



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/39265/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 8 December 2014**

**Determination
Promulgated
On 16 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SHANELLE SOCO JOCOY
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy of the Specialist Appeals Team

For the Respondent: Mr P Lewis of Counsel instructed by Kidd Rapinet LLP

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as the “the Applicant” is a citizen of the Philippines, born on 24 March 1984. On 2 December 2009 she arrived with leave to enter as a student. Such leave was extended, expiring on 11 August 2013.
2. On 9 August 2013, in time she applied for leave to remain on the basis of her relationship with Lee Tang, a British citizen born on 18 May 1983 in the

United Kingdom. They had first met in about May 2011. They began living together in June 2013 and in February 2014 their child was born.

3. On 11 September 2013 the Appellant (the SSHD) refused the Applicant's application under paragraph 276ADE of the Immigration Rules and under Article 8 of the European Convention outside the Rules. At the date of the decision, the Applicant was some two or three months pregnant.
4. The Applicant appealed under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds were generic and referred to Article 8 of the European Convention.

The First-tier Tribunal's Determination

5. The appeal was heard on 4 August 2014 and by a determination promulgated on 3 September 2014 Judge of the First-tier Tribunal Denson allowed the appeal on human rights grounds by way of reference to Article 8 outside the Immigration Rules. He referred to Section 55 of the Borders, Citizenship and Immigration Act 2009 as well as Sections 117A-D of the 2002 Act which had come into effect on 28 July. He noted the immigration history of the Applicant and that her partner had spent all his life in the United Kingdom and that his family and in particular his sister lived close by and that he did not speak "Filipino" (Tagalog?). He also had a medical condition for which he had been operated upon and it was anticipated a further operation would be necessary. The Judge found the relationship between the Applicant and her partner to be genuine, loving and subsisting and that the Applicant's partner supported the family who lived in the family home of her partner's parents.
6. The Applicant could not satisfy the requirements of paragraph 276ADE and the Judge proceeded to consider the claim under Article 8 outside the Rules, referring extensively to Sections 117A and B. He went on to allow the appeal.
7. The SSHD sought permission to appeal on the grounds that the Judge had erred in law by not considering the jurisprudence in *Gulshan (Article 8 - new Rules - correct approach) Pakistan* [2013] UKUT 640 (IAC) and *R (oao Nagre) v SSHD* [2013] EWHC 720 (Admin). The SSHD asserted the Judge had failed to identify any compelling or exceptional circumstances and that there were no insurmountable obstacles to the Applicant together with her child and partner relocating to the Philippines or to the Applicant and her child returning there and maintaining contact with her partner by modern means.
8. On 5 November 2014 Judge of the First-tier Tribunal Holmes granted the SSHD permission to appeal on the basis that in light of the guidance to be found in *R (oao MM and Others) v SSHD* [2014] EWCA Civ 985 it was arguable the Judge had not adequately engaged with the evidence or the requirements of Section 117B of the 2002 Act.

The Upper Tribunal Hearing

9. The Applicant, her child and her partner were in attendance. I showed to the parties the recent decision in R (oao Oludoyi and Others) v SSHD (Article 8 - MM (Lebanon) and (Nagre) IJR [2014] UKUT 00539 (IAC).
10. Mr Duffy for the Respondent relied on the grounds for appeal and submitted the issue was that the Judge had had no need to have considered Article 8 outside the Rules because this was a case which engaged paragraph EX.1 of Appendix FM of the Rules and that insofar as relevant to this appeal paragraph EX.1 provided a complete code for the consideration of a claim under Article 8. Consequently, the Judge's consideration of the claim under the Immigration Rules had not been sufficient.
11. For the Applicant Mr Lewis submitted the decision which the Judge made was open to him. He had had ample regard to the relevant factors including the matters referred to in Section 117B of the 2002 Act and had given sustainable reasons for concluding that it was disproportionate to require the Applicant to leave the United Kingdom.
12. Mr Duffy referred to the Applicant's notice under Procedure Rule 24 on the day of the hearing. This set out the history of the Applicant's immigration history and the history of her relationship with her partner. Sections 117A-D are set out in full and reference is made to comments in R (oao MM and Others) rejecting the approach to Article 8 claims outside the Rules through what has become known as "the Gulshan Gateway". He also relied on the decision in R (oao Oludoyi).
13. He helpfully conceded that the grounds for appeal based on Gulshan and Nagre were not now of any material substance but that the determination contained an error of law because the Judge had failed to consider Appendix FM paragraph EX.1. I noted the SSHD's grounds for appeal did not take issue with the Judge's treatment of the appeal under the Immigration Rules. I also noted the Applicant's child had been born after the date of the decision under appeal but before the hearing of the appeal.

Consideration

14. Mr Duffy referred to the determination in Sanade and Others [2012] UKUT 00048 which included the finding that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to re-locate outside the European Union or to submit that it would be reasonable for them to do so.
15. I noted the grounds for appeal lodged by the SSHD did not challenge the Judge's approach to the Rules but permission was granted on the basis that it was arguable the Judge had not adequately engaged with either or both of the evidence and Section 117B of the 2002 Act. Mr Duffy also

submitted quite reasonably that the Applicant's circumstances were such that she had an arguably good claim that she satisfied the requirements of paragraph EX.1 of Appendix FM but he emphasised that at the date of the decision the Applicant's child had not been born.

16. The Applicant was bound to fail under the provisions of paragraph 276ADE because she could not meet the residence requirements of the Rule. In such circumstances it is questionable whether there is any merit in proceeding to a consideration of Appendix FM because the Appendix must logically be appended to the Rule so that if an Applicant were to satisfy the requirements of Appendix FM but not the requirements of the substantive paragraph, it is difficult to see how she could succeed under the Rules: see *Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 63 (IAC)*.
17. The Judge made findings of fact at paragraphs 24-29 and at paragraph 30 dismissed the appeal under paragraph 276ADE of the Rules and went on to consider the claim under Article 8 outside the Rules. There is no criticism of the Judge's treatment of the claim under the Rules other than the suggestion made for the SSHD that paragraph EX.1 of Appendix FM constituted a complete code. For the reasons given in *Sabir*, I do not accept that submission.
18. The other grounds relying on the requirement that the Applicant meet the additional requirements of exceptional or compassionate circumstances to engage Article 8 outside the Rules, colloquially known as the "*Gulshan Gateway*", do not disclose an error of law for the reasons already given.
19. The consequence is that I find the grounds of appeal do not disclose an error of law so the determination of the First-tier Tribunal shall stand.

Anonymity

20. There was no request for an anonymity order or direction. Having considered the papers in the Tribunal file and of the error of law appeal, I find none is warranted.

DECISION

The First-tier Tribunal's determination did not contain an error of law and shall stand. The effect is:-

The appeal of the Applicant is allowed and the appeal of the SSHD is dismissed.

No anonymity order or direction is made.

Signed/Official Crest
2014

Date 15. xii.

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal