Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02839/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 24th April 2015	**On 5th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

NAHEED JAHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr K Wood of Rochdale Legal Enterprise
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge of the First-tier Tribunal Lever (the judge) promulgated on 9th September 2014.

2. The Appellant is a female citizen of Pakistan born 23rd September 1948 who applied for entry clearance to the United Kingdom to enable her to settle with her adult children in this country.

3. The Respondent assessed the application as a returning resident and therefore referred to paragraphs 18 and 19 of the Immigration Rules. The application was refused on 8th February 2014.

4. The Respondent noted that the Appellant had been away from the United Kingdom for more than two years and therefore refused the application with reference to paragraph 18(ii). The Respondent noted that the Appellant had only lived in the United Kingdom for a period of five years. The Respondent refused the application with reference to paragraph 320(9) on the basis that the Appellant had failed to prove that she meets the requirements of paragraph 18 of the Immigration Rules, and failed to prove that she sought leave to enter for the same purpose as for that which her earlier leave was granted.

5. The Appellant appealed to the First-tier Tribunal. It was contended that the Respondent's decision was not in accordance with the Immigration Rules, and there had been inadequate consideration of paragraphs 18 and 19 of the rules.

6. It was contended that the Appellant satisfied the requirements of paragraph 19 of the rules, and the Respondent had not considered paragraph 317 although this issue had been raised in two previous decisions.

7. It was contended that the Respondent should have exercised differently a discretion conferred by the Immigration Rules when making the decision of 8th February 2014.

8. It was further contended that the decision was not in accordance with the law as there had been no consideration or application of the Respondent's published policy on the exercise of discretion under paragraph 19 of the rules, and the Appellant submitted that a proper application of that policy should have resulted in her being granted entry clearance.

9. Finally it was submitted that the decision breached the Appellant's right to a family life pursuant to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

10. The appeal was heard by the judge on 26th August 2014 and evidence was given by one of the Appellant's daughters who is resident in the United Kingdom, and her son.

11. The judge set out the background to the application, noting that the original application was made by the Appellant and her late husband as long ago as 29th July 2011. The judge took the view that in addition to considering paragraphs 18 and 19 of the Immigration Rules, he should also consider paragraph 317 which was the subject matter of an earlier appeal,

which had not been decided, in that the Respondent's decision had been found not to be in accordance with the law and remained outstanding before the Respondent.

12. The judge concluded, in a comprehensive decision, that the Appellant could not satisfy paragraph 317(iii) of the Immigration Rules.

13. The judge considered paragraphs 18 and 19 in paragraph 30 of his decision and concluded that the Appellant could not satisfy paragraph 18, and that in relation to paragraph 19, the Respondent's exercise of discretion against the Appellant was "neither unreasonable nor unexpected."

14. The judge considered Article 8 in paragraphs 31-33 of his decision and found that refusal of entry clearance was not disproportionate, given the circumstances of this case.

15. The Appellant applied for permission to appeal to the Upper Tribunal relying upon three grounds.

16. Firstly it was contended that the judge had made a material misdirection in law when considering the exercise of discretion under paragraph 19 of the Immigration Rules. Reliance was placed upon EO Turkey [2007] UKAIT 00062. It was submitted that the judge should have considered whether the Respondent's discretion should have been exercised differently, but the judge had confined himself in paragraph 30 to reviewing the reasonableness of the Respondent's decision.

17. Secondly it was contended that the judge had made a material misdirection in law in failing to consider criteria set out in R v SSHD Ex parte Dominic Omosanya Ademuyiwa [1986] Imm AR 1. It was contended that in paragraph 30 the judge had not properly engaged with the criteria set out in Ademuyiwa, and in particular had not taken account of the fact that the Appellant has a British born son, who was born when the Appellant was lawfully in the United Kingdom, or that three of her daughters had been granted entry clearance as returning residents and a fourth was awaiting a decision on her application on the same basis.

18. It was contended that the failure to have full regard to the cumulative effect of the six criteria in Ademuyiwa vitiated the judge's findings on paragraph 19 of the Immigration Rules, and his failure to consider the full factual matrix vitiated the Article 8 assessment.

