IAC-AH-LR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11994/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 11th August 2015	**On 21st August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

GEMMA SANTOS EBIAS
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Howard of Fountain Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Mulvenna, promulgated on 26th June 2014, dismissing her appeal against refusal to vary her leave to remain in this country and to remove her. The Respondent's decision was dated 21st February 2014.

2. The application of the Appellant, who comes from the Philippines, had been made in November 2013 on the basis of her relationship with her daughter, who is a minor and who it is now accepted is a British citizen,

and of her relationship with a British citizen, Mr Stephen Read. Since the date of the decision now under appeal the Appellant and Mr Read have married, the date of the marriage being 6th September 2014.

3. The Appellant's application to the Secretary of State had been refused on several bases. It was said that she had failed to provide a response in time to questions raised by the Secretary of State, in contravention of paragraph S-LTR.1.7 of Appendix FM to the Immigration Rules, that she had not established that she and her partner were in a relationship coming within the Rules, that the Appellant's child was not British or settled or had been in this country for seven years, and it had not been shown that the Appellant had access to the child or was involved in negotiations regarding such. It acknowledged that the Appellant had a genuine and subsisting parental relationship but it was said she failed to fulfil the requirements of E-LTRPT2.2 or E-LTRPT2.4 of Appendix FM. It was also said that she did not meet the requirements of EX.1 to that Appendix nor of paragraph 276ADE of the Rules themselves. There were not thought to be any exceptional circumstances warranting consideration beyond the Rules.

4. The Appellant and Mr Read gave evidence at the hearing before the First-tier Tribunal. At that hearing the First-tier Tribunal Judge was told that it was now accepted that the Appellant's child was indeed a British citizen. With regard to a relationship with a child the judge found (paragraph 21 of the decision) that

> "... there is no evidence, other than the normal parent/child relationship, to suggest that the absence of the Appellant would cause any inevitable or insuperable problem in respect of the child's welfare, development or wellbeing. There is no independent evidence of contact or support. In these circumstances, I do not find that there are any material issues which would adversely affect the child if the Appellant were to leave the United Kingdom."

He expressed the view (at paragraph 17) that the only evidence with regard to a relationship with the daughter was the Appellant's own testimony and that of Stephen Read and there was a lack of supporting documentation. With regard to the relationship with Mr Read he stated (at paragraph 22) that the only evidence was their own testimony supported by a number of photographs and cards and he was not satisfied that the Appellant had discharged the burden of proof as to the existence of the relationship. He stated (at paragraph 24)

> "I emphasise that my findings in relation to each of the elements of the Appellant's claim are based on her failure to produce reliable evidence from any independent source. The burden of proof lies with the Appellant and she has not discharged the burden. "

With regard to the refusal under paragraph S-LTR1.7 of Appendix FM the judge stated (at paragraph 26) that the information sought by the Respondent had not been submitted by the time stated or that there was an application for a further extension of time and "the Respondent's finding cannot be impugned". At paragraph 25 he stated that the

Respondent's decision did not breach the Article 8 rights of the Appellant or her daughter or Stephen Read and it was not necessary to go on to consider the matter beyond the Rules.

5. In the grounds of application, which stand as the Grounds of Appeal, it was contended that in the skeleton argument produced for the hearing it had been set out that the Appellant did actually meet the requirements of the parent route under FMR-LTRPT1.1 and there had been no finding on that point, that the judge had failed to apply established case law under Article 8, that he had failed to give reasons or to make findings of fact and had failed to give adequate reasons as to why the best interests of the child, who was a British citizen, were best served by her mother being removed when there was a duty to safeguard and promote the child's best interests.

6. In granting permission, on 18th August 2014, First-tier Tribunal Judge Kimnell noted, "As the grounds contend E-LTRP2.2 and EX.1 are raised in the skeleton argument but the determination does not address that argument. There is no clear finding on the issue of the Appellant's relationship with her child, a British citizen. Paragraph 21 of the determination refers to "the normal parent/child relationship", whereas paragraph 16 refers to "not the most effective arrangement in which to foster and maintain a close relationship". There is no clear conclusion on the evidence the Appellant presented on this point in paragraph 17 of the determination."

