Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03420/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 August 2019	**On 20th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

JOCELYN [G]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Mark Mullins, Counsel instructed by Bonningtons Solicitors
For the Respondent: Mr Laurence Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal from the decision of the First-tier Tribunal (Judge Abebrese sitting at Taylor House on 6 March 2019) dismissing her appeal against the refusal of her human rights claim in which the central issue identified by the Judge was whether family life between the appellant and her partner, who is an Afghan national, could continue in the appellant's home country of the Philippines. Judge Abrebrese found that there were not insurmountable obstacles to the couple carrying on family life in the Philippines with their young child.

2. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background

3. The appellant is a national of the Philippines, whose date of birth is 30 November 1970. She claims to have entered the UK on 8 August 2002 as a visitor, and to have overstayed. On 4 December 2015 she applied for leave to remain on human rights grounds on the basis of family and private life established in the UK as an overstayer.

4. On 17 January 2018 the Department gave their reasons for refusing the application. She was not eligible to apply as a partner, parent or child under Appendix FM because her partner was not British, settled, or in the UK with refugee or HP leave, and also because she lived with her partner and child as part of a family unit.

5. Consideration had been given as to whether there were any exceptional circumstances. The appellant maintained that family life could not continue outside the UK. She said that she and her family faced discrimination in the Philippines as she had converted to Islam for the purposes of marriage. Alternatively, she said that she and her family could not go to Afghanistan because she was Christian and her family were Westernised. She also stated that her partner had previously been tortured by the Taliban, and that the continuing presence of terror groups in Afghanistan would put them in danger.

6. However, her partner had previously been denied asylum and he had had several further submissions claims rejected. It was considered that family life could continue outside the UK. She was not obligated to travel to Afghanistan. Her child was a national of the Philippines, and so would be able to enjoy the benefits of being a national of that country, including enrolling in education there. Her child was only one year old, and so he would be able to relocate to the Philippines with little disruption to his private life in the UK. It was generally accepted that the best interests of a child whose parents were facing removal from the UK were best served by that child remaining with their parents and being removed with them. This represented the centrality of a child's relationship with their parents in determining their wellbeing. It was therefore decided that it was both reasonable and section 55-compliant for her child to return to the Philippines with her. She had established a family in the UK in the knowledge that she had no legitimate expectation of being able to remain in the UK indefinitely. From the outset, all parties should have been aware of the possibility that family life might not be able to continue in the UK.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. The appellant's appeal came before Judge Abebrese sitting at Taylor House on 6 March 2019. Both parties were legally represented. Mr Mullins of Counsel appeared on behalf of the appellant.

8. In his subsequent decision, at paragraph [8], Judge Abebrese identified the core issue in the appeal as being whether family life could continue in the Philippines between the appellant and her partner. Mr Mullins' submission was that the appellant's partner would not be allowed a spousal visa to reside in the Philippines because he was a national of Afghanistan, and that was not one of the countries for which spousal visas were granted. The Judge noted from the file that at an earlier hearing on 18 September 2018 the respondent had confirmed that, while further submissions from the appellant's partner regarding a fresh protection claim were pending, "*they would not be pursuing the argument that family life could continue in Afghanistan."* The Judge also noted that the Tribunal on the same occasion had made a direction that the appellant's representatives should file and serve any further evidence, such as *"evidence from a lawyer and/or other reliable source"*, regarding the partner's ability or otherwise to obtain a visa for the Philippines in order to allow family life to continue there for the foreseeable future.

9. At paragraphs [20]-[22] of his decision, the Judge gave his reasons for rejecting the evidence provided by the appellant regarding the inability of her partner to obtain a visa.

10. At paragraph [20], the Judge said:

> "The appellant relies on evidence from a claimed expert lawyer from the Philippines and she provided details of the contact to her solicitor and a letter was provided which states that it is unlikely that a visa would be granted to the appellant's partner because of his nationality. The solicitor, on the evidence before me, **did not** have any direct [contact] with the claimed expert and it appears that no payment was made to him for providing the letter/advice. There was no follow-up letter from the appellant's solicitor. There is, in my view, doubt in relation to the credence of this letter and the reliability of the advice that has been provided. I note that the respondents were provided with the information for at least a month prior to the hearing of the appeal and they did not make any inquiries of their own regarding the reliability of the advice which had been provided by the claimed expert. This, however, in my view is not overridden by the fact that the appellant's solicitor herself did not obtain a follow-up letter to verify the information.

