IAC-FH-NL-V1

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

Appeal Numbers: VA/06710/2014
VA/06711/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 15 February 2016** | **On 3 March 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

**ENTRY CLEARANCE OFFICER**

Appellant

**And**

**SAMREEN MAQSOOD**
**[Z M]**
**(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondents: Mrs H Price, Counsel instructed by Mayfair Solicitors

**DECISION AND REASONS**
**EXTEMPORE JUDGMENT**

1. The original Appellants were Mrs Maqsood and her son and to ease following this decision I shall continue to refer to them as the Appellants although this is an appeal by the Entry Clearance Officer. The Appellants had applied for entry clearance to seek to join the Sponsor. The appeal had come for hearing before First-tier Tribunal

Judge Oliver at the Hatton Cross Hearing Centre. By way of a Decision and Reasons promulgated on 3 September 2015 the judge had allowed the Appellants' appeals on human rights grounds. The Secretary of State sought permission to appeal. Permission was granted and the matter has come before me for hearing today. This is my extempore decision.

2. The Entry Clearance Officer grounds that the First-tier Tribunal Judge's be decision be overturned raised the following matters. It was said that the determination was a very short one. Article 8 has been used, in reality, as a dispensing power. There were no findings of fact in relation to matters which were raised such as the Appellant's date of birth. There was also a suggestion that the Appellant had no financial ties to her home country. This had required a finding. It was said that immigration control cannot be dealt with in the cursory way that it was. Paragraph 10 of the judge's decision was inadequate and in any event paragraph 10 makes no sense where it says "it's important" and then "less important". In any event the matters were significantly underplayed from the ECO's side of the balance. There was no real engagement with Article 8. I was referred to the Upper Tribunal's decision in the case of **Kaur (visit appeals; Article 8) [2015] UKUT 487 (IAC)** and in particular paragraph 27 where the Upper Tribunal said in part of that paragraph:

> "Overall, unless an Appellant can show that there are individual interests at stake covered by Article 8 of a particularly pressing nature so as to give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules (see SS (Congo) at [40] and [56]), he is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals."

It was submitted that the matter ought to be remitted to a new judge at the First-tier Tribunal so that he or she could deal with both the legal and factual disputes.

3. Mrs Price in her submissions said that there was no material error of law. The judge had allowed the case on human rights grounds only. He took into account all the points raised by the Respondent. In relation to the allegation in respect of the date of birth it was up to the Home Office to provide HOPOs in a court to make those arguments. In reality they just want a second bite of the cherry. They were not there to do their job. All matters that were alleged were taken into account including that another application could be made. The judge's reasoning is all there. I should take into account Lord Bingham's five points and that family life was engaged. That was then set out. The question was had there been a legal application of matters. It was said that although appeal rights had been taken away, human rights grounds can still be used when there are close family ties. That is why Article 8 rights remain but there are no appeals under paragraph 41. There was a lawful application here. To get to the background of the matter you need to see the previous history. There was no evidence of repeated applications and there was no deception or the like. It was said that an older case of **Palais [2002] UKIAT 05119** ought to be taken into account. It was disproportionate to refuse the application. There was no material error of law.

4. Mr Kotas said in reply that there was no "second bite of the cherry" because the matters were raised in the original ECO refusal. It would have been different if they

had not been. I invited Mrs Price to reply. She said that the judge had said he is satisfied about intention. In reality this was a very minor thing which was being raised, that the refusal letters can raise all sorts of things, the judge did deal with matters adequately and that the Entry Clearance Officer's appeal ought to be dismissed.

5. In coming to my decision, as I indicated during the discussion, I do not have any difficulty with the principle that there can be legitimate Article 8 claims from family members who seek to join a Sponsor here in the United Kingdom for the purpose of a visit. Even more so when that family visit involves a child as this case seems to. That principle is enshrined by the fact that there can be out of country appeals based on human rights. The Judge was not wrong in *considering* a human rights appeal. That is not really the basis of the ECO's appeal. The real issue which arises is whether the First-tier Tribunal's decision and reasons adequately sets out for both parties why it was that they won or lost. In my judgment it is abundantly clear that the Entry Clearance Officer did raise factual issues in the refusal letter dated 28 September 2014. That letter raised specific and clear reasons as to why the Appellants' applications for entry clearance were being refused. Part of the decision said:

> "We contacted your spouse in the UK regarding his Sponsorship to you. However he could not answer basic questions about you such as your age or date of birth and referred to you as his fiancée. I would expect your spouse of over two years to know this information about you and be clear on his relationship to you and also know your child. I do not find it credible that your spouse is not able to answer this information and I am not satisfied that your relationship is as you have claimed."

6. It is abundantly clear that there was a specific factual issue highlighted to the Appellants. Namely why was it that the Sponsor could not get basic things right? Was it really his wife that sought entry to the United Kingdom or was she only his fiancée. What is her age or what is her date of birth? Did the Sponsor now know these things? I accept of course that getting a call during a working day might take one by surprise but that simply does not answer the question. Why was the Sponsor not able to say that this application related to his wife? In my judgment the Entry Clearance Officer's grounds which state that there was a failure to resolve a conflict of fact is made out. There was a failure by the judge to make a finding in respect of this important matter. He needed to say one way or the other whether this was a matter he accepted or not. It was not enough for him to say that this was a husband and wife case. It needed to be set out in clear terms why the findings were being made in favour of the Appellants and against the Entry Clearance Officer. In my judgment it means that the decision of the First-tier Tribunal is fatally flawed in that respect in any event. However, even if I am wrong about that, the judge has indeed failed to explain why there cannot be other ways in which this family could seek to continue their life as they currently do. The judge has indicated in his decision that there would be a sufficient incentive for the Appellant to comply with the Immigration Rules and in terms of having to leave the United Kingdom but there is a failure to deal with Article 8 in the required lawful way. I accept the submission on

behalf of the Entry Clearance Officer that the law is clear. Article 8 is not a general dispensing power. There have to be good reasons as to why an appeal is being allowed in respect of Article 8. It cannot simply be said that there is an equal balance of public interest when dealing with immigration control against all other matters. There is an imbalance in terms of assessment in favour of the Respondent.

6. Further and in any event there are other credibility aspects which were not dealt with adequately. The Sponsor said he could not go to visit Pakistan because he feared he might be at risk because of a land or property dispute. That goes against the fact that he has recently married there and that he has visited Pakistan. Therefore it appears clear that the Sponsor could continue to make visits to Pakistan. Nor was there apparently a response from the Appellants and the Sponsor as to why they could not meet in a different third country (not here in the United Kingdom) if Pakistan really was too dangerous for the Sponsor. I accept that the Judge's task was perhaps made more difficult by the non-attendance with no apparent reason by a Home Office Presenting Officer, but that did not mean that the Entry Clearance Officer's refusal letter had any less weight. The burden of proof remained on the Appellants to deal with that refusal letter.

7. Therefore this appeal by the Entry Clearance Officer succeeds. The First-tier Tribunal's does not adequately deal with factual or legal matters. I accept that short decisions can be sufficient and are to be commended, but if the main issues are not dealt with in such decisions then, as in this case, the decisions will show material errors of law. I conclude that there has not therefore been a sufficient hearing and I direct that the matter be remitted to the First-tier Tribunal where there will be a rehearing in respect of all matters. None of the findings from the First-tier Tribunal's decision are to remain.

**Notice of Decision**

The Entry Clearance Officer's appeal is allowed.

I set aside the decision of the First-tier Tribunal.

The decision shall be re-made at the First-tier Tribunal.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Mahmood