IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004988

First-tier Tribunal No:
HU/59446/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 20th of September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

CB
(ANONYMITY ORDER MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sowerby, Counsel, instructed by Paul John and Co Solicitors
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

Heard at Field House on 18 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is the resumed appeal of the appellant against the respondent's decision to refuse the appellant in her human rights claim, I had previously set aside the decision of the First-tier Tribunal, a copy of which is appended to this decision.

Anonymity

2. I made an anonymity order in my error of law decision, this order continues for the reasons given previously. Mr Tan made no submissions requesting it to be lifted.

Background

3. The appellant entered the UK as a domestic worker on 8 July 2015 with valid leave to 2 January 2016. On 30 December 2015 she made an in-time application for leave to remain as a domestic worker who was a victim of trafficking. On 18 May 2016 she received a positive reasonable grounds decision from the NRM that she was suspected as being a victim of trafficking.

4. On 26 November 2016 her application for leave to remain was rejected on the basis that she had not paid a fee and that as she had not applied for a fee waiver her application had to be rejected. It is common ground between the parties that this rejection was incorrect. The application was not one which required a fee, and the respondent ought not to have rejected the application for that reason.

5. On 27 December 2018 she received a positive conclusive grounds decision from the NRM that she was a victim of trafficking.

6. On 8 December 2021 she applied for leave to remain on human rights grounds. This application was refused on 29 November 2022 and is the decision which led to the appeal before the Judge. As set out in my error of law decision I set that decision aside on 28th February 2024, however preserved the findings at paragraphs 13 – 30:

13. There was no dispute and I find as fact that the appellant entered the UK on 8 July 2015. There was also no dispute that on 18 May 2016 a reasonable grounds decision was made that the appellant was a VOT. This is significant as, although it post-dated the appellant's in-time application for further leave to remain which was made on 30 December 2015 ("the 2015 application"), it pre-dated the rejection of that application which did not take place till 16 November 2016. That the appellant was eventually found to be a VOT but not granted leave as a result is confirmed in the Conclusive Grounds letter of 27 December 2018.

14. The GCID record sets out clearly the basis of the 2015 application. The caseworker noted on 7 January 2016 that the appellant was applying as "domestic worker who is a victim of slavery or human trafficking" and that it was that box which had been ticked on the form. The records also note it as a "fee exempt" application. The full basis of the application were set out within the GCID entry on 4 February 2016, although it notes there was no letter confirming the appellant as a VOT. On 9 February 2016 the caseworker sought advice. The advice was that the appellant's consent should be sought for referral to the National Referral Mechanism ("NRM"). That was actioned and on 17 February 2016 the appellant consented and on 13 May
2016 the referral to the NRM was made. The application was then put on hold to await the outcome of the NRM procedure. There are several notes thereafter which all say no decision had yet been taken. Given that the conclusive grounds decision says that the reasonable grounds decision was taken on 18 May 2016, it follows that the pending decision was the conclusive grounds one.

15. However, on 14 November 2016 a note was added to GCID as follows:

"we are now able to consider Fee Waiver cases while we are awaiting decisions to be made on PVoT Conclusive Grounds cases ….. if rejecting this case as a Fee Waiver, all of the liability to removal parts need taking out of the letter and a paragraph needs adding that the Potential Victim of Trafficking case is still under consideration and that the applicant will hear from that team shortly".

16. On 16 November 2016 a decision was made. The caseworker carried out a number of checks as recorded on GCID. One of the enquiries was the basis on which the appellant was seeking a fee waiver and the caseworker recorded "no reasons stated in the application form, no Appendix 1 submitted or covering letter explaining why the applicant thinks she is destitute". The caseworker therefore concluded that the appellant had not provided sufficient evidence to show she is destitute and the decision was recorded as "reject fee waiver".

17. This is of course where Mr Georget submits the error occurred. The appellant was never applying for a fee waiver and so of course she would not submit evidence to support that sort of application.

18. Mr Georget referred me to the form and, in particular, page 4 which says:

"If you are applying as a domestic worker who is a victim of slavery or human trafficking, you will not be required to pay the specified fee. You should tick the box at item 5 on the payment details page. You will not need to complete form Appendix 1 FLR (FP)."

19. I set this out in some detail as it was a matter not dealt with in written submissions and the documents on which Mr Georget relied were sent in piecemeal.

20. Having considered all of the evidence, I am satisfied that an error was made when the application was dealt with on 16 November 2016 as it was treated as a fee waiver application whereas it was, in fact, a fee exempt case.

21. As to the significance of this finding, I am satisfied had the application been dealt with correctly, then it would not have been rejected, it would have been substantively considered on its merits and a decision made. If successful, the appellant may have been granted an additional period of leave to remain in the UK. If not, she may have had a right of appeal or to ask for reconsideration of the refusal.

22. Beyond that, as Mr Georget recognises, it is speculative to say what might have happened. However, I have regard to the fact, that notwithstanding the respondent's error, a conclusive grounds decision was not made until December 2018 so there would have been no requirement for the appellant to leave the UK whilst that decision was pending. I will return to this later when considering the public interest in the appellant's removal.

