



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/13071/2015

THE IMMIGRATION ACTS

Heard at Field House
On 16 June 2016

Decision & Reasons Promulgated
On 06 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MRS MYLEEN MINA NEWMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Ahmed, Counsel
For the Respondent: Mr J McGirr, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the Philippines who was born on 23 August 1976 who applied for leave to remain in the United Kingdom under Appendix FM and on the basis of her private and family life outside the Immigration Rules. The respondent refused her application on 17 March 2015 and she appealed. In a decision promulgated on 10 December 2015 Judge of the First-tier Tribunal Farmer dismissed her appeal under both the Immigration Rules and under Article 8 of the European Convention on Human Rights.
2. The appellant sought permission to appeal which was granted by Judge of the First-tier Tribunal Frankish on 24 May 2016. His reasons for so doing are:-

- “1. In a decision promulgated on 10 December 2015 F-tTJ Farmer dismissed an appeal, having entered as a student, against refusal of leave to remain under FM or article 8 by reason of not qualifying.
 2. The application for permission to appeal asserts that, a lack of English language certificate being the only objection, and the F-tTJ finding for the appellant on this point, the appeal should have been allowed under the partner route rather than going on wrongly to consider EX.1; failed to apply Zambrano or IDI of August 2015 as a partner/parent of ten years standing; wrong article 8 assessment per SS (Congo) and S117(b)(6) for this genuine marriage to a UK citizen and their UK citizen child.
 3. Notwithstanding previous use of a false English language certificate, with a new uncontested certificate, §11 indicates that the appellant had done all she need to do to succeed. All grounds, however, are arguable.”
3. Thus the appeal came before me today.
 4. In his decision the judge recorded that since the making of the respondent’s decision the appellant has given birth to a baby T M N born on 2 June 2015 who is a British citizen and that the appellant was in the United Kingdom with her husband and child having married a British citizen on 18 June 2014. The appellant entered the United Kingdom as a student on 6 October 2006 and was granted leave to remain following various applications until 29 September 2015. Her leave was curtailed by notice dated 29 August 2014 and a decision made to remove her on 17 March 2015 being the decision subject to the appeal.
 5. The respondent refused the application on the basis that the appellant had failed to meet the suitability requirements because she used deception by submitting a false document in support of an application for a visa. She cannot rely on EX.1 in support of her appeal and she failed to meet the requirements of paragraph 276ADE of the Immigration Rules as she was 30 years old when she arrived in the United Kingdom and lived most of her life in the Philippines, where it cannot be said that there are significant obstacles to her reintegration into that country. Further, no compelling or exceptional circumstances exists that merit consideration outside the Immigration Rules.
 6. The nub of this appeal is the findings of the judge at paragraph 11 of his decision. It state:-
 - “11. The appellant does meet the suitability criteria under the Immigration Rules Appendix FM. It was conceded by the appellant that she did use deception to pass an English language test in 2010. She paid in total £650 to get a proxy sitter who helped her with the test. Since that time she has passed a test on her own merit (this is not in dispute) and this result was used in support of this application. Having considered the Rules I agree with this submission by Mr Dias conclusion and find that the suitability requirements of Appendix FM S-LTR.2.2 are met. I find this because the false document was used in a previous application and whilst this is

relevant overall to the credibility of the applicant the false document, from the reading of the Rules has to have been used in the application. It does not extend to previous applications. Therefore as this was the only matter in issue under suitability I find that she does meet the suitability criteria.”

7. The judge went on to find at paragraph 16 of his decision that the appellant could not take advantage of EX.1 and further there were no insurmountable obstacles to her husband joining her in the Philippines. Paragraph 276ADE was not pursued in the appeal. The judge considered exceptional circumstances and found that none existed. However, he did go on to consider the case under Article 8 on the basis of the existence within the factual matrix of this appeal of a British child. The judge then went on to carry out an Article 8 balancing exercise subsuming within it the best interests of that child before dismissing the appeal both under the Immigration Rules and on Article 8 grounds.
8. Mr Ahmed submitted that the only issue within this appeal was whether the appellant could meet the suitability criteria under the Immigration Rules of Appendix FM. Having found that those criteria are met (and this was accepted by Mr McGirr) it was for the judge simply to allow the appeal under the Immigration Rules with no consideration of exceptionality under Appendix EX.1 required. Paragraph 12 of the judge’s decision states:-

“12. Having satisfied myself that the appellant meets the suitability criteria I went on to consider whether she could avail herself of EX.1 either as a partner or as a parent.”
9. The decision discloses an error of law as it is only necessary to look at EX.1 if the appellant were unable to satisfy the suitability criteria. That amounts to a material error of law.
10. He then went on to make alternative submissions relying on the written grounds of appeal with particular reference to paragraph 13 where it is asserted that the appellant, should in any event, benefit from EX.1(a) as she has a genuine and subsisting relationship with a child who is under the age of 18 and a British citizen. The grounds then referred to the authority of **Ruiz Zambrano (EU citizen) [2011] EU ECJ (C-34/09)** and the respondent’s own policies.
11. Mr McGirr highlighted that on his analysis the appellant had made a valid application which became subject to the appeal before Judge Farmer. He was accepting that the appellant met the suitability requirements but argued nonetheless that, contrary to the submission of Mr Ahmed, it was open to the judge to go on and consider EX.1.1 of the Immigration Rules. He argued that the whole of the Immigration Rules had to be met.
12. With regard to the first limb of Mr Ahmed’s submissions it was accepted by Mr McGirr, and I find, that this is an appellant who met the suitability requirements.

13. There is before me no cross appeal argument that the judge erred by failing to consider the eligibility requirements. Mr McGirr argued that the issue was raised within the final sentence of paragraph 3 of the respondent's Rule 24 notice. It states:-

"The grounds do not make any reference to any element of the claim that was not captured by the consideration under the Rules."
14. I have considerable difficulty in understanding the meaning of this sentence in the context of the submissions being made, and Mr McGirr was unable to assist me further in relation thereto. However, I was referred by Mr Ahmed to the respondent's own refusal letter of 17 March 2015 wherein it appears that the only assertion against the appellant meeting the eligibility grounds is consequent upon her being found to be unsuitable. It is important to note that the issue of the eligibility requirements has never previously been raised by the respondent within this appeal.
15. That being the case Mr Ahmed urged me to accept that in light of the appellant meeting the suitability requirements and the respondent accepting that to be the position, the appeal should be allowed outright.
16. That is a submission that I accept.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remake the decision in the appeal by allowing it.

No anonymity direction is made.

Signed

Dated: 5 July 2016

Deputy Upper Tribunal Judge Appleyard