



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08996/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 June 2018

Decision & Reasons Promulgated  
On 31 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MYLENE [M]  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Mr A Slatter of Counsel instructed by Chris Raja Solicitors

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Rothwell promulgated on 13 November 2017 in which the appeal of Ms Mylene [M] against a decision of the Secretary of State dated 16 March 2017 to refuse leave to remain in the UK, was allowed on human rights grounds.
2. Although before me the Secretary of State for the Home Department is the appellant and Ms [M] is the respondent, for the sake of consistency with the proceedings before

the First-tier Tribunal I shall hereafter refer to Ms [M] as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a citizen the Philippines born on 10 February 1987. She entered the United Kingdom on 6 August 2010 as a Tier 4 migrant with leave until 29 October 2012. She was granted a further periods of leave until 30 November 2013. On 26 November 2013 she made an application for an EEA residence permit, which was refused on 25 February 2014.
4. A further application for leave to remain was made on 17 November 2015, based on Article 8 private life, in part pleading 5 years' residence in the UK. The Appellant also pleaded that she wished to remain to care for her employer, Ms PD. In her application form the Appellant indicated that she worked as a carer, lived in accommodation provided by her employer, and was paid £800 net per month. By way of supporting evidence, amongst other things, she provided information relating to her employer's medical condition and supporting letters from her employer's daughter.
5. The Respondent refused the Appellant's application for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 16 March 2016. The Respondent was not satisfied that the Appellant met the requirements of paragraph 276ADE(1) of the Immigration Rules, and moreover that there were not exceptional circumstances to warrant the grant of leave outside the Rules by reference to Article 8 of the ECHR or otherwise.
6. In this latter regard the decision-maker noted in the RFRL the supporting evidence in respect of the medical circumstances of PD, and the Appellant's claim of the development of mutual emotional ties. However, the Respondent decided that the evidence "*does not establish a need for any additional care other than that which can be provided by the NHS, Social Services and family resident in the UK who are not subject to immigration control*". Concerns expressed in the application in respect of the inconsistency of other carers were noted: however the Respondent commented "*no evidence of this inconsistency has been provided*", and determined that the Appellant had "*not demonstrated why [PD] specifically has to be cared for by yourself, instead of someone who is not subject to immigration control*". It was asserted that subsequent to the Appellant's departure from the UK her employer "*will still be able to access qualified health carers*". The decision-maker added: "*Although [PD] may experience a degree of unhappiness if you were to depart the United Kingdom, she can rely on the support of her friends and family in the UK*"; it was also noted that it would be possible to remain in contact "*via modern methods of communication*", and that the Appellant could apply for entry clearance as a visitor or a carer if she wished to return to the UK.

7. The Appellant appealed to the IAC.
8. It became apparent before the First-tier Tribunal that during the period between the Appellant's application and the Respondent's decision circumstances had changed. PD had died. In late January 2016 the Appellant began to work for SC - by then approximately 86 years old, suffering from dementia and recurrent urinary tract infections. The Appellant had become her main carer. The Appellant's relationship with SC became the core element relied upon by the Appellant in respect of her human rights appeal.
9. Because of the death of PD, and the change of circumstances since the Appellant's application, necessarily the factual matters relied upon before the First-tier Tribunal were not those expressly addressed in the RFRL. Nonetheless they were similar. The basis upon which the Respondent put his case before the First-tier Tribunal is apparent from paragraphs 26 and 27 of the decision of the First-tier Tribunal, where the submissions of the Home Office Presenting Officer are summarised. The Respondent continued to rely upon the RFRL, and argued that the Appellant's current employment was essentially unlawful, that the Appellant was "*not unique in her care*", that the Appellant was essentially an economic migrant, but that she could return to her own country with qualifications, experience and references with there being no adverse issue in respect of job prospects in the Philippines shown.
10. First-tier Tribunal Judge Rothwell allowed the Appellant's appeal on human rights grounds for the reasons set out in the decision promulgated on 13 November 2017.
11. The Respondent applied for permission to appeal to the Upper Tribunal. The grounds of challenge are in these terms:
  1. *The Judge has found at [47] that little weight can be placed on this appellant's private life in the UK due to her precarious immigration status and illegal working. At [49] the FTT has found that the appellant's role as a carer could be replaced by another. The FTT then found that the appellant's employer has emotional reliance on the appellant which amounts to a compelling situation and allows the appeal on that basis.*
  2. *It is unclear why the FTT has made that finding when they have acknowledged that as a carer for a woman with dementia this appellant could be replaced. This appellant has worked and continues to work illegally in the UK. In addition the employer is in breach of minimum wage legislation and is employing an illegal immigrant.*
  3. *It is unclear why the FTT has therefore made a compelling situation finding and allowed this appeal."*