23. As for the appellant's relationship with the sponsor, notwithstanding what I raised at the beginning of the hearing Mr Alam did not ask any questions about it. He challenged the history of cohabitation and asked some questions about the relationship to test its nature. The sponsor confirmed he proposed to the appellant but he is not ready to marry. However, he wants her to be able to stay with him in the UK and he does not think he could go to the Philippines with her.

24. The matter on which they were challenged was the chronology of their cohabitation about which the appellant has provided inconsistent information. She accepts she has done that and she explains it by saying that she did not want to rely on her sponsor for her application at first as she did not want him to think she was using him. That is why she founded her application on the basis of her private life and why she submitted evidence that she was living elsewhere, whereas she now says she was in fact living with the sponsor. It was only after he saw the letter about the original hearing that he challenged her about it, she came clean and she then sought to vary the basis of her application.

25. This is not just a case where the appellant has provided a different address to the one she now claims to have been living at the date of application. If her account is correct, she also convinced her friend to write a letter containing false information namely that on 29 July 2021 the appellant was living with her and would continue to do so until she got her visa [AB69]. This is the time the appellant and sponsor now say they were living together in an address at East Ham and had been since 12 January

2021, a matter of weeks after they first met. There is no evidence corroborating their cohabitation at the East Ham address, which the sponsor said was 38 Essex Road, although there is evidence that he lived there. The first evidence to corroborate cohabitation was from the landlord of their current address confirming them both living there since 6 February 2022 [SB138].

26. In her witness statement, the appellant said the sponsor proposed to her in January although she does not specify which year. The sponsor said it was January 2023. He also said they are planning to marry soon, which he obviously amended in evidence. There are limited photos in the SB and all but one of them are undated. The one that is dated is from 12 January 2021.

27. I do not accept the evidence that the couple lived together from January 2021 onwards. Given the photos from that date, I accept they knew each other then and they were probably in the early stages of their relationship. The appellant is inviting me to find that she went to considerable efforts and involved other people to lie for her in order to deceive the respondent about where she was living in order to hide her application from the sponsor. I find this improbable. I find it much more likely that the appellant gave her correct address in her application and simply did not rely on her relationship in December 2021 as it was not the type of relationship at that stage to bring her within the scope of either the Rules or Article 8. Over time her relationship developed and I am satisfied, and I find as fact, that they have been cohabiting since 6 February 2022 which means by the date of hearing they have been cohabiting for a period of 1 year and 7 months. Given the evidence that the sponsor is not ready to marry, I am not satisfied that there is an intention to marry at the date of hearing and so I do not find the sponsor to be the appellant's fiancé, save perhaps in name only.

28. Applying these findings, I do not find the appellant able to show that the sponsor is her 'partner' as defined in paragraph GEN.1.2 of Appendix FM, so I do not find there her able to come within the scope of Appendix FM.

29. In any event, whilst it was not a matter expressly raised at the hearing, the appellant has not filed evidence that the sponsor has either settled status in the UK or limited leave to remain, and neither was it dealt with in any of their witness statements. Accordingly, she has failed to satisfy me that the sponsor comes within scope of paragraph E-LTRP.1.2 (the relationship requirements).

30. As for whether or not the sponsor would accompany the appellant to the Philippines in the event she had to leave, having regard to his evidence, his life here of many years as characterised by his work and other family ties, I find it more likely than not that he would not accompany the appellant to the Philippines.

The hearing

7. I heard evidence from both the appellant and her partner, I do not set out a summary of that evidence here, save for relevant parts in my findings below. Mr Sowerby relied on his skeleton argument, and both advocates made oral submissions. I am grateful to both for focussing on the salient issues.

Decision and reasons

8. The appellant advances her case on three heads:

    a. Whether there are insurmountable obstacles to family life continuing outside the UK for the purpose of Ex.1
    b. Whether there are very significant obstacles for the purposes of paragraph 276ADE
    c. Whether in all the circumstances the appellant's removal would be disproportionate for the purposes of Article 8.

Ex.1

9. The appellant's reliance on appendix FM in relation to her relationship with her partner did not form part of the application made to the respondent or the decision under appeal. The appellant applied for consent to raise it, and the respondent granted consent on 20 September 2023.

10. I revisit the preserved findings in particular at paragraphs 28 – 30 given the below, and I conclude that given the change in the immigration rule outlined below that the findings in paragraphs 28 – 30 cannot stand for the purpose of remaking given that the change in the immigration rules has a significant impact on the appellant's ability to meet the provisions of Ex.1.

11. It is trite that when making a decision the relevant rule is that as of the date of the decision (as per *Odelola v Secretary of State for the Home Department [2009] UKHL 25)* rather than the date of application. The extent to which this remains the case where the rules change significantly post decision without transitional provisions is a point of argument, however it does not arise in this case. In this case however, in an appeal where consent has been given to a matter after the date of the decision it becomes less clear.

12. There was brief discussion at the hearing in relation to this matter, and Mr Sowerby had originally advanced in his skeleton argument that it was the date at which consent was given by the respondent. However, in my judgment that cannot be correct, an appeal is brought against the refusal of a human rights claim under s82, and the ground of appeal available to the appellant:

(2)An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

13. The only question is therefore whether the decision is unlawful under s6, there is nothing within the grounds of appeal which asks the Tribunal to go back and consider the immigration rules at an earlier place in time.

