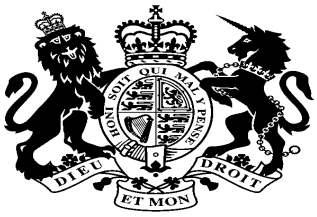

Upper Tribunal
(Immigration and Asylum Chamber) HU/10097/2016

THE IMMIGRATION ACTS

Heard at Glasgow
On 19 September 2019

Decision & Reasons Promulgated
On 8 October 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

Analin [Y]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Caskie, Advocate, instructed by Duheric & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the Philippines, born on 18 February 1976. She is separated from her husband. She has three sons, two now adult and one still a child, in the Philippines. She began to work in Hong Kong in October 2012 as a domestic worker for Mr and Mrs [M], an airline pilot and a pharmaceutical researcher. She has remained with them, principally as a nanny to their children [S[1]], now aged 10, and [S[2]], 7, since they moved to Scotland in May 2014.

2. The appellant had leave as a domestic worker from May to November 2014, and was granted further such leave until February 2016. The respondent says the further leave was granted in error, as the rules did not provide for it, which the appellant does not dispute. On 4 February 2016 she sought further leave. The covering letter from agents then acting for her appears to recognise that her application could succeed only outside the rules. It founds principally upon the needs of [S[1]], who is autistic, and particularly attached to the appellant, and on the pay (above minimum wage) and accommodation provided by Mr and Mrs [M], which take the appellant out of any reliance on public funds.

3. The respondent's decision dated 21 March 2016 says that the application cannot succeed under the rules, which is common ground, and goes on to consider whether compassionate factors might warrant leave outside the rules. It states:

> "… you have requested that the SSHD exercise her discretion due to the fact that you have become an integral member of the employer's family, and that their son who is autistic is attached to you. It is open to the family to make alternative care arrangements, and if required, to employ someone not subject to immigration control. There is no evidence that alternative care arrangements could not be made."

4. The appellant appealed to the FtT. There is no dispute about the facts. Parties agreed that these could be taken as set out, in more detail than above, in the decision of Judge David C Clapham SSC promulgated on 9 October 2017.

5. The Judge had considerable sympathy for the case, expressed at [36 – 37]. He said that the appellant was doing" important and responsible work" with the family, and was "no doubt … a valued member of the household", difficult to replace. He found the argument for her "attractive and appealing" at [36] and again at [41]. However, he thought that she could not be a family member, as her own family, whom she would put first, was in the Philippines. At [39], he said that he "did not consider that what the appellant has built up in Scotland is family life or private life", and that although the children, especially [S[1]], would find separation "very difficult" that did not mean "that family / private life is engaged". At [41], he said that while family relationships "may be assumed to have a degree of permanence … a relationship between a domestic employee and the family she works for cannot have the same essential character", and at [42] that in his view the appeal "requires to fail".

6. The FtT and the UT refused permission to appeal. The appellant petitioned the Court for judicial review. Parties entered into a joint minute agreeing that the refusal of permission should be reduced. In that light, the Vice President of the UT granted permission on 15 August 2019.

7. Having heard representatives on error of law, I indicated that the decision of Judge Clapham fell to be set aside.

8. It was an error to find that article 8 was not engaged. The threshold for engagement is not high. Proportionality is a different matter.

9. Family life qualifying for article 8 protection is not limited to the core relationships of adult partners, parents and minor children. Circumstances may extend that protection beyond biological relationships. Domestic employees do not usually come within the scope of article 8, but there is no rule such as stated by the Judge at [41]. He was not bound to conclude that family life did exist, but it was an error to rule out even the possibility.

10. It was an error to find that the appellant had established no private life. There were, at the least, strong private life links among the parties. Again, proportionality is a different matter.

11. Mr Govan's argument on error of law was that the Judge set out all the salient facts, and reached a conclusion open to him on the facts. That is correct, as far as it goes, but this was not a case with such an inevitable outcome that it does not matter that it rests on erroneous reasons.

12. Having held as above, the hearing proceeded to submissions on remaking the decision, which was reserved.

13. Neither party referred to section 117B of the 2002 Act, but that is a crucial provision:

> *117B Article 8: public interest considerations applicable in all cases*
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) 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.

14. Mr Caskie submitted that the appellant should be found to have family and not only private life in the UK, but also that the distinction was an arid one, as all the same matters were to be taken account of as part of private life. In some contexts, that is so, but in applying section 117B there is a major difference.

15. *Rhuppiah* [2018] UKSC 58 establishes that anyone who, not being a UK citizen, is present in the UK and who has leave to reside there other than to do so indefinitely, has a precarious immigration status; and that the appellant's ability to speak English, and non-imposition on taxpayers, cannot be given significant weight in her favour.

16. The same authority also explains how to apply section 117B(5):

> … the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:
>
> > "53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question …"

17. The nuclear family here comprises Mr and Mrs [M] and the two children. The appellant has been with the two children for most of their lives. Even the older child, whose needs and attachment are greater, can have little if any recollection of her not being there. The closeness of the relationship with [S[1]] was brought out, for example, by the evidence of her involvement with his school. The headmistress specified turning to her for practical help when needed during the school day.

18. It is unusual, but not impossible, to find family relationships within article 8 even where the core of relationships among two parents and their children is in place. It would also be unusual, but not impossible, to find family relationships within article 8 even when the "additional" family member has primary family relationships elsewhere.

19. The appellant's relationship with the [M] family is economic, but also more than that. I do not think her relationship with the children is parental in nature, when they have mother and father both closely involved.

20. The issue is finely balanced but in my view the evidence crosses the line of showing that the appellant is for article 8 purposes a member of the [M] family. As I find that not to be a parental relationship, but something different, that does not automatically give her a right to remain.

21. I have no hesitation in finding that even if the appellant's relationships in the UK do not constitute family life, they display particularly strong features, such as might enable her to benefit from the limited degree of flexibility available when applying section 117B(5).

22. Given those findings, would removal be proportionate?

23. Mr Govan did not suggest anything on the respondent's side in this case which goes beyond the norm of recognising the public interest in maintaining the rules; an important interest, but one which can be outweighed.

24. It is inevitable that relationships end, and children adapt. I have no doubt that the parents would cushion the blow by making the best available alternative arrangements. There would be an adverse effect, but not drastic long term damage. It would be rather better for the children, particularly [S[1]], if the appellant were to stay with them into the medium term.

25. The appellant has been here longer than might lawfully have been expected, partly due to an error of the respondent in applying the rules. There is no right for an appellant to have an error perpetuated in her favour, but the passage of time has deepened the relationships affected, and has diminished the significance of strict insistence on the rules.

26. In summary, the family (although not parental) relationships of the appellant in the UK, or alternatively, the strong features of her private relationships, and the best interests of the children involved, outweigh the public interest in enforcing the rules.

27. The decision of the First-tier Tribunal is set aside, and the following decision is substituted: the appeal, as brought to the FtT, is allowed.

28. No anonymity direction has been requested or made.

Hugh Macleman

23 September 2019
UT Judge Macleman