



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

Appeal Number: OA/08749/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 12th December 2014**

**Decision & Reasons Promulgated
On 16th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MRS ZAHRAA SAMI DAKHIL AL-HASAWI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Gibson-Lee, Counsel

For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Iraq born on 14th May 1985. The Appellant applied for entry clearance as a partner under Appendix FM of the Immigration Rules. Her application was refused by the Entry Clearance Officer on 26th February 2013 on the basis that the Appellant had not provided satisfactory evidence that her Sponsor's financial circumstances were as she claimed and that she had not provided satisfactory evidence that her Sponsor's income met the required amount. Therefore

the application was refused under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Wellesley-Cole sitting at Taylor House on 2nd July 2014. In a determination promulgated on 15th July 2014 the Appellant's appeal was allowed.
3. On 23rd July 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those grounds contended that the judge had erred in law by allowing the appeal outright and that it was submitted that the correct approach was that where the issue turned on the misapplication or failure to apply a policy rather than a provision of the Rules the correct approach was to find the decision to be not in accordance with the law and to remit the application back to the Respondent. Further, or in the alternative, it was contended that the First-tier Tribunal Judge had at paragraph 9 of her determination applied the incorrect relevant date. It was contended that in Appendix FM applications the relevant date is the date of application and not as applied by the learned judge the date of decision and consequently any findings made on the income requirement are vitiated by a material misdirection in law as to the applicable relevant date.
4. On 4th August 2014 Designated Judge of the First-tier Tribunal McClure refused permission to appeal. The Grounds of Appeal were resubmitted and on 30th October 2014 Upper Tribunal Judge Kebede granted permission to appeal. Judge Kebede considered that there was arguable merit in the grounds that the judge had erred by allowing the appeal outright and that it was also arguable, given the indication from the Entry Clearance Manager at paragraph 3 of the Entry Clearance Manager's review that the tax documents were subsequently produced that the judge had erred in her consideration of the available evidence at the relevant time.
5. On 27th November 2014 the Appellant's instructed solicitors filed a Rule 24 response to the Entry Clearance Officer's Grounds of Appeal. It is against that background that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. This is an appeal by the Secretary of State. For the purpose of continuity throughout proceedings Mrs Al-Hasawi is referred to herein as the Appellant and the Secretary of State as the Respondent. The Appellant appears by her instructed Counsel Mr Gibson-Lee. The Secretary of State appears by her Home Office Presenting Officer Mr Shilliday.

Submissions

6. Mr Shilliday albeit acting for the Secretary of State indicates agreement with much that is written within the Rule 24 response by Counsel instructed on behalf of the Appellant. The specific reason for refusal by the Entry Clearance Officer was that the Sponsor had not provided sufficient evidence for the purposes of Appendix FM-SE of the Rules to demonstrate his self-employed earnings as a cab driver between the commencement of his self-employment in March 2012 and the date of application. His employed earnings at Tesco were accepted. Mr Shilliday submits that the First-tier Tribunal Judge had erred in law in allowing the appeal outright and that the

correct approach would have been to have found the decision to be not in accordance with the law on the basis that the policy had not been taken into consideration thus effectively remitting the matter to the Entry Clearance Officer. He seeks to rely on the authorities of *UKUS (Discretion: When Reviewable)* [2012] UKUT 00307 (IAC) and *Sultana and Others* [2014] UKUT 00540 (IAC). He submits that *Sultana* builds on the decision in *UKUS* and that the matter should be sent back to the executive to consider and to make a decision within its policy guidance.

7. Mr Gibson-Lee submits that when looking at the amount of income required to meet the relevant Rule there is guidance that says cash in hand can be taken into account providing the correct tax is paid. However he submitted it is not a question of exercising discretion but that the Secretary of State has actually failed to follow its own guidance and that the maladministration by the Secretary of State is due to the failure of the Entry Clearance Officer/Manager to consider the relevant policy not an issue of delay. He submits that IDIs are not Rules and the effect is that in fact there has been a complete disregard of the Rules and policy by the Secretary of State and that on that basis the Tribunal has jurisdiction to deal with it and that providing I found that the Entry Clearance Officer and Manager had their policy guidance and instructions in mind when dealing with the application they have exercised their discretion and the First-tier Tribunal Judge was entitled to substitute her own findings on that exercise of discretion and therefore there is no material error of law disclosed. He asked me to dismiss the appeal.

