



IAC-FH-NL-V1

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

Appeal Number: IA/05437/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 11th February 2016**

**Decision & Reasons Promulgated
On 1st March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**ELIZABETH DULNUAN MATEO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Benfield, Counsel instructed by Bespoke Solicitors

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The applicant, a citizen of the Philippines appealed to the First-tier Tribunal against the decision made by the Secretary of State on 28th January 2015 to refuse her application for leave to remain in the UK on the basis of her private and family life. First-tier Tribunal Judge S Aziz dismissed the appeal under the Immigration Rules and decided that there was no need to consider Article 8 freestanding outside of the Rules and therefore dismissed it under Article 8 also. The Appellant now appeals with permission to the Upper Tribunal.

2. The background to this appeal is that the Appellant entered the UK unlawfully on 8th April 2004. She applied for leave to remain on 22nd October 2009 and that was refused with no right of appeal. On 20th April 2011 her representatives asked for reconsideration of her case and that was refused. On 15th December 2012 the Appellant's daughter was born in the UK. She is a British citizen due to the fact that the Appellant's husband has indefinite leave to remain in the UK. On 19th July 2014 the Appellant married her partner and on 18th September 2014 she made an application for leave to remain. The refusal of that application is the subject of this appeal.
3. In the reasons for refusal letter the Secretary of State did not accept that the Appellant's marriage was valid due to a question as to when the Appellant's former husband had died. However at the hearing in the First-tier Tribunal the Presenting Officer accepted that the Appellant and her current husband had entered into a valid marriage ceremony on the basis of a death certificate produced in relation to the Appellant's first husband.
4. The First-tier Tribunal Judge considered Appendix FM and Ex 1 of Appendix FM and concluded that it would be reasonable to expect the Appellant's child to leave the UK and that there were no insurmountable obstacles to the Appellant and her husband continuing family life in the Philippines as they are both Filipino nationals. The judge considered paragraph 276ADE(1)(vi) of the Immigration Rules and decided that there would be no significant obstacles to the Appellant reintegrating into the Philippines. The judge decided that there was no need to consider Article 8 outside of the Rules.
5. The Appellant's grounds of appeal contend that the case should not have been considered under Ex 1 as the Appellant does not meet Appendix FM as a parent and that the judge erred in failing to consider the appeal outside the Rules under Article 8. It is also contended that the judge erred in failing to consider the cases of **Ruiz Zambrano C-34/09** and **Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC)** and failing to recognise that removal would require the family to relocate the child outside the European Union. It is also contended that the judge erred in failing to consider Section 117B (6) of the Nationality, Immigration and Asylum Act 2002.
6. Permission to appeal was granted by Upper Tribunal Judge Martin sitting as a judge of the First-tier Tribunal who considered that it was arguable that the First-tier Tribunal judge erred in his consideration of Ex 1 given his findings about the role of the Appellant in her very young child's life and in particular in light of the Secretary of State's own guidance as to the reasonableness of requiring a British child to leave the UK or separate the child from its parents.
7. At the hearing before me Mr Walker clarified that there was no specific guidance in relation to the issue of British children and that he suggested that Upper Tribunal Judge Martin may have been referring to the concession made by the Secretary of State in the case of **Sanade**.
8. At the hearing before me Ms Benfield relied on her skeleton argument which she said clarified the Grounds of Appeal. She contended that the judge was wrong to have

considered Appendix FM under the parent route as the Appellant is excluded from Appendix FM under the parent route because she is married to her husband who has indefinite leave to remain in the UK. She submitted that such error may not have been material had the judge gone on to consider Article 8 on a freestanding basis outside of the Rules. She submitted that the judge's consideration of paragraph 276ADE (1) (vi) was insufficient because it did not take account of the child's nationality. She submitted that the child's British nationality is a highly material part of this case and that it is absent from consideration. She relied on the case of **JO & Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC)** and submitted that the judge's decision is lacking in any proper analysis of the circumstances of the child. She submitted that paragraph 62 of the judge's decision is not sufficient in circumstances where a British child would be forced to leave the UK and the European Union.

9. Mr Walker accepted that there is force to Ms Benfield's submission that the First-tier Tribunal Judge erred in considering the appeal under Appendix FM parent route. He accepted that paragraph 62 which deals with the Appellant's daughter is brief.

Error of law

10. I accept the submissions put forward in the skeleton argument that the judge erred in his consideration of Appendix FM. The appropriate provisions applicable in this case are the partner route and not the parent route. I accept that this may not have been material had the judge gone on to undertake a full assessment of the appeal under freestanding Article 8. In any event I am satisfied that the First-tier Tribunal Judge materially erred in failing to undertake a full assessment as to whether it is reasonable to expect the Appellant's British citizen child to be removed from the UK and the European Union or to remain in the UK without her mother in light of the case law set out above. I therefore set aside the decision of the First-tier Tribunal.
11. In terms of remaking the decision Ms Benfield submitted that further evidence is required in relation to the changes in the circumstances of the family since July 2015. I accept that none of the findings can be preserved as this requires further findings and reassessment of the case under the Immigration Rules and Article 8.
12. I am satisfied that in these circumstances the nature and extent of the judicial fact finding which is necessary in order for the decision to be remade is such that (having regard to the overriding objective in Rule 2 of the Upper Tribunal Procedure Rules 2008) it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The judge made an error of law in relation to this appeal and I set aside the decision of the First-tier Tribunal. I remit the appeal to the First-tier Tribunal to be heard afresh.

No anonymity direction is made.

Signed

Date: 24th February 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 24th February 2016

Deputy Upper Tribunal Judge Grimes