



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

Appeal Number: VA/16021/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3<sup>rd</sup> September 2014**

**Determination  
Promulgated  
On 17<sup>th</sup> September 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAIRD**

**Between**

**MRS FATIMA ZIA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - ABU DHABI**

Respondent

**Representation:**

For the Appellant: No representation

For the Respondent: Mr S. Whitwell - Home Office Presenting Officer

**DETERMINATION AND REASONS**

- 1.** This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge N J Osborne issued on 28<sup>th</sup> May 2014 allowing under the Immigration Rules the appeal of the Appellant against the

decision of the Entry Clearance Officer made on 9<sup>th</sup> July 2013 to refuse entry clearance as a visitor under paragraph 41 of HC 395 (as amended).

2. The Appellant is a citizen of Afghanistan born 18<sup>th</sup> June 1945.
3. Permission to appeal was granted on 7<sup>th</sup> July 2014 by First-tier Tribunal Judge Cruthers. He said,
  - “2. As per the grounds on which the Respondent seeks permission to appeal, it appears that the Judge allowed the appeal by reference to the requirements of paragraph 41 of the Immigration Rules, HC 395 but in relation to applications made from 25<sup>th</sup> June 2013 Appellants in the position of this Appellant are restricted to pursuing only equality and human rights grounds. Therefore the Respondent’s current grounds are arguable.
  3. I note that the Appellant’s Visa Application Form (VAF) bears the date 17<sup>th</sup> June 2013. Therefore the Sponsor should write to the Tribunal as soon as possible (putting reference VA/16021/2013) to say whether or not he accepts that his mother’s visa application was made on or after 25<sup>th</sup> June 2013. If the Sponsor does not accept this it may be that the onus will be on the Respondent to show that the relevant application was made on or after 25<sup>th</sup> June 2013.”
4. It is submitted in the grounds seeking permission that the application was made on 27<sup>th</sup> June 2013, two days after (by virtue of Section 52 of the Crime and Courts Act) the appeal rights for visitors were restricted to grounds of race relations and human rights. It is submitted that in these circumstances it was not open to the First-tier Tribunal to consider whether the decision was in accordance with the Immigration Rules or otherwise in accordance with the law. The Judge had no jurisdiction to make such a decision and the appeal should have been dismissed. This was not raised in the refusal letter.
5. Judge Osborne noted that the decision was made by the Respondent on 9<sup>th</sup> July 2013. He went on to say that the point in time at which he has to consider the relevant facts for both immigration and Article 8 ECHR issues is the date of decision. He set out the requirements of paragraph 41. He set out the circumstances of the Appellant, noting that she lives with her youngest child and the younger of her two sons in Kabul. The Sponsor in the UK is her son. Judge Osborne found that the requirements of the Immigration Rules were met.
6. I have a statement from the Sponsor, Mr Umar Zia, in which he explains that he consulted a solicitor about his mother’s intention to make an application to come to the UK as a visitor and was told the law was about to change. He was told that many such applications are refused and that from 25<sup>th</sup> June 2013 an appeal would only be considered on human rights or race relations grounds. He therefore submitted an application online as

soon as he could. There seems to be no dispute that the application form was completed and sent to the Entry Clearance Officer using the online process on 17<sup>th</sup> June 2013. The Sponsor was ready and able when he completed the application online to pay the required fee but it was for some unexplained reason not possible to pay the fee online. He therefore immediately made an appointment for the Appellant and his brother who lives in Pakistan to attend the post in Islamabad on 24<sup>th</sup> June to pay the fee. He did this specifically to ensure that the application was in prior to the changes in the law taking effect. He questions why the issue of the scope of the appeal was not raised at the hearing before Judge Osborne. His solicitor had requested evidence from the Respondent to prove that the Entry Clearance Officer had not received the application until 27<sup>th</sup> June but nothing had been forthcoming.