The Law

8. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
9. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

The Relevant Authorities

10. I have given due consideration to the relevant authorities to which I am referred.

UKUS (Discretion: When Reviewable) [2012] UKUT 00307 (IAC)

- "1. If a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently (see s 86(3)(b) of the Nationality, Immigration and Asylum Act 2002).*
- 2. Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (s 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in SSHD v Abdi [1996] Imm AR 148. In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above.*
- 3. If the decision maker has lawfully exercised his discretion and the Tribunal has such a statutory power, the Tribunal must either (i) uphold the decision maker's decision (if the Tribunal is unpersuaded that the decision maker's discretion should have been exercised differently); or (ii) reach a different decision in the exercise of its own discretion."*

11. The issues were considered further in *Sultana and Others (Rules: Waiver/Further Enquiries; Discretion) [2014] UKUT 00540 (IAC)*. That decision is authority for

- "(1) Paragraph [D] of Appendix FM-SE is an example, within the context of the requirement to supply specified evidence, of the increasing influence of discretionary powers of waiver and further enquiry in the Immigration Rules.*
- (2) Where applicants wish to invoke any discretion of this kind, they should do so when making the relevant application, highlighting the specific provision of the Rules invoked and the grounds upon which the exercise of discretion is requested.*
- (3) Where any request of this kind is made and refused, a brief explanation should be provided by the decision maker.*
- (4) A refusal to exercise a discretionary power as described in (1) above may render an immigration decision not in accordance with the law, under section 84(1)(e) of the Nationality, Immigration and Asylum Act 2002.*
- (5) Powers of waiver are dispensing provisions, designed to ensure that applications suffering from certain minor defects or omissions can be readily remedied."*

Findings

12. The fact that there has been an error in law in the First-tier Tribunal Judge is conceded. What is not conceded is that that error of law is material. If I find that the Upper Tribunal did not have their policy guidance and instruction in mind when dealing with the application then it follows that they have not exercised their discretion and, as such, the decision of the First-tier Tribunal Judge must be set aside and re-made to the extent that the Entry Clearance Officer decision is not in accordance with the law. The effect therefore would be to remit the appeal for reconsideration. The argument that is put to me forcefully by the Appellant's legal representatives is that whilst on the face of it there is a technical error of law that error is immaterial in that the Sponsor had adequate maintenance for the relevant period and provided that he had sufficient documents to demonstrate that he had (which they contend that he did) the First-tier Tribunal Judge was entitled to reach the decision that she did.
13. Mr Gibson-Lee has quite openly invited me to find that there has been maladministration on behalf of the Secretary of State. I do not find that that is the case. An Entry Clearance Officer or Manager does not look at the appeal until it is listed. He merely deals with the application that is before him. I would agree with the contentions put to me by Mr Shilliday that the Secretary of State cannot be held accountable for the way in which the appeal is listed by the First-tier Tribunal. IDIs in common with comparable instruments of the Secretary of State's guidance or policy are subservient in nature and notwithstanding their legal status can nonetheless feature in a Tribunal's review of whether a decision was in accordance with the law. However in this instance I am satisfied that the policy guidance and instructions were not being considered by the Entry Clearance Officer or the Entry Clearance Manager when they dealt with the application. It thus follows particularly when applying the authorities mentioned herein that not only is there an error of law but that it is material and that it was wrong of the First-tier Tribunal to allow the appeal outright. As is put to me by both advocates if I make such a finding the correct approach is to set aside the decision of the First-tier Tribunal and remit the matter to the Secretary of State.

Notice of Decision

The decision of the First-tier Tribunal Judge to allow the appeal outright is wrong in law and I find a material error of law in the determination. The decision is remade to the extent the Entry Clearance Officer's decision is not in accordance with the law and is remitted to him. Direction is given to the Entry Clearance Officer when reconsidering this matter to have proper regard to the relevant requirements of Annex FM as at the date of the original decision.

No anonymity direction is made.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed

Date **15th January 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date **15th January 2015**

Deputy Upper Tribunal Judge D N Harris