



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/32040/2014

THE IMMIGRATION ACTS

**Heard at Columbus House, Newport
On 29 July 2015**

**Decision and Reasons
Promulgated
On 29 September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS DOREEN DE LA CRUZ

Respondent

Representation:

For the Appellant: Mr Irwin Richards, Senior Home Office Presenting Officer
For the Respondent: Mr Michael McGarvey of McGarvey Immigration and Asylum

DETERMINATION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal

Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge O'Rourke) allowing the respondent's appeal against a decision taken on 24 July 2014 to refuse further leave to remain and to remove the respondent from the UK.

Introduction

3. The respondent has lived in the UK since 2010 as a Tier 4 student and then as a Tier 4 post study worker with leave valid until 30 May 2014. She qualified as a nurse in the Philippines and speaks excellent English. She has a degree in nursing from Glasgow Caledonian University and works as a live-in carer for PC who has progressive MS. She has been in a relationship with LT, a UK citizen, since 2011; they broke up in January 2014 but got back together in September 2014. They lived together except when the respondent was living in as a carer (about two weeks a month). The respondent did not want to return to the Philippines to make an application under the Immigration Rules ("the Rules") for financial reasons. She has a child in the Philippines.
4. The Secretary of State accepted the respondent's identity and nationality but concluded that the requirements of the Rules were not met and there were no grounds for granting leave outside the Rules.

The Appeal

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Columbus House on 30 January 2015. She was not represented. The First-tier Tribunal found that the respondent's arguments against return were primarily economic ones and the requirements of the Rules were not met. However, her relationship with LT engaged Article 8 and she would not be able to replicate that relationship in the Philippines. The respondent could probably comply with the Rules if properly advised and was not a drain on the public purse, providing a valuable service to society as a nurse. Removal was not proportionate.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in failing to consider section 117B of the Nationality, Asylum and Immigration Act 2002 (ground 1). The judge further erred by giving weight in the assessment of proportionality to the possibility that the appellant could probably comply with the Rules (ground 3).
7. Permission to appeal was granted by Upper Tribunal Judge Deans on 7 April 2015 on grounds 1 and 3. Permission to appeal was refused on two further grounds.

8. Thus, the appeal came before me

Discussion

9. Mr Richards submitted that the judge gave weight to the finding that the respondent could meet the requirements of the Rules with no explanation and it was not for the judge to speculate on a future event and to give it weight in the Article 8 assessment. There was no reference to section 117B and the appeal was allowed on private life only – under section 117B(v) little weight should be given to private life developed in the UK when immigration status is precarious. The reasons are fundamentally flawed.
10. Mr McGarvey submitted that the judge did consider the requirements of section 117B in substance and the judge had the importance of immigration control in mind. The respondent was financially independent and speaks excellent English. The finding in relation to the Rules did not form part of the Article 8 assessment. This was about the relationship with LT.
11. I have considered Dube (ss. 117A-117D) [2015] UKUT 00090 (IAC). Judges are required statutorily to take into account a number of enumerated considerations; the sections are not an a la carte menu of considerations. The considerations are not exhaustive. It is not an error of law to fail to refer to section 117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.
12. In this appeal, the judge did refer to English language ability and financial independence. However, no account was taken of the considerations set out in sections 117B(5), namely 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. The respondent's immigration status has been precarious throughout and the appeal was expressly allowed on private life grounds. That is a material error of law.
13. I have not found it necessary to make findings regarding ground 3.
14. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under Article 8 involved the making of an error of law and its decision cannot stand.

Decision

15. Mr McGarvey invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. The respondent was not represented at the First-tier hearing and there were no witness statements before the judge. Further evidence and

consideration of that evidence will be required. I find that the error of law infects the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

16. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed



Date 27 September 2015

Judge Archer

Deputy Judge of the Upper Tribunal