Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/27109/2012

THE IMMIGRATION ACTS

Heard at Stoke
on 14th August 2013

Determination Promulgated
on 20th August 2013

Before

UPPER TRIBUNAL JUDGE HANSON

Between

GULSHAN GULSHAN BAHAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Khan – Sponsor in person.
For the Respondent: Mr Lister – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Gladstone determined on the papers on 5th March 2013 in which he dismissed the appellant's appeal against the refusal of an Entry Clearance Officer (ECO) to allow her to enter the United Kingdom for the purposes of a family visit.

2. The date of decision is the 8th July 2012 and the reason the ECO refused the application was because it was not felt the appellant had demonstrated she met the requirements of paragraphs 41 (i) and (ii) of the Immigration Rules.

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3. The appellant sought permission to appeal which was granted on the 10th May 2013 by First-tier Tribunal Judge Saffer on the basis Judge Gladstone should have acceded to a request made on 17th December 2012 for the case to be determined at an oral hearing to enable the sponsor who is in the United Kingdom to give evidence, on payment of the relevant difference in the fee between an oral and paper hearing.

Discussion

4. The First-tier Tribunal (Immigration & Asylum Chamber) Fees Order 2011 sets out the rules for charging fees. The Tribunal Procedure (Amendment) (No.2) Rules 2011 make consequent changes to the Asylum & Immigration (Procedure) Rules 2005. A fee is payable in respect of an appeal to the First-tier Tribunal where the appeal relates to an immigration or asylum matter and the decision against which the appeal is made was taken on or after the coming into force of the Fees Order (Article 3(1) of the Fees Order).

5. Article 3(2) denotes the fee payable which is £80 where the appellant consents to the appeal being determined without a hearing and £140 where the appellant does not consent to the appeal being determined without a hearing. If the appellant withdraws their consent to the appeal being determined without a hearing, the difference of £60 will become payable on the withdrawal of the consent, unless the Tribunal decides that the appeal can be justly determined without a hearing, in which case the fee remains £80. If an appellant consents to the appeal being determined without a hearing and pays the lower fee but the Tribunal then decides that an oral hearing is required, either at the instigation of the respondent or on its own initiative, then the appellant will not be liable to pay the higher fee. Where the appellant has paid the higher fee but the appeal is determined without a hearing, the appellant is then entitled to a refund of the difference between the two fees (Article 9(1)). A fee is payable in respect of each appellant in terms of Article 3(2) of the Fees Order.

6. As far as the Tribunal is concerned the only question at the commencement of proceedings is whether the Lord Chancellor has issued a certificate of fee satisfaction under Article 8. In effect an appeal will not be processed for determination, with or without a hearing, without a certificate of fee satisfaction. In further guidance from the President it has been stated that the collection of, deferral from, or exemption from fees is a matter for the Lord Chancellor as Secretary of State for Justice. In other words it is an administrative function, not a judicial function. No judge should adjourn, strike out or dismiss an appeal because a fee has not been collected. However, no appeal should be considered unless a certificate of fee satisfaction has been issued on behalf of the Lord Chancellor and the appeal has been through the case creation process resulting in (i) the creating of an appeal file with a unique appeal number (prefixed by AA, DA, IA, OA, etc); and (ii) the listing of the appeal by the Tribunal (either as a paper case or for oral hearing). The filing of a notice of appeal does not mean

that there is a valid appeal. Rule 9 (as amended) allows for an appeal to be struck out administratively if no certificate of fee satisfaction is issued.

7. In this appeal the appellant lodged her notice of appeal against the decision of the ECO in which she stated that she wanted the appeal to be decided on the papers. The form IAFT-2 explains that an appeal on the papers means the appeal will be decided on the information provided on the appeal form and any other documents submitted as evidence. The appeal was received at the Administrative Support Centre on 31st July 2012. On 13th August 2012 a member of staff wrote to the appellant advising her that the appeal had been received without payment of a fee. The notice of requirement to pay a fee contains the following endorsements:

> " You have not requested an oral hearing and you must now pay £80.00 in order for your appeal to proceed. This payment must be made to the tribunal no later than Monday, 24 September 2012. Failure to pay the fee will result in the tribunal taking no further action on your appeal".

