Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA 24441 2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 May 2014	**On 2 June 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ENTRY CLEARANCE OFFICER ISLAMABAD

Appellant

and

ZILFQAR ALKOZY

Respondent

Representation:
8 April 2014
For the Appellant: Mr G Saunders, Senior Home Office Presenting Officer
For the Respondent: Miss S Qureshi (Wife and Sponsor)
30 May 2014
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr S Saini, Solicitor, Justmount & Co Solicitors

DETERMINATION AND REASONS

1. This appeal came before me and Deputy Upper Tribunal Judge Mailer, on 8 April 2014. It is as an appeal by the Entry Clearance Officer, Islamabad, against the decision of the First-tier Tribunal allowing an appeal by a citizen of Afghanistan against a decision of the Entry Clearance Officer refusing him entry clearance to join his wife and child in the United Kingdom. We were satisfied that the First-tier Tribunal erred in law and gave our reasons.

2. We set aside the decision and gave directions for the progress of the case. We incorporate here the reasons given on 9 April to explain our decision. Subject to some minor grammatical corrections these are the reasons that have already been disclosed to the parties with the directions.

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REASON FOR FINDING ERROR OF LAW

1. The respondent, hereinafter "the claimant", is a citizen of Afghanistan who appealed successfully to the First-tier Tribunal against the decision of the respondent, hereinafter the Entry Clearance Officer, refusing him entry clearance to the United Kingdom as the wife of his sponsor.

2. Before us he was represented by his wife and sponsor who was assisted by an official interpreter. The appeal had been listed as an expedited hearing at the request of the claimant's solicitors so we were a little surprised that they did not attend.

3. Essentially the Entry Clearance Officer did not accept that the claimant's marriage was subsisting or that he and his wife intended to live together permanently in the United Kingdom, or that the claimant had shown in the required way that sufficient funds were available or that his competence in the English language was sufficient. The Entry Clearance Officer decided the application with regard to the rules in force on 9 July 2012.

4. The First-tier Tribunal Judge found that the marriage was subsisting and that the parties to the marriage intended to live together permanently. The First-tier Tribunal Judge was particularly assisted by evidence that the parties to the marriage had a child, a boy, born on 7 May 2008.

5. These findings have not been challenged by the Entry Clearance Officer.

6. He further found that the appellant satisfied all of the requirements of the rules relevant to an application make before 9 July 2012 and allowed the appeal. The finding that the application was made before 9 July 2012 is challenged by the Entry Clearance Officer. The finding that the application should have been allowed if the pre 9 July rules applied was not challenged. The finding that those rules did apply is challenged by the Entry Clearance Officer.

7. The First-tier Tribunal Judge considered the position if the application should have been decided under the rules that came into force on 9 July 2012 and said that he allowed the appeal under the "new" rules if they applied. This decision was challenged by the Entry Clearance Officer.

8. We have no hesitation in allowing the Entry Clearance Officers' appeal in as much as it relates to that part of the determination that purported to allow the application under the new rules.

9. Firstly, the First-tier Tribunal Judge was quite wrong in his consideration of the production of proof of competence in the English language. It is a clear requirement of the Rules that the proof accompanied the application. It did not accompany the application and the failure to provide it with the application was fatal to the application and there is no need to say any more.

10. We do, however, say that the First-tier Tribunal Judge was also wrong in his decision to allow the appeal under the new Rules on financial grounds. We are well aware of the decision of the Administrative Court in **MM v SSHD [2013] EWHC 1900 (Admin).** It is a controversial decision that is subject to appeal to the Court of Appeal but it would be very difficult to say that a First-tier Tribunal Judge who had followed that decision had erred in law unless and until the Court of Appeal says that the decision is wrong. However this First-tier Tribunal Judge did not apply **MM** properly. He referred to the Administrative Court finding that the

requirement to demonstrate an income of £18,600 was held to be "disproportionate and unlawful" whereas in fact that is what Blake J. was very careful not to do.

