IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000088
First-tier Tribunal No: HU/52411/2023 & IA/00208/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 September 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

REGIELYNE STONEHOUSE
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Stein, instructed by MBM Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at 52 Melville Street, Edinburgh on 31 July 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge S P J Buchanan promulgated on 27 October 2023, dismissing her appeal against the decision of the respondent made on 17 February 2023 to refuse her leave to remain.

2. The appellant's case is that she is in a genuine and subsisting relationship with a British citizen, Gordan Barron, and that to require her to return to the Philippines would be a breach of her rights pursuant to Article 8 of the Human Rights Convention. She met her partner in June 2021 and shortly thereafter they started living together. In June 2023, she found out she was pregnant. It is also her case that there would be difficulties on her returning to the Philippines as she is pregnant but unmarried and that

she was at risk of facing physical harm, as well as bullying which would affect her mental health. It is also said that her partner could not go to live with her in the Philippines.

3. The Secretary of State's case is set out in the refusal letter, 17 February 2023. The Secretary of State did not accept that the appellant and her partner were "partners" for the purposes of GEN.1.2. given they had not been living together for at two years prior to the date of application. Nor was she satisfied that the appellant was her partner's fiancé. In addition, it was noted that her previous leave as a visitor had ended on 6 March 2018 and she had therefore been without valid leave in the United Kingdom, and that although she met the financial eligibility requirements, did not meet the English language eligibility requirements. The Secretary of State considered also that paragraph EX.1 did not apply as she was not a partner for the purposes of the Rules nor was she satisfied that she met the requirements of paragraph 276ADE(1) of the Immigration Rules as it was not accepted that there would be very significant obstacles to her integration into the Philippines.

4. The Secretary of State considered also that there were no exceptional circumstances such that in her removal there would be unjustifiably harsh consequences for her or her family, were she removed.

5. The judge heard evidence from the appellant and her partner. He noted [4] that at the outset of the hearing, the appellant had accepted that she does not fall within the provisions of the Immigration Rules as her case was made on the basis of Article 8 outside the Rules, on the basis of exceptional circumstances. He noted also [5] that the appellant was not relying on Section EX of Appendix FM.

6. The judge found that:-

(i) the couple are in a genuine and subsisting relationship but that there was no sufficient basis to conclude when they had started living together;

(ii) the appellant is pregnant but that he had not been provided with details of an expected due date of birth [22];

(iii) limited weight was to be attached to the appellant's argument about the difficulties and prospects for the couple if they return to the Philippines [23], there being no evidence to show that their partner's qualifications or achievements would not be recognised in the Philippines [24];

(iv) little weight must be attached to the appellant's private life and the relationship formed in the United Kingdom established at a time when she was here unlawfully, given Section 117B(4) of the Nationality, Immigration and Asylum Act 2002;

(v) the refusal would not result in unjustifiably harsh consequences for the appellant or her partner [28].

7. The appellant sought permission to appeal on the grounds the judge had erred:-

(i) in not considering the imminency of the child's birth and whether it was reasonable for the appellant to live in the United Kingdom where her partner opposed the child being born outside the United Kingdom, relying also on Section 117B(6) of the 2002 Act; and, in failing properly to apply **Chikwamba**, given that the suitability and eligibility requirements were met and thus application for entry clearance was likely to succeed and there was a failure properly to engage with the insurmountable obstacles that the family would suffer;

(ii) in failing to give proper reasons why it would be appropriate for the couple to separate whilst the appellant was pregnant and properly to apply Section EX.1;

(iii) in failing to note that there was in fact an estimated due date given in the bundle as 4 March 2024 and failing to consider the best interests of the, as yet, unborn child and properly to apply Section 55 of the Borders, Citizenship and Immigration Act 2009.

8. On 9 January 2024, First-tier Tribunal Judge Chowdhury granted permission noting it would be arguable that the appellant's application for leave to remain was refused on the narrow procedural ground that she must leave the UK in order to make an application for entry clearance and the judge had not properly considered the obstacles facing the appellant as a single mother in the Philippines and that the judge had not considered the relationship between the then soon to be born child as a British father.

9. I heard submissions from both representatives. It transpired, however, that, contrary to the directions issued, the bundle prepared by the appellant's solicitors was not served on the respondent. This appears to be as a result of a misunderstanding of a difference in procedure with what happens in the Upper Tribunal and the First-tier Tribunal. In the First-tier Tribunal, when a document is uploaded to the CCD system it becomes available to the other parties. That is not the case where documents are uploaded in the Upper Tribunal onto the CE-file system.

10. At the outset of the hearing, I asked for Ms Stein's comments on my observation that the grounds appeared to have been drafted on the basis that the judge had failed properly apply the Immigration Rules, yet that it has been conceded in the decision that the appellant had accepted that the Rules did not apply to her, that is that she did not meet the requirements of the Immigration Rules. I asked further for any comments that she might have on the fact that the author of the grounds appeared to have been of the view that a family life could exist between an as then unborn child and an adult, given the clear case law to the contrary.

