Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/21886/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 November 2019	**On 20 December 2019**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS MARILOU ABALOS MENDOZA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms S Jones, Senior Home Office Presenting Officer
For the Respondent: Mr G Hodgetts, Counsel, instructed by Barar & Associates

DECISION AND REASONS

This is an appeal by the Secretary of State against the decision of Judge of the First-tier Tribunal promulgated on 13 June 2019.

Background

The respondent (hereafter "the claimant") is a citizen of the Philippines born on 10 November 1982.

She has not lived in the Philippines since 2003, when she moved to Saudi Arabia as a domestic worker.

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On 2 November 2011 she entered the UK as a domestic worker with leave until 15 November 2011.

On 4 October 2012, having left the UK, she applied for entry clearance as an overseas domestic worker (to work for the same employer as previously). Her application was granted and on 23 October 2012 she entered the UK with leave valid until 9 April 2013.

She changed employer because of abusive conditions and overwork, and on 4 April 2013 applied for leave to remain as a worker for her new employer. The application was refused on 18 October 2013 ("the 2013 decision").

The claimant appealed against the 2013 decision. She did not attend, and was not represented at, the appeal hearing on 21 May 2014. In a decision promulgated on 3 June 2014 the First-tier Tribunal dismissed the appeal ("the 2014 FtT decision").

The claimant remained in the UK following her appeal rights becoming exhausted on 13 June 2014 despite not having a lawful basis to do so.

On 20 July 2017 the claimant applied for leave to remain as an overseas domestic worker. The application was refused on 5 December 2017 and the decision was upheld following administrative review on 12 January 2018.

On 3 July 2018 the claimant made a human rights application, which was refused on 11 October 2018.

She then appealed to the First-tier Tribunal. In a decision promulgated on 13 June 2019 her appeal was allowed by Judge of the First-tier Tribunal Thew ("the judge"). The Secretary of State is now appealed against that decision.

Decision of the First-tier Tribunal

It was argued before the First-tier Tribunal by Mr Hodgetts (who also represents the claimant in the Upper Tribunal) that the 2013 decision and the 2014 FtT decision were legally flawed, resulting in an "historical injustice", because the wrong version of the Immigration Rules was applied. He also argued that if the correct (earlier) version of the Rules had been applied the claimant would have been granted leave.

The judge accepted this argument, and found that it was proper for him to do so notwithstanding the applicability of *Devaseelan* [2002] UKIAT 00702 in respect of the 2014 FtT decision. The judge explained, at paragraph 35, that he was departing from the 2014 FtT decision because:

> On the documentation before me relating to the appeal hearing in 2014 there is no credible evidence to suggest that the problems relating to changes in the transitional provisions were addressed by the respondent or brought to the attention of the judge considering that appeal.

In finding that removal of the claimant from the UK would be disproportionate under article 8 ECHR, the judge attached significant weight to the claimant

being refused leave in 2013. He described this as an “historical injustice” and “exceptional circumstance.”

Grounds of appeal

The Secretary of State’s grounds of appeal submit that the judge erred because (a) the correct version of the Immigration Rules was applied in the 2013 decision and the 2014 FtT decision; and (b) even if the earlier version of the Immigration Rules, as contended by the claimant, were applicable, this is immaterial because the claimant would still not be entitled to a grant of leave.

At the error of law hearing, Ms Jones stated that although she was not formally conceding the appeal and relied on the grounds of appeal, she would not be advancing any submissions. She clarified that she agreed with Mr Hodgett, following consideration of his skeleton argument, that the earlier version of the Immigration Rules should have been applied in the 2013 decision.

Analysis

I have decided to dismiss the Secretary of State’s appeal. Given that Ms Jones accepted the primary arguments advanced by Mr Hodgett, I give only brief reasons.

The Immigration Rules prior to 6 April 2012 allowed domestic workers to accompany their employer to the UK, change employer once in the UK (provided they continued to be a domestic worker) and to become eligible to apply for indefinite leave to remain after completing 5 years continuous lawful residence.

Following changes on 6 April 2012, the Immigration Rules no longer allowed, inter alia, for a change of employer or an application for indefinite leave to remain after 5 years.

The claimant’s argument, in summary, is that the pre-6 April 2012 Rules should have been applied by the respondent to her in the 2013 decision because she benefited from the Transitional Provisions at paragraph 159AE of the (then) Immigration Rules (cited at paragraph 27 of the decision) and the Implementation Provisions of the Statement of Changes in Immigration Rules HC 628 dated 6 September 2013 (cited at paragraph 31 of the decision).

At paragraphs 24 – 34, the judge evaluated the competing arguments about whether the pre-6 April 2012 Rules or the post -April 2012 Rules were applicable to the claimant. Ms Jones accepted that the judge’s analysis withstands scrutiny, and I agree. The key point made by the judge, which I accept, is that paragraph 159EA provided that the pre 6 April 2012 Rules applied to domestic workers who had entered the UK as a domestic worker in a private household before 6 April 2012, as the claimant did on 12 November 2011, even if they subsequently left and re-entered (which the claimant did on 23 October 2012). As of 1 October 2013, the position changed, such that the Transitional Provisions would henceforth apply only to a domestic worker who “last entered” the UK before 6 April 2012, as opposed to someone who had merely “entered” before 6 April 2012. However, the implementation of this

change (on 1 October 2013) post-dated the claimant's application and therefore did not apply to her. The judge was therefore entitled to find that the pre-6 April 2012 Rules ought to have been applied to the claimant in the 2013 decision and 2014 FtT decision. The judge was also entitled to recognise that the wrongful refusal in 2013 prevented later applications being made which might have led to settlement, given that the pre-6 April 2012 Rules provided for an application for indefinite to remain after 5 years continuous lawful residence.

I am therefore satisfied that the judge was entitled, for the reasons he gave, to find that the pre-6 April 2012 Rules should have been applied to the claimant in the 2013 decision; and that as a consequence of the post- 6 April 2012 Rules being incorrectly applied in that decision (and subsequently in the 2014 FtT decision) the claimant was prevented from making future applications which might have led to settlement.

I therefore dismiss the appeal.

Notice of Decision

The appeal is dismissed. The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed

Upper Tribunal Judge Sheridan   Dated: 19 December 2019