**Upper Tier Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/53506/2013

**THE IMMIGRATION ACTS**

**Heard at Field House** **Decision and Reasons Promulgated**
**On 4 August 2015** **On 28 August 2015**

**Before**

**Deputy Upper Tribunal Judge Pickup**

**Between**

**Jobeth Lpoit Daguio**
**[No anonymity direction made]**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**
For the appellant: Mr I Khan, instructed by Kolia Solicitors
For the respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**ERROR OF LAW DECISION AND REASONS**

1. The appellant, Jobeth Lopit Daguio, date of birth 5.5.85, is a citizen of the Philippines.

2. This is her appeal against the determination of First-tier Tribunal Judge Shergill promulgated 23.1.15, dismissing her appeal against the decision of the Secretary of State, dated 25.11.13, to refuse leave to remain in the United Kingdom as a partner, pursuant to R-LTRP of Appendix FM of the Immigration Rules. The Judge heard the appeal on 8.1.15.

© CROWN COPYRIGHT 2015

3. First-tier Tribunal Judge Grimmett granted permission to appeal on 17.3.15, on the basis of failure to consider the best interests of the appellant's recently born child.

4. Thus the matter came before me on 4.8.15 as an appeal in the Upper Tribunal.

**Error of Law**

5. For the reasons set out herein, I found that there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Shergill should be set aside to be remade. I remitted the appeal to the First-tier Tribunal in accordance with the attached directions.

6. The relevant background can be briefly summarised as follows. The appellant came to the UK with leave as a domestic worker. Within that period of leave she applied on 26.9.13 for further leave to remain as the partner of a French national settled and retired in the UK. Following the application and before decision, the appellant married her partner on 24.10.13 and on 8.6.14 gave birth to their daughter. Judge Shergill was satisfied that their relationship was genuine.

7. Whilst the appellant may be entitled to a Residence Card under the Immigration (EEA) Regulations 2006, she did not make any such application. Judge Shergill found that the application had been made in a haphazard way and the evidence did not comply with the specified evidence requirements of Appendix FM-SE.

8. The judge then went on to consider family life outside the Rules under article 8 ECHR, but the reasoning set out from §27 onwards for doing so is confused and it is not clear why the judge considered there were any compelling circumstances justifying considering family life outside the Rules.

9. On the basis of the judge's findings it was concluded at §30 that the decision was not disproportionate.

10. However, at §31 the judge then stated that, "No live issue of the child's interests were before me and as the appellant is represented I am not obliged to deal with that on the case as pleaded."

11. That finding is in clear error of law, as established in Azimi-Moayed & others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC), the duty to have regard to the best interests of a child "are so well established that a judge should take the point for him or herself as an obvious point to be considered, wherever the issue arises on the evidence, irrespective of whether the appellants or the advocates have done so." The Upper Tribunal also stated, "Where that evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question, or that the best interests of the child are undermined by such action, there is simply no basis for any further judicial exploration or reasoned decision on the question."

12. The First-tier Tribunal Judge should have addressed the best interests of the child. It is impossible to say at this stage what view might have been taken of those best interests, even though on the face of the facts this is a weak case for allowing leave to remain outside the Rules, and thus failure to do so amounts to an error of law.

13. It may be that in reconsidering the matter another judge may take the view that in light of the facts of this case there is no prospect of the child being removed from the UK, given the father's settled status as an EEA national in the UK. There may also be a route for the child and the appellant through a diligent application under Appendix FM, taking care to address the specified evidence requirements.

14. Peculiarly, at §32, the judge also went on to purport to make a direction that no removal direction may be exercised because the judge was satisfied that it is unlawful, reaching that view on a so-called concession of the Home Office that removal would be unlawful, as the appellant had a prima facie right to a family permit as the spouse of an EEA national.

15. The judge has no power to make any such direction. If the judge considered that the immigration decision was unlawful, not being in accordance with the law, the correct decision would have been to allow the appeal to the limited extent that the decision was not in accordance with the law and that it remains for the Secretary of State to make a decision that is in accordance with the law. Instead, the judge went on to simply dismiss the appeal on both immigration and human rights grounds.

16. Elsewhere in the decision the judge also states that the appellant's child is a British citizen. That is not correct. She may be entitled to British citizenship, but as Mr Khan accepted, she cannot become a British citizen unless and until an application is made.

17. In all the circumstances, the decision is flawed for error of law and cannot stand.

18. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

19. In all the circumstances, I remit this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

**Decision:**

20. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside set aside the decision.

I remit the making of the appeal to the First-tier Tribunal.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

**Consequential Directions**

21. The appeal is remitted to the First-tier Tribunal for the decision in the appeal to be made afresh, with no findings preserved;

22. The hearing will take place at Taylor House on a date to be fixed;

23. The estimated length of hearing is 2 hours (2 witnesses);

24. An interpreter in Tagalog will be required;

25. The appellant should serve and lodge with the Tribunal no later than 7 working days before the notified hearing date a consolidated bundle, indexed and paginated, and containing all subjective and objective materials relied on by the appellant.

**Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules.

Given the circumstances, I make no anonymity order.

**Fee Award** **Note: this is not part of the determination.**

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**