



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/05454/2016

**THE IMMIGRATION ACTS**

Heard at Manchester  
On 23 April 2018

Decision & Reasons Promulgated  
On 21 June 2018

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SYEDA RIDA ZEHRA RIZVI

Respondent

**Representation:**

For the Appellant: Mr McVeety, Home Office Presenting Officer  
For the Respondent: No attendance

**DECISION AND REASONS**

1. This is the Secretary of State's appeal. The respondent, whom I shall call the claimant, is a national of Pakistan born in 1990. The decision under challenge is the respondent's decision by an Entry Clearance Officer dated 7 April 2016. It expressly refuses the claimant's application for an EEA family permit.

2. The claimant's appeal to the First-tier Tribunal, Judge Gladstone, allowed her appeal in terms which I shall set out in due course. The Secretary of State now has permission to appeal to this Tribunal.
3. Judge Gladstone had available a substantial bundle of materials. The judge was dealing with the matter on the papers, the fee for an oral hearing not having been paid, and on consideration of the materials was apparently satisfied that the question whether the claimant met the requirements of the Immigration Rules as a partner should be considered. The reason for that was that it is, I think, accepted on all sides that the claim to admission as the family member of an EEA national could not be made out.
4. The starting point for the application had been that the claimant's Muslim husband had previously had a Christian marriage to an EEA national in this country which had been dissolved. He has a residence card as a person with a continuing right of residence following the dissolution of his marriage. As such, although he has a right under the EEA Regulations it is not a right which enables him to be treated as a national of a member state for the purposes of having family members of his own within the EEA Regulations. That is the factual situation. It is not to that extent disputed and it is clear that the application for a residence card as a family member of an EEA national was doomed to failure.
5. However, as I have said, the judge was persuaded that other matters were to be taken into account. Extensive material had been produced by the claimant's and perhaps the sponsor's solicitor, WhiteField Solicitors of 4 Bury Old Road, Manchester. They alleged that there had been an application as the partner under the Immigration Rules and that the application should have been considered under those terms and should have been granted under those terms.
6. The judge said that she did not know what was in the original covering letter. She did not know if it submitted what was subsequently argued in the appeal grounds. The appeal grounds were detailed and the judge went on to say at paragraph 31: "I consider, therefore, that the application should have been considered under the Immigration Rules, if not when it was made, then certainly on appeal", on appeal in the decision in which that paragraph 31 appears.
7. Two paragraphs later the judge has concluded that the appeal is to be allowed under the Immigration Rules as follows:
  - "33. In the circumstances, therefore I find that the appellant has discharged the burden of proof to the required standard. I am satisfied that the appellant has fulfilled all the criteria in relation to her application. The respondent's decision is not in accordance with the law and the Rules, so the appeal must succeed.

#### **Notice of Decision**

34. The appeal is allowed under the Immigration Rules",

and as a consequence of that decision but separately the judge made an order making a fee award.

8. Before me today the Secretary of State is represented by Mr McVeety, who has made brief submissions. The claimant does not appear and is not represented. Her solicitors indicate that they wish the appeal to be determined without their presence. In those circumstances I have proceeded.
9. It appears to me that there are at least four reasons in law why the judge's decision cannot stand. The first is that by reason of paragraphs 34 and following of the Immigration Rules a prescribed form had to be used for an application for leave to enter as a partner under the Rules. A letter such as the judge found was not available would not suffice and the fee had to be paid for that application. It was not paid. There is therefore no basis upon which it could ever have been said that a valid application was made under the Rules.
10. The second reason was that in any event the relevant provisions of the Immigration Act 2014 applied to this appeal and the possibility of, as the judge put it, allowing the appeal under the Immigration Rules on the basis that the decision was "not in accordance with the law and the Rules" had been removed. The only question before the judge had to be in the circumstances of this case whether the appeal should be allowed under Article 8, a matter which is not considered in the determination at all.
11. Thirdly, insofar as the matter could be looked at under Article 8, this would be a case to which the decision in Amirteymour v SSHD [2017] EWCA Civ 353 applies and there is no perceptible basis for saying that the refusal on the terms on which it was made infringes anybody's Article 8 rights disproportionately. There is no doubt at all that the claimant, if she wishes to do so, could make a proper application under the Rules and pay the appropriate fee.
12. Fourth, it is clear from the provisions of paragraph 1 of Schedule 1 to the EEA Regulations 2006, which apply to this appeal, that the Article 8 or indeed the Immigration Rules argument would be a new matter not previously dealt with by the Secretary of State, so that Section 85(5) prohibited the judge from dealing with it in any event in the absence of consent by the Secretary of State, which of course could not be forthcoming as this matter was dealt with on the papers.
13. This was therefore an appeal which was never originally formulated properly in relation to an application as a partner. It was allowed by a judge under provisions not available to the Tribunal. If those provisions had been available they would on authority have been bound to fail and in any event, the matters taken into account by the judge were matters that the judge was prohibited from taking into account.
14. It is difficult to imagine a more comprehensive example of a decision which is erroneous in law. I set it aside. There was in truth only one possible outcome to this appeal, which was that it fell to be dismissed because as an application under the EEA Regulations it was doomed to failure and there was no other factor which ought to

have required the grant sought to be made. I therefore substitute a determination, dismissing the claimant's appeal.

C. M. G. OCKELTON  
VICE PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER  
Date: 5 June 2018