IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-005104

First-tier Tribunal No:
HU/58929/2023; LH/02194/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 January 2025

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ILIAN DAYANA MORFFI VELAZQUEZ

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The Appellant appeared in person
For the Respondent: Mr J Thompson, Senior Home Office Presenting Officer

Heard at Field House on Monday 20 January 2025

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Abebrese dated 14 June 2024 ("the Decision") dismissing her appeal against the Respondent's decision dated 7 July 2023 which refused her human rights claim made in the context of an application to remain in the UK with her partner, Mr Galan Zambo who is a dual South African and Hungarian national ("the Sponsor").

2. The Appellant is a national of Cuba. She came to the UK on 18 March 2019 with leave to enter as the partner of John Joseph Hewer until 19 November 2021. It appears that Mr Hewer in fact died on 29 November 2018 but nothing turns on that for the purposes of this appeal. The Appellant sought indefinite leave to remain on two occasions as a bereaved partner. Both applications were refused, the second on 14 July 2022. The Appellant has had no leave to remain since that date. On 28 July 2022, the Appellant applied for leave to remain as the partner of the Sponsor which was refused by the decision under appeal.

3. The Respondent did not accept that the Appellant met the definition of a partner within the Immigration Rules ("the Rules") but in any event did not accept that the Appellant met the eligibility requirements of the Rules in relation to her status and in relation to the financial requirements. A further issue was raised in relation to the Sponsor's status in the Respondent's review. He sought status under the EU Settlement Scheme but there is no evidence that he has been granted status, having been refused previously.

4. The Judge did not accept that the Sponsor met the financial requirements in the Rules due to lack of evidence. The issue in relation to his own status is raised at [9] of the Decision but not determined. In addition, the Judge did not accept that the Appellant meets the Rules based on her private life. He found that the Appellant and the Sponsor could live together in Cuba if they chose to do so. The Appellant has a son, but he continues to live in Cuba. The Judge gave little weight to the Appellant's private life due to her lack of status and found it in the public interest for her to be removed due to that lack of status. He therefore dismissed the appeal.

5. It is far from clear to me that this Tribunal has the grounds of appeal which were submitted to the First-tier Tribunal in support of the application for permission to appeal as the ones submitted appear to pre-date the Decision. I have therefore based my decision on the grant of permission to appeal. Permission was granted by First-tier Tribunal Judge Turner on 4 November 2024 in the following terms:

> "…2. The grounds assert that the Judge erred in failing to properly assess the Appellant's claimed relationship with her Sponsor. The determination fails to address the evidence which the Appellant argues provide sufficient evidence of a durable relationship. Whilst the Appellant cannot meet the Rules within Appendix FM under the 'partner' route on account of her immigration status, findings should have been made in relation to whether the Sponsor met the financial requirements or could maintain the Appellant without recourse to public funds for the purpose of any proportionality assessment under 117B of the 2002 Act. Whilst making brief reference to this at paragraph 12, the IJ failed to properly assess this in relation to what evidence had or had not been provided.
> 3. As an aside, it is not that the IJ refers to the incorrect standard of proof at paragraph 7 of the determination.

> 4. I also note that the IJ fails to undertake a proper balance sheet approach to any proportionality assessment (article 8 ECHR GEN.3.2) at paragraph 13. I do not find that the Appellant could properly understand why she was unsuccessful in her appeal due to the lack of proper reasons given in the determination.
> 5. I find that the Appellant has identified an arguable error of law and permission to appeal is granted."

6. The appeal comes before me to decide whether there is an error of law. If I determine that the Decision does contain an error of law, I then need to decide whether to set aside the Decision in consequence. If I set the Decision aside, I must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

7. I had before me a bundle running to 340 pages. I refer to documents in that bundle as [B/xx]. That bundle was prepared by the Tribunal because the Appellant is in person. As the Appellant is in person, I suggested to her that it may be easier for her if I heard from Mr Thompson first in relation to the Respondent's position and she could then reply. She agreed with that course.

8. Having heard from Mr Thompson and the Appellant, I indicated that I would reserve my decision and provide that with my reasons in writing which I now turn to do.

