



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28120/2013

THE IMMIGRATION ACTS

Heard at Field House
On 2nd April 2014

Determination Promulgated
On 03rd April 2014

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MS FAKHAR NISA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Khan (instructed by Haq Hamilton, Solicitors)
For the Respondent: Mr G Saunders (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant appeals to the Upper Tribunal, with permission, against the determination of the First-tier Tribunal (Judge A J M Baldwin) promulgated on 10th February 2014 by which it dismissed the Appellant's appeal against the Secretary of State's decision to refuse her leave to remain as a parent under Appendix FM.
2. Although not specifically referred to in the grounds or the grant of permission to appeal, there is an obvious point material to the determination in this case.

3. The Appellant, a citizen of Pakistan came to the UK on 5th December 2012, with leave to enter as a family visitor accompanying her British son. Her son was born in Pakistan on 30th November 1999. His father, the Appellant's ex-husband is British and said to be in the UK.
4. The Appellant then applied to remain with her son who had started in education in the UK. She applied under Appendix FM as a parent.
5. When one looks at the Letter of Refusal, apart from the first sentence that correctly identifies the application, the whole of the decision relates to an application as a partner. The letter goes on, after refusing the application to say that there has been consideration as to whether there are exceptional circumstances rendering it appropriate to consider outside the Immigration Rules and under the ECHR and the decision reached that there are not. The Letter of Refusal says in terms that "you have no children in the UK and so do not meet the requirements of Ex.1". That is a factual error on the part of the decision maker.
6. Furthermore if the decision maker had not made that factual error then when looking at exceptional circumstances they may well have noticed that, if her claim is correct, the facts of the case would mean that the Appellant has a derivative right to remain in the UK under Regulation 15A of the EEA Regulations.
7. I find that to decide an application that had not been made and to fail to decide the actual application on a misunderstanding of the facts renders the decision unlawful. Mr Saunders sought to defend it arguing that the Appellant could not have succeeded because she was in the UK as a visitor. That, I find cannot render the decision lawful. Even given that the Appellant could not succeed on that basis, if the decision maker had been aware of the child who is British they may have realised the situation with the EEA Regulations which have no such requirement.
8. Accordingly the First-tier Tribunal erred in failing to recognise the unlawfulness of the decision and so I set it aside.
9. In re deciding the appeal I allow it to the extent that the application remains outstanding and awaits a lawful decision by the Secretary of State.

Signed

Date 2nd April 2014

Upper Tribunal Judge Martin