14. The relevance of this in this appeal is that the definition of partner in the immigration rules changed in January 2024. Prior to this the definition was found in Gen 1.2:

'GEN.1.2. For the purposes of this Appendix "partner" means-

(i) the applicant's spouse;

(ii) the applicant's civil partner;

(iii) the applicant's fiancé(e) or proposed civil partner; or

(iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix.'

15. Thus an applicant who was relying on a relationship 'akin to marriage' had to show:

a. Cohabitation;
b. Of 2 years duration
c. Prior to the date of the application.

16. It was this rule which the Judge applied in dismissing the appeal in 2023.

17. From January 2024, by virtue of HC 246, Gen 1.2 was amended to delete the above definition. The definition is now located in the interpretation section found in the introduction to the immigration rules. This defines partner as:

"Partner" means a person's:

(a) spouse; or
(b) civil partner; or
(c) unmarried partner, where the couple have been in a relationship similar to marriage or civil partnership for at least 2 years.

18. As such the only requirement now is that the relationship 'similar to marriage' has to have been of 2 years duration. The requirements of cohabiting and it being prior to the date of application have been deleted. No transitional provisions are in the immigration rules outlining that the

changes take effect to new applications or similar. Similarly the explanatory memorandum is of limited assistance:

7.34 The definition of 'Partner' in the Introduction is being updated to bring it in line with Appendix Relationship with Partner.

19. As can be seen in this case, if the relevant date of the consideration of the rules is before January 2024 then the 'old' provisions apply, which the appellant could not succeed under given that her application was made on 8 December 2021, at that point her and her partner on both their own narrative, and the findings of Judge Rastogi, had not been living together for at least 2 years. If it is the rules from January 2024 then the only consideration is whether the relationship is 'similar to marriage' for at least 2 years.

20. I find that there is nothing within the immigration rules or statute which would require me to consider the rules as they were at a period of time prior to the date of the appeal hearing. There were no transitional provisions when the rules were changed, and as such given the issue before me is whether the appellant's removal would be unlawful for the purposes of s6, the public interest as to where the respondent says the balance lies is informed by the immigration rules.

21. I find therefore that I have to consider the provisions of the rules as they are as of the date of the hearing before me. The Judge's conclusion on the rules at paragraphs 28 – 30 therefore cannot stand as they are, at the hearing before me, wrong in law.

22. As a consequence the appellant can rely on the partner route. In his submissions Mr Tan submitted that the appellant cannot access appendix FM because she is engaged to her partner and as such is a fiancée, she cannot as a result meet the definition of partner as a fiancée because she was not granted leave to enter due to that status. Given my findings as to the immigration rules being those that are in force at the date of hearing the word fiancée has been deleted, and as such it is of no consequence that they are engaged or not. The key question is whether they have been in a relationship similar to marriage for 2 years or more.

23. The retained findings as to their relationship is that they commenced living together on 6th February 2022. I take that as my starting point. They have remained living together since, and as such at the hearing before me they have lived together for 2 years and 4 months. Their relationship started earlier in January 2021 when they met.

24. Their unchallenged evidence before me is that the appellant has explored fertility treatment so they can have a child. There was further, much as there was before the FTT, no challenge to their evidence of being in a long standing, subsisting, genuine and durable relationship. They have planned to get married. In all the circumstances I consider that the

evidence shows they are in a relationship ‘akin to’ or ‘similar to’ marriage. They enjoy a family life together.

25. The appellant’s partner has provided evidence that he has settled status in the UK under appendix EU, as a consequence he is present and settled here. This is another reason to depart from the finding at paragraph 29, the appellant has now produced evidence to show her partner is settled here. This is a question of fact which has been established beyond any question.

26. The central question is whether there are insurmountable obstacles to family life continuing outside the UK.

27. The relevant test is set out in Ex.2:

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

28. This element of the test focusses primarily upon the appellant’s partner’s ability to move with the appellant to the Phillippines. She has her two sons there, it is the country of her birth and applying the provisions of Ex.2 there is little by the way of obstacles for her which are insurmountable if they were the only considerations. Relevant of course to this assessment however is also the fact that the appellant was trafficking to the UK and is a victim of trafficking, with that backdrop the appellant will be returning as a victim of trafficking, and would, given the lack of any work experience have to carry the responsibility, certainly to begin with, to be the main breadwinner in the house. This will be challenging for her to obtain work sufficient for the pair of them.

29. However her partner will face significantly greater challenges. The Judge made findings that the partner would not leave the UK. No findings were made as to whether there were insurmountable obstacles. In my judgment, in a finely balanced case, there are such obstacles.

30. The appellant’s partner cares for his mother. They live with her so that he can provide that care. He works here as a carpenter and has done since 2008. He has no connection or familiarity with the Philippines either culturally, linguistically or in a practical sense. Expecting him to return to the Philippines with the appellant would separate him from the life he has established in the UK, and from his mother to whom he is a significant carer would be a very significant challenge to meet. He oversees her care and whilst they have his other brother living with them he does not take as much as a hands on role with the care of their mother.