DISCUSSION

9. In order to consider the complaints made about the Decision as summarised in the grant of permission and the reasons given for granting permission as well as the parties' submissions, I set out the Judge's findings which are in this case very brief and are as follows:

> "12. I considered all of the documentation, oral evidence and submissions and I make the following findings in this appeal. The appellant relies on her relation with her partner Mr Zambo and they both gave evidence. I was not persuaded that the are [sic] appellant has satisfied the requirements of the rules. The appellant partner was not able to satisfy the financial requirements primarily because he did not provide the full information that is required of him in order for a full assessment to be made. The required income figure in these application is £18,600 and the sponsor's income falls short of this figure. I was also of the view that the appellant has not satisfied the requirements in respect of private life for the following reasons. The appellant has resided in the UK for less than 5 years and most certainly cannot satisfy the requirements of the rules in that she has not resided in this country for a [sic] continuously for a minimum period of 20 years. The appellant in my view if returned to Cuba will be able to integrate as she has resided in that country for as she has resided in that country for [sic] a substantial period of her life and is familiar with the language and the culture. The appellant in my view would not face very significant obstacles if she were to return to Cuba.
> 13. I also find that the appellant has not satisfied the requirements Article 8 of ECHR for the following reasons. I find on the facts that Article 8

> of ECHR is engaged but that interference with this would not in my view be disproportionate or unjustified for the following reasons. The appellant has a three year old child in my view because she does not satisfy the requirements of the rules she may return to Cuba with him. The appellants partner also has the option of returning with her to Cuba, his evidence is that he has a business in this country and that it would be difficult for him to relocate to another country this is a matter for him. The appellant immigration status in this country is precarious and I have given little weight to any private life that may have been established in this country. I am of the view that it is in the public interest for the purposes of effective immigration control for the appellant to be returned to her country."

10. Mr Thompson submitted that, whilst brief, the Judge's findings were sufficient to explain why the Appellant failed in her appeal. The Judge found that the evidence was insufficient to show that the Sponsor met the financial requirements of the Rules. That finding was open to the Judge. The Judge also found that the Appellant could not meet the Rules in relation to her private life due to lack of status and that she could not show that there would be very significant obstacles to her integration there. The Judge found that the couple could go to live together in Cuba if they chose to do so. The Appellant's son continues to live in Cuba. The reason given why they could not do so (based on the Sponsor's business in the UK) was not sufficient reason (see in that regard R (on the applications of Agyarko and Ikuga) v Secretary of State for the Home Department [2017] UKSC 11 – "Agyarko"). The Appellant's private life in the UK was given little weight due to her lack of status. There was a public interest in removal as she could not meet the Rules.

11. Mr Thompson relied on the Court of Appeal's judgment in Volpi and another v Volpi [2022] EWCA Civ 464. In short summary, an appellant is required to identify an error of law; there is no appeal on an error of fact save insofar as that gives rise to an error of law. An appellate court should be slow to interfere with findings made by a Judge below unless satisfied that he was "plainly wrong". An appellate court should not find an error just because it might have reached a different conclusion on the facts (although I should say that I would not have done so in this case in any event). An appellate court is entitled (indeed compelled) to accept that a Judge below has considered all the evidence if he says that he has unless it is evident that he has not. A Judge at first instance is not bound to refer to every piece of evidence. Reasons might be better expressed but a Judge's decision should not be interpreted as if it were legislation or a contract. Mr Thompson accepted that the Decision could have gone into more detail and be better expressed but maintained that the findings were open to the Judge on the evidence.

12. In response, the Appellant said that she considered the Decision to be wrong as the Judge had not given sufficient weight to her relationship with the Sponsor. They have been in a relationship for over four years. She is shortly expecting his child. Her solicitor had told her that she

had submitted more than sufficient evidence to show what she needed to. The Sponsor could support her. She accepted in response to a question from me that she has had no leave to remain in the UK since 2022. As I explained to her, this means that she would be unable to meet the Rules unless she could show that she and the Sponsor would face insurmountable obstacles to continuing their family life in Cuba. She said that they could not live together in Cuba as he has two children in the UK for whom he pays child maintenance. Cuba as a communist country would not give him the employment opportunities to afford to continue to pay that maintenance.