11. The decision that the pre 9 July rules applied is more troublesome.

12. Although it was plain from the Grounds of Appeal and terms of the decision that the date of the application being made was controversial neither party has done very much to resolve the controversy. The Entry Clearance Manager was first aware of the difficulty on receipt of the Grounds of Appeal but responded by assuring us in the most general terms that the application was made on 9 July because that is what the records show. The Entry Clearance Manager provided no copy of the record or explanation about how the record was compiled or any reason to explain why the record was likely to be right. For example we do not know if it was made contemporaneously, or if the person making the record appreciated the importance of recording the correct date, if the change in rules had coincided with a big increase in work. We did not have a statement from the person who made the record. It is not a question of what the Entry Clearance Manager believes, but what in fact has actually happened. The Manager's assurance that he is right is not evidence that he is right. To illustrate the poverty of this kind of evidence we point out that it is analogous to a police officer inspector saying that a defendant in the criminal courts must be guilty because he had seen a report saying that that the accused was guilty. This really will not do.

13. Regrettably the claimant did not do any better. Indeed the claimant's case is obscure.

14. The grounds of appeal supporting the appeal to the First-tier Tribunal include the following paragraphs:

"4. It is submitted that the [claimant] had attended the Visa Office in Pakistan for submitting the application on 5 July 2012 and had paid the application fees on 5 September 2012. However, is [sic] application was not accepted on the same day given the large number of applicants. The [claimant] gain [sic] attended the office on 6 July 2012 and at the close of the day was informed to come on 9 July 2012. He was further given to understand that the application submitted on 9 July 2012 in respect of the applicants having paid their visa fees before 9 July 2012 will be treated as having been submitted before 9 July 2012 and will accordingly be considered under the Rules applicable before 9 July 2012.

5. The [claimant] contends that having paid the fees 5 July 2012, the [claimant] was prevented from submitting the application because of the paucity of resources at the end of the respondent and therefore fell to be considered under the Immigration Rules application [sic] before 9 July 2012. The [claimant] contends that the ECO has failed to make any disclosure regarding the date of payment of fees."

15. Setting aside the somewhat idiosyncratic English, these grounds set up the possibility of an interesting trial concerning what exactly happened when the claimant tried to present his application and the legal consequences, if any, of the claimant not being able to present the application because the staff were too busy to receive it, whether or not they said it would be treated as if it had been submitted before 9 July. However no evidence whatsoever was produced before the First-tier Tribunal to substantiate this claim. There was no witness statement from the claimant. There was a witness statement from the sponsor signed and dated 8 October 2013 in which she said that she understood that the claimant had attended the Visa Office in Pakistan. She then said things that supported the

grounds of appeal but she gave no indication of why she had that understanding. It was hearsay. Before us the sponsor denied any knowledge of what had happened when the claimant had made his application. We do not criticise her for this. It would have been highly unlikely that she had been present and able to give evidence but for whatever reason she did not repeat before us the points made her statement.

16. We have a letter from London Consultancy Immigration Services and Solicitor Advisory dated 24 September 2013 addressed to the First-tier Tribunal identifying the claimant and saying that he

> "has submitted his online visa application form and visa fee on 15 July 2012 but his complete Case is submitted at UK Visa Application Centre, Islamabad, Pakistan on 9 July 2012 under reference number (number given) before the implementation of UKBA new rules".

17. This serves more to draw attention to the confusion than it does to illuminate the situation. Certainly that letter made it plain that the claimant wanted the case dealt with under the Rules applicable before 9 July and referred to an online Visa Application Form and fee of 5 July but also his "complete case" being submitted on 9 July 2012. The Visa Application Form is said to have been presented on 4 July but is also dated 6 July.

18. We understand that practices vary between visa posts. There are some places where an application can only be made online and where payment can only be made or is normally made on line. There are other places where an application is made online but payment has to be made separately. However this understanding is from our general knowledge. No-one has given us any evidence about the procedures in operation at Islamabad at the necessary time and we are not in any position to make any rational assumptions about which systems operated there.

19. Certainly the claimant's own case set out in his letter from London Consultancy suggests strongly that he expected payment to be made after the application was submitted. The contentious points are when the sum was actually paid and why it was not paid earlier.

