The Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32313/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 5 March 2015	**On 23 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

LSY
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms McCrae, Counsel instructed by Halliday Reeves Law Firm
For the Respondent: Mr Dewison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Malaysia. She entered the UK on 7 March 2008 with a valid grant of entry clearance as a student until 31 October 2010. An application made for a variation of that leave was refused on 16 December 2010, so that the Appellant was an overstayer from 31 October 2010.

2. On 28 January 2011 the Respondent issued to the Appellant a certificate of approval of marriage, for a proposed wedding to a British citizen, Mr Wan Can Go. Once that wedding had taken place the Respondent

granted a period of DLR to the Appellant from 11 April 2011 until 11 April 2014. On 9 April 2014 the Appellant applied for a variation of that leave, but it was refused on 7 August 2014 on the basis the marriage was not longer subsisting. As a result the Respondent went on to make a removal decision by reference to s47 of the 2006 Act the same day.

3. The Appellant's appeal against these immigration decisions was heard on 30 October 2014, and it was allowed under the Immigration Rules in a Decision promulgated on 18 November 2014 by First Tier Tribunal Judge Hands.

4. First Tier Tribunal Judge Cox granted the Respondent permission to appeal the decision on 19 January 2015 on the basis it was arguable the Judge had either failed to apply, or had misapplied the provisions set out in Appendix FM to the Immigration Rules.

5. The Appellant filed no Rule 24 Notice.

6. Thus the matter comes before me.

The errors in the Judge's approach

7. The appeal was pursued before the Judge on the basis the Appellant claimed to meet the requirements of Appendix FM to the Immigration Rules, and even if she did not, her appeal against the removal decision ought to be allowed outside the Immigration Rules on the basis her removal to Malaysia would be a disproportionate interference in her Article 8 rights, notwithstanding the failure of her marriage. During the course of the marriage the Appellant had given birth to two children, both of whom were entitled to British citizenship derived from their father, her ex-husband. Thus the available evidence upon the true arrangements for the upbringing of these children, and the true nature of the Appellant's involvement in their lives required a careful consideration by the Judge. The need for a careful examination of that evidence was highlighted by the point taken by the Respondent against her, namely that although certain documents relating to these children purported to have been signed by the same person, the signatures were so distinct that this was unlikely to have been the case.

8. The Judge found [15] that she was not satisfied that the same individual had signed the birth certificates of the children as their father, and the letters said to set out their father's agreement to custody and contact arrangements for those children. She also found that the Appellant had not provided her true address either to the school attended by her children, or to the Respondent in connection with the application, or to the Tribunal in connection with her appeal [18]. She found the Appellant an unreliable witness [18], and decided that she could place little weight on the documents relied upon by the Appellant to corroborate her claim to have a role in the lives of her children [15, 16]. Nevertheless the Judge went on to find [17] that the Appellant did have some

involvement in the lives of her children – although she failed to make any findings as to what that involvement consisted of.

9. Those findings, if they were to stand, would not only bring the suitability requirements of Appendix FM into play, but also beg the question of what actual involvement in the lives of her children the Appellant had enjoyed since the breakdown of her marriage. The Judge made no reference to these issues, and thus made no findings of fact in relation to them before finding that the Respondent "did not err in law in refusing the Appellant further discretionary leave to remain in the UK based on her relationship with her sons" [19], and apparently dismissing the Article 8 appeal [20].

10. The Judge then returned however to the Article 8 appeal, and decided that the Appellant did not meet the requirements of Appendix FM E-LTRPT, because she did not have sole responsibility for her two sons, and was not the parent they normally lived with [24]. Based apparently upon the display of affection between the Appellant and the two children who attended the hearing, the Judge then found that the Appellant did take an active role in the lives of her children [29] and thus that the requirements of Appendix FM were met. The appeal was then allowed under the Immigration Rules [31].

11. I am satisfied that the Judge's approach to the evidence was such as to render the Determination unsafe. I have in these circumstances considered whether or not to remit the appeal to the First Tier Tribunal for it to be reheard. In the circumstances of the appeal I am satisfied that this is the correct approach, and I note Mr Dewison does not seek to suggest otherwise. In circumstances where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the Appellant of the opportunity for his case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012.

12. Indeed it is common ground before me that the Decision is so fatally flawed because of internal inconsistencies (in particular between [20] and [29]), and, a failure to properly consider the relevant provisions of Appendix FM, and then make the necessary findings of fact, that there is no alternative to my setting aside the Decision, and remitting the appeal to the First Tier Tribunal for rehearing afresh. No findings of fact can survive.

13. Having reached that conclusion, and with the agreement of the parties I make the following directions;

i) The decision upon the appeal is set aside and the appeal is remitted to the First Tier Tribunal for hearing after 15 April 2015. The appeal is not to be listed before Judge Hands.

ii) Any further evidence that the Appellant wishes to rely upon in relation to either her ability to satisfy the requirements of E-LTRPT or S-LTR shall be filed and served by 5pm on 15 April 2015.

Decision

14. The Determination promulgated on 6 August 2014 did involve the making of an error of law and accordingly the decision upon the appeal is set aside. The appeal is remitted to the First Tier Tribunal with the following directions;

    i) The decision upon the appeal is set aside and the appeal is remitted to the First Tier Tribunal for hearing after 15 April 2015. The appeal is not to be listed before Judge Hands.

    ii) Any further evidence that the Appellant wishes to rely upon in relation to either her ability to satisfy the requirements of E-LTRPT or S-LTR shall be filed and served by 5pm on 15 April 2015.

Deputy Judge of the Upper Tribunal JM Holmes
Dated 17 March 2015