Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/37814/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18th July 2014	**On 07th Aug 2014**

Before

UPPER TRIBUNAL JUDGE KING
UPPER TRIBUNAL JUDGE RINTOUL

Between

MA GUL

Appellant

and

ENTRY CLEARANCE OFFICER, ABU DHABI

Respondent

Representation:

For the Appellant: Mr A Pretzell, Counsel, instructed by Duncan Lewis & Co.
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge R A Cox promulgated on 6 February 2014 in which he dismissed her appeal against a decision to refuse her entry clearance.

2. The appellant is a citizen of Afghanistan. She is married to Abdul Hai Pirzadeh who is also married to Momtaz Pirzadeh. Both marriages took place in Afghanistan when the sponsor was living there and are both lawful according to the law of Afghanistan. Momtaz fled to the United Kingdom where she successfully sought asylum; where

the sponsor and his three children by the appellant were later admitted to the United Kingdom under family reunion.

3. Having thought that Ma Gul had died, it was only in 2011 that the sponsor found out that she was still alive. By this point the sponsor and the children had acquired British citizenship. With the assistance of legal representatives in the United Kingdom, Duncan Lewis & Co., an application was prepared whereby the applicant should seek entry clearance to the United Kingdom so she had access rights to her children. Documentation and a covering letter was prepared and forwarded to the appellant with a view to an application being made online.

4. The application, as prepared by Duncan Lewis & Co. was framed in terms of paragraph 246 of the Immigration Rules which was in force at the time, March 2012. Although the materials were sent to the appellant in good time, there were delays in the submission of the application owing to the intervening loss of the appellant's passport. The application was not submitted until 16 October 2012 by which time the covering letter was out of date, and paragraph 246 of the Immigration Rules had been superseded.

5. The application, made online, was for a family visit visa and was supported by the documentation prepared by Duncan Lewis & Co. in respect of an application pursuant to paragraph 246 of the Immigration Rules. The application indicated that a visit of about a month was envisaged.

6. The respondent refused the application pursuant to paragraph 41 on the grounds that:-

   (a) he was not satisfied that they were related as claimed to the sponsors in the United Kingdom;

   (b) there was no evidence to show how she was supported in Afghanistan and, on the basis of the evidence supplied, was not satisfied that she would be adequately maintained in the United Kingdom without recourse to work or public funds.

7. The refusal notice also noted a request to consider that the application be considered under paragraph 246 of the Immigration Rules whereas it had expressly stated that as the application form was that from a family visit visa it would be considered under paragraph 41 of the Immigration Rules only.

8. The appellant appealed to the First-tier Tribunal on the grounds that:-

   (a) the Entry Clearance Officer should have examined the application under paragraph 246 of the Immigration Rules instead of paragraph 41 as specifically mentioned in the cover letter;

(b) the decision is unlawful because it is incompatible with her rights under Article 8 of the European Convention as her right to see her children has been denied;

(c) the application was not in accordance with the Immigration Rules.

9. The respondent maintained the decision in the review.

10. First-tier Tribunal Judge Cox concluded:-

(a) that the appellant could not meet the requirement of the Immigration Rules as the sponsor's evidence was that he would be grateful if the appellant could be given permanent residence here [7];

(b) that having directed himself with regard to **SZ (Applicable immigration rules) Bangladesh [2007] UKAIT 00037**, given the time-lapse between the solicitors' letter of 2 March 2012 and the application of 16 October 2012 and the terms of the application which were entirely consistent with a single one month family visit that the respondent was entirely justified in taking the view that the appellant was now seeking no more than a visit [11];

(c) that whilst the delay was now explained by the need to obtain a passport and that the form was completed by agents that was not necessarily known to the respondent and the respondent did not need to consider the case outside paragraph 41 [11];

(d) that he could not and should not consider the application under Appendix FM-E.C.P.T. (the successor to paragraph 246) given that there was no obvious link or connection between the two [12]; that it would not be in the requirements of fairness if he were to determine the issues under Appendix FM at first instance himself; and, that there are some very difficulties issues around Appendix FM-E.C.P.T. given that the sponsor has another wife here who was apparently the means by which he and the children were able to enter the United Kingdom and because the ECO would not normally countenance admission of more than one wife of a sponsor [12].

11. The appellant sought permission to appeal on the grounds that:-

(a) the reasons identified by the judge when considering the respondent's refusal to look at the parental contact visit were not those given by the respondent [8], [9];

(b) the judge overlooked the additional documents;

(c) in considering the requirements of fairness the judge had erred in concluding that there would be difficult issues under Appendix FM-E.C.P.T. and that a definition of partner excluded polygamous marriage and thus there was no issue; and

(d) the judge had erred in concluding that there was no obvious link and connection between a parental contact visa and a visit visa given that both were to facilitate visits to children.