19. Thirdly it was contended that the judge had failed to make a finding of fact on a material matter as the Appellant had raised as one of the grounds of appeal that the Respondent's decision was not in accordance with the law, because of the failure to consider the Respondent's published policy on returning residents. It was submitted that the decision did not demonstrate that the Respondent had had regard to the published policy, which meant the decision was not in accordance with the law, and the

judge erred in failing to make such a finding. Permission to appeal was granted by Upper Tribunal Judge Renton in the following terms;

> The Appellant applied in time for leave to appeal. There is an arguable error of law.
> The Appellant appealed a decision to refuse her leave to enter as a returning resident and dependent relative. First-tier Tribunal Judge Lever (the judge) dismissed the appeal because he was not satisfied that the Appellant met the requirements of paras 317 and 18 of HC 395. These decisions are not impugned in the grounds.
> The judge also dismissed the appeal as he was not satisfied that discretion should be exercised in favour of the Appellant under para 19 of HC 395. It is arguable that the judge erred in law in reaching that decision by not taking into account all the criteria set out in R v SSHD ex parte Dominic Omosanya Ademuyiwa [1986] Imm AR 1.
> The remaining grounds may be argued.

20. Following the grant of permission there was no response from the Respondent pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

21. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal decision should be set aside.

Submissions

22. Mr Harrison apologised for the lack of a rule 24 response, and advised that the application for permission to appeal was not opposed. It was accepted that the judge had erred in law as contended by the Appellant.

23. Mr Wood relied upon the grounds set out in the application for permission to appeal.

24. Mr Wood submitted that the decision of the First-tier Tribunal should be set aside for the reasons given in the grounds, and that the appropriate course of action was for the decision of the Respondent to be declared not in accordance with the law, which would mean that the decision remained outstanding before the Respondent.

25. Mr Harrison agreed.

My Conclusions and Reasons

26. I take into account that the application for permission to appeal is not opposed on behalf of the Respondent. The decision of the Respondent does not demonstrate that the Respondent's published policy on returning residents was adequately considered. There is a reference to paragraph 19 in the refusal decision, but no evidence to indicate that the terms of the policy were taken into account and analysed in making the decision.

27. There has therefore been inadequate consideration of paragraph 19 by the Respondent which means that the decision dated 8th February 2014 is not in accordance with the law. I conclude that the judge erred in not making such a finding.

28. The consideration of paragraphs 18 and 19 by the judge is contained in paragraph 30 of the decision. It is common ground that the requirements of paragraph 18 cannot be satisfied. In relation to paragraph 19 the judge concluded;

> "Any exercise of discretion against the Appellant by the Respondent is therefore neither unreasonable nor unexpected."

29. In my view the judge reviewed the reasonableness of the Respondent's decision, rather than considering whether the discretion should have been exercised differently. The decision made by the Respondent was a flawed decision, not having taken into account the published policy in relation to rule 19. That amounts to an error of law. The judge made no reference to the decision in Ademuyiwa which is not in itself an error, if the principles have been considered and applied. I am persuaded that the judge did not engage with all the criteria set out in Ademuyiwa which also amounts to an error of law.

30. The decision of the First-tier Tribunal is therefore set aside. I accept the submissions made by both representatives, that the appropriate course is to find the decision not to be in accordance with the law, so that the application remains outstanding before the Respondent for a lawful decision to be made. The issue to be decided relates to rule 19 of the Immigration Rules, which needs to be considered by the Respondent in the light of the published guidance on returning residents, and the criteria set out in Ademuyiwa.

Notice of Decision

The First-tier Tribunal erred in law and the decision is set aside. The appeal is allowed to the extent that the Respondent's decision is not in accordance with the law, and therefore the application remains outstanding before the Respondent for a lawful decision to be made.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and I find no need to make an anonymity direction.

Signed Date 28th April 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

Mr Wood applied for a fee award. Mr Harrison indicated that it was difficult to oppose such an application. Even though the appeal has only been allowed to a limited extent I find it appropriate to make a fee award. This is because the Respondent's decision was not in accordance with the law, as was accepted on behalf of the Respondent, and an appeal had to be entered as a result of that decision. I make a full fee award.

Signed Date 28th April 2015

Deputy Upper Tribunal Judge M A Hall