31. I find that taking everything into account that there would be insurmountable obstacles to family life continuing together which could

not be overcome and without entailing very serious hardship for him, in particular the separation from his mother and the care he gives her.

32. Whilst his brother could try to pick up the mantel from the appellant's partner, I find that the separation from his mother would lead to very significant hardship for him. He will be relocating to the Philippines, which is a significant distance away. His mother's health conditions has meant that they are far closer than they were when they were both younger, and further she is reliant on him for her care.

33. It is a finely balanced assessment but given the reliance from her on him, and the natural closeness as a result of the growing dependence, I find that there would be would face significant difficulties such as to amount to very serious hardship to separate him from his mother. I consider, by a fine margin, that there are insurmountable obstacles to family life continuing outside the UK.

Very significant obstacles to integration

34. Mr Sowerby advanced that the appellant faced very significant obstacles to integration for the purpose of paragraph 276ADE of the immigration rules. This assessment is one which focusses purely on the appellant alone.

35. Given the family she has in the country, including her children, there is nothing in the evidence which suggests that she would have any significant difficulty re-integrating on return.

36. I find that she has failed to show that there are such obstacles.

Proportionality

37. It follows from my findings above from paragraphs 9 to 36 that the appeal succeeds on Ex.1 grounds. However if I am on wrong on that discreet issue I have to consider the overall proportionality of the decision.

38. Even if there are not insurmountable obstacles to family life continuing outside the UK, there will be significant challenges for the appellant and her partner in particular to leave the UK. The appellant's partner undertakes a significant role with his mother's care. Even if his hypothetical departure from the UK would not amount to leading to insurmountable obstacles, the impact on both him and his mother is probably going to be significant.

39. The Judge below found it probable that he would not leave with her. Having heard the appellant's partner give evidence I agree. The reality of the situation is that he is unlikely to leave, and that in the circumstances the proportionality assessment is in reality the proportionality of removing the appellant and separating her from her partner.

40. I give weight to the public interest, the appellant has been an overstayer since 2016 and has had precarious status throughout her time in the UK. Her family life was developed when she had no status in the UK. There is a public interest in effective immigration control.

41. The above however has to be qualified with the circumstances she found herself in. She was trafficked to the UK as a domestic worker. The respondent accepts as much. However, the significant and weighty consideration in this case is the claimed historical injustice suffered by the appellant.

42. She applied on 30 December 2015 as a domestic worker who had been trafficked. The respondent wrote to her on 7 January 2016 acknowledging that the application raised issues relating to the ECHR. This application was, as accepted by the Judge below, wrongly rejected as an application for a fee waiver. However, the application did not require a fee. As a result of this error she become an overstayer.

43. The NRM sought her consent for the claim to be considered on 9 February 2016, she gave consent on 15 February 2016. Her case was also referred to the NRM on 6 June 2016 by the Met Police. The NRM concluded that there were reasonable grounds she was a victim of modern slavery and trafficking on 18 May 2016.

44. The concept of historical injustices has been considered by the Upper Tribunal in two relatively recent cases. In Patel (historic injustice; NIAA Part 5A) India [2020] UKUT 351 (IAC) the Tribunal distinguished between *historic* and *historical* injustices. There is no need to distil this further as Mr Sowerby squarely submits this case shows a *historical* injustice, defined in Patel as:

> *(3) Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12); where delay in reaching decisions is the result of a dysfunctional system (eg EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category.*

45. This concept was developed further in Ahmed (historical injustice explained) Bangladesh [2023] UKUT 165 (IAC):

> *1. As is clear from the decision in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC), the phrase "historical injustice" does not connote*

some specific separate or freestanding legal doctrine but is rather simply a means of describing where, in some specific circumstances, the events of the past in relation to a particular individual's immigration history may need to be taken into account in weighing the public interest when striking the proportionality balance in an Article 8 case. In relation to the striking of the proportionality balance in cases of this kind we make the following general observations:

a. If an appellant is unable to establish that there has been a wrongful operation by the respondent of her immigration functions there will not have been any historical injustice, as that term is used in Patel, justifying a reduction in the weight given to the public interest identified in section 117B(1) of the Nationality, Immigration and Asylum Act 2002. Although the possibility cannot be ruled out, an action (or omission) by the respondent falling short of a public law error is unlikely to constitute a wrongful operation by the respondent of her immigration functions.

b. Where the respondent makes a decision that is in accordance with case law that is subsequently overturned there will not have been a wrongful operation by the respondent of her immigration functions if the decision is consistent with the case law at the time the decision was made.

c. In order to establish that there has been a historical injustice, it is not sufficient to identify a wrongful operation by the respondent of her immigration functions. An appellant must also show that he or she suffered as a result. An appellant will not have suffered as a result of wrongly being denied a right of appeal if he or she is unable to establish that there would have been an arguable prospect of succeeding in the appeal.

d. Where, absent good reason, an appellant could have challenged a public law error earlier or could have taken, but did not take, steps to mitigate the claimed prejudice, this will need to be taken into account when considering whether, and if so to what extent, the weight attached to public interest in the maintenance of effective immigration controls should be reduced. Blaming a legal advisor will not normally assist an appellant. See Mansur (immigration adviser's failings: Article 8) Bangladesh [2018] UKUT 274 (IAC).