12. On 13 May 2014 I gave permission for appeal asserting that the First-tier Tribunal Judge erred in his application of **SZ (Bangladesh)** and in concluding he should not consider whether the requirements of Appendix FM-E.C.P.T. were met. I also gave further directions that a skeleton argument was to be produced.

13. When the matter came before us on 18 July 2014, we heard submissions from both parties and were assisted by a detailed skeleton argument prepared by Mr Pretzell.

14. There are two principal issues in this appeal: 1) did the respondent err in law in refusing to consider the application as an application for entry clearance as the parent of a child settled here; and, 2) did Judge Cox err in law in refusing to consider whether the appellant met the requirements of paragraph Appendix FM-E.C.P.T.?

15. The respondent's reason for refusing to consider the application except under paragraph 41, as set out in the decision notice, is that the application form for family visitor had been completed. Unlike applications for leave to remain from within the United Kingdom, there are no prescribed application forms for Entry Clearance, but in practice, applications made online generate specific electronic forms, as the specific questions asked are governed by the initial choice of the type of application it is sought to be made. We have no reason to doubt that, here, Family Visit was the purpose of the visit chosen and so the questions and form generated relate to that.

16. The current situation is now, thus, in effect more structured than was the case when **SZ (Bangladesh)** was decided but nonetheless it is still good law, and is still relevant to the facts of this case. We consider that it is in the circumstances appropriate to quote in full paragraphs 8, 9, 10 and 11:-

> 8. The correct starting point must, in our view, be the appellant's application for entry clearance or leave. It is the basis upon which that is made which must inform the decision-maker (and on appeal the Tribunal) of the appropriate immigration rule or rules which should be considered and applied. This is not to say that the applicant must identify and specify the rules upon which he or she relies. That would often be to expect too much in practice and would be uncalled for on any legal basis. Nevertheless, it is the applicant's duty to set out the factual matrix for their application to enter the UK as a spouse, an adopted child, a dependent relative, a student, a visitor and so on. The decision-maker must then make an assessment of what immigration rule or rules that application engages and respond accordingly. Thus, not only must the correct rule be identified and applied (CP Dominica [2006] UKAIT 00040), but also if an application (as presented) could be considered under alternative parts of a relevant rule it will be the decision-maker's duty to do so (see, IAT v Tohur Ali [1988] Imm AR 237 (CA) and Mohammed Fazor Ali v SSHD [1988] Imm AR 274 (CA)). An example of this might arise in an application by a dependent child under paragraph 297 or a dependent adult relative under paragraph 317. More than one part of the relevant rule might be applicable or become applicable when the decision-maker examines the evidence and determines the facts.

9. Although, the authorities recognise that the decision-maker (including the Tribunal) must consider all the relevant parts of an applicable rule, the duty to consider the applicable rules is not an all-embracing obligation to seek out and find any (or every) potentially applicable rule. In Mohammed Fazor Ali v SSHD Mann LJ pointed out (at p. 282) it was not 'any part of an immigration officer's duty to conduct a roving expedition through all the paragraphs to see whether a person before him is eligible under any of them.'

10. Without deciding the issue, the Court of Appeal has expressed scepticism as to whether the Tribunal is required to consider the application of immigration rules not directly relied upon by the appellant (see Tohur Ali, especially *per* Balcombe LJ at p. 247 and Woolf LJ at p. 255).

11. It is important to bear in mind that the Tribunal is not the primary decision-maker in immigration cases. It hears appeals against decisions taken (see, EA Nigeria [2007] UKAIT 00013, at para [7] clarifying the relevance in appeals of post-decision facts and the application of s.85(4) of the 2002 Act). Consequently, the focus of enquiry by the Tribunal must always be the basis upon which the application was made. It is that application which leads to the decision which is the subject of any appeal before the Tribunal. If an appellant seeks to assert a different basis from that put forward in his application upon which he should have been granted entry clearance or leave under the immigration rules, that is properly a matter for a fresh application or possibly a variation of the existing application. It is not a matter for the Tribunal to consider on an appeal against the decision made on the existing application. "

17. The starting point is that, whether through her fault or not, the applicant applied under the wrong provision. Further, there is no evidence that the higher application fee payable for an application pursuant to Appendix FM for access to a child has been paid. We note in this context that, as was noted in **Kaur (Entry Clearance – date of application) India [2013] UKUT 381**, Article 3 of the Immigration and Nationality (Fees Order) 2011 requires applications for entry clearance to be accompanied by the fee specified in the Fees Regulations; the effect of a failure to pay the correct fee for an application means that it is not a valid application; it is a nullity.

