



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

Appeal Number: HU/16262/2017

THE IMMIGRATION ACTS

Heard at Field House

On 13 March 2019

**Decision & Reasons
Promulgated
On 28 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE APLEYARD

Between

**MRS P S
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Chowdhury, Counsel.

For the Respondent: Mr S Whitwell, Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh who made an application to the Respondent for entry clearance to the United Kingdom under Appendix FM of the Immigration Rules HC395 (as amended). The Respondent did not accept that she met the eligibility relationship requirement under Paragraph E-ECP.21 of the Immigration Rules because her Sponsor was not a British citizen, was not present and settled in the United Kingdom and nor was he in the United Kingdom with refugee leave or humanitarian protection. The Respondent did not accept that there were exceptional circumstances which

would have amounted to a breach of her rights under Article 8 of the European Convention on Human Rights.

2. The Appellant appealed and following a hearing, and in a decision promulgated on 14 August 2018 Judge of the First-tier Tribunal J Macdonald, dismissed her appeal.

3. She sought permission to appeal which was granted by Judge of the First-tier Tribunal L Murray on 7 February 2019. Her reasons for so granting were: -

“1. The Appellant seeks permission to appeal, in time, against a Decision of First-tier Tribunal Judge J MacDonald, who in a Decision and Reasons promulgated on 14 August 2018 dismissed her human rights appeal.

2. The grounds assert that the Judge erred in concluding that the appeal could not succeed because the Appellant had not made a valid application under the Immigration Rules. It is argued that the Judge should have applied the appropriate Rules (paragraph 410) and concluded that the requirements were met.

3. It is arguable that the Judge erred in concluding that because the Appellant’s solicitors referred to the term ‘settlement’ in the application that paragraph 410 could not be considered as a valid application had not been made. It is arguable that the fact that the Appellant otherwise satisfied the Immigration Rules was not adequately considered in the balancing exercise.”

4. Thus, the appeal came before me today.

5. Mr Chowdhury began by relying on the grounds seeking permission to appeal and immediately referred me to question 48 of the Appellant’s application for United Kingdom entry clearance where he was asked to confirm his nationality and replied “STATELESS (1954 CONVENTION)”. The purpose of this reference was to highlight the asserted material error of the Judge at paragraphs 40 to 45 of his decision where he finds that the Appellant has not made a “valid application”. Mr Chowdhury’s simple submission is that the Appellant made use of the correct form and that the Judge has erred in coming to the conclusion that he did. In short, that the Appellant had made a valid application under the appropriate Immigration Rules.

6. That being the case it was then open to the Judge to apply the appropriate Immigration Rules (paragraph 410) and conclude that the requirements of the Immigration Rules were accordingly met. The Judge has materially erred as the Appellant’s Solicitors referred to the term “settlement” in the application. Accordingly, the Judge should then have considered paragraph 410 of the Immigration Rules and not followed the entry clearance officer’s decision who concluded that the Appellant had not applied under paragraph 410 and paragraph 411 of the Immigration Rules because an application for limited leave to remain in accordance with those rules had not been made.

7. In asserting that this is a material misdirection Mr Chowdhury urged me to accept that the Judge could have considered and taken this issue into account when looking at Article 8 of the European Convention on Human Rights or

under the principles of **Robinson [1997] EWCA Civ 3090** where Lord Woolf said:-

“... If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely “arguable” as opposed to “obvious”. Similarly, if when the Tribunal reads the Special Adjudicator’s decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do. It follows that leave to apply for judicial review of a refusal by the Tribunal to grant leave to appeal should be granted if the judge is of the opinion that it is properly arguable that a point not raised in the Grounds of Appeal to the Tribunal had a strong prospect of success if leave to appeal were to be granted.”

8. The grounds refer me to the guidance given by the Upper Tribunal in **PD (Grounds-implied variation - section 86(3)) Sri Lanka [2008] UKAIT 00058** and the headnote which states: -

“(1) The jurisdiction of the Tribunal is in all cases limited to the grounds of appeal, as varied before the Immigration Judge, plus any grounds contained in section 120 statements and Robinson obvious points. The tribunal is not empowered by section 86 of the 2002 Act to allow an appeal on some other basis. Grounds of appeal cannot be varied by implication.”

9. The Judge further erred in finding that the Entry Clearance Manager was correct in asserting that the Appellant could not make an application for indefinite leave to remain under part 14 (Immigration Rules 407-408), because that rule only applies to a person who is stateless and not for their family. The Judge should have allowed the appeal under different Immigration Rules as he meets the criteria set out in paragraph 411.
10. The Judge again erred at paragraph 65 of his decision when he concluded that the Appellant was entitled to make a fresh application, if she considers it appropriate, for limited leave to enter as the family member of a stateless person and that that application could then be considered under part 14 of the Immigration Rules.
11. Mr Whitwell referred me to the Entry Clearance Officer’s refusal. It states that on 6 September 2017 the Appellant made an application for entry clearance to the United Kingdom under Appendix FM to the Immigration Rules on the basis of her family life with the Sponsor. The application was considered under those Immigration Rules and with reference to Article 8 of the European Convention on Human Rights. The decision was made on the failure of the Appellant to meet the eligibility relationship requirement as the Appellant

stated she wished to join her spouse who was a stateless person under Article 1 of the 1954 Convention and has been issued with a Home Office travel document with leave to remain in the United Kingdom until 3 February 2019. As the Appellant's Sponsor is not present and settled in the United Kingdom the decision was made to refuse the appeal under the Immigration Rules. This inability to meet those Immigration Rules was accepted by the Appellant's representatives as recorded in the grounds seeking permission to appeal. Mr Whitwell referred me to paragraphs 410 and 411 of the Immigration rules and submitted that there was nothing *Robinson obvious* about the position given that consequent upon the Appellant's limited leave she cannot meet the requirements of paragraph 411 of the Immigration Rules as she has not made a valid application to the Secretary of State for leave to enter or remain as the family member of a stateless person. The Appellant was invited to reapply by the Entry Clearance Manager and that is the course she should have adopted. The Judge was never the primary decision maker. The Appellant was unable to meet the requirements of the Immigration Rules. Appendix FM does not apply in this appeal and these were factors taken into account by the Judge when considering Article 8 and the proportionality of the Respondent's decision. It was open to the Judge to come to the conclusion that he did. There is here no material error.

12. There is no material error of law within Judge Macdonald's decision. I accept the submission of Mr Whitwell and the Judge's findings at paragraph 65 of his decision that the Appellant's appropriate remedy is to make a fresh application. The Judge fully considered the issues that the grounds now seek to argue once more. He found that the Sponsor had been granted leave to remain in the United Kingdom as a stateless person and that Appendix FM could not be met. The Sponsor is not a British citizen, is not present and settled in the United Kingdom nor is he in the United Kingdom with refugee leave or humanitarian protection. The Sponsor is a stateless person. The Judge rightly concluded at paragraph 40 of his decision that the starting point under Rule 411 is that the Appellant has made a valid application for leave to enter or remain as a family member of a stateless person. The Appellant has not applied for limited leave to enter because in her application form she has applied for "settlement" and thus for indefinite leave to remain. It was open to the Judge to conclude that Appellant had not made a valid application. Consequently, the Judge went on to consider Article 8 before coming to conclusions that were open to be made on the evidence. His reasons for dismissing the Article 8 claim are adequately reasoned.
13. The grounds disclosed no material error of law whatsoever.

Notice of Decision

In those circumstances the decision of Judge Macdonald is not set aside.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him

or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed
2019

Date 26 March

Deputy Upper Tribunal Judge Appleyard