11. At paragraph [21], the Judge said that he did not accept that the information provided by the expert was credible, "*primarily because a solicitor did not have any contact with the expert and there was no follow-up letter to the expert confirming his credibility."* Further, he noted that the expert had been referred to the appellant by a friend who worked at the same company as the expert.

12. In paragraph [22], the Judge reiterated his finding that the evidence provided by the appellant regarding her partner's ability to obtain a visa from the Philippine Government was not credible. He observed that neither she nor her partner had valid leave in this country, and he held that there was nothing preventing them from seeking to continue their *"private life"* in the Philippines.

The Reasons for Granting Permission to Appeal

13. On 15 July 2019 First-tier Tribunal Judge Wilson granted permission to appeal for the following reasons: "*It is at least arguable that the Judge failed adequately or at all to consider the Philippine Embassy web page. That is potentially significant, is definitely material and is arguably a material error.*"

The Reasons for Finding an Error of Law

14. The evidence relied on before the First-tier Tribunal to establish an insuperable legal barrier was two-fold. Firstly, reliance was placed on a letter of certification dated 19 October 2018 purportedly issued by Attorney Charlie D. C. Pascual. In his letter he said that he was an accredited lawyer of the Philippine Bureau of Immigration and he was authorised to provide immigration advice as to whether an Afghan national married to a Filipino national could or could not obtain permanent residency in the Philippines. He certified that an alien validly married to a Filipina might only be eligible to apply for a permanent residence visa if his country had an existing immigration reciprocity agreement with the Philippines pursuant to the Philippine Immigration Act 1940. He continued:

> "Based on the circular information of the Philippine Bureau of Immigration, the country of Afghanistan is not among those countries listed to have a reciprocity agreement with the Philippines.
>
> Hence, an Afghan national is disqualified in applying for a permanent residence visa in the Philippines."

15. The second source of information relied on was a printout from the website of the Embassy of the Philippines in Singapore dated 1 December 2017. Under the heading of "*Residence visa for spouse of a Filipino citizen",* the Embassy stated that the Philippine Immigration Authority issues a permanent residence visa (specifically the 13A Non-Quota Immigrant Visa) to the qualified non-Filipino spouse of a Filipino citizen only to nationals of specified countries, which are then listed. Afghanistan is not one of the specified countries on the list. The following is stated at the end of the list: "*The 13A permanent residence visa is not issued to nationals not included in the preceding list.*"

16. The provenance of the letter from the Attorney was unsatisfactory in that it had not been obtained pursuant to a letter of instruction from the

appellant's solicitors and they had not sought to verify the Attorney's credentials. The appellant had obtained the advice through a friend who was said to work at the same office as the Attorney, and the Judge was misinformed that the Attorney had not been paid for the provision of his professional services. In the circumstances and on the information available to him, I consider that there was sufficient doubt surrounding the reliability of the letter that it was open to the Judge not to attach credence to it, viewed in isolation.

17. However, the Judge wholly failed to engage with the second source of evidence relied upon, which was the information contained on the website of the Philippine Embassy in Singapore. Not only did this evidence buttress the credibility, and hence the reliability, of the letter of from the Attorney – which was to the same effect - but it was also capable of proving the appellant's case independently of the letter from the Attorney.

18. The upshot is that the Judge did not give adequate reasons for rejecting the evidence deployed by the appellant to show that her partner was not eligible for a spousal visa.

19. Accordingly, the decision of the First-tier Tribunal is vitiated by a material error of law such that it must be set aside and remade.

The Remaking of the Decision

20. Following my error of law ruling, which I gave orally in short form, I invited submissions from the legal representatives as to how to proceed. It was agreed that the appeal should be retained by the Upper Tribunal and that no further hearing was necessary.