46. Applying the above to this case I find that:

a. The respondent wrongly rejected the application as invalid for non payment of a fee, when no fee was actually payable. I adopt the findings of the Judge in the FTT:

20. Having considered all of the evidence, I am satisfied that an error was made when the application was dealt with on 16 November 2016 as it was treated as a fee waiver application whereas it was, in fact, a fee exempt case.

21. As to the significance of this finding, I am satisfied had the application been dealt with correctly, then it would not have been rejected, it would have been substantively considered on its merits and a decision made. If successful, the appellant may have been granted an additional period of leave to remain in the UK. If not, she may have had a right of appeal or to ask for reconsideration of the refusal.

b. She would not have at that point overstayed her visa because her leave would have continued to run pursuant to section 3C of the Immigration Act 1971.
c. Whilst it cannot be said for definite that she would have succeeded on that application, it can clearly be seen that as a victim of trafficking she would have had an arguable prospect of being granted leave to remain; or in the alternative she would have been refused with a right of appeal having made human rights representations, and where the respondent expressly noted that ECHR issues had been raised. Indeed before the application was rejected, the respondent wrote to the appellant on 7 January 2016 (p87 AB) to say that as her application raised issues relating to the ECHR which are complex, ordinary service standards could not be applied to this application.
d. Had such an application had been refused with a right of appeal it clearly would have had arguable prospects of succeeding given she had been trafficked here as a domestic worker; however that opportunity to advance such a case was denied to her due to the error of the respondent.
e. The respondent in the review and decision letter identifies that the NRM rejected her claim to be at risk of retrafficking, however the respondent does not identify this as the refusal of a human rights claim. The NRM does not extend her leave by virtue of 3C, that was only extended for as long as the December 2015 application was outstanding, however this was rejected (erroneously) in 2016 on account of not qualifying for a fee waiver.
f. Further it is clear, and no evidence has been provided to the contrary, that there was any appeal possible against the NRM decision from 2018, it cannot sensibly be suggested therefore that this was tantamount to a consideration of the 2015 application.
g. I reject the submission made by Mr Tan that the best she would have received is a short period of leave for reflection and recovery. There is a material difference between someone applying raising human rights considerations for leave to remain; and someone being recognised as a victim of trafficking. In this case the appellant made an application for leave as a victim of trafficking. That either would have yielded a positive or negative decision, but the appellant was denied that opportunity due to the historical injustice of wrongly rejecting the application as invalid.
h. The above had knock on consequences of rendering her an overstayer wrongly.

47. Taking the above into account I consider that the public interest is reduced in this case by a significant amount, in particular the established of her family and private life whilst she was unlawfully here as an overstayer is significantly offset by the historical injustice.

48. Further, I reject the submission made by Mr Tan that the proportionate outcome to this case is the appellant making an entry clearance application. Given his submissions on the non-applicability of Ex.1 the respondent places a significant amount of reliance on this factor, albeit not the only one. I find having taken into account the evidence before me that an entry clearance application is likely to be successful given the financial circumstances of the appellant's sponsor. However given the respondent's submissions that her partner could if he chose go to the Philippines with her this is not one of those cases where the only issue is making an entry clearance application. Nevertheless the likely success in an application is a relevant consideration.

49. Taking everything together in the round for the reasons given I conclude that the appellant's removal would be disproportionate. On the case specific circumstances in this case I find that her Article 8 rights outweigh the public interest, she has an established family life in the UK with her partner, he has ILR and has been in the UK since 2008. He has a well established family and private life here not only with the appellant but also with his own family. The public interest is impacted by the historical injustice as to how the 2015 application was treated, and the impact that had on the appellant.

Notice of Decision

The appeal is allowed on Article 8 grounds.

Judge T.S. Wilding

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 13th September 2024

APPENDIX

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

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(ANONYMITY ORDER MADE)

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SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sowerby, Counsel, instructed by Paul John and Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 28 February 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Rastogi ('the Judge') who dismissed her appeal against the respondent's decision refusing her human rights application.

Anonymity

2. The appellant is an accepted victim of trafficking, the respondent has accepted as much in a conclusive grounds decision as long ago as 2018. For reasons which are unclear no anonymity order has been made in this case to date. I canvassed with the parties at the hearing whether one ought to be made. The appellant asked me to order one. Mr Melvin did not oppose, he simply observed that the appellant had not asked for one until now.

3. Applying *Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private* I have decided to make such an Order. The appellant as a victim of trafficking is entitled to life-long anonymity. An Order should have been made previously, that it was not is an error. I rectify that error myself by making such an Order.

Background

4. The appellant entered the UK as a domestic worker on 8 July 2015 with valid leave to 2 January 2016. On 30 December 2015 she made an in time application for leave to remain as a domestic worker who was a victim of trafficking. On 18 May 2016 she received a positive reasonable grounds decision from the NRM that she was suspected as being a victim of trafficking.

5. On 26 November 2016 her application for leave to remain was rejected on the basis that she had not paid a fee and that as she had not applied for a fee waiver her application had to be rejected. It is common ground between the parties that this rejection was incorrect. The application was not one which required a fee, and the respondent ought not to have rejected the application for that reason.