11. Ms Stein did not attempt to persuade me that the concessions set out in paragraphs 4 and 5 of the First-tier Tribunal's determination had not been made nor did she seek to persuade me that an unborn child is a person with whom a family life can exist.

12. Much of what is set out in the grounds is misconceived. There is no proper or effective challenge to the judge recording that it had been conceded before him that the appellant did not fall within the provisions of the Immigration Rules. The judge cannot therefore be faulted in failing to apply Appendix FM or assessing whether the appellant falls within the terms of paragraph 276ADE(1) of the Immigration Rules.

13. The author of the grounds appears not to have appreciated that an unborn child is not a person for the purposes of the Human Rights Act. That is clear under Scots Law from Kelly v Kelly [1997] ScotCS CSIH_2, which in turn relied on Paton v British Pregnancy Advisory Service Trustees. The decision of the court, following those precedents is that a foetus does not have a legal persona or it is otherwise recognised as capable of being vested in personal rights, which can be protected.

14. More recently, in Evans v Amicus Healthcare Limited and others [2004] EWCA Civ 727, Thorpe LJ held [19]:

> "In our domestic law it has been repeatedly held that a foetus prior to the moment of birth does not have independent rights or interests: see *Re F (In Utero)* [1988] (Fam) 122 and *Re MB (Medical Treatment)* (1997) 2FLR 426."

15. It follows therefore that as an unborn child has no rights and does not exist as a person for the purposes of the law, that Section 55 of the 2009 Act has no application to such cases.

16. That is not, however, to say that the fact that a woman is pregnant is not a factor to be taken into account in assessing any family life that she has or exists between her and her partner or her private life.

17. In assessing the First-tier Tribunal's approach to this matter I bear in mind what was said in Volpi v Volpi [2022] EWCA Civ 464 at [2], and that an appeal court should not interfere with a lower court's conclusions on primary facts unless satisfied that it was plainly wrong. An appeal court can set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

18. Further, I bear in mind also what was held in HA (Iraq [2022] UKSC 22 at [72]:

> It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
>
> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves

in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.

(ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.

(iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope.

19. I bear in mind the uncontroversial propositions that the decision must be read sensibly and holistically and that it is not necessary for every aspect of the evidence to have been addressed, nor that there be reasons for reasons. Justice requires that the reasons enable it to be apparent to the parties why one has won and the other has lost: English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [16]. When reading the decision, I am entitled to assume that the reader is familiar with the issues involved and arguments advanced.

20. In light of the above, it cannot be argued, as the grounds do at [6] that the judge had accepted that the appellant satisfied the requirements of family life provided for under Appendix FM. The judge had clearly found that he was not satisfied as to how long the couple had been together and at the time the relevant Rules required them to have been living together in a relationship akin to marriage for at least two years. There is no challenge to that finding and thus any challenges to whether or not Appendix FM, or for that matter, paragraph EX.1 of Appendix FM apply, are without merit. Similarly, it simply cannot be argued that Section 117B(6) applies and thus what is averred at paragraphs 12 and 13 of the grounds is again without merit.

21. With respect to the application or otherwise of Chikwamba, - see SSHD v Hayat [201] EWCA Civ 1054and Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) and in there is not just a technical obstacle here; the appellant had overstayed for a significant period, it simply cannot be argued that there was a failure to apply the relevant principles.

22. Further, the submission at [34], that the starting point is that the best interests of the unborn child to be with both parents is simply wrong as a matter of law.

23. Although what is argued in ground 2 is infected by the error that the upcoming child has an independent right to be in the United Kingdom [19], and what is averred at [20] refers back to Section EX.1, which again, it was

accepted, does not apply, it is arguable that the judge erred in his assessment of the impact of separation on the appellant. There are no proper findings as to what her situation would be in the Philippines on return; what support she could get from her partner; or, the impact on him of separation from his partner, even for a short time while she applied for entry clearance, and there would have been the prospect of her not being able to return to the United Kingdom until after the birth of her child, given restrictions on flying.

24. This may well flow from the judge's error in concluding that there was no indication before him that the due date is 4 March 2024; there was evidence of it in the Third bundle at page 6-7.

25. In the circumstances, I consider that there was in this case a material error in the assessment of the appellant's article 8 case outside the framework of Appendix FM and paragraph 276 ADE.

26. I note that the appellant and her partner now happily have a child. In these circumstances, I consider that the appropriate course of action is to remit the appeal to the First-tier Tribunal, but with the observation that there it will be necessary to consider whether the existence of a child is a "new matter".

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. The appeal is remitted to the First-tier Tribunal in Glasgow, not to be heard by Judge Buchanan.

3. No interpreter is required.

Signed Date: 9 August 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal