



IAC-FH-NL-V1

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

Appeal Number: IA/02012/2015

THE IMMIGRATION ACTS

Heard at Field House

On 8 February 2016

**Decision & Reasons
Promulgated
On 19 April 2016**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MIRIAM LOYOLA EDRALIN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Presenting Officer

For the Respondent: Ms F Allen, instructed by Gupta Law Solicitors

DECISION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the SSHD. I shall refer to Ms Edralin as the claimant herein. The claimant is a citizen of the Philippines born on 2 July 1961. This decision is made in relation to an appeal brought to the Upper Tribunal with the permission of First-tier Tribunal Judge Grant-Hutchinson, granted on 11 December 2015, against the decision of First-tier Tribunal Judge James of 13 August 2015 allowing the claimant's appeal.

FtT's decision

2. It is important for the purposes of my decision that I set out in some detail the following reasons and conclusions of Judge James:

“9. There are numerous errors in the reasons for refusal, which include:

- The Appellant is from the Philippines but the reasons for refusal refer to returning her to Nigeria;
- It is accepted that the Appellant has submitted evidence of her relationship with her British partner, such that “it is accepted that your client does have a genuine and subsisting relationship” and then it is stated it is not accepted the Appellant has submitted evidence of her relationship with her partner or that she has a genuine and subsisting relationship;
- On the Respondent’s bundle is evidence of the Appellant residing with her partner since 2004, which appears to be ignored;
- The reasons for refusal refer to the Appellant as a ‘he’ and ‘his’ when she is a ‘she’ which creates confusion and lack of confidence the decision maker has the correct information before her;
- There is a litany and repeating of the rules and a generic assertion that the Appellant does not meet these rules without explanation or referring to the relevant paragraph she fails to meet;
- The reasons for refusal confirm the Appellant meets the suitability and eligibility criteria but then refused the Appellant her applications stating that she does not meet the eligibility criteria;
- The reasons for refusal conflate the criteria under the parent and partner route then refuse on the parent route based on the partner route criteria e.g. referring to the Appellant’s partner under EX.1(a)(ii) which concerns the child not the adult partner;
- The Appellant made no application for leave to remain as a parent;
- The female Appellant’s partner is referred to as a ‘she’ and ‘her’ when it is a man;
- The reasons state that the Appellant entered the UK lawfully in 2003 but then later states that she entered the UK unlawfully;
- It is then stated the Appellant has not formed a private life beyond the usual relationships formed after stating there is a genuine and subsisting relationship with her partner;
- It is then stated the Appellant has not formed a private life beyond the usual relationships formed after stating there is a genuine and subsisting relationship with her partner;

- It is stated the Appellant has never held any lawful leave to enter the UK whilst also stating that she entered on a visit visa i.e. lawfully;
 - Although being aware of the partner's cognitive deterioration as evidenced by the NHS documents nevertheless the Respondent fails to consider this matter under the derivative rights set down in the EEA Regulations regarding an overseas person who is caring for a dependent adult as a primary carer.
10. As the Respondent chose not to be represented at the hearing, it was not possible to clarify what matters remained at issue due to the cumulative contradictory statements made in the reasons for refusal.
 11. The cumulative impact of the number of errors and type of errors made in the reasons for refusal are such that the negative conclusion and decision is not viable and cannot be relied on by the Respondent. Furthermore despite being on notice that this was a potential case that fell within the EEA Regulations regarding derivative residence permit rights as the primary carer of a debilitated partner, the Respondent has not considered this case under what may be the correct regulation. This is a further fundamental error.
 12. Thus in summary the Appellant's appeal is allowed to the extent that the incorrect Immigration Rule has been applied in her application and the cumulative impact of the contradictory errors in the reasons for refusal renders it so confusing as to be void. The consequent effect of that decision is to vitiate the entirety of the Respondent's decision, which as it stands is unlawful.
 13. I find that the Respondent's decision in relation to the Appellant remains outstanding with the Respondent and she awaits a lawful decision on her applications. I allow the appeal to this limited extent.

Conclusion

14. I have given careful consideration to all the documents before me and to the evidence and submissions, which are set out in the Record of Proceedings.
15. The general burden of proof is on the Appellant and the civil standard of balance of probabilities applies. On the totality of the evidence before me, I find that the Appellant has discharged the burden of proof upon her and the reasons given by the Respondent do not justify the refusal of leave to remain. Therefore the Respondent's decision is not in accordance with the law and the applicable Immigration Rules or Regulations."

Summary of submissions

3. Mr Clarke contended that paragraph 9 of the FtT's decision discloses a sufficient number of inaccuracies to require its decision to be set aside. In the alternative, it was submitted that the matters identified by the FtT were not such so as to render the substance of the SSHD's decision ("the decision letter") unlawful, and the FtT's conclusion to the contrary is

irrational. Unsurprisingly, Ms Allen took an opposing view and submitted that there were sufficient errors in the Secretary of State's decision letter so as to entitle the FtT to rationally conclude as it did. Both parties took me through the points set out in paragraph 9 of the FtT's decision in some detail.

Discussion

4. The FtT's decision makes an unpromising start, paragraph 2 thereof identifying the decision under appeal in the following terms:

"This appeal is brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 against the decision of the Respondent dated 28 March 2012 to refuse to grant leave to remain as the partner of a person present and settled in the UK, under private and family life under Appendix FM and paragraph 276ADE of the Immigration Rules HC395."

5. The papers before me do not disclose there ever having been a decision of 28 March 2012 made in relation to this claimant. Not only is the date of the decision under appeal incorrectly identified by the FtT but it also incorrectly states that the decision under challenge is a decision to refuse the claimant leave to remain. In fact the decision under appeal is a decision dated 8 December 2014 to remove the claimant - a decision which was not in the papers before the FtT and was only supplied to me upon request after the hearing.
6. Of itself the aforementioned error in the FtT's decision would have led me to set it aside. The entirety of the FtT's decision is focused on the reasons given by the SSHD for refusing leave to remain and it is this decision which the FtT finds to be unlawful. For reasons which are obvious, the FtT does not address anywhere the issue of whether the SSHD's decision to remove (the decision under appeal) is unlawful. This is material because as of the date the SSHD made her decision, the claimant was not lawfully in the UK, which of itself founds a lawful basis for that decision.
7. In any event, putting to one side all that I say above, I nevertheless find that the FtT's decision is vitiated by legal error and must be set aside; ostensibly for the reasons commended to me by Mr Clarke at the hearing.
8. Whilst the FtT was correct in stating that at one point in the SSHD's decision letter [paragraph 40(iii) thereof] reference is made to returning the claimant to Nigeria, when in fact she is a national of the Philippines and it is to the Philippines that she would be removed, this was plainly no more than a slip. That this is so is evidenced by the heading to the decision of 3 December which identifies the claimant as a national of the Philippines, as well as the numerous further references within the decision letter to the return of claimant to the Philippines (see for example paragraphs 16, 18, 23, 26, 32 and 43).
9. As to the matters raised in the second bullet point in paragraph 9 of the FtT's decision, it is absolutely clear from reading the decision letter as a

whole that the Secretary of State accepts that the claimant and Mr Halabi are in a genuine and subsisting relationship (see for example paragraphs 11 and 34 of the decision).

