Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42532/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 December 2015	**On 26 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MISS RUTH RINA RESURRECCION
(anonymity order not made)

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Othieno, Geo Immigration Consultants Ltd
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

ERROR OF LAW DECISION & REASONS

1. The Appellant is a national of the Philippines, born on 15 March 1985. She came to the United Kingdom on 9 February 2010 in order to attend the University of Winchester where she undertook a Degree in Professional Practice in Health and Social Care. She graduated with a BSc in February 2012. Prior to that time the Appellant graduated with a degree in Nursing from the University of Bangatas in the Philippines in March 2006. The Appellant also worked during her studies and has been employed as a healthcare assistant both by the NHS and BUPA.

2. On 15 August 2012, the Appellant obtained an extension of leave for 2 years as Tier 1 Post Study Migrant. On 8 August 2014, she applied for an extension of leave outside the Rules to complete her studies. This application was refused on 9 October 2014 and her appeal came before Judge of the First-tier Tribunal Suffield-Thomas for hearing on 12 May 2015. The appeal was confined to consideration of Article 8 of ECHR outside the Rules.

3. In a decision and reasons promulgated on 18 May 2015, the Judge dismissed the appeal. She considered at [23] that there were exceptional circumstances that would lead the Tribunal to make an Article 8 assessment outside the Rules. She noted at [25] that the Appellant does not have a family life in the UK and that her mother and son live in the Philippines. She found at [26] that the Appellant has a private life in the UK. She went on to find at [28] that the Appellant has been an overstayer since her leave as a post-study migrant ended in August 2014. The Judge went on to conclude at [32] that the decision of the Respondent refusing to grant her further leave to remain was proportionate.

4. An application for permission to appeal was sought in-time on 29 May 2015. The grounds in support of the application asserted that the First-tier Tribunal Judge erred materially in law: (i) in holding that the Appellant had overstayed her visa when she made the application underlying her appeal and that this erroneous finding has coloured her view and affects the application of section 117A & B of the 2002 Act to the detriment of the Appellant; (ii) the Judge erred in holding that no evidence of the inability of the Appellant to secure employment as a nurse in the Philippines when the Appellant has testified as to the difficulties in securing employment and has provided objective backdrop evidence supporting her assertion; (iii) in failing to give clear reasons as to why the public interest in removal outweighs the compassionate circumstances of the case.

5. Permission to appeal was granted by First-tier Tribunal Judge Colyer on 18 August 2015 on the basis that:

> **“4. It is arguable that the judge fell into material error in finding (at paragraph 28) that the appellant had been an overstayer with no valid leave to be in the UK; whereas in paragraph 2 the judge sets out the appellant’s immigration history indicating her application on 8 August 2014 which predates the conclusion of her leave to remain as a tier 1 post study migrant on 15 August 2014.**
>
> **5. It is arguable that the judge erred in fact in holding that no evidence of the inability of the appellant to secure employment as a nurse in the Philippines (at paragraph 30). This formed part of the appellant’s case and is referred to by the judge at paragraph 12(viii). In addition the appellant’s bundle contains a number of articles relating to that issue.**
>
> **6. It is arguable that erroneous factual finding may have coloured the judge’s view and diminish the quality of the**

appellant's lengthy and lawful residence in the UK. It is also arguable that it may have affected considerations of section 117A and 117B of the 2002 Act to the detriment of the appellant.

7. It is also arguable that the judge's assessment of proportionality and public interest may have been tainted by factual inaccuracy."

Hearing

6. At the hearing before me, Mr Othieno stated that he had nothing to add to the grounds seeking permission to appeal. He stated that the Appellant is still residing in the UK with leave by virtue of section 3C of the Immigration Act 1971 and that this would have had a bearing on whether or not her appeal should be allowed. He submitted that in respect of maintaining integrity of immigration laws an overstayer or illegal entrant is less attractive than someone who entered with leave. In respect of the issue of securing employment, the Judge did refer to what the Appellant said [at 12(viii)] but at [30] found that there was no evidence. However, there was background evidence which Judge did not look at. The Appellant faces an uncertain future there, whereas in the health sector here she is of benefit to the UK. Mr Othieno acknowledged that in respect of sections 117A & B the Appellant's leave had been precarious *cf.* AM Malawi so he was not pursuing this point very hard. In respect of the third ground of appeal, the Judge does deal with the issue of proportionate response as the Appellant could maintain friendships here by way of modern means but the proportionality exercise was flawed by a lack of clear reasons.