13. I begin by mentioning what is said at [3] of the permission grant about the standard of proof. At [7] of the Decision, the Judge (rightly) states that the Appellant bears the burden of proof (at least so far as establishing that the Respondent's decision will interfere with her family and private life to such an extent that it would be disproportionate to remove her). The Judge wrongly refers to the standard as being "the lower standard of proof". The standard for the Appellant to prove interference is a balance of probabilities. However, if the Judge adopted a lesser standard that is obviously in the Appellant's favour and does not disclose an error which is material.

14. Taking the grounds as summarised in the permission grant in order, there is no error in relation to the consideration of the evidence about the nature of the Appellant's relationship with the Sponsor. In fact, most of the Appellant's evidence in the bundle is concerned with that issue but the Judge did not dispute that the relationship was either genuine or durable. He did not find that the Appellant could not meet the Rules as she could not be described as a "partner". Nor did he decide that she could not meet the definition of a "partner" due to the Sponsor's status although on the evidence including that recorded at [9] of the Decision that he is "still going through the process" of establishing his status, the Judge might well have determined that issue against the Appellant. However, he did not do so and those are not therefore reasons why the Judge decided the appeal adversely to the Appellant. He did not therefore need to mention them or refer to the evidence about those issues.

15. Turning to the financial requirements, the Sponsor could not show that he met those requirements within the Rules as he had not provided sufficient evidence within the evidential requirements of the Rules. There can be no dispute about that. Nor can it be said that the Judge did not consider it.

16. I was initially concerned that the Judge might have erred by failing to determine whether the Sponsor could support the Appellant without recourse to public funds (in other words whether section 117B(3) Nationality, Immigration and Asylum Act 2002 – "Section 117B" – was met). However, as made clear by the Supreme Court in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, that

factor can only be neutral. The Appellant's ability to maintain herself without recourse to public funds cannot operate as a positive factor in her favour. The Judge did not determine that issue adversely to the Appellant and was not therefore required to say what he made of the evidence about the Sponsor's financial position. Although not referred to in the grounds, the same reasoning applies in relation to the Appellant's ability to speak English and the impact of Section 117B(2).

17. I have considered what was said by Judge Turner at [4] of the Decision. Whilst [13] of the Decision does not set out the proportionality assessment in the form of a balance sheet exercise, the Judge in substance carries out the exercise in that paragraph.

18. The Judge explains why paragraph EX.1 of Appendix FM to the Rules ("EX.1") is not met. The couple could go to live in Cuba together if they chose to do so.

19. There is very limited evidence about this issue in the bundle. There are no witness statements from the Appellant or the Sponsor. There is a letter from the Sponsor at [B/120-121] within the documents submitted to the Respondent with the application but that does not make reference to any obstacle to relocation to Cuba. It mentions that the Appellant's son continues to live in Cuba. It mentions that he has two children but provides no details about them. It mentions that he has a business in the UK.

20. The Respondent has gone slightly further in her review by reference to what is said in the Appellant's skeleton argument. I point out that the Appellant's skeleton argument is not evidence. The Respondent deals with this issue in her review at [B/338-339] as follows:

> "35 ASA 22 raises several claims as to why A's partner is unable to relocate to Cuba, either permanently or temporarily. No evidence has been provided to suggest A would be unable to employment [sic] should he choose to return to Cuba. Additionally, A has raised a language barrier as a reason A's partner is unable to relocate, it must be noted A's partner claims to be proficient in English, Afrikaans and Hungarian. In **Khan V the secretary of state**, Lord Carloway found at paragraph 23, " He noted the evidence and submission that the appellant's wife did not speak Urdu or Punjabi. He recorded that he
> did have regard to these matters and mentions them repeatedly. Indeed, he noted the wife's ability to adopt to another culture and her conversion to Islam as a way of life". As A's spouse previously adopted a new culture and language in their move from their home country to the United Kingdom, there is no evidence to support the claim they are unable to do this again given their skill set.
> 36. Further to this, A has raised her partners relationship with his children in the United Kingdom. Although it is noted financial records have been provided to indicate A's partner provides child support, no evidence has been provided to indicate a continued relationship with these children. Therefore, it is considered reasonable to believe A's partner can continue

> the financial support in Cuba should he choose to relocate. It must also be highlighted A has maintained a relationship with her young son, [E], who resides in Cuba through modern means like video calls and messages. A has claimed within the application that the young child calls her partner father, indicating A can continue a meaningful relationship with her partner should he return to Cuba to apply for entry clearance and her partner to remain in the United Kingdom."

