IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17469/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd December 2015	**On 7th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MS JUDITH DAPA NOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L Magsino, Stanford Law Associates
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of the Philippines, appealed to the First-tier Tribunal against the decision of the Secretary of State dated 12th March 2014 to refuse her application for leave to remain in the United Kingdom. The appeal was dismissed by First-tier Tribunal Judge Mozolowski in a decision dated 17th April 2015. The Appellant now appeals with permission to this Tribunal.

Background

2. The background to this appeal is that the Appellant came to the United Kingdom on 21st August 2007 as an overseas domestic worker on a visa valid from 5th August 2007 to 2nd February 2008. Her visa was extended on three occasions until 29th March 2011 after which her applications were rejected on four occasions until she was granted leave to remain as a domestic worker from 28th October 2011 until 28th October 2012. This was extended until 4th March 2014. On 24th October 2013 she applied for indefinite leave to remain on the basis of five years' continuous lawful residence as an overseas domestic worker but that application was refused on 12th March 2014.

3. At the hearing of the appeal before the First-tier Tribunal the Appellant's representative accepted that the Appellant could not meet paragraph 159G of the Immigration Rules as she had not established five years' continuous lawful residence. However, he argued that the immigration decision would breach the UK's obligations under the Human Rights Convention.

4. The judge heard oral evidence from the Appellant and from her partner. The evidence was that the Appellant's partner is a British national and that the couple have two daughters, one born on 13th November 2008 and the other on 12th January 2011. The judge considered Article 8 within the Rules and decided that the Appellant did not meet the provisions of Appendix FM or paragraph 276ADE in relation to private life. The judge went on to consider the appeal under Article 8 of the ECHR. The judge took into account Section 117B of the Nationality, Immigration and Asylum Act 2002 and weighed up various factors and concluded that it would not be harsh or unreasonable for the Appellant's family to return to the Philippines [30]. She found that the Appellant could return to the Philippines alone, allowing the children to remain with their father or that the father could choose to accompany the family to the Philippines. The judge decided that the best interests of the children would be for them to be with both of their parents but that this was not inevitably a trump card. The judge concluded that the immigration decision appealed against is proportionate and would not cause the UK to be in breach of the law or of its obligations under the Human Rights Convention.

5. In her Grounds of Appeal the Appellant contends that the judge erred in reaching a decision without adequate consideration of the best interests of the children as required by Section 55 of the Borders, Citizenship and Immigration Act 2009. It is secondly contended that the judge undertook an erroneous approach to Article 8 in failing to give adequate assessment of the Appellant's right to respect for family life in accordance with the five stage test set out in the case of **R v SSHD ex parte Razgar [2004] UKHL 27**.

6. Permission to appeal was granted on the basis that it is arguable that an overall analysis of the relevant factors together with the conclusions to be drawn from such analysis had not been furnished in the decision in relation to Section 55 and that an arguable error of law had arisen in

relation to the consideration of Article 8 in that the criteria in **Razgar** had not been applied or set out.

Error of Law

7. At the hearing before me Mr Kotas accepted that there has been an error of law in the First-tier Tribunal Judge's decision in relation to the Section 55 considerations. Mr Kotas pointed out that Appendix FM Ex 1 and paragraph 276ADE had been considered in relation to a consideration within the Rules and that involved an assessment as to whether it was reasonable to expect the children to leave the UK. He said that he would not be submitting that it is reasonable to expect the children to leave the UK in light of the Respondent's policy and in light of the fact that there is no evidence of criminality or other negative factors in this case.

8. In light of Mr Kotas' concession and considering the determination as a whole I accept that the judge did not give adequate consideration to the best interests of the children and I set the decision of the First-tier Tribunal aside. Mr Kotas confirmed that there was no challenge to the findings of fact made by the judge and I preserve those findings.