7. In response, Ms Holmes submitted that, in respect of the first point and the error of fact relating to the Appellant being overstayer when she is not, this has not clouded her view. At [28] the Judge does not take that as a point against the Appellant and does not mention as a factor in her consideration that the Appellant has overstayed. Consequently, she did not accept it is a material error. In respect of the second point, Ms Holmes stated that she did not agree with this. The Judge makes a note of the evidence and she states this at [12(viii) but what she actually says at [30] is: "*I have no evidence before me that the Appellant could not find work in the Philippines.*" This does not mean she has not taken account of the evidence before her. If one looks at the bundle and the evidence dated from 2011, the Judge may well have looked at this and concluded that it did not confirm that the Appellant would not get a job as there is oversupply but also undersupply of trained nurses. In relation to the evidence about nurses taking different career paths dating from 2014, this does not help the Appellant because it is referring to other jobs done by people who trained as nurses. The Appellant may not be able to work as a nurse, which is debatable in any event, but there are other jobs she can do. The Judge took account of the Presenting Officer's submissions that she has gained education and experience here. The Judge considered the evidence but did not consider it of assistance and it was open to her to do this. No-one has a guarantee they would have a certain kind of job. There is nothing to show she

would not be able to get other work if she were to be unable to get work as a nurse. In respect of the third ground of appeal and the alleged absence of reasons, Ms Holmes submitted that there are not really any compassionate circumstances and it was open to the Judge to make her findings and she has set out everything she needed to. The Judge considered the evidence about the Appellant's work and her private life. There is no merit in the grounds of appeal and no material error.

8. Mr Othieno did not wish to respond.

Decision

9. I find that whilst the First-tier Tribunal Judge made errors, when the appeal is considered as a whole and in the proper context of the current jurisprudence those errors are not material. My reasons for so finding are as follows:

9.1. whilst the Judge made a factual error in finding at [28] that the Appellant is an overstayer, the error is not material given that the Appellant's leave to remain was precarious, in accordance with section 117B(5) rather than developed when she was here unlawfully [section117B(4)]. The application of either of these sub-sections means that little weight can be given to a private life established in such circumstances. In any event I find that this did not infect or impact negatively upon the Judge's overall conclusion that the Respondent's decision was proportionate;

9.2. in respect of the Appellant's ability to obtain employment as a nurse in the Philippines, I accept Ms Holmes' submission that the Judge's finding at [30] that there was no evidence before her that the Appellant could not find work in the Philippines does not mean she has not taken account of the evidence before her. At 12 (viii) she records the Appellant's oral evidence that: "*There are no jobs for nurses in the Philippines as they have thousands of nurses and not enough jobs."* However, this does not mean that the Appellant would be unable to get a job but that she may not be able to easily get a job as a nurse. The Judge at [30] expressly accepted the submission by the Presenting Officer that the qualifications and experience she had gained in the UK would stand her in good stead if she returns home. I find that the Judge was aware of the evidence on this issue and her finding in this respect was open to her on the evidence before her. Even if the Judge failed to consider the documentary evidence as to the oversupply of nurses in the Philippines, I do not consider that this would have made a material difference given that the evidence was dated and in any event did not show that the Appellant would be unable to get a job there at all.

9.3. the application was made outside the Immigration Rules as a "freestanding" Article 8 case, however, this is no longer permissible since the coming into force of the amended Immigration Rules in July 2012. SS (Congo) & Ors [2015] EWCA Civ 387 [23.4.15] makes clear that compelling circumstances

would have to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM [33]. Judgment had been handed down by the date of the hearing before the First-tier Tribunal Judge but was not considered by her in determining the appeal and the test set out therein was not applied by the Judge at [24] where she applied a test of "exceptional circumstances."

9.4. I further accept the submission by Ms Holmes that the Judge fails, in any event, to give reasons as to why she considered there were exceptional circumstances justifying consideration of Article 8 outside the Rules. The only reason provided at [24] is that "*it can be that the Immigration Rules do not provide discretion to examine whether the immigration decision is proportionate in the light of the Appellant's circumstances and the consequences of that decision may have a significant impact on the Appellant's private and family life continuing.*" I agree with Ms Holmes that this does not justify a finding that, on the facts before her, the Appellant's case discloses exceptional or compelling circumstances to consider the appeal outside the Rules. The Appellant had resided in the United Kingdom since 9 February 2010. The Judge found correctly at [25] that she has no family life in the United Kingdom and her mother and son reside in the Philippines. The only possible basis for finding that there was an exceptional and compelling circumstance is that the Appellant, who is qualified as a nurse in the Philippines, wished to complete her studies so as to qualify as a nurse in the United Kingdom, but whilst laudable, I find this is neither exceptional nor compelling.

9.5. Whilst I can accept the argument put forward by Mr Othieno that the Judge's reasons at [28]-[32] for finding that the Respondent's decision is proportionate lack clarity and detail, given my findings above it would not have been possible for the Appellant to succeed on the basis of the evidence before the First-tier Tribunal Judge. In any event, her findings were not tainted by factual inaccuracy so as to render this aspect of the case a material error.

10. For the reasons set out above, I find that whilst there are errors in the decision of First-tier Tribunal Judge Suffield-Thomas these are not material errors in that the outcome of the appeal would have remained the same on the basis of the facts and evidence before her. It remains open to the Appellant to apply for entry clearance or leave to remain under the Immigration Rules, under the Points Based System should she qualify for such leave.

Deputy Upper Tribunal Judge Chapman

23 February 2016