



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: VA/05568/2013

**THE IMMIGRATION ACTS**

Heard at Newport  
on 27 February 2014

Determination Promulgated  
on 4 March 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER - MANILA

Appellant

and

MEREIA CANIVESI DELAITUBUNA  
(Anonymity direction not made)

Respondent

**Representation:**

For the Appellant: Mr Lee - Sponsor.

For the Respondent: Mr Richards - Senior Home Office Presenting Officer.

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Moore promulgated on the 16<sup>th</sup> October 2013, in which the Judge allowed Ms Delaitubuna's appeal against the refusal of an Entry Clearance Officer (ECO) to grant entry clearance to allow her to enter the United Kingdom for the purposes of a family visit.

## **Background**

2. Ms Delaitubuna is a national of Fiji born on the 1 July 1984. On 14<sup>th</sup> January 2013 she made an application for a visit visa. In the application form Ms Delaitubuna states she has a partner by the name of Christopher Lee, a British citizen living in the United Kingdom in Bristol. Mr Lee will pay her travel costs and provide accommodation and food. She will stay with him for the duration of the visit. Ms Delaitubuna also states that Mr Lee will travel to the United Kingdom with her as it was his intention to fly to Manila and accompany her back. In Part 7 of the application Ms Delaitubuna states she had no other family or friends in the United Kingdom.
3. The application was refused as the ECO was not satisfied Ms Delaitubuna is a genuine visitor under paragraphs 41 (i) (ii). The refusal notice, dated 23<sup>rd</sup> January 2013, states that Ms Delaitubuna has a limited right of appeal on the grounds referred to in section 84 (1) (c) of the Nationality Immigration and Asylum Act 2002 (the '2002 Act'). This ground is limited to a claim that the decision is unlawful under section 6 of the Human Rights Act as being incompatible with Ms Delaitubuna's Convention rights.
4. An appeal was lodged challenging the decision which was received by the First-tier Tribunal on 22<sup>nd</sup> February 2013. It was completed by Mr Lee who describes Ms Delaitubuna in section D of the fees form as "a friend". The grounds of appeal are as follows:

"The Immigration Officer acknowledges that the sponsor (myself - Christopher Lee) will sponsor the visit for six months of Mercia Delaitubuna. I will fly to Fiji and return to the UK with her. I will return to Fiji with her and return to UK on the expiry of the Visa. For the Entry Clearance Officer to refuse her UK visa on her socio-economic background is not politically correct, unhelpful and irrelevant. My sponsor letter clearly shows my name, address, my intentions and passport detail. If the appeal tribunal is in any doubt, I hope that the fact I have chosen to attend the hearing in person will count for us."
5. Following the appeal being received it was referred to a Duty Judge as it was stated to be out of time with no reasons being provided and because a validity issue arose. On the 20<sup>th</sup> March 2013 the Duty Judge considered the referral and made the following case management decision:

"Sponsor claims to be the applicant's partner..... finding of fact will need to be made. Appeal to proceed. Validity for the IJ"
6. The case was listed for hearing before Judge Moore. Mr Lee attended as did a representative of the ECO. The Judge noted the nature of the application, the relevant immigration rule, and the case advanced by the parties, before setting out his findings of fact at paragraphs 17 to 24 of the determination. The Judge

accepted that Ms Delaitubuna and Mr Lee are in a genuine relationship that started approximately 18 months ago during the course of a visit to Fiji by Mr Lee. The evidence of subsequent visits was accepted as was the evidence regarding future intentions and the economic circumstances of the sponsor within the United Kingdom, leading to a conclusion that Ms Delaitubuna was genuinely seeking entry as a visitor for a limited period not exceeding six months. Accordingly it was found the decision of the ECO was not in accordance with the law and the appeal allowed.

## Discussion

7. What is missing from the determination is any consideration of the two issues for which the appeal was referred to the Duty Judge; namely whether the appeal is out of time and, if so, whether it should be admitted and if there is a valid appeal in any event. The fact the Judge proceeded to deal with the appeal can be read as implying that, even if out of time, the appeal was admitted but it is not possible from the determination to be able to infer that the Judge did consider the issue of jurisdiction.
8. Those applying as family visitors before 25 June 2013 had a right of appeal under the Immigration Rules by virtue of Section 88A of the 2002 Act, but only if he had applied for entry clearance for the purposes of visiting a family member as defined by the applicable regulations.
9. For applications made between 9<sup>th</sup> July 2012 and 25<sup>th</sup> June 2013 those regulations were the Immigration Appeals (Family Visitor) Regulations 2012. Pursuant to Regulation 2, an applicant will be a family member of the person he or she is applying to visit if he is either (i) spouse, civil partner, father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister; (ii) father-in-law, mother-in-law, brother-in-law or sister-in-law; (iii) son-in-law or daughter-in-law; or (iv) stepfather, stepmother, stepson, stepdaughter, stepbrother or stepsister; of the family member he is applying to visit. He will also be that person's family member if he is that person's partner.
10. Ms Delaitubuna in her application states that she has a partner but no other family member or friends in the United Kingdom. Mr Lee in the appeal form described Ms Delaitubuna as a friend. The Judge found they were in a genuine relationship with the intention of marrying in the future. As stated above, however, the 2012 Regulations do specifically provided for a person who is a partner of the person to be visited to be included within the class of persons to be visited such as to confer a right of appeal [Regulation 2 (3)]. The term partner does however have a specific meaning within the terms of the 2012 Regulations and only applies to an applicant for entry clearance and the person they intend to visit who have been in a relationship that is akin to a marriage or civil partnership for at least two years before the date on which the application for entry clearance was made [Regulation 2 (4)(a)] and that such a relationship is

genuine and subsisting [Regulation 2 (4)(b)]. Whilst the Judge finds that Ms Delaitubuna and Mr Lee are in a relationship that is genuine and subsisting he also finds that they have only known each other for approximately 18 months and makes no finding that the nature of their relationship is one akin to a marriage or civil partnership. In that respect the Judge has made a legal error by failing to consider the correct legal provisions and to properly direct himself in law as to the relevant matters upon which he was required to make a finding.

11. I find the error to be material such that the determination must be set aside as it is clear from the facts, and was accepted by Mr Lee, that the nature of the friendship/relationship he has with Ms Delaitubuna is not one that satisfies the definition of a partner within the 2012 Regulations. As no other category of person identified within the Regulations has been shown to exist who Ms Delaitubuna was intending to visit, it has not been established on the facts that there is a right of appeal against the substantive refusal.
12. Section 88 A (3) provides that notwithstanding an inability to appeal against the substantive decision a person refused entry clearance to visit relatives in the UK will be able to appeal against that immigration decision on human rights grounds, although no such ground was raised in the appeal notice.
13. In Virk v Secretary of State for the Home Department [2013] EWCA Civ 652 it was said that "Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the tribunal to be alive to the point".
14. I find it was not established on the facts that the First-tier Tribunal had jurisdiction to hear this appeal. That determination has been set aside. It has not been established that the Upper Tribunal has jurisdiction to remake the decision.

### **Decision**

15. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. As there is no valid right of appeal there is nothing extant upon which the Upper Tribunal can, or is required, to make a decision.**

Anonymity.

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order as no application for anonymity was made and the facts do not establish a need for the same.

Fee Award.

Note: this is **not** part of the determination.

17. In the light of my decision to set aside the determination for want of jurisdiction, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: there was no jurisdiction for the Tribunal to consider this appeal on the grounds relied upon.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 28<sup>th</sup> February 2014