- 7.** As I have already said it is accepted by the Respondent that the online application was made and received on 17<sup>th</sup> June. Mr Whitwell submitted that the Appellant must have met with the agent on 24<sup>th</sup> June and that the Entry Clearance Officer did not receive the payment required to create a valid application until 27<sup>th</sup> June. I pointed out to him a stamp on the application form bearing the date 24<sup>th</sup> June. He said that that stamp had probably been put on the form by the agent. It seems therefore that the position of the Respondent is that the Appellant and her son did not see the Entry Clearance Officer but the agent. They paid the fee not to him but to the agent. I did ask Mr Whitwell if the Appellant would have been aware that there would be further delay but he could not give me a response.
- 8.** I granted Mr Whitwell a week to allow time for information or evidence about the payment of the fee that he had already requested from the Entry Clearance Officer to arrive in the UK. On 10<sup>th</sup> September he sent me an e-mail advising me that he had received nothing.
- 9.** I have a letter from Mr Zia's solicitor in the UK dated 5<sup>th</sup> September in which she confirms that the Appellant had had biometrics processed by an agent on 24<sup>th</sup> June. Biometrics cannot be processed until the fee is paid so the fee must have been paid that day. The agent was one of those nominated by the post in Islamabad to receive entry clearance applications on their behalf.
- 10.** I found the Sponsor to be entirely credible. I accept that when he arranged the meeting on 24<sup>th</sup> June he believed, and indeed was entitled to believe, that when his mother paid the fee that would create a valid application, treated as lodged on 24<sup>th</sup> June. There was no reason for him to think otherwise. He was not surprisingly confused by the stance of the Respondent and taken aback by the suggestion that the application was late because the fee had been paid to what was so far as he was concerned the man he had been given an appointment with so that the fee could be paid prior to the change in the law.
- 11.** I am concerned at the circumstances of this case. The document received from the Entry Clearance Officer setting out the details of the application

does give the date of application as 27<sup>th</sup> June but this document is not in the Respondent's bundle but was apparently sent to the Home Office Presenting Officers' Unit from the Foreign and Commonwealth Office on 2<sup>nd</sup> September 2014, presumably for the purpose of the hearing before me. It is quite unacceptable that neither the Appellant nor Sponsor were made aware that the appointment was with an agent and that it might take a couple of days for the application to be passed to the Entry Clearance Officer. The Appellant's representative is of course correct in saying that if the agent is instructed and accepted as an agent by the Entry Clearance Officer then service on the agent is deemed to be service on the Entry Clearance Officer. I therefore find that the application was lodged on 17<sup>th</sup> June and the fee paid on 24<sup>th</sup> June thus creating a valid application. The Appellant therefore had a full right of appeal against the refusal of entry clearance and Judge Osborne was entitled to allow it under paragraph 41 of the Immigration Rules.

- 12.** Further, the issue of a restricted right of appeal was not raised before Judge Osborne, despite the fact that the Respondent was represented by Counsel. The position of Mr Whitwell, relying on **Virk & others v SSHD [2013] EWCA Civ 652** was that it was open to either the First-Tier or Upper Tribunal to take the jurisdiction point notwithstanding the failure of the Respondent to raise it. Judge Osborne quite simply did not have jurisdiction to deal with the appeal under s 41 so his decision should be set aside. I do not agree with that. The only document before me which shows the date of the application as 27<sup>th</sup> June is the Form referred to above and it seems that that was not before Judge Osborne. The copy application form in the bundle has an online application date of 17<sup>th</sup> June, is silent on the payment of the fee and bears a stamp showing a date of 24<sup>th</sup> June. I doubt there was anything before Judge Osborne to suggest that the application was received after 25<sup>th</sup> June and clearly Counsel for the Home Office made no mention of it. Judge Osborne could not have been expected to consider it.

### **Decision**

The determination of the First-tier Tribunal does not contain a material error of law and shall therefore stand.

The appeal of the Respondent is dismissed.

Signed

Date: 16<sup>th</sup> September 2014

N A Baird  
Deputy Upper Tribunal Judge

