



IAC-FH-CK-V1

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

Appeal Number: OA/14746/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21st December 2015**

**Decision & Reasons Promulgated
On 14th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SC

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

ENTRY CLEARANCE OFFICER, BEIJING

Respondent

Representation:

For the Appellant: Mr T Gaisford, Counsel instructed by AKL Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant, a citizen of China born on 27 July 2005, against the decision of First-tier Tribunal Judge Rose (Judge Rose) promulgated on 4th June 2015. The Appellant's appeal was against the Respondent's decision of 4th November 2014 refusing entry clearance under Appendix FM to the Immigration Rules. The application for entry clearance was made on 5th September 2014.
2. The Respondent's grounds of refusal were twofold: first that the Appellant had failed to produce a TB certificate as required; secondly that the United

Kingdom-based sponsor, the Appellant's mother, did not have sole responsibility for her upbringing.

3. Judge Rose concluded that the Appellant was required to produce a TB certificate and went on to find that no such certificate had in fact been provided as at the date of decision (paragraphs 12-14 of his decision). As a consequence, it was said by Judge Rose that the Appellant was unable to satisfy paragraph A39 of the Rules and sections EC-C.1.1(c) and S-EC.1.6 of Appendix FM.
4. In respect of the sole responsibility issue, Judge Rose found in the Appellant's favour (paragraphs 17-21). The judge then went on and considered Article 8 outside of the Rules and concluded that in all the circumstances the Appellant's rights under that provision were not breached by reason of the Respondent's refusal of entry clearance (paragraphs 22-33).

The grounds and grant of permission

5. The Appellant was granted permission to appeal to the Upper Tribunal by First-tier Tribunal Judge Simpson on 18 September 2015.
6. The grounds are based effectively on a single issue, namely that there existed as at the date of decision a policy of the Respondent, a policy that was before Judge Rose but one that had not been considered by either the Respondent or in turn the judge. That policy was said to be relevant to the Appellant's case because it stated in terms that only applicants aged eleven years or above who were seeking to come to the United Kingdom for longer than six months needed to provide a TB certificate. It is said in the grounds that this policy was applicable to the Appellant's case, given that she was at the date of decision only nine years old. The grounds also argue that the terms of the policy represented a reasonable excuse for not providing the certificate at the time of the application and decision. Finally, it is said that a certificate was eventually provided to the ECM on review of the initial refusal of entry clearance.

The hearing before me

7. I first asked Mr Clarke to make submissions. He relied on the decision of the Supreme Court in *Alvi* [2012] UKSC 33. He submitted that the Rules took precedence over policy and therefore the Appellant's arguments were bound to fail in this case. In respect of the Appellant obtaining a TB certificate after the decision was made, Section 85A of the 2002 Act precluded its admissibility.
8. Having already read the relevant papers in this case and having regard to Mr Clarke's submissions I deemed it unnecessary to call upon Mr Gaisford for submissions.

Decision on error of law

9. In my view there is a clear material error of law in the decision of Judge Rose, namely a failure to consider what was clearly an applicable policy in existence at all relevant times.
10. The wording of the policy document, the relevant version of which I find was before the judge (81 of the Appellant's bundle) and one which still exists to date, is clear: it is only those aged eleven years or above who are required to obtain the relevant TB certificate.
11. I reject Mr Clarke's submission that in effect the Rules render any policy redundant in a case such as this. It is well-established by a long line of decisions that policies can run in parallel to the Rules and, where an applicable policy exists at the relevant point in time, this must be addressed by the decision-maker and in turn by a judge on appeal, who may in certain circumstances then allow an appeal on the limited basis that the decision under appeal is not otherwise in accordance with the law (see for example, Abdi [1995] EWCA Civ 27, AG and others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082, and Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC)).
12. In this case the Respondent entirely failed to apply her mind to the applicable policy. Unfortunately, so did Judge Rose. This failure was obviously material to the appeal.
13. In light of this error, there is no need for me to deal with the alternative errors alleged in the grounds.
14. For the reasons outlined above, I set aside the decision of Judge Rose. There has been no challenge from the Respondent as regards the judge's finding on sole responsibility, and I expressly preserve that finding for the purposes of my remake decision.

Disposal

15. Both representatives were agreed that I could remake the decision myself on the evidence before me. This I now proceed to do.
16. I find that the relevant policy to which I have already referred was indeed in existence as at the date of the Respondent's decision. The Respondent clearly did not apply her mind to the policy at all, as she was bound to do. It follows therefore that the decision under appeal was not otherwise in accordance with the law.
17. I therefore allow the Appellant's appeal on this limited basis, and as a consequence the application made on 5th September 2014 remains outstanding before the Respondent awaiting a lawful decision.

18. In making a new decision the Respondent will of course have to bear in mind the terms of her own policy and the particular facts of the Appellant's case. There is a preserved finding that the sponsor had sole responsibility for the Appellant's upbringing and there has never been any issue with the financial requirements of Appendix FM.
19. It will also no doubt be borne in mind that the Appellant is a young child who is currently separated from [her] mother (who has been granted settlement in the United Kingdom), and the Respondent is strongly urged to make a fresh decision as quickly as possible.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal to the limited extent that the refusal of entry clearance was not otherwise in accordance with the law, and the Appellant's application therefore remains outstanding before the Respondent awaiting a lawful decision.

~~No anonymity direction is made.~~

Signed

Date: 13 January 2016

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award. The Respondent entirely failed to have any regard to its own policy in this case, a policy that was clearly applicable to the application made by the Appellant. The appeal before me has succeeded on this basis.

Signed

Date: 13 January 2016

Deputy Upper Tribunal Judge Norton-Taylor