



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03846/2015**

THE IMMIGRATION ACTS

**Heard at Field House
On 22 January 2016**

**Decision & Reasons
Promulgated
On 3 February 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

**MRS M M
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Doerfel, Counsel instructed by International Care Network

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity direction was made by the First-tier Tribunal. As a protection claim, it is appropriate to continue that direction.

DECISION AND REASONS

1. The Appellant appeals the decision of First-tier Tribunal Judge Lamb promulgated on 17 August 2015 (“the Decision”) finding that the Appellant had no in country right of appeal on the basis that the Respondent had certified the immigration claim so that an appeal could be brought only from outside the UK.
2. Permission to appeal was granted by First-tier Tribunal Judge Zucker on 3 November 2015. The Secretary of State has conceded in her Rule 24 statement that there is an error of law in the Decision and she is right to do so. The decision against which the Appellant appeals is contained in the notice which is given in accordance with the Immigration (Notices) Regulations 2003 (“the Notices Regulations”).
3. As the Judge observed at [4] of the Decision, the notice indicated that the Appellant’s appeal was exercisable in country. As he noted, this was inconsistent with the reasons for refusal Letter which certified the claim. However, he erred in finding that the reasons for refusal Letter takes precedence in those circumstances. It is the notice of decision which under the Immigration (Notices) Regulations 2003 specifies whether there is a right of appeal and the forum of that appeal.
4. I note also that the Secretary of State had no power to certify the appellant’s claim on the basis she purported to do in the reasons for refusal letter. She indicated that the claim was certified on the basis that it is one to which Section 94(3) Nationality, Immigration and Asylum Act 2002 applies and therefore is certified under Section 94(2). The appellant is from Iran and Iran is not on the list of countries specified in Section 94(4). The certification decision was also therefore in error.
5. I am therefore satisfied that the Decision contains an error of law. The Judge did not go on to consider the merits of the appeal because he thought he had no jurisdiction to do so. In accordance with the guidance and the practice statement, it is appropriate to remit the appeal to the First-Tier Tribunal to be heard by a different Judge. Mr Kotas on behalf of the Secretary of State agrees that this is the appropriate course.
6. The Appellant’s grounds raise another point in relation to costs. At the hearing before the First-Tier Tribunal Judge the Appellant sought costs under Rule 9(2) of the Tribunal Procedure (First-Tier Tribunal) Rules 2014. It appears from the Decision that this was also an application under rule 9(1) but it is rule 9(2) on which the focus of this ground has been presented before me this morning by Mr Doerfel. Mr Doerfel says that the Respondent failed to comply with the directions in the First-Tier Tribunal by failing to supply the Respondent’s bundle. He says that, if she had done so, it would have been evident that a point was being taken on certification at a point prior to the First-tier Tribunal hearing. I disagree that this had any causative effect in relation to the costs which have been incurred as a result of the Judge’s error of law and the Secretary of State’s

mistake. The decision to certify was evident from the reasons for refusal letter and the Appellant's representatives were on notice of it prior to the hearing.

7. However, there is a further point in relation to the Secretary of State's original decision and the fact that the Presenting Officer at the hearing when asked whether she maintained the certificate indicated that she did indeed do so. The original mistake, as I say, is between the inconsistency in the notice of decision and the reasons for refusal Letter. There is also an error, as I have already noted, in the certification as the Secretary of State had no power to certify on that basis. It should have been evident to the Presenting Officer who appeared before the Judge firstly that Section 94(3) could not apply to an Iranian case and secondly that under the Notices Regulations the notice of decision takes precedence.
8. However, in this case the Appellant was legally represented by Counsel. Counsel says that he did not have the opportunity to carry out research on the day when he became aware of the inconsistency between the notice of decision and reasons for refusal letter and the certification of the claim in the latter. However, I note from [7] of the Decision that the Judge permitted further argument later on the morning of the hearing so that both representatives had the opportunity to consider the point.
9. Had the Appellant been unrepresented I would have been minded to find that there was an error of law in the Decision in relation to costs. The Judge when dealing with costs said this at (second paragraph)[4]:

"It is apparent from this history that there were missed opportunities on the part of all those involved. The appellant's advisers overlooked the statement in the reasons for refusal that the claim had been certified. The respondent failed to write to the appellant's advisers and the Tribunal stating that the jurisdictional point would be taken at the prehearing review or the hearing. Until the hearing the Tribunal did not take account of the reference to certification in the letter from the respondent, which was on the Tribunal file."
10. I concur with that statement. It should have been evident to the Judge, to the Presenting Officer and to Counsel who represented the Appellant at the hearing that the point, which is a very short one, when properly considered, should have led to the opposite conclusion to that reached by the Judge. If the Judge had been directed to the Notices Regulations, as should have happened, and to the fact that Section 94(3) cannot apply to an Iranian case, the Judge would undoubtedly have taken the opposite course and the wasted costs could have been avoided. The points were not difficult ones and should have been evident to Counsel.
11. The judgment of the Upper Tier Tribunal President and First-Tier Tribunal President in **Cancino (costs-First-tier Tribunal-new powers) [2015] UKFTT 00059 (IAC)** makes clear that the power to order costs is one which is to be exercised only in exceptional cases and is a matter of discretion.

12. I am not satisfied that the Judge erred in law in exercising his discretion in the way that he did. Accordingly I find that the Judge did not make any error of law in relation to costs.

Notice of Decision

**The First-tier Tribunal Decision did involve the making of an error on a point of law.
I set aside the Decision. I remit the appeal to the First-Tier Tribunal for re-hearing.**

Signed

Date 2 February 2016

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Upper Tribunal Judge Smith