20. There was some reference to this at the hearing before the First-tier Tribunal because there was a point where the claimant's representative asked for an adjournment to get a copy of the bankers draft used to pay the fee. This caused her to comment somewhat sharply that "it must have been self-evident to Mr Saini that any objective evidence relating to the payment the fee would be, to put it at its lowest, most helpful". In that respect she was right.

21. The First-tier Tribunal Judge allowed the appeal. He said at paragraph 7:

> "I note the application is dated 6 July 2012. The front page of that application, however, indicates that it was submitted online on 4 July 2012. There are no documents before me to indicate that the application was rejected by the respondent for want of the appropriate fee and I would reasonably have expected that the appellant, naturally wishing his application to succeed would have paid the fee, promptly. On the balance of probabilities I accept that the application was properly made and the fee paid before the change to the Immigration Rules. That being so I address, in the first instance, the application under paragraph 281."

22. We have reflected very carefully on this paragraph. Although we have every sympathy for the claimant's wife we cannot follow the logic of this paragraph. We

see no reason whatsoever to assume that the fee was paid with the application. There is no evidence that it was paid with the application. As indicated above, all the evidence points to it being paid after the date shown on the application but when? We can find no logical basis for her finding and we have to conclude, albeit without any enthusiasm, that the judge's reasoning is not sound and we set aside her determination.

23. We must remake the decision.

24. If we find that the complete application was made before 9 July 2012 we are likely to allow the claimant's appeal. If we find that it was made on 9 July 2012 we are likely to dismiss the appeal. It is quite clear to us that the claimant's wife will find it very difficult to earn sufficient money to maintain him to the requirements of the new Rules. Ironically it is more than ordinarily desirable that her husband joins her. We have evidence from the Birmingham Children's Hospital showing us that, very sadly, their child is suffering from cancer and, wholly unremarkably, his mother is suffering from a degree of depression as a result. It is not suggested that she is suffering from a severe form of clinical depression but that the combined responsibilities of nursing her child and holding down a job without the support of her husband are making life difficult for her although she is being supported by her family.

25. It is a measure of her concern about this case that although the claimant's solicitors did not attend before us the claimant's wife had travelled from Birmingham even though he son was in hospital receiving some cancer treatment that she described as an "operation" today and was supported by her sister.

26. Although she did her best to help us we understand that she may well have been a little preoccupied and we encouraged her to return to Birmingham safely to see her child.

27. We have pored through the papers very carefully after the hearing, together, to see if we could find any evidence that would enable us to support a conclusion about when the application was actually made, but we can find none of any use. For example, although there are several bank statements which may have shown when payment was made, they are not for the relevant period. There is no bankers draft from the appellant's solicitors even though one was talked about at the First-tier Tribunal. Nothing was produced in response to the grounds. The Entry Clearance Officer has wholly failed to appreciate that his assertions might be in any way deficient.

28. We therefore find an error of law and set aside the essential decision of the Tribunal. We will decide how to proceed with this case best after there has been a response to the following directions. We wish to emphasise that we will not necessarily order a further hearing. We may make a decision on the papers before us.

29. According to paragraph 6 of the Determination, Mr Saini, a solicitor then acting for the appellant said that "the fee had been paid by bankers' draft" but that he would need time to produce a copy of that draft. It would be very helpful if that can done.

30. We are aware from experience that Entry Clearance Officers often find it hard to respond to directions. We remind the parties that it is always open to them to apply for directions to be amended, particularly to be given more time to respond. However we are very concerned about the claimant's wife and we are not going to allow this appeal to drift. There is a direction dealing with the need for a prompt

response and a warning of the consequences of a failure to respond. This must be heeded by the parties because it will not be forgotten by the Tribunal.

DIRECTIONS

(1) No later than 28 days after the date on this decision the parties shall serve on the Tribunal and on each other copies of any further evidence on which they wish to rely going to the issue of the date on which the application was made and the date for which payment was made, including any signed witness statement drawn to stand as evidence in chief without the need for further questions.