7. At the hearing before me Mr Howard relied upon the grounds. Mr Smart for his part submitted that in any event a failure to comply with paragraph S-LTR1.7, which had been relied on in the refusal decision, had led to mandatory refusal under the Rules and the judge had found at paragraph 26 that the paragraph of the Appendix had not been met. He produced a copy of the relevant Section of Appendix FM as at the date of decision. Mr Howard said there had been no finding in paragraph 26 of the judge's decision as to whether there had been a reasonable excuse for the failure to comply and he referred to correspondence sent to the Respondent as to the difficulties at that particular time being encountered with access to the child and to the steps being taken by the Appellant to comply. Mr Smart pointed out the very specific nature of the request for information made by the Respondent.

8. Having considered the decision of the judge at first instance, the grounds and the submissions made I came to the view that there were material errors of law in the decision. It was apparent that the judge had heard oral evidence from the Appellant and from Mr Read both as to the Appellant's relationship with Mr Read and as to the relationship between the Appellant and her daughter. There was also before him a letter from the daughter. It is apparent from the Record of Proceedings that the evidence given was to the effect that there was regular contact with the child, who on occasions stayed with the Appellant. Whilst it appears to be the case that there was no external supporting evidence as to the relationship, beyond

the letter from the child, it was for the judge to make findings on the evidence given by the Appellant and by Mr Read, and if he disbelieved that evidence to give reasons why that was the case. The point is made very clearly in the reported decision of **MK (Duty to give reasons) Pakistan [2013] UKUT 00641 (IAC),** a Presidential decision, the head note to which states

> "It is axiomatic that a determination discloses clearly the reasons for a Tribunal's decision. If a Tribunal finds oral evidence to be implausible, incredible or unreliable or a document worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons."

There was no express discrete finding upon the oral evidence of the Appellant and Mr Read, which was relevant both as to their own relationship and as to the Appellant's relationship with her child.

9. With regard to paragraph S-LTR.1.7 the first line of that paragraph reads "The Appellant has failed without reasonable excuse to comply with a requirement to …". At paragraph 26 of his decision the judge made no finding as to whether either on the basis of the correspondence or the oral evidence which he heard a reasonable excuse had been put forward by the Appellant for failing to supply the specific information requested within the time stated. It was necessary to make a finding on that point and none was made. In the circumstances I set aside the decision and reasons with no findings preserved.

10. Having done so I indicated that I had time to hear the case again. Mr Howard asked that it be remitted to the First-tier Tribunal. I adjourned for a short period to allow the representatives to discuss whether it was practical to proceed immediately or whether the better route was for remittal to the First-tier.

11. When the hearing resumed Mr Smart indicated that as the matter was to be heard afresh the Respondent would wish to take issues on whether the financial requirements of Appendix FM and FM-SE had been met as was required by the Rules. I found that he was entitled to do so and Mr Howard did not demur. Bearing in mind the guidance in **RM (Kwok on Tong) [2006] UKAIT 00039** this was clearly correct and in fairness to the Appellant and as a wholly new issue had been raised it was not appropriate to proceed within the Upper Tribunal. As fresh credibility findings were required on all relevant points, including a new point, and having regard to Upper Tribunal Practice Statement 7.2.(b) I decided that the case should be disposed of by remittal to the First-tier Tribunal under the provisions of Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

Notice of Decision

The decision of the First-tier Tribunal has been set aside.

The case is remitted to the First-tier Tribunal with the directions below.

No anonymity order was requested and none is made.

Signed Date 19 August 2015

Deputy Upper Tribunal Judge French

Directions (Sections 12(3)(a) and 12(3)(b) of the Tribunals, Courts and Enforcement Act 2007

(1) The members of the First-tier Tribunal who are to reconsider the case should not include First-tier Tribunal Judge Mulvenna.

(2) None of the findings of Judge Mulvenna are preserved and the appeal is to be heard afresh. The Respondent has indicated that matters of maintenance under Appendices FM and FM-SE to the Immigration Rules are now in issue.

(3) The appropriate hearing centre is Stoke-on-Trent where the appeal should be listed not before six weeks from today's date. If an interpreter is required the Appellant's solicitors must inform the hearing centre at least fourteen days before the date of hearing.

(4) All witness statements and other documents to be relied upon by either party are to be served upon the other party and upon the Tribunal at least fourteen days before the hearing.

Signed Date 19 August 2015

Deputy Upper Tribunal Judge French