



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: VA/13480/2013

**THE IMMIGRATION ACTS**

Heard at Newport  
On 20<sup>th</sup> August 2014

Determination Promulgated  
On 22<sup>nd</sup> August 2014

Before

UPPER TRIBUNAL JUDGE POOLE

Between

ENTRY CLEARANCE OFFICER - BANGKOK

Appellant

and

NUTCHA KWAOSAM  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr Erwin Richards, Home Office Presenting Officer  
For the Respondent: Mr Lee Stone, UK Sponsor

**DETERMINATION AND REASONS**

1. In this determination I will refer to the parties by the style in which they appeared before the First-Tier Tribunal.

2. The appellant is a citizen of Thailand born 11 December 1980. The appellant applied for entry clearance as a visitor to enable her to enter the United Kingdom to visit her fiancé Mr Lee Stone.
3. The respondent refused the application having formed a view that a number of aspects of the applicable Immigration Rules had not been met by the appellant.
4. The refusal notice clearly indicated that the appellant's appeal rights were limited to the grounds referred to in Section 84(1)(c) of the Nationality, Immigration & Asylum Act 2002. These limited grounds related to Human Rights and/or racial discrimination.
5. A full right of appeal in respect of a visitor is only available to family visitor that is someone proposing to visit a close family member in the United Kingdom. Regulations define family members and the definition does not include (as in this case) fiancés.
6. The appellant, through her UK Sponsor, purported to lodge grounds of appeal. Because of the restricted nature of any appeal the matter was referred to a Duty Judge who in his words construed the appeal "benevolently" and in doing so considered there was the right of appeal limited as set out above.
7. The appeal came before Judge of the First-Tribunal Osborne sitting at Newport on 24 March 2014. An oral hearing was held. The sponsor Mr Stone attended. The respondent was represented by a Presenting Officer. Judge Osborne took evidence from Mr Stone and in a determination of the same day concluded that the respondent's decision refusing the application was "not in accordance with the law and the applicable Immigration Rules". Judge Osborne's decision is recorded as "I allow the appeal under the Immigration Rules". There is no reference within the determination to the question of Human Rights or racial discrimination.
8. The respondent sought leave to appeal that decision on the basis that the judge had made a material misdirection of law, in that the judge had purported to allow the appeal under the Immigration Rules, whereas no right of appeal in respect of that decision existed.
9. In granting leave to appeal to the respondent another judge of the First-Tier Tribunal said this:

"1. The appellant seeks permission to appeal, in time, a decision of the First-Tier Tribunal (Judge Osborne) who, in a determination promulgated on 1 April 2014 allowed the appellant's appeal against the Entry Clearance Officer decision to refuse a visit visa.

2. The appellant wished to visit her fiancé. The grounds of appeal argue that the judge failed to consider the limitations placed on her right of appeal, as indicated in

the refusal. This is because she is not a member of the sponsor's family as set out in the 2012 Immigration Appeals (Family Visitor) Regulations.

3. In fairness to the judge the respondent was represented by a Home Office Presenting Officer at the hearing, who is not recorded in the ROP to have taken the above point. However on the face of it there was no jurisdiction to hear the appeal and there is therefore an arguable error of law disclosed by the application".

10. Thus the matter now comes before me in the Upper Tribunal.
11. Mr Stone again attended. At the commencement of the hearing I explained to him the nature of the proceedings and the possible outcomes.
12. Mr Richards referred briefly to the grounds seeking leave which he now supported. Mr Richards indicated that the judge had erred in law. It was a material error and the decision should be set aside.
13. Mr Stone produced a letter that he had written explaining his various options which included a fresh application or him travelling to Thailand to visit the appellant and the possibility of future marriage.
14. I do find that Judge Osborne made a material error of law for the following reasons.
15. The Nationality, Immigration & Asylum Act 2002 provides at Section 88A:
  - (1) *A person may not appeal under Section 82(1) against refusal of an application for entry clearance unless the application was made for the purpose of -*
    - (a) *visiting a person of a class or description prescribed by regulations for the purpose of this subsection, or*
    - (b) *entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.*
  - (2) *Regulations under subsection (1) may, in particular -*
    - (a) *make provision by reference to whether the applicant is a member of the family (within such meaning as the regulations may assign) of the person he seeks to visit;*

