



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/41910/2013

THE IMMIGRATION ACTS

Heard at Birmingham

On 21st January 2015

**Decision & Reasons
Promulgated**

On 2nd February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**IDA PATRICIA ELPA
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Mr D Krushner of Counsel

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Birk promulgated on 30th July 2014.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the claimant.

3. The claimant is a national of the Philippines born 29th December 1988 who applied for leave to remain in the United Kingdom to enable her to continue to reside with her husband, Marlon Pusikit Ante (the Sponsor) who is a British citizen.
4. The application was refused on 26th September 2013 and a decision made to remove the claimant from the United Kingdom.
5. In giving reasons for refusal the Secretary of State considered section EX.1 of Appendix FM and found that EX.1(a) did not apply as the claimant did not have a child in the United Kingdom.
6. In considering EX.1(b) it was accepted that the claimant had a genuine and subsisting relationship with her British partner, but the application was dismissed as the Secretary of State found no insurmountable obstacles to family life with that partner continuing outside the United Kingdom.
7. The claimant's private life was considered with reference to paragraph 276ADE with the Secretary of State finding that the claimant did not satisfy any of the requirements in that paragraph.
8. The claimant's appeal was heard by Judge Birk (the judge) on 16th July 2014. By the time of the appeal hearing, the claimant had given birth on 22nd December 2013. The judge found that section EX.1(a) was satisfied, the claimant was in a genuine and subsisting parental relationship with a child who was in the United Kingdom, and who is a British citizen. The appeal was therefore allowed under the Immigration Rules. The judge did not go on to consider Article 8 outside the rules.
9. This prompted the Secretary of State to apply for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had considered section EX.1 as freestanding which was not the case. If a claimant did not meet the requirements of the Immigration Rules, compelling circumstances need to be established for the purposes of Article 8. As the claimant had failed to meet the requirements of the Immigration Rules, it was not clear from the determination on what basis the judge found that there were compelling circumstances to merit allowing an appeal under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
10. It was submitted that the judge had failed to provide adequate reasons why the claimant's circumstances were either compelling or exceptional.
11. Permission to appeal was granted by Judge of the First-tier Tribunal Ransley who gave the following reasons for granting permission;

"The determination is so full of material inconsistencies that it is irrational. The judge noted [at 9 and 11] that it had been conceded on behalf of the Appellant that section EX.1 is not freestanding and it needs a gateway; the Respondent's representative had submitted that at the date of the application the Appellant could not meet the financial requirements of

Appendix FM although there is evidence now that this can be met. The judge found [at 16] that the Appellant met EX.1(a)(i)(cc) and (ii) of the Rules. At [21] the judge stated 'I find that that the Immigration Rules under paragraph R-RLTR.1.1(d) are met and that paragraph EX.1 applies. The refusal was therefore in accordance with the law and the Immigration Rules'. The judge [at 24] stated that as the Appellant has shown that she meets the Immigration Rules with regard to Article 8 under Appendix FM there was no need for the judge to proceed to consider Article 8 in any other sense. In the Decision section the judge allowed the appeal under the Immigration Rules and dismissed the appeal under the Human Rights Convention".

12. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal's determination should be set aside.

The Upper Tribunal Hearing

13. Mr Mills conceded at the outset that the application for permission was misconceived and did not disclose any material error of law. Mr Krushner, not surprisingly, had nothing to add.
14. I found that the determination of the First-tier Tribunal did not contain material errors of law and should stand. I indicated I would issue a written decision giving reasons.

My Conclusions and Reasons

15. Mr Mills was entirely correct in making the concession. The grounds seeking permission did not refer to irrationality, although this was mentioned in the grant of permission. There is a high threshold, and in my view it certainly could not be said that this determination was irrational.
16. There are some typing errors, for example in the first sentence of paragraph 11, and the final sentence of paragraph 21, the word "not" has been missed out which alters the meaning of the sentences. These are not however material errors.
17. The judge did not consider EX.1 as freestanding and acknowledged this in paragraphs 9 and 21. The Secretary of State considered EX.1 in the reasons for refusal letter dated 26th September 2013. At that time the claimant did not have a child, and therefore EX.1(a) was not applicable. The Secretary of State considered EX.1(b) accepting that the claimant had a genuine and subsisting relationship with her British partner, but concluded that there were no insurmountable obstacles to family life with that partner continuing outside the United Kingdom.
18. By the time of the First-tier Tribunal hearing the claimant had given birth and the judge noted that the Secretary of State in the refusal letter had not contended EX.1 should not be considered, and correctly went on to consider whether the claimant could succeed under EX.1. It is not the

case that EX.1 was treated as freestanding either by the Secretary of State or the judge. The judge did not err on this issue.

19. I am somewhat surprised that the Secretary of State relied in the grounds contained in the application for permission to appeal, upon Gulshan, and the contention that the judge had not made it clear what compelling circumstances existed to merit allowing an appeal under Article 8, and that permission was granted on this ground.
20. The judge did not consider Article 8 outside the Immigration Rules. There is therefore no question of the judge having to explain why there were compelling circumstances to merit allowing the appeal on that basis. The appeal was allowed under the Immigration Rules, therefore the judge did not go on to consider Article 8 outside the Rules, as was recorded at paragraph 24 of the determination.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The appeal of the Secretary of State is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity direction.

Signed

Date **21st January 2015**

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

As the determination of the First-tier Tribunal stands, so does the fee award.

Signed

Date **21st January 2015**

Deputy Upper Tribunal Judge M A Hall