



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01455/2015**

THE IMMIGRATION ACTS

**Heard at Field House, London
On 7th January 2016**

**Determination Promulgated
On 28th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

PAZ CAYABYAB VIZCONDE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: in person along with her husband Mr Nicolas Americanos

For the respondent: Ms E Savage, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of the Philippines, appealed to the First-tier Tribunal against a decision by the respondent of 30 June 2015 to refuse her application for leave to remain in the UK on the basis of her private and family life. Judge of the First-tier Tribunal Judge S Pacey considered the appeal on the papers, as requested by the appellant, and dismissed the appeal. The appellant now appeals with permission to this Tribunal.

2. The grounds of appeal contend that the First-tier Tribunal Judge erred in three ways. It is contended that the Judge made a material error in proceeding

to determine the appeal without the respondent's bundle which contained evidence relevant to the determination of the issues under appeal. It is secondly contended that the Judge erred in considering the appeal under Ex 1 of Appendix FM when that provision does not apply to the appellant, who had leave to remain as a visitor in the UK. It is contended that this is a material error as the Judge did not consider Article 8 outside the Rules. The third ground contends that the Judge erred in failing to consider whether the appellant fulfilled the requirements of the Immigration (EEA) Regulations 2006 as her husband is a national of Cyprus.

3. I deal firstly with the third ground. This ground has no substance as there was no EEA appeal before the First-tier Tribunal Judge and there is no evidence that this issue was raised in the papers before the First-tier Tribunal Judge.

4. The first ground contends that the Judge erred in proceeding to consider the appeal in the absence of the respondent's bundle. It is apparent that the Judge did not have the bundle from paragraph 17 of the decision where she says that she did not have the application form before her and was therefore unable to determine how long the appellant and her partner had been in a relationship and whether they were married. This led to the Judge to conclude that the relationship was not longstanding. However the evidence in the respondent's bundle actually shows that they had known each other since 2011 and had married on 22 September 2012. Although the Judge did go on to assess the situation as if the couple were married [18], she did so without knowing the background to the relationship or its duration. In my view this was a material error as a proper assessment under Appendix FM or Article 8 requires a full and detailed picture of the appellant's circumstances.

5. The Judge went on to consider the appeal under Appendix FM and focussed on the 'insurmountable obstacles' test under Ex 1. However, as the grounds point out, and as accepted by Ms Savage, the appellant does not fall within paragraph E-LTRP2.2 because she was in the UK as a visitor. Accordingly Ex 1 does not apply to the appellant. Having considered Ex 1 the Judge went on to look at whether she needed to go on to consider Article 8 of the ECHR outside the Rules and decided that there were no 'good arguable grounds' for doing so in this case [35]. Ms Savage submitted that this was not a material error as the Judge considered all of the factors relevant to an Article 8 assessment of 'insurmountable obstacles' at paragraphs 23-26 of the decision. However I cannot be sure that this is the case, particularly in light of the fact that the Judge did not have the respondent's bundle before her when she considered this issue. The Judge's decision to decline go on to look at Article 8 outside the Rules could have been different had she realised that the appellant did not meet the Rules at all. Also, a proportionality assessment under Article 8 could have encompassed factors other than those considered in the Judge's 'insurmountable obstacles' assessment, for example factors relating to the circumstances of the appellant and her husband within the UK. Further, the Judge has not given any consideration to the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002.

6. In light of both errors identified above I find that the Judge made a material error of law and that the First-tier Tribunal decision should be set aside in its entirety.

7. I am satisfied that the appellant has not therefore had her case properly considered by the First-tier Tribunal. The parties were in agreement with my view that the nature and extent of the judicial fact finding which is necessary in order for the decision to be remade is such that (having regard to the overriding objective in Rule 2 of the Upper Tribunal Procedure Rules 2008) it is appropriate to remit the case to the First-tier Tribunal.

Decision

The Judge made an error on a point of law and the determination of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal to be remade.

Signed

Date: 7th January 2016

A Grimes

Deputy Upper Tribunal Judge