21. The evidence for remaking comprises the evidence that was before the First-tier Tribunal and the additional evidence served by the appellant's solicitors in advance of the hearing before me. This comprises a witness statement from Ms Kapilla Ram dated 1 August 2019, to which various documents are exhibited. She explains that she did not think it necessary to verify Mr Pascual's credentials prior to the hearing in the First-tier Tribunal as she had no reason to believe that his letter was not from a genuine lawyer in the Philippines. However, she has now carried out various checks to confirm his credentials. On 1 August 2019 she checked the website of the Supreme Court of the Philippines' list of lawyers and established that he was on the Attorney roll with the corresponding roll number set out in his letter of certification. She has also checked the Philippine Immigration Bureau online and established that his law office is an accredited law office. On 30 July 2019 she wrote to him requesting confirmation of his accreditations and confirmation of his advice. On 1 August 2019, she was able to speak to Mr Pascual to confirm that he was indeed a practising Lawyer registered with the Philippine Supreme Court, and also an accredited Immigration Lawyer. He verbally confirmed to her his written advice, namely that an Afghan national would not be issued with a permanent residence visa as the spouse of a Filipino national and

that was because the Philippines would need to have a reciprocal agreement with the country of the non-Filipino national, which it does not have with Afghanistan.

22. In his submissions on remaking, Mr Tarlow submitted that the issue of whether there is an insuperable legal obstacle to the appellant's partner carrying on family life with the appellant and their child in the Philippines turned on the reliability of the information given on the Embassy web page. There is nothing before me which casts doubt on the reliability of this information, and Mr Tarlow did not suggest otherwise. In addition, I have had the benefit of receiving additional evidence that was not before the First-tier Tribunal, which adequately addresses the concerns raised by the First-tier Tribunal Judge about the credibility of the letter of certification from Mr Pascual.

23. Accordingly, I find that the appellant has discharged the burden of proving on the balance of probabilities that there is an insuperable legal obstacle to family life being carried on in the Philippines, which is that her partner is not eligible to apply for a permanent residence visa in the Philippines as the spouse of the appellant, by virtue of being a national of Afghanistan. Mr Tarlow has not sought to persuade me that this obstacle can be obviated by the partner seeking to enter or remain in the Philippines on a different basis. Mr Tarlow does not dispute the underlying premise of the appellant's case which is that, absent the partner's ability to enter or remain in the Philippines on a 13A Non-Quota Immigrant Visa, it is impossible for family life between the appellant and her partner to be carried on the Philippines for the foreseeable future.

24. Nonetheless, the appellant does not qualify for leave to remain under EX.1 of Appendix FM, as her partner does not have the requisite status in the UK to enable her to invoke EX.1. So I turn to consider whether the appellant's human rights claim succeeds outside the Rules. I do so within the framework of the five-point **Razgar** test.

25. Questions 1 and 2 of the **Razgar** test must be answered in the appellant's favour with regard to the establishment of family life in the UK. Questions 3 and 4 of the **Razgar** test must be answered in favour of the respondent. On the issue of proportionality, the public interest considerations arising under section 117B of the 2002 Act either militate in favour of the appellant's removal or they are at best neutral. However, there are exceptional circumstances in this case which tip the balance in the appellant's favour, as Mr Tarlow has effectively conceded by the stance he took in his closing submissions.

26. The exceptional circumstances are that family life between the parents and their child cannot be carried on outside the UK for the foreseeable future, and so maintenance of the refusal decision will inevitably split up the family. They cannot be removed together, as envisaged in the RFRL. The appellant's partner cannot be removed to the Philippines as he is not

a national of the Philippines, and he cannot voluntarily accompany the appellant and their child to the Philippines for the reasons given earlier.

27. While the parents have never had a legitimate expectation of being able to carry on family life in the UK, given the irregular or precarious status of each of them, maintenance of the refusal decision will have unjustifiably harsh consequences for their blameless child in circumstances where, as acknowledged in the RFRL, his remaining in the same household as his parents is central to his wellbeing. The inability of the family unit to be reconstituted elsewhere for the foreseeable future engenders a very strong claim under Article 8(1) ECHR such as to outweigh the pubic interest in the appellant's removal, and to make her removal disproportionate to the legitimate public end sought to be achieved: see **R (Agyarko) v SSHD [2017] 1 WLR 824** at [19] and [40]-[60].

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision substituted: this appeal is allowed on human rights (Article 8 ECHR) grounds outside the Rules.

I make no anonymity direction.

Signed Date 13 August 2019

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

As I have allowed this appeal, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and I have decided to make no fee award as the appellant needed to bring forward further evidence by way of appeal in order to succeed in her appeal.

Signed Date 13 August 2019

Deputy Upper Tribunal Judge Monson