21. The Respondent also refers to the test in Agyarko at [§38] ([B/339-340]) when dealing with Article 8 outside the Rules and rightly submits that the obstacles would need to "go beyond mere difficulties, inconvenience or even being harsh". Paragraph EX.2. of Appendix FM to the Rules of course itself makes clear that "insurmountable obstacles" is a very high threshold ("very significant difficulties").

22. The Appellant's response to the Respondent's review as drafted by the Appellant's former solicitors is at [B/79-81]. That does not deal with the issue in relation to EX.1 at all. The closest it comes to dealing with it is an assertion that the Respondent could have waived the requirement under the Rules in relation to the Appellant's unlawful immigration status or might have "granted" section 3C leave. The requirements for leave under Appendix FM under the Rules in relation to eligibility are not discretionary (see R-LTRP.1.1). Section 3C leave is not of course something which is "granted" but leave which is continued by primary legislation (Immigration Act 1971) in certain circumstances which do not apply here. I observe as an aside based on this document that the Sponsor's status under the EU Settlement Scheme was still not resolved at that stage.

23. The only evidence about the Sponsor's children is the two birth certificates at [B/196-197] which shows that they are aged eleven and seventeen years. There is also one document showing that he was paying child maintenance of £302.99 per month in 2022. As the Respondent points out there is no evidence that the Sponsor has continuing contact with either child. There is no evidence in the bundle about what the Sponsor might be able to earn in Cuba to show that he could not afford the child maintenance. Whilst the Judge might have referred to this issue, he was not bound to do so, particularly since it is raised only in the Appellant's skeleton argument and not in evidence. Any error in that regard could not possibly be material. It could not disclose (on the evidence which is in the bundle) that there is an insurmountable obstacle to family life continuing in Cuba and could not therefore establish that the Appellant meets EX.1.

24. The Judge had found at [12] of the Decision that the Appellant could not meet the Rules in relation to her private life. There can be no challenge to those findings. She had not had leave to remain as a partner for five years. She has not been here for twenty years. There is no evidence of any very significant obstacles to her integration in Cuba, a country she left only five years ago.

25. For those reasons, the Judge was entitled to find as he did that the Appellant did not meet the Rules. Although he made no express reference to Section 117B at [13] of the Decision, he referred to Section 117B(5) in substance, giving the appropriate weight to the Appellant's private life. He also referred in substance to Section 117B(1) which sets out the public interest in removal. That is a weighty factor where, as here, an appellant cannot meet the Rules. Having found that the Appellant could return to Cuba with the Sponsor and rejoin her son who still lives there, the Judge was fully entitled to conclude that removal would be proportionate.

26. The Judge could have gone into more detail as to the reasons why the Appellant's appeal fails. He might have expressed his reasons more fully. However, properly analysed, [12] and [13] of the Decision do explain why the appeal did not succeed and the findings made are ones which were lawfully open to the Judge on the (limited) evidence put forward by the Appellant.

27. It is of course open to the Appellant to make a further application for leave to remain. It is not clear if the issue in relation to the Sponsor's own status is now settled. It may be that the Sponsor is now able to show that he meets the financial requirements of the Rules. The Appellant's unlawful immigration status (as an overstayer) continues to be a barrier to meeting the Rules unless she and the Sponsor can show that there are insurmountable obstacles to them living in Cuba together. However, they can at least direct their evidence to that issue. The upcoming birth of their child may also impact on the outcome (although that is not to be taken as any indication that it will).

28. However, for the reasons given above, the grounds do not establish an error of law in the Decision (or not any that is material to the outcome). Accordingly, I uphold the Decision with the result that the Appellant's appeal remains dismissed.

CONCLUSION

29. For the reasons set out above, the Decision does not contain any material error of law. I therefore uphold the Decision with the result that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Abebrese dated 14 June 2024 does not involve the making of an error of law. I uphold the Decision with the result that the Appellant's appeal remains dismissed.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal

Immigration and Asylum Chamber

22 January 2025