



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

Appeal Number: IA/41894/2013

THE IMMIGRATION ACTS

Heard at Field House

On 22 April 2014

Determination

Promulgated

On 28 May 2012014

.....

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

NIPHAPORN CHAICHIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr T Melvin

DETERMINATION AND REASONS

1. The appellant who is a national of Thailand where she was born on 13 January 1979 appeals with permission the decision of First-tier Tribunal Judge K Miller who for reasons given in his determination dated 3 March

2014 dismissed the appeal against the decision dated 30 September 2013 refusing to issue a residence card.

2. The appellant had applied for that card as an extended family member of a Spanish national, Mario Lorenzo. She had come to the United Kingdom on 8 March 2004 with entry clearance as a student and remained in this category until 2009 when she applied for a work permit which was refused. The respondent informed her that she was no longer entitled to remain in 2010. Her application for a residence card is dated 29 January 2013.
3. The respondent refused the application because she was not satisfied with the evidence provided that the appellant was in a durable relationship. She also referred to Appendix FM and paragraph 276ADE but reached no decision on whether the appellant could succeed under the new Rules on the basis that no valid application for Article 8 consideration had been made.
4. The grounds of appeal to the First-tier Tribunal include the ground that, *inter alia*, the respondent's decision was incompatible with the appellant's rights under ECHR. No specific Article is identified and no specific basis on which it was contended that there would be interference is advanced.
5. The judge gave detailed reasons why he did not consider the appellant was able to succeed based on the claimed durable relationship. He was in no doubt that the appellant and Mr Lorenzo were good friends but did not accept that they were any more than this or that their relationship was such that they could be described as unmarried partners.
6. The grounds of challenge argue that the judge erred in two respects. The first is that the judge failed to take into consideration material, verbal and documentary evidence adduced before the First-tier Tribunal. The second is that the judge erred in failing to consider Article 8.
7. As to the first ground it is argued that the judge could have reached a different conclusion on consideration of the relationship and had failed to refer to the witness statements by the appellant and his spouse nor the evidence of a Mr Supakit Tangpanlert.
8. In granting permission to appeal, First-tier Tribunal Judge Andrew observed that there was no reference at all to Article 8 in the determination and thus found there was an arguable error of law.
9. There was no appearance by the appellant at the hearing before me. Her solicitors had written to the Upper Tribunal on 17 April explaining that due to the appellant's financial situation and an insufficiency of funds, she wished to rely on the submissions made to the First-tier Tribunal and the further grounds submitted for permission to appeal. I therefore proceeded in her absence.

10. As to the first ground, I accept Mr Melvin's submissions that there is no merit. The determination refers to the bundle of documents including the relevant statements and sets out the oral testimony from the appellant, Mr Lorenzo and Mr Tangpanlert. Having regard to the judge's careful assessment of the evidence, there is no reason to believe the judge did not have full regard to the evidence before him and I am not persuaded that this ground is any other than a disagreement with a conclusion legally open to the judge on the evidence. As the grounds themselves state, the judge could have come to a different conclusion on his consideration of the relationship. But the fact is he did not do so and did not err in reaching the conclusion that the parties had not established a durable relationship under the Regulations.
11. I turn to the second ground. It is correct as accepted by Mr Melvin, that the judge did not reach a conclusion on the Article 8 grounds. He could not be criticised for failing to do so if all that he had before him was the barest of challenges in the grounds of appeal. The appellant's statement however provides marginally more detail:

"I request the Tribunal to consider my established private and family life in the United Kingdom and the respondents requiring me to leave the United Kingdom will be in breach of my rights under Article 8 of ECHR."
12. I conclude that the appellant was entitled to a decision on that ground. To that limited extent I consider the judge erred in law. The decision dismissing the appeal is set aside which I now proceed to remake. There is no new evidence before me that was not before the First-tier Tribunal. The appellant has chosen not to attend the Upper Tribunal and she must accept that my decision can only be made on the evidence that was before the First-tier Tribunal.
13. I am not satisfied that the appellant is able to rely on any protected family life in the United Kingdom. The only basis on which she sought to do so was in respect of a relationship which the First-tier Tribunal Judge gave valid reasons for concluding was not a durable one and thus not family life. This leaves the issue of whether the appellant has a protected private life.
14. The Immigration Rules have now been amended to include a basis on which a private life can lead to a grant of leave to remain at paragraph 276ADE. In the appellant's case the relevant question is whether she has lived continuously in the United Kingdom for at least twenty years or in the alternative whether she has lived here continuously for less than twenty years but has no ties (including social, cultural or family) with Thailand.
15. There is no dispute that the appellant has lived here for only ten years. Of those ten years, some three/four have been without lawful leave to remain. There is no evidence that the appellant has lost ties with her country of origin and I am not therefore persuaded that she is able to succeed under paragraph 276ADE.

16. The Tribunal in *Gulshan* (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) observed at 24(b):

“After applying the requirements of the Rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: *Nagre*; ...”

The absence of any evidence by the appellant that there are compelling circumstances which are not sufficiently recognised under the architecture of paragraph 276ADE leads me to conclude that the appellant is unable to succeed on discrete Article 8 grounds.

17. By way of summary therefore, the decision of the First-tier Tribunal contained an error of law only insofar as it failed to determine the Article 8 ground. I remake the decision in order to consider that ground. On the evidence before me I am not satisfied that ground is made out; article 8 is not engaged. I therefore dismiss the appeal.

Signed

Date 23 May 2014



Upper Tribunal Judge Dawson