Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09395/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 April 2018	**On 11 April 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELKIN PATA ZULUAGA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms E King, Counsel, instructed by Alexander Shaw Solicitors LLP

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (appellant) against the decision of Judge of the First-tier Tribunal Abebrese (the judge), promulgated on 27 October 2017, allowing the respondent's appeal against a decision made by the appellant on 22 March 2016 refusing the respondent's human rights application made on or around November 2015.

Background

2. The respondent is a national of Colombia, date of birth 5 May 1969. He claims to have first entered the UK in 1992 pursuant to a visit visa. He

returned to Colombia in 1997, 1999 and 2005. He obtained a Residence Card as a family member of an EEA national on 29 March 2004 based on his marriage to a Spanish national. The Residence Card was valid until 20 March 2009. An application for a residence card signifying a right to permanent residence was refused on 12 February 2010 as there was insufficient evidence that the spouse had exercised Treaty rights for a five-year period. Although an appeal was lodged against this decision it was later withdrawn because the relationship with the spouse broke down. A divorce was finalised on 24 May 2017.

3. The November 2015 application was made on the basis of the respondent's relationship with his daughter and other members of his immediate and extended family, including his mother and sister, and the private life he claimed to have established since first arriving in the UK. The respondent married Dorelsy Morena, a Spanish national, on 28 July 2017.

4. The application was refused on several bases. The appellant was not satisfied that the Suitability requirements of Appendix FM were met given the length of the respondent's unlawful residence, his illegal employment and his illegal entry to the UK on at least 2 separate occasions. The respondent could not meet the requirements of Appendix FM under the 10-year Parent route because his daughter was over the age of 18 at the date of the application. The appellant was not satisfied EX.1 applied because the respondent did not have a qualifying relationship within the terms of that provision. The appellant was not satisfied the respondent had lived continuously in the UK for at least 20 years, as required by paragraph 276ADE(1)(iii), because his residence was broken by his visits to Colombia and he had no reasonable expectation at the time of leaving the UK that he would be lawfully able to return. Nor was the appellant satisfied there were very significant obstacles to the respondent's return to Colombia, as required by paragraph 276ADE(1)(vi). The appellant was not satisfied there were any 'exceptional circumstances' outside the immigration rules warranting a grant of leave to remain in accordance with article 8 principles.

The First-tier Tribunal's decision

5. At the appeal hearing the judge heard oral evidence from the respondent, his wife and his mother. Although there was a letter from the respondent's daughter the respondent informed the judge that he and his daughter had an argument and she did not attend the hearing. The respondent's representative conceded that he could not succeed under the '20-year rule' in paragraph 276ADE(1)(iii).

6. The judge found, based on the respondent's immigration history, that he had evaded the attention of the authorities for a significant period of time. The judge nevertheless stated, at [31], "… I do not make a finding that the [respondent's] behaviour whilst in this country does not make him suitable under the rules in respect of the parent route

because of his own evidence he has worked illegally, overstayed and not made himself known to the authorities for significant part of his time in this country." The judge found that the respondent was not eligible under the parent route of Appendix FM because his daughter was over the age of 18 when the application was made and because she and the respondent did not appear to be on speaking terms [32]. In light of the concession by the respondent's representative the judge found that the '20-year rule' had not been met [33]. Nor was the judge satisfied that there were 'very significant obstacles' to the respondent's return to Colombia [34].

7. The judge proceeded to consider the appeal outside the immigration rules. The judge set out the 5-stage approach established in Razgar [2004] UKHL 27. At [36] the judge stated,

> I find that the proposed removal of the [respondent] will be an interference of the [respondent's] family life. I also find that the interference will such consequences of such gravity [sic] so as to potentially engage Article 8.

8. At [37] the judge stated,

> I am also of the view that the decision of the [appellant] is unlawful because it has given [sic] sufficient weight to the circumstances of the [respondent] in this country and the relationships which he has built with them in this country.