6. On 27 December 2018 she received a positive conclusive grounds decision from the NRM that she was a victim of trafficking.

7. On 8 December 2021 she applied for leave to remain on human rights grounds. This application was refused on 29 November 2022 and is the decision which led to the appeal before the Judge.

8. Her appeal was heard on 20 September 2023. I set out below the relevant findings for the purpose of the appeal before me:

> *13. There was no dispute and I find as fact that the appellant entered the UK on 8 July 2015. There was also no dispute that on 18 May 2016 a reasonable grounds decision was made that the appellant was a VOT. This is significant as, although it post-dated the appellant's in-time application for further leave to remain which was made on 30 December 2015 ("the 2015 application"), it pre-dated the rejection of that application which did not take place till 16 November 2016. That the appellant was eventually found to be a VOT but not granted leave as a result is confirmed in the Conclusive Grounds letter of 27 December 2018.*
>
> *14. The GCID record sets out clearly the basis of the 2015 application. The caseworker noted on 7 January 2016 that the appellant was applying as "domestic worker who is a victim of slavery or human trafficking" and that it was that box which had been ticked on the form. The records also note it as a "fee exempt" application. The full basis of the application were set out within the GCID entry on 4 February 2016, although it notes there was no letter confirming the appellant as a VOT. On 9 February 2016 the caseworker sought advice. The advice was that the appellant's consent should be sought for referral to the National Referral Mechanism ("NRM"). That was actioned and on 17 February 2016 the appellant consented and on 13 May*
> *2016 the referral to the NRM was made. The application was then put on hold to await the outcome of the NRM procedure. There are several notes thereafter which all say no decision had yet been taken. Given that the conclusive grounds decision says that the reasonable grounds decision was taken on 18 May 2016, it follows that the pending decision was the conclusive grounds one.*
>
> *15. However, on 14 November 2016 a note was added to GCID as follows:*
>
> > *"we are now able to consider Fee Waiver cases while we are awaiting decisions to be made on PVoT Conclusive Grounds cases ….. if rejecting this case as a Fee Waiver, all of the liability to removal parts need taking out of the letter and a paragraph needs adding that the Potential Victim of Trafficking case is still under consideration and that the applicant will hear from that team shortly".*
>
> *16. On 16 November 2016 a decision was made. The caseworker carried out a number of checks as recorded on GCID. One of the enquiries was the basis on which the appellant was seeking a fee waiver and the caseworker recorded "no reasons stated in the application form, no Appendix 1 submitted or covering letter explaining why the applicant thinks she is destitute". The caseworker therefore concluded that the appellant had not provided sufficient evidence to show she is destitute and the decision was recorded as "reject fee waiver".*
>
> *…*
>
> *20. Having considered all of the evidence, I am satisfied that an error was made when the application was dealt with on 16 November 2016 as it was*

treated as a fee waiver application whereas it was, in fact, a fee exempt case.

21. As to the significance of this finding, I am satisfied had the application been dealt with correctly, then it would not have been rejected, it would have been substantively considered on its merits and a decision made. If successful, the appellant may have been granted an additional period of leave to remain in the UK. If not, she may have had a right of appeal or to ask for reconsideration of the refusal.

22. Beyond that, as Mr Georget recognises, it is speculative to say what might have happened. However, I have regard to the fact, that notwithstanding the respondent's error, a conclusive grounds decision was not made until December 2018 so there would have been no requirement for the appellant to leave the UK whilst that decision was pending. I will return to this later when considering the public interest in the appellant's removal.

9. The Judge then went on to consider the evidence before her as to the claimed relationship between the appellant and her partner. She found that the couple had not started living together when initially claimed:

27. I do not accept the evidence that the couple lived together from January 2021 onwards. Given the photos from that date, I accept they knew each other then and they were probably in the early stages of their relationship. The appellant is inviting me to find that she went to considerable efforts and involved other people to lie for her in order to deceive the respondent about where she was living in order to hide her application from the sponsor. I find this improbable. I find it much more likely that the appellant gave her correct address in her application and simply did not rely on her relationship in December 2021 as it was not the type of relationship at that stage to bring her within the scope of either the Rules or Article 8. Over time her relationship developed and I am satisfied, and I find as fact, that they have been cohabiting since 6 February 2022 which means by the date of hearing they have been cohabiting for a period of 1 year and 7 months. Given the evidence that the sponsor is not ready to marry, I am not satisfied that there is an intention to marry at the date of hearing and so I do not find the sponsor to be the appellant's fiancé, save perhaps in name only.

28. Applying these findings, I do not find the appellant able to show that the sponsor is her 'partner' as defined in paragraph GEN.1.2 of Appendix FM, so I do not find there
her able to come within the scope of Appendix FM.

29. In any event, whilst it was not a matter expressly raised at the hearing, the appellant has not filed evidence that the sponsor has either settled status in the UK or limited leave to remain, and neither was it dealt with in any of their witness statements. Accordingly, she

has failed to satisfy me that the sponsor comes within scope of paragraph E-LTRP.1.2 (the relationship requirements).