12. Permission was granted by First-tier Tribunal Judge Andrew on 12 April 2018.
13. Under cover of letter dated 23 May 2018, the Appellant has filed a 'Rule 24 response' in the appeal. In essence it is pleaded that Judge Rothwell "*provided full and detailed reasons for reaching her conclusions and whilst the [Secretary of State] may disagree with the conclusions reached [no errors of law have] been identified*". It is submitted that the First-tier Tribunal Judge drew a careful distinction between the potential replaceability of the Appellant in a practical or physical sense, and the emotional bond that existed between the Appellant and her employer.
14. In his submissions Mr Bramble confirmed that the Respondent's challenge was essentially a 'reasons challenge', and in this context it was not contended that the decision was 'perverse' or otherwise one that no reasonable Tribunal Judge could have made.
15. Mr Slatter in his submissions – in echo and amplification of the Rule 24 response - essentially argued with reference to **Budhathoki (reasons for decision) [2014] UKUT 00341 (IAC)** at paragraph 7 ("*“Transparency should be the watchword.” Parties should be in no doubt why they have won or lost.*"), and **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)** at paragraph 10 ("*reasons need not be extensive if the decision as a whole makes sense*"), that the Judge's reasons were adequate in the sense that there was transparency – it was clear from the Decision why the Judge had found in the Appellant's favour.
16. In my judgement the basis of the First-tier Tribunal Judge's decision is clear. Indeed it seems to me that the grounds of appeal are drafted in such a way that this is adequately apparent to the Respondent. It is implicit in the grounds that it is recognised by the drafter that the First-tier Tribunal Judge allowed the appeal on the basis of the emotional dependency between the Appellant and SC. Further, it seems to me that what the grounds of challenge are really seeking to do is to argue that that was not an adequate basis for the decision – not that the decision was not adequately clear. That is essentially to express disagreement with the outcome, and disagreement with the weight attached by the Judge to this feature: it is not to identify an error of law as such. To this extent I agree with the Rule 24 response and the submissions of Mr Slatter.
17. It seems to me that the decision of the First-tier Tribunal Judge is a manifestly careful decision that seeks to traverse all relevant evidence and factors. The Judge noted that there "*were no specific challenges to the factual matrix of the appellant's case*", save in one respect (paragraph 31), where the Judge found "*that the appellant must have been aware that she did not have permission to work in the United Kingdom*" when she started her

current employment (paragraph 32). The Judge also addressed and took into account the unlawful nature of the Appellant's employment (paragraphs 34 and 35) - matters upon which I make further observations below. However, notwithstanding these adverse features, it is clear that the Judge had particular regard to the nature of the relationship between the Appellant and SC and the impact on SC's health and well-being (paragraph 36 *et seq.*). Moreover in so doing it is also clear that the Judge drew a distinction between the physical and practical care that the Appellant provided (which might be replicated by any other competent carer), and the emotional bond between the Appellant and SC, which was necessarily personal and specific in nature. For example: "*a close relationship*" (paragraph 36); confirmation of "*the close relationship*" by a consultant in old age psychiatry (paragraph 37), and the opinion of the psychiatrist "*that [SC] would suffer from acute emotional distress if the appellant were to leave and would lead to a more dramatic and rapid cognitive decline*" with a potential for becoming institutionalised (paragraph 38); "*I do not find that the appellant is irreplaceable in a physical sense... But I do take into account the emotional bond between the appellant and [SC]*" (paragraph 49).