18. Further, it is thus difficult to understand how, where an application has been made expressly on the basis of a family visit and the correct fee for that application has been paid, that it was not correct for the Entry Clearance Officer to proceed on the basis that that it what was intended. As was said in **SZ (Bangladesh)** at [14]:

14. It follows that in the generality of cases it will be obvious from the application which immigration rule (or rules) must be considered. The nature of the application, the statements within it and the boxes ticked will indicate that the appellant is seeking entry clearance or leave, for example on the basis of marriage, as a family visitor, a dependent relative or as a student. (This will be particularly so for in-country applications where a specific prescribed form must be used depending upon the basis for the application: see the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2006 (SI 2006/1421).) As a result, the Tribunal's scope of enquiry will be circumscribed and focussed upon a clearly applicable rule (or rules).

19. We accept that there was evidence within the application form that the appellant had been unable to sign her name and had never travelled to the UK before and had applied for exemption from the English language requirements, as well as the fact that she had used an agent. We note Mr Pretzell's submission that it was evident from the appellant "signing" with a thumbprint that she was illiterate, and so could not have understood the form as prepared by the agent; that the respondent should have made enquiries of her, given that the application was accompanied by additional documentation evincing an intention to apply on an entirely different basis.

20. We do not accept that submission. It is for an applicant to complete forms correctly, to pay the correct fee, and to submit the relevant documentation. It cannot properly be argued that an Entry Clearance Office or his agents are under a duty to examine applications to determine if they are, in fact, what was intended; that would be to impose a wholly unreasonable burden. Further, it is even more difficult to understand why such a duty should apply where, as here, the appellant had used an agent. Such an argument is, in effect, to put Entry Clearance Officers under a duty to make sure applicants do not make mistakes, rather than applicants having to face the consequences of making mistakes.

21. Further, while the respondent here noted the material relating to paragraph 246, it was dated many months before the date of application. Whilst we accept that Judge Cox did in his analysis [10], [11] refer to other matters, the points made – that the visit had been stated to be for a month to visit children and giving intended travel dates, the judge is simply illustrating in more detail reasons which would been open to the Entry Clearance Officer and which were patent on the face of the application.

22. We are not satisfied that the Entry Clearance Officer erred in not treating this as an application under Appendix FM-E.C.P.T. We consider also that Judge Cox did not err in concluding that the respondent had not been compelled to consider the application under that or an earlier provision.

23. Turning to the issue of whether Judge Cox erred in refusing to consider whether the appellant met the requirements of Appendix FM-E.C.P.T., we consider that the starting point in assessing his conclusions is again **SZ (Bangladesh)** with particular reference to what was said at [11].

24. We consider that, for the reasons set out above, it cannot be said on the facts of this case as known to the Entry Clearance Officer that he acted unfairly in not considering the application under Appendix FM-E.C.P.T. nor in the circumstances, absent any proper reason being given why a fresh application should not have been made accompanied by the explanations which are now given.

25. On reflection, we do not accept that Judge Cox erred in concluding that there was a difficulty with respect to Appendix FM-E.C.P.T. flowing from the appellant's polygamous marriage. The definition of "partner" for the purposes of Appendix FM set out at Gen 1.2 does not expressly exclude a party to a polygamous marriage and

includes "spouse". The Immigration Rules do not define spouse per se. For most purposes, English law treats a polygamous marriage as valid if the parties had, through their domicile at the time, the capacity to enter into a polygamous marriage, and the marriage was valid according to the law of where it was contracted (see Dicey and Morris, *Conflict of Laws* Vol 2 at page 850). Were "spouse" not to include a party to such a marriage, it is difficult to understand why paragraph 278 of the Immigration Rules would be necessary but this is not an issue on which we heard argument, nor did we hear submissions as to whether the sponsor would, under Afghan law at the relevant time, have been able to enter into a polygamous marriage.

26. In any event, Judge Cox gave substantial other reasons why it would not be appropriate for him to consider the application under Appendix FM, not least of which is the fact that there were no primary findings of fact with respect to that Immigration Rule. The reality is that there was no valid application for Entry Clearance under Appendix FM; the appellant could and should have made a fresh application in the correct form, and it is not properly arguable that the Judge erred in refusing to consider whether the appellant met the requirements of Appendix FM-E.C.P.T.

27. Accordingly, for these reasons we consider that the determination of the First-tier Tribunal Judge did not involve making an error of law and we uphold it.

Signed Date: 7 August 2014

Upper Tribunal Judge Rintoul