...
  - (3) *Subsection (1) -*
    - (a) *does not prevent the bringing of an appeal on either or both of the grounds referred to in Section 84(1)(b) and (c), and*

- (b) *is without prejudice to the effect of Section 88 in relation to an appeal under Section 82(1) against refusal of entry clearance.*

The effect of this provision is that visitors refused entry clearance only have a right of appeal by virtue of the Immigration Rules if they are proposing to visit a family member as defined by the regulations laid down by Parliament. By virtue of Regulation 2 of the Immigration Appeals (Family Visitor) Regulations 2012 laid before Parliament on 18 June 2012 with effect from 9 July 2013 the definition of family member was restricted.

- (1) *A person ("P") is of a class or description prescribed for the purposes of Section 88A(1)(a) of the Nationality, Immigration & Asylum Act 2002 (entry clearance), if -*
- (a) *the applicant for entry clearance ("A") is a member of the family of P; and*  
 (b) *P's circumstances match those specified in Regulation 3.*
- (2) *For the purposes of paragraph (1), A is a member of the family of P if AS is the -*
- (a) *spouse, civil partner, father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister;*
- (b) *father-in-law, mother-in-law, brother-in-law or sister-in-law;*
- (b) *son-in-law, stepmother, stepson, stepdaughter, stepbrother or stepsister; of P.*
- (3) *For the purposes of paragraph (1), A is also a member of the family of P if A is the partner of P.*

16. From the facts of this case I am satisfied that the appellant and Mr Stone are not partners as defined. They are not family members.
17. I did explain both to Mr Stone and Mr Richards (who was not aware of the situation) that a Duty Judge had considered that the grounds of appeal could be construed to include human rights and therefore the appeal, in its restricted form, could proceed. However the determination of Judge Osborne does not deal with either human rights or racial discrimination. It merely deals with the appeal under the rules for which there was no right of appeal.
18. Having found a material error of law, I set aside the decision of Judge Osborne and move forward to remake the decision.
19. I am again restricted to only consider matters for which there was a right of appeal. That is human rights and racial discrimination. Mr Stone understood this and made no attempt to pursue the appeal on the basis of racial discrimination under the Race Relations Act. It is merely a question of Article 8 ECHR.

20. Mr Stone referred to the letter mentioned above and to the grounds of appeal. He indicated that he had been able to maintain contact with the appellant by telephone etc and he had the option of visiting her and of the appellant making further application using the findings of Judge Osborne.
21. In considering the appeal under Article 8, I have noted the content of the letter of appeal and I note in particular that the appellant, as described by Mr Stone, is post-operative transgendered. Any reference to that in the grounds of appeal is in respect of the possible discrimination in Thailand and not in the United Kingdom. The respondent's decision to refuse entry clearance would not impact upon that and there is no allegation that the appellant's position effected the Entry Clearance Officer's decision.
22. Any family or private life enjoyed by the appellant with the sponsor had continued in the way that it always has. The appellant has visited the United Kingdom in the past and the sponsor has visited Thailand on a number of occasions. They keep in contact and have future plans.
23. Whilst the decision of the Entry Clearance Officer did affect their lives, the decision was proportionate. In reaching this conclusion I have looked at the situation of the appellant and sponsor before the decision and after it, and I have noted the ability of the appellant to reapply for entry clearance.
24. The decision of the respondent is not disproportionate and the appellant's appeal in respect of human rights must be dismissed.

### **Decision**

25. The determination of Judge Osborne contains a material error of law. The decision cannot stand and I remake that decision dismissing the appellant's appeal under Article 8 ECHR.
26. I note Judge Osborne made a fee award in favour of the appellant. As the appeal has now been dismissed, I am not in a position to make any fee award and that aspect of Judge Osborne's determination is again reversed.

Signed

Date 22/8/14

Upper Tribunal Judge Poole