



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

Appeal Number: OA/06739/2014

THE IMMIGRATION ACTS

**Heard at: Phoenix House
On 12 May 2015**

**Decision and reasons
Promulgated
On 9 June 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS NAZMA WQAQAS
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Senior Presenting Officer
For the Respondent: Mr S Malik, Legal Representative

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondent is a citizen of Pakistan born on 8 January 2015. However, for the sake of convenience I shall refer to the latter as the “appellant” and to the Secretary of the State as the “respondent”, which are the designations they had in the proceedings before the First-tier Tribunal.
2. The appellant’s appeal to the First-tier Tribunal Judge Mensah was against the decision of the respondent dated 30 May 2014 and 11 November 2014 who refused the appellant’s application for entry

clearance as a spouse under Appendix FM of the Immigration Rules. The Judge allowed the appellant's appeal in a decision dated 11 November 2014.

3. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Grimmett who stated that it is arguable that the Judge had erred in her application of evidential flexibility as the appellant could not provide the 12 months bank statements as required. The Judge nevertheless allowed the appeal on the basis that the Entry Clearance Officer should have applied the policy. It is arguable that the Judge erred in allowing the appeal outright on that basis as the discretion can only be exercised by the respondent not by the Judge.
4. Thus the appeal came before me.
5. At the hearing before me the parties agreed that there was a material error of law in the determination. It was accepted that the Judge erred in law when he stated at paragraph 10, "it is correct that the appellant did not provide the required 12 months personal bank statements and for that reason the appellant could not, on the face of it, meet the evidential requirements under appendix FM SE". The Judge stated that the sponsor's "minimarket started on 1 May 2013 and his application was made on 12 December 2013. The bank statements provided cover the 10 May 2013 through to 1 November 2013. Therefore the sponsor provided all the bank statement he could reasonably be expected to provide at the date of application."
6. The Judge that stated at paragraph 10 "under the Border Agency guidance and evidential flexibility under paragraph (e) states that where the decision maker is satisfied there is a valid reason why a document cannot be provided, discretion exists not to apply the requirements. The Entry Clearance Officer/Manager has failed to exercise their discretion in favour of the appellant and circumstances where it is in my opinion clear that the appellant could not file 12 months of bank statements. I allow the appeal on the grounds discretion should have been exercised differently in that the decision maker should have considered the other evidence available". The Judge allowed the appeal under the Immigration Rules and under Article 8 "for the same reasons".
7. It was accepted by the parties that the Judge made a mistake when he said at paragraph 10 that the appellant's sponsor's minimarket started on 1 May 2013. The market in fact started in 2012.

Error of law decision

8. There is no suggestion that the First-tier Judge's consideration of the subsistence of the relationship between the appellant and her sponsor in respect of the Immigration Rules is materially flawed. The respondent did

not challenge this finding in the grounds of appeal. This finding by the Judge's therefore is upheld.

9. The only issue taken by the respondent with the determination was that the Judge's findings that the appellant can meet the financial requirements of the Immigration Rules by the Judge applying the respondent's evidential flexibility policy, herself when it was for the respondent to apply her policy and not the Judge.
10. I accept that it was not for the Judge to apply the respondent's evidential flexibility policy but she should have sent it back to the Secretary of State on the basis that the discretion be exercised by her. I find that the Judge by allowing the appeal outright, materially erred in law.
11. There is also an error of law in the determination of the Judge in reaching his decision to allow the appellant's appeal pursuant to Article 8 as he stated "for the same reasons" as he allowed the Judge allowed the appellant's appeal under the Immigration Rules. The Judge gave no reasons for her decision. The Judge also materially erred in law in this respect.
12. In the circumstances, I set aside the decision of the First-tier Tribunal Judge and remit the appeal to the Secretary of State awaiting her lawful decision.

DECISION

The Secretary of State's appeal succeeds to the limited extent that it be remitted the Secretary of State for her lawful decision.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

The 7th day of June 2015