



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

**Case No: UI-2023-002484**  
**First-tier Tribunal No:**  
**EA/11440/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 07 December 2023**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**  
**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS SIDRA SARFRAZ LODHI**  
**(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr Tan, Senior Home Office Presenting Officer

For the Respondent: Mr Chohan, Legal Representative

**Heard at Manchester Civil Justice Centre on 29 November 2023**

**DECISION AND REASONS**

1. Whilst it is the Respondent who is seeking leave to appeal today, we have hereinafter referred to the parties as they were identified in the First-tier Tribunal. Mrs Lodhi will be referred to as the Appellant and the Secretary of State for Home Department will be referred to as the Respondent
2. The Appellant is a national of Pakistan, date of birth 26 February 1987. She made an application for an EUSS Family Permit on 19 July 2021, but the Respondent refused this application on 16 December 2021. The Appellant appealed this decision on 2 April 2022 and her appeal came before Judge of the First-tier Tribunal Farrelly (hereinafter referred to as the FTTJ) on 4 April 2023 who allowed the Appellant's appeal in a decision promulgated on 11 May 2023.

3. Permission to appeal was granted by Upper Tribunal Judge Smith on 16 October 2023 for the following reasons:

“ 2. I am just persuaded to grant permission to appeal by the Respondent’s grounds one and three taken together. There is no witness statement from the Appellant suggesting that she and her husband were separated nor that a mistake was made in the application form indicating that they were living together. Although the Judge had oral evidence from the Sponsor indicating that the Appellant had separated from her husband, there is no witness statement from the Sponsor to that effect nor, crucially, that what was said in the application form was based on a mistake. As such, what is said at [13] of the Decision is arguably based on conjecture rather than evidence. For the reasons set out in the grounds of appeal before the First-tier Tribunal upon which the Respondent continues to rely, this arguably has an impact on the Judge’s findings as to dependency.

3. Ground two is weaker but I do not restrict the grounds which may be argued.”

4. Mr Tan adopted the grounds of appeal and submitted there had been a material error in law. Grounds one and three were linked and Mr Tan referred us to paragraph [13] of the FTTJ’s decision. He submitted the FTTJ’s finding that the agent may have had made an error about the Appellant and her husband living together was based on supposition and conjecture as there was no statement from the Appellant supporting this finding. Mr Tan submitted the form was inconsistent with the Sponsor’s evidence that the Appellant and her husband were separated. This error meant the FTTJ’s finding that the Appellant was financially dependent on the Sponsor was flawed as the mere fact funds were sent to her did not mean she needed them for her essential needs. In so far as the second ground of appeal was concerned, Mr Tan submitted the FTTJ had erroneously found dependency based on documents that postdated the date of application. Under Appendix EU (Family Permit), paragraph FP.6 the relevant date was the date of application which in this case was 19 July 2021 and all the evidence in the Appellant’s bundle postdated the date of application.
5. Mr Chohan invited us to uphold the FTTJ’s decision. He submitted the FTTJ had placed weight on the Sponsor’s oral evidence and had stated in his decision he had no reason to doubt the Sponsor’s evidence about the whereabouts of the Appellant’s husband. Mr Chohan submitted grounds one and three amounted to a disagreement rather than an error in law. With regard to ground two he was unclear what documents were before the FTTJ, but stated the Sponsor maintained he had submitted the relevant paperwork and the FTTJ concluded on balance she was supported for her essential needs by the Sponsor.
6. Both Mr Tan and Mr Chohan agreed that if there was an error in law then the matter should be remitted back to the First-tier Tribunal for a de novo hearing.

7. No anonymity direction was made.

## **DISCUSSION AND FINDINGS**

8. Having heard detailed submission, we reserved our decision. For the reasons hereinafter given we were satisfied there was an error of law identified in the FTTJ's decision.

9. There were effectively three grounds of appeal albeit grounds one and three were linked and ground two was a standalone ground.

10. The FTTJ was not helped by a lack of documentary evidence in this appeal and in particular the failure by the Appellant to explain what her personal circumstances were and whether she was living with her husband. It is clear from the papers that were before the FTTJ that the Appellant was married and she had been in a relationship with her husband given one of her children was only one year of age when this application was submitted to the Respondent in July 2021.

11. The FTTJ had identified an inconsistency in the evidence because in her application form the Appellant stated she was married and that they had begun living together on 29 June 2009. The FTTJ had raised this with the Sponsor at the hearing and in his oral evidence the Sponsor stated the Appellant and her husband were separated albeit this claim was not confirmed by the Appellant whose application it was. At paragraph [12] of his decision the FTTJ recorded the Sponsor's answer about the Appellant's husband as "they are separated and her husband lives a few miles away.... Her husband was a wastrel who could not provide for his family...."

12. In paragraph [13] of his decision the FTTJ concluded-

"If what the sponsor says is true then I can envisage a situation of real dependency. As a woman in Pakistan with young children and no spousal support she would be in a very vulnerable position. Crucial to this however is the truth of the claim about her husband. A counter indicator is the application which states he was living with his wife. However, applications are frequently made by agencies and there can be innocent mistakes. In the circumstance there is no material before me which calls into question the sponsor's account about her husband. Therefore, I accept dependency has been established."

13. None of the documents contained in the Respondent's or Appellant's bundles - supported the Sponsor's claim that the Appellant and her husband lived separately.

14. Whilst we accept it was in theory open to the FTTJ to make a finding about the Appellant's circumstances it was incumbent on him to provide detailed reasons for why he believed the application form had been incompletely completed by the agent bearing in mind he had no first-hand knowledge of the circumstances in which the application form was completed.

15. Evidence about this possible error was needed from either the Appellant or the agent who completed the form. Without such evidence the FTTJ's finding that agents make mistakes was, as Mr Tan submitted, speculative. We are satisfied the grounds demonstrate a material error in law.
16. Turning briefly to ground 2 we accept Mr Tan's point that as this was an EUSS application the Tribunal had to be satisfied, with evidence, that the Rules were met when the application was submitted.
17. The FTTJ helpfully set out the evidence that was before him between paragraphs [3] and [7] of his decision. None of the documentary evidence before the FTTJ which was detailed in these paragraphs showed the Sponsor supported the Appellant at the date of application. We are satisfied that an error in law in respect of ground two is also made out.
18. Paragraph 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
  - a. the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
  - b. the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
19. In our judgment, given that it is necessary for all the issues in this case to be considered afresh on the merits, this case falls within para 7.2 (a) and (b) because further evidence, including oral evidence is likely, and findings of fact on the issues will need to be made.

### **Notice of Decision**

The decision of the First-tier Tribunal did involve the making of an error on points of law. We have set aside the decision and remit the same back to the First-tier Tribunal to be heard by a Judge other than Judge of the First-tier Tribunal Farrelly.

Deputy Judge of the Upper Tribunal Alis  
Immigration and Asylum Chamber  
**29 November 2023**