustifiably harsh outcomes for the appellant or sponsor. It was further submitted that the Judge had attached significant weight to the appellant's family life in the UK, despite it being established with an unlawful Immigration status as an overstayer.

The Reasons for the Grant of Permission to Appeal

17. On 30 March 2023, Judge Bulpitt granted permission to appeal because it was at least arguable that the Judge erred by failing to have regard to the factors set out in section 117B of the 2002 Act, when resolving the public interest question in determining that the respondent's decision involved a disproportionate interference with the appellant's private and family life. This ground was at least arguable, as the Judge made no reference in his decision to the considerations identified in s117B, and in particular the "*little weight provisions*" of s117B(4) and (5). Judge Bulpitt continued:

> "Whether this apparent error is material is less clear given the Judge also appears to have found at [22] that the appellant would face very significant obstacles to integrating into The Philippines which would suggest that he found the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules had been met. However, in view of the fact that the Judge elsewhere (at [21]) expressly states the appellant did not meet the requirements of the Immigration Rules, I am not satisfied the review of the decision under R35 First-tier Tribunal (Immigration & Asylum Chamber) Procedure Rules is appropriate but instead conclude that as there is an arguable material error of law permission to appeal should be granted."

The Hearing in the Upper Tribunal

18. At the hearing before me to determine whether an error of Law was made out, Mr Draycott applied to apply for permission to rely on an extensive response to the Secretary of State's notice of appeal. Mr Draycott acknowledged that procedurally the application was made out-of-time. However, Mr Wain did not object to the admission of the response, which he had had an opportunity to consider. Accordingly, I granted Mr Draycott permission to put in and rely on the response.

19. Mr Wain developed the case put forward in the grounds of appeal. He confirmed that the underlying premise of the error of Law challenge was that the Judge had not found that the appellant met the requirements of EX.1 or Rule 276ADE(1)(vi). He did not accept Mr Draycott's submission, developed in the response, that properly read the Judge had found that EX.1 applied; or, in the alternative, that the Judge had plainly accepted that the appellant met the criteria within paragraph 276ADE(1)(vi) of the Immigration Rules by reason of age, gender and lack of employment opportunities upon return.

20. On behalf of the appellant, Mr Draycott referred me to various authorities cited in his response in support of the proposition that, properly construed, the decision of Judge Davey found for the appellant under EX.1 and/or Rule 276ADE. Alternatively, even if the SSHD's ground of appeal was taken at its highest, and the Judge had overlooked section 117B(4)(b), this mis-direction was not material as, on the strength of the Judge's factual findings, the appellant and the sponsor plainly came within the exception of *Rhuppiah*. In the reply, Mr Wain submitted that the Judge's finding about Mr Wright (at paragraph [21] was irrelevant to the correct test that needed to be applied for EX.1, which was the ability of the couple to continue family life in the country of return - although he accepted that there was some crossover. He also submitted that delay had not been relied on by the appellant as tipping the scales of proportionality in her favour.

21. I reserved my decision.

Discussion and Conclusions

22. Although it is possible to extract various passages from the decision so as to construct a case that the Judge was making a finding that EX.1 applied, and/or that the appellant qualified for leave to remain on private life grounds under Rule 276ADE(1)(vi), the inescapable fact is that the Judge did not make clear findings to this effect, and also there are other passages in the decision which clearly point to the Judge deciding that the appellant fell short of meeting the exacting requirements of the Rules, and therefore he was allowing the appeal on Article 8 grounds outside the Rules in the light of the fact that he viewed the appellant's and Mr Wright's personal circumstances as being exceptional.

