Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31387/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th October 2015	**On 23rd November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MRS JENNIFER RATIFICADO PADILLA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Plowright; Blakewells Solicitors
For the Respondent: Mr S Kotas, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Philippines. She entered the UK on 18 November 2009 and has resided in the UK to date. The Appellant's last period of leave expired on 5 June 2013 when she withdrew her last in-time application for an extension of leave to remain as a Tier 1 (Entrepreneur) migrant. Thereafter, the Appellant made successive applications for further leave to remain, which were unsuccessful culminating in her most recent refusal of her application for leave to remain as the spouse of a settled person. That refusal was dated 8 May 2014. Following that refusal, the Appellant's solicitors submitted a letter requesting consideration of her human rights under Article 8 of the ECHR. That consideration was refused via a letter dated

17 July 2014 that was accompanied by an IS151B, Notice of Immigration Decision that was dated 22 July 2014. The Appellant appealed against that decision.

2. The Appellant's appeal was decided on the papers submitted and was dismissed by First-tier Tribunal Judge Narayan under the Immigration Rules.

3. The Appellant appealed against the decision of Judge Narayan and was granted permission to appeal by First-tier Tribunal Judge White. The grounds upon which permission was granted may be summarised as follows:

   (i) It is arguable that there has been procedural unfairness in the Appellant not being informed of the deadline for submission of evidence when the appeal changed from an oral hearing to one to be decided on the papers, which may have deprived the Appellant of a reasonable opportunity to submit material evidence;

   (ii) It is arguable that the judge erred in stating "*there is no legal imperative to consider free standing Article 8*".

4. I was provided with a 'Rule 24' response from the Respondent which states that the judge had found there were no exceptional circumstances such that removal is not appropriate and the judge considered if there were compelling reasons to why the Appellant should not be removed.

Submissions

5. Mr Plowright placed reliance on his skeleton argument, which I have fully considered in reaching my decision. In relation to the first ground concerning procedural fairness, Mr Plowright rightly accepted that this was the only ground with a prospect of success. Mr Plowright highlighted that there were no witness statements as there was no forewarning of when the evidence should be submitted. I was provided by the Appellant's solicitors with a 29-page bundle including various exhibits, which arrived the day before the hearing. It was contended that this bundle should be considered as it would demonstrate the materiality in not being given the opportunity to present evidence, as the bundle contained evidence that the Appellant would have produced had she been given the opportunity.

6. After taking instructions from his solicitors, Mr Plowright was able to produce a letter from those that instruct him, sent to IAC Stoke on 28 October 2014 which recorded the Appellant's request to change from an oral to a paper-based appeal hearing. The appeal was originally listed to be heard at Nottingham Magistrates Court on 10 November 2014. Mr Plowright also produced a further letter of the same date and format sent to Nottingham Magistrates Court by his instructing solicitors. The Tribunal's file carries a reply to the letters dated 10 November 2014 which reflects that the request was accepted but makes no mention of any further matters other than there being no fee to refund to the Appellant. Mr Plowright finally produced a 'file note' from Blakewells solicitors' files dated 7 November 2014 which reflects that a staff member from the firm called the Tribunal to ask if the hearing was changed from an oral hearing to a paper one and that the Tribunal apparently stated

that the hearing was de-listed and a notice would be sent soon with a date for final submissions. The note finally reflects that the call lasted five minutes. Mr Plowright submitted that the file note should be taken at face value but accepted that Blakewells should have submitted the file note sooner and included a statement of truth regarding the events underlying the grounds of appeal which failed to give any relevant dates or specifics underlying permission to appeal.