30. As for whether or not the sponsor would accompany the appellant to the Philippines in the event she had to leave, having regard to his evidence, his life here of many years as characterised by his work and other family ties, I find it more likely than not that he would not accompany the appellant to the Philippines.

10. The Judge found that Article 8 was engaged, and then undertook a 'balance sheet' approach to her assessment of the Article 8 claim:

33. I have regard to the following factors on the respondent's side of the balance sheet:

a) effective immigration control is in the public interest (s.117B(1) of the 2002 Act). When deciding on the weight to be attached to this factor, I have regard to a number of factors:

i) the appellant is unable to meet the requirements of the Rules;
ii) if the appellant is permitted to remain in the UK in those circumstances she is circumventing the system of immigration control and risks the integrity of and confidence in it;
iii) for the avoidance of doubt, applying my findings, the appellant would not be able to meet the relationship requirements for entry clearance either so this is not a Chikwamba v SSHD [2008] UKHL 40 type situation;
iv) my findings at [21-22] above;

Balancing those factors, whilst I attach significant weight to the need for effective
immigration control, I have reduced the weight from 'substantial' weight to reflect the factors referenced at (iv) above.

b) I am satisfied on the basis of her English language certificate that the appellant can speak English to the requisite level. On the basis of the sponsor's bank, tax and employment evidence I am satisfied he earns in excess of the minimum income requirement and supports the appellant so I do not find the public interest offended by her remaining here on language or financial grounds (s.117B(2-3)).

34. I have regard to the following factors on the appellant's side of the balance sheet:

a) I attach limited weight to her family/private life given that her stay here has been precarious and unlawful throughout (section 117B(4) and (5)). Given the factors at [21-22] above, her unlawful status is a matter about which I attach less weight so in that context, whilst I am bound by statute to limit the weight to the appellant's family life with her partner, I find that I can attach weight towards the upper end of the little weight spectrum. I also have regard to the fact that if the appellant left the UK she would be unable to meet the requirements for entry clearance to return as her sponsor's partner applying my findings at the date of hearing. Therefore, her

relocation is likely to mean permanent separation given also my findings at [30] above;

b) As the appellant was trafficked to the UK in domestic servitude and as she was then awaiting a decision on her trafficking claim until December 2018, and given the respondent's error, I also find I can place weight at the top end of little weight on the appellant's private life;

c) I was not invited to find that the appellant would have difficulty in reintegrating into the Philippines given the extent of her family, linguistic and other ties there, so I do not attach any weight to these factors on the appellant's side of the balance sheet;

d) I attach some weight to the impact on the sponsor of the respondent's decision as he is left to make choices between his life in the UK and his life with the appellant. Whilst I have made findings about what he is likely to do, that does not mean to say it represents an easy choice for him or that he will not feel the impact of separation. However, the weight I attach to this factor is limited by the precarious nature of the appellant's status in the UK albeit that appeared not to be a factor known by the sponsor at the outset.

35. Balancing those factors, even in light of the cumulative impact on the appellant and sponsor of all of the above, I still do not find that implementation of the respondent's decision will have an impact which is unjustifiably harsh upon them. The reality is that this is a relationship in its relative infancy. It is developing into one which has the hallmarks of longevity and commitment but it is not quite there yet. I do not find it to be sufficiently strong to justify displacing the need for effective immigration control. I do not find the addition of the circumstances of the appellant's arrival into the UK or the respondent's error to be sufficient (even cumulatively) to render the outcome unjustifiably harsh. A proper assessment took place against which there was no challenge, that the appellant did not require discretionary leave to recover from her experiences of trafficking or servitude or for any other reason. The respondent's mistake, whilst unfortunate, is not determinative of what the other course might have been for the appellant had it not been made. The appellant has remained here and now does not have a basis under the Rules to stay. Refusal of her application in these circumstances, is not unjustifiably harsh.

11. The Judge dismissed the appeal. The appellant appealed and having been refused permission to appeal by the FTT, renewed her application to the Upper Tribunal. Upper Tribunal Judge Pitt granted permission to appeal on limited grounds of appeal:

3. It is arguable that the First-tier Tribunal took an incorrect approach to the weight to be attached to the appellant's private life given that she was found to be a victim of human slavery and the respondent's errors in the processing of her application for leave in 2015, all of which was accepted by the judge. Arguably Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 does not restrict weight to be afforded to private life only to the "higher end of the little weight spectrum" as the judge states here but allows for substantive weight to be attributed in some circumstances. This issue could have made a material difference to the outcome of this appeal.

The Hearing

12. I heard submissions from both advocates. My Melvin also provided a helpful skeleton argument. I do not set out their submissions here, other than to note that Mr Sowerby focussed on the grounds, and argued that the Judge's error at paragraph 34(a) was contradictory to *Rhuppiah*, and that the Judge had treated herself straight jacketed by s117B. Mr Melvin argued that the complaint is not well founded, that the Judge had taken everything into account and had simply considered what weight to give to the elements of the appellant's claim.

Decision and reasons

13. I consider that ground 2 is made out and that the Judge did materially err in law for the reasons advanced. My reasons for doing so are as follows.

