Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06867/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 29th July 2014	**On 6th August 2014**

Before

UPPER TRIBUNAL JUDGE POOLE

Between

THE ENTRY CLEARANCE OFFICER

Appellant

And

MRS RABIA HAIDARI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Erwin Richards, Home Office Presenting Officer
For the Respondent: Mr A Bandegani, Counsel

Decision

Decision on Error of Law

1. In this determination I will refer to the parties using the descriptions used before the First-Tier Tribunal.

2. The appellant is a female citizen of Afghanistan born 8 March 1989. She applied for entry clearance with a view to settlement as a spouse of a

person present and settled in the United Kingdom. The application was refused and the appellant appealed that decision.

3. The appeal came before Judge of the First-Tier Tribunal Ghaffar sitting at Newport on 9 January 2014. Both parties were represented (the appellant by Mr Bandegani). The judge heard evidence and submissions and in a determination dated 22 January 2014 allowed the appeal "under the Rules" and at paragraph 17 of the determination said "as I have allowed the immigration appeal I have not considered the Article 8 appeal before me".

4. In summary the judge noted a concession on the appellant's behalf that she could not meet the requirements of Appendix FM, however the judge went on to consider the appeal under paragraph EX1 of Appendix FM and considered that by reason of EX1 the appellant was entitled to succeed in her appeal.

5. The respondent sought leave to appeal the decision alleging a material misdirection in law upon the basis that EX1 of Appendix FM could not apply as it was an entry clearance case. The grounds also suggested that the appeal was allowed under Article 8 ECHR (which in fact it wasn't). Reference is made in the grounds to **Gulshan [2013] UKUT 00640**.

6. The application for leave came before another judge of the First-Tier Tribunal who granted leave for the following reasons:

> "1. The respondent seeks permission to appeal, in time, against a decision of the First-Tier Tribunal (Judge Ghaffar) who, in a determination promulgated on 22 January 2014, allow the appellant's appeal against the respondent's decision to refuse to grant the appellant entry clearance as the spouse of a person present and settled in the United Kingdom.
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> 2. There is a concession by the appellant's representative noted at paragraph 10 of the determination that paragraph FM does not apply. Despite this the judge has allowed the appeal under paragraph EX-1. In accordance with the guidance in **Sabir (Appendix FM – EX1 not freestanding) [2014] UKUT 63 (IAC)** he should not have done so.
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> 3. The judge goes on to acknowledge he has not considered Article 8.
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> 4. Accordingly I find there is an arguable error of law in the determination".

7. Hence the matter came before me in the Upper Tribunal. At the commencement of the hearing Mr Bandegani indicated that there had been no response under Rule 24 of the Procedure Rules.

8. Mr Richards relied upon the grounds seeking leave save for the allegations regarding human rights which had not formed the basis of the appeal being allowed. Mr Richards said the judge had clearly erred in law as EX1 was not a freestanding provision whereby an appeal could be allowed under the Rules. He invited me to set aside the decision of Judge Ghaffar.

9. Mr Bandegani accepted that the judge had made an error in law but argued that the error was not material. The judge had found (paragraph 15) that there were insurmountable obstacles to the couple enjoying family life outside the United Kingdom. If the judge had correctly dealt with the EX1 he would then have gone on to deal with Article 8 and in all likelihood would have reached the same conclusion by allowing the appeal under Article 8.

10. I indicated that I considered it far too large a step to suggest that if a judge had considered Article 8 (and he had specifically indicated that he had not) it was inevitable that he would have allowed the appeal. Clearly there was an error which must be material to the decision that the judge made in allowing the appeal without reference to Article 8. He had not dealt with Article 8 at all, so clearly the decision was in respect of the Rules and it was wrong. The error was therefore material and the decision must therefore be set aside. In the circumstances the judge was also in error in not considering Art 8 ECHR.

11. In reaching this conclusion I have taken notice of the reported decision in **Sabir (Appendix FM – EX1 not freestanding) [2014] UKUT 63**.

12. The decision of Judge Ghaffar must thereby be set aside and falls to be remade by the Upper Tribunal and this appeal is to resume at a later date for that to take place. The continued hearing shall be listed before me and I direct that each representative shall, in advance of that hearing, lodge and serve a written submission on the effect on this appeal of The Immigration Act 2014 and whether this appeal should be allowed or dismissed.

Signed Date

Upper Tribunal Judge Poole