10. Moving on, in my view there is nothing in the decision letter capable of supporting the FtT's conclusion that the evidence provided by the claimant as to her residence with her partner (Mr Halabi) since 2004 was ignored by the SSHD. On the contrary, it is highly likely to have been as a consequence of this evidence that the SSHD accepted the claimant to be in a genuine and subsisting relationship with Mr Halabi.
11. The fourth bullet point in paragraph 9 relates to the gender of the claimant and the ninth bullet point to the gender of the claimant's partner. The FtT was correct in identifying that on numerous occasions throughout the decision letter the gender of the claimant and her partner is incorrectly specified. However, it is plain from reading the decision letter as a whole that the SSHD was aware of both the claimant and her partner's gender. In any event, it is difficult to comprehend how any misidentification of gender could impact on the lawfulness of the underlying decision to refuse leave.
12. Moving on to the matters alluded to by the FtT in its fifth bullet point. The conclusions therein are simply inaccurate. The refusal letter does not contain a "litany and repeating of the rules"; rather, the SSHD properly sets out the provisions of the relevant rules necessary for determining the claimant's application, as well as those relating to one rule which was not relevant to such a consideration (i.e. E-LTRPT of Appendix FM).
13. As to bullet point 6, again in my conclusion the FtT's observations are clearly wrong. Duly analysed the decision letter does not disclose a passage in which the SSHD confirms that the claimant meets the suitability and eligibility criteria of the Rules. The FtT's observation is, it would appear, based on a misreading of paragraphs 9 and 11 of the letter. In paragraph 9 the SSHD correctly identifies that the claimant does not meet all of the eligibility requirements of Appendix FM E-LTRP. However, if certain specified requirements of that rule are met (i.e. those contained in E-LTRP 1.2-1.12 and 2.1) then consideration must be given to the question of whether an applicant meets the additional requirements set out in paragraph EX.1 of Appendix FM. In paragraph 11 of the decision the SSHD concludes that the aforementioned specified eligibility requirements (i.e. those in paragraph E-LTRP 1.2-1.12 and 2.1) have been met by the claimant. There is nothing inconsistent in these conclusions.
14. As to the observations in the seventh bullet point in paragraph 9 of the FtT's decision the refusal letter does not, as the FtT states, conflate the parent and partner routes; it deals separately with the eligibility requirements of each and then properly goes on and considers the requirements of paragraph EX.1 - for reasons identified in the previous paragraph herein. The same point can be made in relation to those matters identified in bullet point 8.

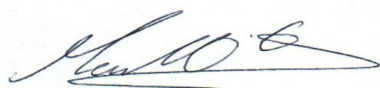
15. Continuing, I agree with Ms Francis that the FtT was correct to observe that in paragraph 40(ii) of her decision letter the SSHD wrongly states that the claimant had never held any lawful leave to enter or remain in the United Kingdom and subsequently treats this as a relevant factor adverse to her. A contrary factual conclusion is to be found elsewhere in the decision letter, as identified by the FtT in the penultimate (twelfth) bullet point in paragraph 9.
16. Turning to the eleventh bullet point. I observe, although the FtT did not, that immediately following the reference in the decision letter to the fact that the claimant had not produced any evidence of a private life which extends beyond the usual relationships which may be formed whilst residing in the United Kingdom, is a consideration of the claimant's relationship with Mr Halabi (see paragraph 34). The decision of the SSHD must be considered as a whole. If paragraphs 30 to 36 thereof are considered in the round it is clear that the SSHD did take account of the relationship between the claimant and Mr Halabi but, nevertheless, concluded that claimant's removal in such circumstances would not lead to a breach of Article 8.
17. The final bullet point refers to a failure of the SSHD to consider whether the claimant is entitled to any derivative rights "set down in the EEA Regulations". As identified by Mr Clarke the claimant has never made an application under the EEA Regulations and, consequently, there was no requirement on the SSHD to consider this matter. It is certainly not unlawful for the SSHD to make a removal decision absent giving consideration to such a matter in circumstances where there has been no application made to her in this regard.
18. It is clear from all I have said above that in my view the FtT took into account numerous materially irrelevant factors when concluding that the SSHD's decision to refuse leave, dated 3 December 2014, was not in accordance with the law. As a consequence its decision must be set aside for this reason.
19. There is no dispute between the parties that having set the FtT's decision aside the right course is for the matter to be remitted back to the FtT for that Tribunal to determine the appeal on a *de novo* basis.

Notice of Decision

The First-tier Tribunal's decision contains an error of law capable of affecting the outcome of the appeal and is set aside.

The appeal is remitted to the First-tier Tribunal to be determined *de novo*.

Signed:

A handwritten signature in black ink, appearing to be 'A. W. B.', written over a horizontal line.

Upper Tribunal Judge O'Connor