7. Concerning the substantive Determination, Mr Plowright submitted that the judge is technically wrong to state that there is no legal imperative to consider freestanding Article 8 at paragraph 19. However, he accepted that the judge dealt with Article 8 at paragraph 17 anyhow. Mr Plowright describes ground 3 as not being of assistance anyhow. Concerning the materiality of the absent evidence to the judge's determination, it was submitted that the only additional evidence was that the Appellant was pregnant with a child at the time and that child is now born. Mr Plowright submitted it was a *Chikwamba*-style case and that there would need to be exceptional circumstances, however making an application for entry clearance might be a moot point as the Appellant's husband is receiving disability living allowance and may not be able to meet the £18,600 threshold. If I found there was an error, I was invited to proceed to re-make the decision based on the evidence now on file.

8. In reply, Mr Kotas accepted that the solicitors had called the Tribunal concerning the change of hearing from an oral one to a paper-based one. Mr Kotas submitted that there should have been a supporting witness statement dealing with the unfairness in the manner in which the appeal proceeded and was reluctant to accept there had been procedural unfairness when that had not been made out on the evidence.

9. Concerning the substantive Determination and the materiality of the absent evidence, Mr Kotas noted that there is a Department for Work and Pensions (DWP) Letter and other evidence which post-dates the hearing which I was asked not to take into account as it would not have been provided. Mr Kotas accepted that the strongest factors were the Appellant's pregnancy and that she would have been 1 month pregnant at the time (as her due date was recorded as 22/08/15 at the time at page 36 of the bundle). The other evidence not before the Tribunal related to the husband's family connections in the UK. However, given the Appellant's immigration history, she submitted a Tier 1 entrepreneur on 1 August 2012 which was withdrawn on 5 June 2013, and before withdrawing that application she made a variation of her application on 5 Feb 2013 based upon her private and family life with a George Doko (as stated in the refusal letter) which was refused with no right of appeal. The Appellant states in her witness statement that she met her current partner (Mr Heng Keong Lim) in March 2013 and the relationship started in April 2013. Their marriage took place in November 2013 and the Appellant got married when she had no leave and as there are no children involved at the date of hearing before the First-tier Tribunal, based on *SS (Congo)*, exceptional circumstances are needed and even if the Appellant were one month pregnant, the judge would have reached the same conclusion. It was further submitted that little weight should be given to the Appellant's private life due to her precarious status. In terms of Article 8, it was contended that there was a full balancing exercise. Mr Kotas asked me to note

that the Appellant has not turned up again and it was unsatisfactory to proceed without her and there was no medical evidence excusing her. Taking evidence at its highest, the two pieces of missing evidence, the one-month pregnancy and the husband's family connections, would not have been of assistance.

Error of Law

10. At the close of submissions, I indicated that I would reserve my decision, which I now give. In summary, I find that there was no error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

11. I find that do not find that there is an error of law such that the determination should be set aside. As stated at the hearing to both parties, I cannot take new facts into account which were not in existence at the time of the hearing before the First-tier Tribunal, such as the recent birth of the Appellant's and her partner's child.

12. I do not find that there has been procedural unfairness that either intentionally or inadvertently resulted in the Appellant being deprived of the opportunity of putting material evidence before the judge that then led to a material error in the judge's determination. I come to this conclusion having given the benefit of the doubt to the Appellant's solicitors' late-served evidence that a phone call was placed to the Tribunal whereupon the solicitors were apparently told that there would be a notice sent to them with 'a date for final submissions'. I reluctantly give the benefit of such doubt as it is not in the custom of Tribunal staff to give such assurances regarding dates for service of submissions as the evidence is customarily provided several weeks in advance of a hearing and the request to de-list the hearing only took place less than 2 weeks before the hearing date itself. Therefore, one would have expected the Appellant's representatives to have complied with any directions before that time. As it so happens, the appeal was 'heard' on the papers on 11 December 2014, more than one month after the Appellant's representatives were informed that the hearing would take place on paper. During that time, no further correspondence was exchanged and there is no evidence from the Appellant's solicitors showing that further enquiries were made as to when any remaining evidence should be submitted by.

13. Returning to the ground of appeal, in order to gauge whether there was procedural unfairness it is crucial to determine what difference any absent evidence would have made to the judge's decision to determine the unfairness that is said to be present in this particular scenario. Context is key.