14. In *Rhuppiah* the Supreme Court outlined:

> *49. It was in section 117A(2)(a) of the 2002 Act that Parliament introduced the considerations listed in section 117B. So, in respect of the consideration in section 117B(5), Parliament's instruction is to "have regard … to the consideration [that] [l]ittle weight should be given to a private life established by a person at a time when the person's immigration status is precarious". McCloskey J suggested in para 23 of the Deelah case, cited in para 21 above, that the drafting "wins no literary prizes". But, as both parties agree, the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:*
>
> > *"53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question …"*

15. The above makes it clear that the statutory provisions of s117B whilst mandatory in their applicability to every case, are not a strait-jacket

mandating that little wight must be given to a set of circumstances. In this case the relevant provision is s117B(4) because the appellant was, as a matter of fact, unlawfully in the UK after her leave, extended by section 3C of the 1971 Act, ended in November 2016 with the rejection of her application. That provision however is drafted in exactly the same language as s117B(5):

> *(4) Little weight should be given to -*
>
> *(a) a private life, or*
> *(b) a relationship formed with a qualifying partner,*
>
> *that is established by a person at a time when the person is in the United Kingdom unlawfully.*

16. The above extract from the Supreme Court makes it clear that the provision of s117B(4) has to be applied in each case as a starting point, however is, in suitable cases, flexible enough to be overridden by particularly strong features. The reference to "an exceptional case" plainly is not seeking to create a sub-test to be met, but is reflective that it will not be in an 'ordinary' case where such flexibility will arise. In the same way as the reference to 'exceptional' appears in Gen 3.2 of the immigration rules.

17. Turning to the Judge's decision, she falls into error in my judgment by failing to identify the above learning from *Rhuppiah*. At 34(a) she says , "*her unlawful status is a matter about which I attach less weight so in that context, whilst I am bound by statute to limit the weight to the appellant's family life with her partner, I find that I can attach weight towards the upper end of the little weight spectrum*". In my judgment this plainly misstates the test. The provisions of s117B(4) do not 'bind' her to limit the weight. They are her starting point, and in an ordinary case will not be overridden, however that is different to identifying that she is bound to attribute limited weight. To take this approach falls into the precise issue foreshadowed in *Rhuppiah* and leads her into the metaphorical strait-jacket when considering the private life claim. She further repeats the error at 34(b) "*I also find I can place weight at the top end of little weight on the appellant's private life*".

18. The error is clearly a material one. It plainly could have made a difference to the Judge's conclusion had she felt able to attach greater weight than 'little' to the private life the appellant had built up in the UK.

19. In particular the appellant was wrongly rejected for not paying a fee in an application made as long ago as 2015. That could have had a significant bearing on the weight to be given to the developed private life, in particular that she was recognised as a victim of trafficking. As Mr Sowerby put it in his submissions, she was unlawfully in the UK upon the rejection of that application for reasons which the respondent now accepts as being wrong. I do not know, nor do I seek to guess, what outcome that

application may have had, however it is potentially a relevant and weighty matter to the overall balancing exercise which the Judge strait-jacketed herself with by her error in how she applied the s117B(4) provision.

20. I reject Mr Melvin's submission that the point as to the exceptional nature of the case was not made before the FTT and that I should reject the arguments because the point was not argued below. The appellant plainly was relying on the fact she was recognised as a victim of trafficking and that the respondent accepted that the application made in 2015 was rejected in error. It is difficult to understand how the appellant could have raised the issue any more clearly. In any event Mr Melvin's submissions say nothing as to the misdirection I have identified in paragraph 34(a) of the Judge's decision.

21. For the above reasons the Judge materially erred in law and her decision is set aside.

22. I turn next to what happens next and what findings of fact can be retained. There is no challenge before me as to the Judge's findings at paragraphs 13 – 30. I see no basis for setting them aside. Any change in circumstances since the hearing in September 2023 can be addressed on remaking.

23. I have considered whether this is a case which requires remittal or whether it should be retained in the Upper Tribunal. Given the preserved findings I do not consider that it is a matter which requires a remittal to the FTT. The appellant can present any updating evidence she wishes to, which may include that as of February 2024 she and her partner may be able to show they have lived together for 2 years. If that is the case then the question of Ex.1 may come into consideration, however I note the finding at paragraph 30 in this regard.

24. I make the following case management directions:

    a. The decision of the Judge is set aside of the reasons given above. The findings at paragraphs 13 – 30 are preserved.

    b. The appeal is to be reheard in the Upper Tribunal before Deputy Upper Tribunal Judge Wilding on the first available date after 1 April 2024.

    c. The case is listed for 3 hours.

    d. It is unclear if an interpreter is required. No interpreter will be booked unless the appellant writes to the Tribunal requesting an interpreter, specifying the language and, if necessary, the dialect required.

e. The appellant has leave to file and serve any further evidence she wishes to rely, including updated witness statements, no later than 21 days before the resumed hearing.

f. The appellant is to file and serve a skeleton argument addressing all the material matters no later than 14 days before the resumed hearing.

g. The respondent is to file and serve a skeleton argument no later than 7 days before the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal is infected with legal error and is set aside.

The appeal will be reheard in the Upper Tribunal before Deputy Upper Tribunal Judge Wilding

Judge T.S. Wilding

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 28th February 2024