9. Mr Magsino submitted an additional bundle for consideration in terms of remaking the decision. He pointed out that there was a significant change of circumstances in this case in that there has been an incident of domestic violence and the Appellant and her partner are now separated and living in separate accommodation. The Appellant and her children are living in accommodation provided for by the council and is no longer in contact with her partner and it appears that the couple are likely to be separated.

Remaking the Decision

10. I remake the decision in accordance with the findings of fact made by the First-tier Tribunal Judge and the new evidence submitted in the Appellant's bundle in the context of Mr Kotas' concession.

11. I firstly consider the provisions of the Immigration Rules. In terms of Appendix FM I note that the judge found at paragraph 16 that it had not been demonstrated that the Appellant and her partner could meet the requirements of the Rules for a spouse to enter the UK. However, I note that Ex 1(a) of Appendix FM applies where there is a genuine and subsisting relationship with children who would not be expected to leave the UK. Ex 1 of Appendix FM provides exceptions to certain eligibility requirements for leave to remain as a parent or partner.

12. The judge accepted that there was a genuine and subsisting relationship between the Appellant and her children. I note that the children are British nationals and I accept that because they are British nationals born in the UK one of whom is now 7 years old that it is not reasonable to expect the children to leave the UK. I also take account of the fact that the

children's father is receiving treatment for cancer and is therefore unlikely to be able to travel with them or visit them if they were to leave the UK.

13. As she and her partner are no longer together the Appellant cannot meet the requirements of Appendix FM for leave to remain as a partner. However the Appellant appears to meet the requirements for leave to remain as a parent as her daughters are living with her and their other parent is a British Citizen and paragraph Ex 1 applies. On this basis I am satisfied that the Appellant has demonstrated that she meets the requirements of Appendix FM. I note the change of circumstances and note that Mr Kotas had no submissions to make in relation to that change of circumstances and I consider that the separation of the Appellant and her former partner do not affect the core issue to be determined in this case.

14. I further consider paragraph 276ADE of the Immigration Rules. I note paragraph 276ADE(1)(vi) which considers whether there would be very significant obstacles to the Appellant's integration into the Philippines if she was required to leave the UK. I note that the Appellant has much of her family in the Philippines but take account of the fact that her daughters are British citizens and her former partner is a British citizen too.

15. Although I do not need to in light of my findings above I go on to consider the appeal under Article 8 of the European Convention on Human Rights in accordance with the guidance in **R v SSHD ex parte Razgar [2004] UKHL 27**. I firstly accept that there is a family life between the Appellant and her daughters. As the Appellant's daughters are British citizens and cannot be removed from the UK I accept that the decision may interfere with the Appellant's family life if she were to be removed from the UK and her children were to remain here.

16. Although that decision may be lawful I consider whether or not it is proportionate. In considering proportionality I take account of the change of circumstances between the Appellant and her former partner. Although there is no contact between the Appellant and her former partner right now it may well be that the former partner seeks access to the children and that is likely to be facilitated by the courts.

17. I take into account the fact that the children are British nationals and have resided in the UK since birth. The children are aged 7 and 4.

18. I take into account Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. I note in accordance with Section 117B(2) that the Appellant speaks English. There is no evidence in relation to whether she is financially independent. However, Section 117B(6) states that:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

19. Section 117D defines a qualifying child as a person who is under the age of 18 and who is a British citizen or has lived in the UK for a continuous period of seven years or more. I take into account Mr Kotas' concession, in accordance with Home Office policy, that it is not reasonable to expect the British citizen children to leave the UK.

20. Taking all of these factors into account I am satisfied that the Appellant has a family life in the UK along with her children and that it is not in the public interest to seek to remove her from the UK. I therefore conclude that the decision appealed against is not proportionate to the Respondent's legitimate aim. I therefore allow the appeal.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and I set it aside.

I remake the decision by allowing the appeal on the basis of the Immigration Rules and under Article 8 of the ECHR.

No anonymity direction is made.

Signed Date: 5th January 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 5th January 2016

Deputy Upper Tribunal Judge Grimes