



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/40864/2013

THE IMMIGRATION ACTS

Heard at Field House
On 1 July 2014

Determination Promulgated
On 25 July 2014

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MS DANALYN ARRIANE VILORIA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pretzell, Counsel
For the Respondent: Miss J Isherwood, HOPO

DECISION ON ERROR OF LAW AND DIRECTIONS

1. The appellant appeals with leave against the decision of First-tier Tribunal Judge Hawden-Beal who dismissed her appeal against the decision of the respondent to issue directions under Section 47 of the Immigration, Asylum and Nationality Act 2006 and to refuse to grant further leave to remain outside the Immigration Rules

under paragraphs 276ADE and Appendix FM of HC 395 as amended and under Article 8 of the Human Rights Convention. The respondent's decision was made on 18 September 2013

2. On 24 September 2011 the appellant was granted limited leave to enter the UK until 19 December 2012 as a Tier 4 student. On 11 December 2012 an application was made on the appellant's behalf for leave to remain on the basis of her family and private life in the UK. The respondent refused the application because the appellant could not meet the requirement of the family and private life provisions of the Immigration Rules. She was not married to her sponsor and they had not been living together for two years preceding the date of the application.
3. At paragraph 11 of the determination, the judge noted the appellant's evidence that as at the date of the hearing on 4 April 2014, she had been married to her now husband and then partner for one month and one day. The judge said at paragraph 6 that by virtue of Section 85(4) of the Nationality, Immigration and Asylum Act 2002 she could consider any evidence which she considered to be relevant to the substance of the matter, including postdecision evidence. In in-country appeals she could also take account of evidence right up to the date of the hearing as per the case of **LS Gambia [2005] UKAIT 0085**. However, at paragraph 16 the judge held that the appellant could not meet the requirements of Appendix FM in relation to her family life, firstly, because, although since the date of the refusal, the appellant has married her partner, she did not make this application for leave to remain as either a partner or fiancée as per Section R-LTRP1.1. Secondly, she could not meet the financial requirements of Appendix FM because her partner only earned £9,160.32 in the six months prior to the date of the application when he required £9,300.
4. I find that the judge's findings at paragraph 16 were contrary to her assertion at paragraph 6 that she could take post-decision evidence that was relevant to the substance of the issue that was before her. The judge's failure to consider the appellant's marriage in the context of the family and private life provisions of the Immigration Rules was an error of law.
5. Section EX of Appendix FM states that this paragraph applies if the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK. Given that the appellant was now married to her partner the judge was not precluded from considering EX.1(b). In light of the evidence before her the judge was required to look at whether the appellant's circumstances complied with the requirements of the Immigration Rules and, as **Gulshan** said, it is only if there may be arguably good grounds for granting leave to remain outside then is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.
6. I find that the judge materially erred in law in failing to consider the appellant's circumstances as presented to her at the hearing within the fabric of Appendix FM of the Immigration Rules.

7. The judge's decision cannot stand. It is set aside in order to be remade.

Signed

Date

Upper Tribunal Judge Eshun

DIRECTIONS

- The appellant's appeal is remitted to Taylor House for rehearing.
- The appeal is to be heard by a First-tier Tribunal Judge other than Judge Hawden-Beal.
- There will be two witnesses, the appellant and her husband.
- No interpreter will be required.
- Time Estimate - one and a half hours