



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

Appeal Number: HU/15254/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 18th December 2018**

**Decision & Reasons
Promulgated
On 8 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

**MARIAM [S]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr. E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Real promulgated on 23rd October 2018. The underlying decision that was the subject of the appeal before the First-tier Tribunal (“FtT”) was the decision of the respondent dated 5th July 2018 to refuse the appellant’s application for leave to remain in the UK on human rights grounds.

2. The appellant is a national of Ghana. Her immigration history is not entirely clear. She appears to have arrived in the UK in 2008, and subsequent applications made by her for leave to remain in the United Kingdom on human rights grounds, were refused in August 2013 and October 2015. The appellant then appears to have made further submissions to the respondent, but in May 2016 and April 2017, the respondent refused to treat the further submissions as a fresh claim. On 9th January 2018, the appellant made an application for leave to remain in the UK on the basis of her family life with her two children, both of whom were born on 9th July 2012. That application was refused for the reasons set out in a decision dated 5th July 2018 that attracted an in-country right of appeal. The appellant's appeal against that decision, was dismissed for the reasons set out in the decision of FtT Judge Real promulgated on 23rd October 2018.

3. The appellant did not attend at the hearing of the appeal before the FtT Judge. In her decision, the FtT Judge records that "*The appeal was listed for determination on the papers, with the consent of both parties.*". The FtT Judge summarises the claim made by the appellant at paragraphs [4] to [7] of her decision. At paragraph [16] of her decision, the FtT Judge states:

"No documentary evidence has been filed by either party in support of the appeal.."

4. In the grounds of appeal filed, the appellant claims that contrary to what is said by the FtT Judge, the appellant's representatives had in fact filed a bundle of documents in support of the appeal, that the FtT Judge has simply had no regard to.

5. Permission to appeal was granted by FtT Judge Swaney on 12th November 2018. The matter comes before me to consider whether the decision of the FtT involved the making of a material error of law, and if so, to remake the decision.

6. I have carefully considered the Tribunal file and note that a bundle of documents containing the evidence relied upon by the appellant was in fact received by the Tribunal on 31st August 2018 from those that represented the appellant at the time. That contains not only a copy of the application that was made by the appellant but also a number of other documents. At the hearing of the appeal before me, Mr Tufan concedes that the Judge erroneously proceeds upon the basis that the appellant has not filed any evidence in support of the appeal. He accepts that in the circumstances, the decision of the FtT cannot stand. He concedes that the decision of the FtT contains a material error of law and should be set aside.
7. I remind myself that in **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** the Upper Tribunal held that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-Tier Tribunal (the “FtT”) to be set aside. The authorities referred to by the Upper Tribunal in **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** make it clear that upon an appeal such as this, the criterion to be applied is fairness and not reasonableness. There are plainly concerns as to the status of the appellant’s children and whether or not they are British Citizen’s as claimed by the appellant. That is a matter that requires careful consideration, and if they are found to be British Citizens, there will plainly be a need for the Tribunal to consider the consequences that flow from such a finding.
8. I must then consider whether to remit the case to the FtT, or to re-make the decision myself. As the Upper Tribunal did in **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)**, I consider that where a first instance decision is set aside on the basis of an error of law involving the deprivation of the appellant’s right to a fair hearing, the appropriate course will be to remit the matter to a newly constituted FtT for a fresh hearing.