(2) At a time convenient to the Tribunal after 28 days the Tribunal will review the evidence and either determine the appeal or give further directions and when reviewing the evidence the party is likely to find that any party that has not responded to these Directions is no longer interest in pursuing the appeal.

(3) The Tribunal will consider the state of the evidence after 28 days and in the event of a party not responding to these directions the Tribunal may take the view that the party in default is no longer interested in pursuing the appeal.

(4) The parties are reminded that they can apply for further directions including variation of the timescale.

3. The directions required things to be done within 28 days. The Entry Clearance Officer did nothing. Mr Tarlow made a formal request for more time but given the clarity of the directions and the express reminder therein that the parties could ask for more time I saw no reason to further adjourn the hearing.

4. The claimant, through his solicitors, did provide some further information. However that further information is not enough to show when the application for entry clearance to the United Kingdom was made. All it shows is that a cheque in the form of a bankers draft was raised on 5 July. It does not show when that was presented and that is the crucial gap in the evidence.

5. Notwithstanding our expressed preference for determining the appeal without a further hearing I did not consider it appropriate to make a decision on human rights grounds without giving both parties, the chance of making further submission, particularly given our comments in paragraph 24 of the Reasons. As it was not desirable to determine the case on the papers without a further hearing I arranged for the case to be listed as soon as possible and it was listed before me only, Deputy Judge Mailer not being available on 30 May or any time near to that date. Principal Resident Judge Latter made an appropriate transfer order on 22 May 2014.

6. I asked Mr Saini, for the claimant, if there was anything he wanted to say concerning the evidence about when the application was made. He submitted that it was for the Entry Clearance Officer to show when the application was made but I reject that submission. It is the claimant who has to prove his case and if it is his case that the application was made before 9 July then he should have produced evidence to show that.

7. The directions were deliberately wide and produced nothing of any value.

8. There is nothing to support a finding that the application was made before 9 July and I rule that it was not. I find that it was made after that date which is what the Entry Clearance Officer maintains. It follows therefore that the

claimant does not meet the requirements of the Immigration Rules and the case has to be dismissed under the Rules.

9. The grounds of appeal clearly raised the European Convention on Human Rights. I am aware that there has been an attempt to codify or identify in the Rules the circumstances where an appeal or application should succeed under Article 8 and this claimant does not come within those circumstances. Nevertheless it is my decision that this is an appeal that ought to be allowed under Article 8 of the European Convention on Human Rights and I allow it on those grounds. My reasons for this decision (which, for the avoidance of doubt, I considered before making the decision) are set out below.

10. The European Convention on Human Rights embodies a positive obligation on the United Kingdom to promote person's private and family life in its policies and decisions. Unlike the Immigration Rules which are subject only to a weak form of scrutiny, the European Convention on Human Rights is incorporated into domestic law by statute and so the obligation to follow the convention is a high one that I must and do respect (see **Izuazu (Article 8 – new rules)** [2013] UKUT 00045 (IAC).

11. It is established law that where a child or spouse is a British citizen, and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so (**Zambrano v Office national de l'emploi (ONEm) C-34/09**). In any event the claimant's son is a British national benefitting, as he is entitled to do, from National Health Service treatment for leukemia. He cannot be expected to leave that to join his father in Afghanistan and Mr Tarlow did not suggest that he should.

12. Clearly, keeping apart a husband from his wife and a father from his young son is an interference what the private and family lives of the people concerned. The Entry Clearance Officer must show that the interference is justified and proportionate.

13. Mr Tarlow, as he was required to do, reminded me of the decision of this Tribunal in **Gulshan (Article 8 – new Rules – correct approach)** [2013] UKUT 00640 (IAC). He submitted that there was nothing exceptional or compelling in the **Gulshan** sense about this case and that I should dismiss the appeal.

14. I do not agree.

15. Following **Gulshan** I must first ask myself if there are here arguably good grounds for granting leave outside the rules. The obligation to promote private and family life is heightened here by the (in the circumstances) unremarkable evidence that the claimant's wife wants his support in the United Kingdom and that the claimant's child cannot travel to see him (see the report from the CLIC Sargent Social Work Team dated 17 March 2014).