14. Turning to the judge's determination, whilst noting the absence of statements from the Appellant and her husband (at paragraph 11), the judge considers the documentation submitted by the Appellant with her application and concludes that the Appellant does meet the suitability requirements and eligibility requirements for limited leave to remain as a partner and that the partner does meet the definition of a partner under the Immigration Rules. Notwithstanding Mr Kotas' submissions regarding a previous relationship with George Doko, the judge has already accepted that the Appellant is in a genuine and subsisting relationship with her husband, Mr

Lim. The reason that the appeal failed is due to the Appellant failing to show insurmountable obstacles to family life with her husband continuing outside the UK in the Philippines or Malaysia and that 276ADE(iii) to (vi) are equally not met. This is fully reflected at paragraphs 15-16 of the determination and a separate Article 8 assessment is performed at length at paragraph 17 thereafter. The question is does the new evidence establish anything which the judge would have considered an insurmountable obstacle or sufficiently compelling to render removal disproportionate.

15. I have fully considered the bundle of evidence submitted (although only served the day before the hearing) from the Appellant's representatives which includes Exhibit JRP001, which is a bundle of documents that the Appellant submits would have been placed before the First-tier Tribunal had she had the opportunity. The key evidence from these 40 pages, which both parties found their submissions upon, is the evidence of pregnancy and the partner's family ties.

16. When assessing this evidence it is important to bear in mind that the judge has performed a comprehensive Article 8 assessment as Mr Plowright rightly observed in his submissions at paragraph 17 of that determination.

17. Taking the evidence in turn, turning first to the witness statements of the Appellant and her husband, in my judgment, there is nothing of materiality that is referred to that would affect the outcome of the judge's assessment from paragraphs 10 onwards of the determination. The letters from the Appellant's brother-in-law and his wife do not add any detail to the consideration already given by the judge. The letters discuss in very brief terms that the couple are happy and rely upon each other but do not state much more. There is a letter from Castle Partnership GP Practice however, this evidence post-dates the determination and would not have been before the First-tier Tribunal. Nonetheless, the partner's ill health was already considered in the Respondent's refusal letter and that refusal and its reasoning was explicitly upheld in the judge's determination. However, any new evidence concerning treatment for or rehabilitation due to the partner's polio is a matter of new evidence that could not have been presented to the Tribunal and cannot be considered by me now in considering the lawfulness of the determination. Again, there is new evidence from the DWP which documents the partner's entitlement to benefits however, this evidence did not come into existence until well after the hearing and could not have been put before the Tribunal at the relevant time. Next, there is an NHS printout which records the Appellant's pregnancy and her due date being 22 August 2015. This confirms that at the relevant date of paper hearing, the Appellant would have been a few weeks to one month pregnant. It is clear that taking this evidence at its highest; the pregnancy would have been in a nascent stage and a far off event that could not have had a bearing on the Appellant's removal at that time. Again, the subsequent birth or nationality of any child the Appellant may have had is not a matter for this Tribunal retrospectively assessing what evidence could have been placed before the Tribunal on 11 December 2014.

18. Therefore, having considered the new evidence that might have been before the Tribunal on 11 December 2014, namely the letters of support from the Appellant's brother-in-law and his wife, the witness statements and the evidence of pregnancy, taking all of that evidence at its highest, none of it establishes anything that could be classified as an insurmountable obstacle or sufficiently compelling to render the decision to remove as disproportionate.

19. Concerning the new evidence referred to above, none of it could have been raised before the First-tier Tribunal and it cannot be said that the First-tier judge erred in law in failing to consider it. The Appellant is entitled to ask for that evidence to be considered by the Respondent on a further application if so advised, but it is of no concern for this Tribunal in this context.

20. In summary, I am not satisfied that there is any error of law in the decision of the First-tier Tribunal, or any that could have affected the outcome of the appeal.

Decision

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

22. The decision to dismiss the appeal therefore stands.

Signed Date

Deputy Upper Tribunal Judge Saini