9. At [38] the judge stated,

> I also find that the decision of the [appellant] has not been made in the legitimate pursuance of effective immigration control and that the interest of the [respondent] outweighs that of the public. The [respondent] speaks English, he has worked in this country albeit for the majority illegally but he has paid tax and made disclosure to HMRC in respect of his taxes and he provided evidence of having paid tax in addition to evidence of his P60. The [respondent] will not and has not been a burden to the state and he has made a contribution. He has also in my view integrated into British society. I have also taken into consideration the fact that the [respondent] was candid in his evidence and I found him and members of his family to be credible witnesses.

10. At [39] the judge found the appellant's decision disproportionate because the respondent had been in the UK for at least 18 years and because he has a daughter who was 20 years old. At [40] the judge found that the majority of the respondents 'key' family members were either in the UK or Belgium, and found that the appellant, his mother and his wife were a close family unit. The judge found that the majority of close family members were no longer in Colombia and that the respondent's removal would have "a negative impact" on his family members in the UK and Belgium. The judge consequently allowed the appeal "under Article 8 outside of the Rules under exceptional circumstances."

The challenge to the First-tier Tribunal's decision

11. The grounds content that the judge failed to give legally adequate reasons and made perverse or irrational findings. The grounds challenge the judge's assessment from [36] to [41]. The grounds contend that the judge gave inadequate reasons for concluding that family life was engaged in the context of the respondent's relationships with adult family members. It was irrational to find the appellant's decision 'unlawful' having accepted that she properly refused the application under the immigration rules. The judge failed to acknowledge that English language ability and a person's ability to demonstrate financial self-sufficiency were at best neutral factors. Nor had the judge considered the 'little weight' provisions in circumstances where private or family life was formed in precarious circumstances. There was also said to be a dearth of adequate reasoning as to how the impact on the respondent's family and private life relationships was disproportionate.

12. Permission to appeal was granted as it was arguable that the judge failed to adequately explain on what basis family life was found to exist between the respondent and his adult family members, that he failed to adequately explain on what basis the appellant's decision was unlawful even though the application was found to have been correctly refused under the rules, and that the judge failed to adequately explain on what basis the section 117B factors were treated as other than neutral in the proportionality exercise.

13. At the outset of the hearing I raised my concern that no consideration appeared to have been given to any right that the respondent may have had under EU free movement law when the proportionality assessment was undertaken. Mr Bramble pointed out that no application had been made for a residence card under the Immigration (European Economic Area) Regulations 2016, and later submitted that any consideration of the respondent's relationship with his Spanish wife would have constituted a 'new matter' under s.85 of the Nationality, Immigration and Asylum Act 2002. Ms King informed me that the respondent's wife passed away in January 2018. Ms King defended the decision and, whilst accepting that there were no clear findings in respect of the respondent's relationship with his wife or her circumstances, any such failure, as well as any failure to regard the factors in s.117B (2) & (3) as neutral, and any failure to attach little weight to the private life established during the respondent's mostly precarious immigration status, was not material.

Discussion

14. The principle reasons given by the judge for allowing the appeal on article 8 grounds outside the immigration rules, on the basis that there were 'exceptional circumstances', are detailed at [36] to [40] of his decision. At [36] the judge finds that the respondent's removal would interfere with his family life, and that such interference would be of sufficient gravity to engage article 8. The judge does not identify

the individual or individuals with whom the respondent has established his family life. If it is with his daughter, this sits uncomfortably with the judge's previous findings that the respondent was not on speaking terms with his daughter. Nor was there any assessment as to whether there was anything more than the normal emotional bonds one would expect between adult children and their parents (Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; Singh & Anor v Secretary of State for the Home Department [2015] EWCA Civ 630). It may however be that the judge was referring to the respondent's relationship with his wife. If so, there can be little challenge to the conclusion that article 8 was engaged as this relationship was accepted as genuine. Although the paragraph remains unclear, I am not persuaded that this amounts to a material legal error.