16. I find that this is precisely the kind of case where there are there are arguably good grounds for granting leave outside the rules and it is necessary, again

following **Gulshan**, to consider whether there are sufficiently compelling circumstances not sufficiently recognised by the rules.

17. In my judgement there are. Article 8 operates (inter alia) to underpin all immigration decision making and an attempt to codify the operation of the Convention cannot possibly be done in a way that is succinct enough to be useful unless it includes some elements that are highly generalised. It is inconceivable (I think), for example, that the rules would identify different degrees of illness and grades of severity of those illnesses in order to prescribe when the illness of a relative might impact on an article 8 decision. I regard the need for family unity in the case of a seriously ill child as a "sufficiently compelling circumstance not sufficiently recognised by the rules."

18. In order to follow **Gulshan** properly I must, in this case, look beyond the rules. I do not allow the claimant's appeal on human rights grounds *because* the claimant's child is ill. Rather it is the child's illness and the associated compassionate factors, that cause me to look beyond the rules.

19. I have reminded myself of the five stage test identified by Lord Bingham in **R v. SSHD ex parte Razgar** [2004] UKHL 27. I see no need to set it out. In this case the contested issue is proportionality.

20. Public policy, as embodied in the rules, requires the claimant's exclusion until he can satisfy the rules. If this is not the case then the rule of law in the matter of immigration control gives way to the decision maker's whim.

21. The claimant cannot show that his wife earns the required sum to maintain him and he did not produce a certificate of competence in the English language at the required time. I recognise the public policy imperatives of declining to admit people who cannot achieve a certain level of income or who are not inclined to integrate into British society. The claimant has addressed these concerns by evidence that he will be maintained without recourse to public funds, albeit not at the higher level required by the rules, and he has proved his competence in the English language.

22. I also recognise the legitimacy of a policy that requires an applicant to order his case before making his application rather than later on appeal. Such a policy discourages wasteful appeals by requiring applications to be prepared carefully and properly. However in this case the applicant prepared his application before the rules changed. That being so, his failure to produce his evidence at the required time is less important than it might otherwise have been.

23. In my judgement these are an example of the sort of circumstance which cannot be exhaustively defined but which can be recognised where the Convention operates to allow somebody to enter the United Kingdom outside the Rules.

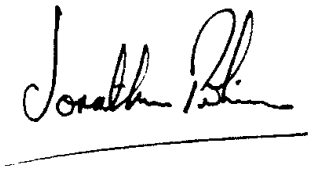
24. It is for the Secretary of State (because she made the rules) to justify the interference in the private and family lives of the people concerned consequent on excluding the claimant. I find nothing before me that justifies separating a man from his family in circumstances such as these. It is wholly unreasonable to contemplate the idea of the wife and child moving from the United Kingdom where they are citizens and benefit from the health service to go and live in Afghanistan. I do not see how it is proportionate to the proper purpose of

enforcing immigration control to exclude a husband who wants to be with his family in these compelling compassionate circumstances where he can be maintained without recourse to public funds and where he has prepared himself for living in the United Kingdom by proving that he uses the English language competently. Set against the importance of promoting a person's private and family life, and particularly promoting the private and family life between husband and wife and father and minor child, I do not find the public policy imperatives of a high level of maintenance, and pre-application disclosure of all the evidence particularly weighty. The balance is in favour of allowing the appeal on human rights grounds, which I do.

25. I make no direction about what sort of leave the claimant should have. That is something for the Secretary of State to sort out in all the circumstances of the case but in order for the human rights of the claimant and his family members to be respected he should be given leave that allows him to enter the United Kingdom to be with his family for a significant period of time and permits him to work.

26. I therefore set aside the decision of the First-tier Tribunal and substitute a decision allow the claimant's appeal on human rights grounds.

27. It seems to me highly desirable that the claimant is allowed to enter the United Kingdom without delay and I have decided to take the unusual step of directing that suitable leave be endorsed in his passport as a matter or urgency.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 2 June 2014