8. There is on the file a further part of the AFT-2 confirming again that the appellant wanted the matter to be dealt with on the papers. This form contains the following statement "You should tick the 'paper hearing' box if no one will attend and you want to have your case determined on the papers provided. You will need to pay the appropriate fee for a paper hearing". Along the left-hand side of that form the following text "(Note) the court fee will be deposited soon after receiving the notice of this honourable court" has been added by hand. The sponsor confirmed in court that she wrote that note on the form and paid the £80.00 as evidenced by the indication that the Lord Chancellor's certificate of fee satisfaction was issued on 13th August 2012 .

9. On 2nd October 2012 the appellant was sent notice of pending appeal confirming that the appeal had been lodged and a copy was sent to the UK-based sponsor on the same date. On 7th December 2012 the appellant was sent form IA 35 advising her that as she had indicated she wanted the appeal to be decided on the papers, without a hearing, any written evidence and submissions had to be received by 4th February 2013. The appeal was according allocated to Judge Gladstone to be determined on the papers.

10. Whilst it is clear that the status of an appeal can be changed from paper to oral there is no evidence such a request was made in advance and the correct fee paid prior to Judge Gladstone's consideration of the evidence. The grounds on which permission to appeal to the Upper Tribunal is sought acknowledges that only £80 was paid, which is that charged for a paper hearing, and that the appellant indicated she only required a paper hearing on her IAFT-2. The grounds go on to state that according to the current facts and circumstances the appellant's sponsor/daughter is liable to be asked to appear for an oral hearing to clear up the facts of the incident/case and it is proper that the sponsor be

asked to appear before the court for an oral hearing with the appellant confirming she will deposit the remaining court fee required for an oral hearing.

11. I find there is no procedural error sufficient to amount to a material error of law in relation to the Judge determining the appeal on the papers. It is clear that the appellant asked for the matter to be determined on the basis of the written evidence and this is the fee that was charged and that which she paid. She had the opportunity to request an oral hearing if she wanted the sponsor to attend to give oral evidence but did not.

12. Judge Gladstone was not satisfied the appellant had provided an adequate explanation of her circumstances in Pakistan, an issue she was put to proof of in the refusal notice. The reasons for this are set out in the determination at paragraphs 29 to 31. Having reviewed the evidence the findings made are within the range of permissible findings available to the Judge and no material error of law has been proved.

13. The Judge was aware of the compassionate circumstances behind the proposed visit [26] but the ECO was not satisfied the appellant will leave the United Kingdom within the period of one month that she refers to in the visa application form. It was not accepted that she would comply with the requirements of paragraph 41 (i) or (ii), i.e. that she was a genuine visitor or that she would leave the United Kingdom within the period stated by her.

14. The Upper Tribunal has received a letter from a Social Worker employed by Nottingham County Council dated 9th July 2013 referring to the sponsor's domestic circumstances, which includes incidents of domestic violence. The Social Worker has been assigned to ensure the needs of the sponsor's five children are met. They are now subject to a Child Protection Plan. The letter states "Mrs Khan anticipates that her mother will stay for a period up to a maximum of six months, if possible and she will reside at Mrs Khans address at ……". On the face of it this casts doubt upon the stated intention of the appellant to only remain for one month. If so the finding of the Judge that in light of the failure of the appellant to prove her circumstances in Pakistan, and the evidence relating to her actual intentions, she had not shown she intended to leave the UK at the end of the stated period is a finding in accordance with the evidence. This matter was discussed with Mrs Khan who indicated that the content of the letter did not properly represent her position as indicated to the social worker although it was clear that it is likely her mother would remain for longer then one month, if not for the full six months of the visa.

15. The appellant's husband applied at the same time but also had his application refused, although his involved a paragraph 320 (7A) refusal, against which he did not appeal. The same issue was also raised regarding the failure to adduce sufficient evidence relating to his own financial circumstances in his refusal.

16. I find no material error proved although the evidence does support the claim that this is an application based upon the wish of the family to provide support to their daughter in the United Kingdom who was experiencing domestic violence with its negative impact upon her and her children. Mrs Khan was advised in court of the outcome of the appeal and the fact her mother could make a fresh application if she wished to do so. She was advised that in any such application evidence regarding the family's financial circumstances in Pakistan must be provided and it must clearly state the maximum period of any proposed visit. If she wishes to stay for four months she should say so. Mrs Khan was advised of the changes that have been made regarding rights of appeal against a refusal of a family visitor applications although on the facts of this case there may be the possibility of an appeal on human rights grounds, especially if adequately supported by the social worker. I do not find any element of deceit or dishonesty in Mrs Khan it is just that her mother did not prove that what she was alleging was true which led to the refusal in its current terms.

Decision

17. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 16th August 2013