15. I find paragraph 37 to be confusing. It is likely, having regard to the paragraph as a whole, that the judge forgot to include the word "not" between "has" and "given". It is not immediately apparent why the judge found the appellant's decision 'unlawful' given that the judge appeared to accept that the appellant was correct to refuse the application under the immigration rules. If the judge found the appellant's decision 'unlawful' based on the case of R (on the application of HRP and Others) v Secretary of State for the Home Department IJR [2015] UKUT 00351 (IAC), which was relied on by the respondent's representative and is incorrectly cited at [27] of the judge's decision, then it is difficult to see how this is relevant to a merits based proportionality assessment. The case of HRP was a judicial review challenge where there was no right of appeal, a context far removed from the present case where the judge was able to consider proportionality for himself. Nor has the judge given legally adequate reasons for concluding that insufficient weight was given to the respondent's circumstances and the relationships established by him. It is apparent from the appellant's decision that she considered the respondent's relationship with his daughter and with his mother and sister (see, in particular, under 'Decision on Exceptional Circumstances'), and that consideration was also given to his personal circumstances during consideration under the 10-year private life route. While one may be entitled to disagree with the appellant's decision, I can find no basis for holding the decision unlawful.

16. It is difficult to identify the basis for the judge's conclusion, at [38], that the appellant's decision was not made in the legitimate pursuance of effective immigration control. This is a separate issue from the assessment of proportionality (compare stages (4) and (5) of the Razgar [2004] UKHL 27 approach). The judge provides no explanation to support his assertion. I can identify nothing in the evidence before the judge that would entitle him to conclude that the decision was not made in pursuance of effective immigration control, which has been held to constitute, albeit indirectly, a legitimate aim under article 8(2). Moreover, it appears from a holistic assessment of [38] that the judge has held the respondent's ability to speak English

and his ability to be financially independent as factors positively advancing his article 8 claim. This approach however is contrary to Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803 and AM (S 117B) Malawi [2015] UKUT 0260 (IAC) which held that a person's English language proficiency and their ability to be financially independent are only neutral factors. Ms King submitted that this error could not materially undermine the judge's ultimate assessment of proportionality. I cannot agree. If the judge had not approached these two factors as positively advancing the respondent's human rights claim then he may have reached a different decision. In any event, I find this error, cumulatively considered with the others I have identified, renders the decision unsafe. I additionally note the absence of any reasoned explanation given by the judge for his view that the appellant has "integrated into British society."

17. Even if the respondent's relationship with his wife constituted a 'new matter' as understood in s.85 of the 2002 Act (and with reference to Mahmud (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC), the respondent's relationship with his spouse, at the very least, constituted a significant element of his private life and required greater consideration than that given by the judge. There was no satisfactory assessment of the nature and extent of the family/private life relationships established by the respondent in the UK. Although the judge accepted that the respondent was in a genuine relationship with Ms Morena there was no assessment of the possibility that she could move to Colombia in order to maintain their relationship. I note that Ms Morena has visited Colombia (see paragraphs [22] & [24] of the determination) and I take judicial notice of the fact that Colombia is a Spanish speaking country. At [40] the judge finds that removing the respondent would have a "negative impact" on all his family members in the UK and Belgium, but there is no further explanation or assessment of this "negative impact." This aspect of the decision lacks satisfactory reasoning.

18. Nor is it apparent from the judge's determination that he considered and applied all of the relevant public interest considerations identified in s.117B of the Nationality, Immigration and Asylum Act 2002, and in particular, s.117B (5), which establishes that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. This failure alone is sufficient to render the judge's proportionality assessment unsafe.

19. For all these reasons I find the First-tier Tribunal judge made material legal errors and that his decision is not sustainable. Given that there has been inadequate assessment of the nature and extend of the private life relationships established by the respondent, and given the recent death of his spouse, and the issues raised by Mr Bramble with whether the respondent's relationship constituted a 'new matter', it is appropriate to remit this case back to the First-tier Tribunal to be

reconsidered afresh by a judge other than judge of the First-tier Tribunal Abebrese.

Notice of Decision

The decision is vitiated by material error of law. The case is remitted back to the First-tier Tribunal, to be decided afresh, by a judge other than judge of the First-tier Tribunal Abebrese.

Signed 5 April 2018

Upper Tribunal Judge Blum