23. Mr Draycott invited me to construe the final sentence of paragraph [22] as the Judge simply referring to the appellant's inability to meet the Immigration status requirement of Appendix FM. This is not a tenable proposition. As a result of the appellant being an overstayer, the only way in which she could be relieved of the requirement to return to The Philippines in order to make the correct application for entry clearance as the spouse of a British national was either if she could show that EX.1 applied, on the hypothesis of the appellant returning to live in The Philippines on her own on a permanent basis (as opposed to simply returning to The Philippines on a temporary basis in order to make an application for entry clearance), there would be very significant obstacles to her integration into life and society in The Philippines. Therefore, when the Judge makes reference to the appellant not being able to meet the exacting requirements of the Immigration Rules, he must be referring as a matter of logic to her inability to meet the requirements of either EX.1 or Rule 267ADE(1)(vi). This construction is consistent with the first sentence of paragraph [21].

24. As noted by the Judge who granted permission to appeal, there is an apparent contradiction in the first sentence of paragraph [22] where the Judge concludes

that for the appellant the burden upon her would give rise to very significant obstacles to her integrating into a life in The Philippines, as opposed to simply returning to The Philippines and no more. Maybe what the Judge had in mind was the distinction between the burden the appellant would face to integrate alone into a life in The Philippines on a permanent basis, as opposed to only having to return to The Philippines on a temporary basis for the purposes of making an application for entry clearance supported by her spouse. Whatever the Judge meant, as a stark proposition the first sentence of paragraph [22] is inadequately reasoned. As submitted by Mr Wain, neither the evidence nor the findings which precede this paragraph disclose a case that the appellant would not be able within a reasonable period of time to build up an adequate private life. The other reason that the proposition beginning at paragraph [22] is inadequately reasoned is because the discussion which precedes it is primarily focused on the obstacles that the couple would face in re-settling in The Philippines. For example, at paragraph [13] the Judge records that the appellant said that the options for her on return to The Philippines are, no doubt in common with the population, extremely limited and with few opportunities to find employment or to be able to support her husband. But if the appellant was returning to The Philippines on her own, as the private life Rule contemplates, her husband can support her from the UK, and thus the main obstacle identified by the appellant falls away.

25. In short, if the Judge meant to make a finding in the appellant's favour under Rule 276ADE, he did not direct himself appropriately as to the correct test to be applied, which is the test in *Kamara*, and he did not give adequate reasons for the finding. Precisely because he is an experienced Judge, it is more likely that he did not intend to find that the appellant qualified for leave to remain on private life grounds under Rule 276ADE, or that EX.1 applied - and for that reason, he decided the appeal on the ground that the respondent's decision was disproportionate to the objective of the maintenance of immigration controls.

26. Mr Draycott invited me to find that the Judge's proportionality assessment was adequate in the light of the strength of the Judge's earlier findings of fact, and because it can be inferred that the Judge took the relevant public interest considerations into account - in particular section 117B(4)(b) - because at paragraph [3] of his decision the Judge had set out the SSHD's case that EX.1 did not apply because the relationship was entered into at a time when the appellant knew that she did not have leave to remain.

27. While I accept that the Judge would have been well aware of the relevant considerations which needed to be taken into account for a proper proportionality assessment, the brief assessment at paragraph [22] does not perform the essential function of explaining to the losing party why she has lost. On the face of it, the only public interest consideration which the Judge takes into account is that the maintenance of effective Immigration controls is in the public interests, as set out in section 117B(1). The Judge does not remind himself, when undertaking the proportionality assessment, that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the UK unlawfully, as set out in section 117B(4)(b), or that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious, as set out in section 117B(5). The assessment wholly fails to explain why it would be unjustifiably harsh for the appellant to return to The Philippines on her own in order to obtain the correct entry clearance.

28. My conclusion is therefore that the decision of the First-tier Tribunal is vitiated by a material error of Law, such that it must be set aside.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of Law, and so the Secretary of State's appeal is allowed. The decision of the First-tier Tribunal is set aside in its entirety, with none of the findings of fact being preserved.

Directions

The appeal should be remitted to the First-tier Tribunal at Taylor House for a *de novo* hearing before any Judge apart from Judge Davey.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 June 2023