18. Indeed, in my judgement, it is transparent from the closing paragraphs of the decision that the Judge placed very particular reliance upon the emotional bond, emphasising "*the extent of the emotional reliance*" pursuant to the psychiatrist's report, and the significance of continuity of care to ensure stability of SC's mental state and the likely deterioration were the Appellant forced to leave SC's employ (paragraph 49), and the Appellant's ability to manage SC because of SC's trust in the Appellant (paragraph 50). The 'weight' to be accorded any particular factor was essentially a matter of evaluation for the Judge. This led to the conclusion stated at paragraph 51:

*"In summary the appellant entered with leave to enter and tried to regularise her status at the end of her student visa. She did have a period of overstaying when she began her care for [SC] and therefore worked illegally without informing [the C family]. In the circumstances the public interest is clearly against her. However I have to balance all the facts in this case and I consider the compelling evidence of the relationship and emotional reliance by [SC] on the appellant. These cases are always fact sensitive and I find that this unique and compelling situation outweighs the public interest in this case. I find that the decision is disproportionate."*

19. This concluding paragraph – even in isolation, but more particularly in the overall context of the rest of the decision – makes the basis of the Respondent's decision to allow the appeal adequately clear.
20. In the circumstances I do not accept the basis of the Respondent's challenge. The challenge is dismissed and the decision of the First-tier Tribunal therefore stands.

21. As intimated above it seems to me that the Respondent's challenge is really in substance an expression of a disagreement with the outcome in the appeal. For my own part I consider it appropriate to express reservations about the outcome also.
22. The Judge plainly had regard to the public interest in general terms - including maintaining effective immigration control - and also had regard to the irregular nature of the Appellant's employment. To this extent I do not suggest that anything has been articulated in the grounds of challenge that might amount to a pleading of error of law in respect of the balancing exercise necessary in the Article 8 proportionality assessment. Whilst, absent an error of law, it is not for the Upper Tribunal to interfere with the weight accorded by a first instance judicial decision-maker to any particular factor in an appeal, my reservations in this regard are such that I consider it appropriate for future reference to make the following brief observations.
23. Notwithstanding the recognition of the very particular nature of the personal relationship that has developed between the Appellant and SC, that relationship had only developed by reason of the Appellant taking unlawful employment. Moreover, as the Judge recognised such employment involve the payment of no tax or National Insurance. Inherent in this was that the Appellant was employed at less cost to her employer than would be the rate for a lawful worker. This strikes at the core of some of the fundamental purposes of immigration control - to protect the domestic employment market, to protect the vulnerable from exploitation, and also, perhaps to a lesser extent, to ensure that service users (including employers) are provided services (including paid work) by those suitably authorised and qualified. It is also to be noted that the nature of the dependency is not equal: the emphasis is on the impact on the patient rather than the carer. In any situation involving sustained, close, intimate caregiving on a near round-the-clock basis, there may arise considerable emotional dependency of the patient upon the caregiver; absent the immigration context it would never be suggested that the relationship should continue just because one or other party wished it, if that was not a mutual agreement. In real-world situations patients will often lose employed carers upon whom they have become emotionally dependent to be replaced by a different paid carer upon whom they may or may not develop a similar relationship. It is difficult to see why the patient herein should be considered in a different light from any other patient who may be receiving paid-for care and who always faces the possibility that her employed carer will leave. The fact that her carer is employed unlawfully cannot be a foundation for improving her prospect of achieving a continuity of care. Indeed, once the Appellant is granted leave to remain pursuant to the successful outcome in her appeal, there is nothing to compel her to continue in her current job. In this context the significance of the impact on the Appellant's private life of the loss of her relationship with SC was not accorded anything approaching the significance of the impact on SC.; the extent of the interference with the Appellant' private life is less clear. In all such circumstances, and notwithstanding the emotional dependency

here, where a relationship is essentially based upon one of unlawful employment, it seems to me that a decision-maker has to be particularly circumspect in determining that the consequential emotional aspect of the relationship is such as to outweigh concerns in respect of the public interest in maintaining effective immigration control.

24. Be that as it may, such matters did not form the basis of the Respondent's challenge, and in any event do not necessarily amount to identification of errors of law so much as identifying a different emphasis that might be taken to the public interest considerations in such appeals. For the reasons already given, the decision of the First-tier Tribunal stands.

### **Notice of Decision**

25. The decision of the first-tier Tribunal contained no material error of law and stands.
26. The appeal remains allowed on human rights grounds.
26. No anonymity direction is sought or made.

Signed:

Date: **14 January 2019**

**Deputy Upper Tribunal Judge I A Lewis**