IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/23078/2012

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons**
On 28th October 2014	**Promulgated On 31st October 2014**

Before

THE HON. MR JUSTICE DAVIS
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

QURAT-UL-AIN NADEEM SIDDIQUE

Respondent

Representation:

For the Appellant: Miss N Braganza, Counsel, instructed by Stevens Machi Solicitors
For the Respondent: Mr R Hopkin, Home Office Presenting Officer

DECISION AND REASONS

1. On 2nd July 2014 First-tier Tribunal Judge Khawar issued a determination in relation to an appeal by Mrs Nadeem Siddique against the decision of an Entry Clearance Officer who refused her application for entry clearance to the United Kingdom as a returning resident. That decision was made on 9th October 2012. First-tier Tribunal Judge Khawar found that the decision was in breach of the Immigration Rules and that it breached the appellant's right under Article 8 of the European Convention on Human Rights. Therefore, Mrs Siddique's appeal was allowed and the decision was overturned.

2. The Entry Clearance Officer appeals against that decision. There are written grounds of appeal relating to alleged misconstruction of the Immigration Directorate Instructions and references to the judge's decision in terms of it being in conflict with Zambrano. But, as has transpired in the course of the hearing before us, this case in fact turns on the First-tier Tribunal's approach to what was and was not known by the Entry Clearance Officer at the time of the decision and the Tribunal's approach thereafter to the validity of that decision.

3. The judge properly referred to the guidance in DR (Morocco) [2005] UKAIT 00038 which indicated that evidence arising subsequent to the decision of an Entry Clearance Officer can be considered by a Tribunal provided that such evidence is relevant to an assessment of the circumstances which appertained at the date of decision. As is very properly conceded by Mr Hopkin on behalf of the Entry Clearance Officer that means that the Tribunal could admit evidence of facts that did exist at the time of the decision. Equally, they cannot and should not admit evidence of circumstances which simply were not in existence.

4. The First-tier Tribunal Judge in considering the Entry Clearance Officer's decision said this at paragraph 23:

> "It is plain to see from the refusal notice that the Entry Clearance Officer only considered the first two factors. [That is as reference to the list of factors in the Immigration Directorate Instructions]. He did not consider factors (iii) to (vi) However the Entry Clearance Officer cannot be blamed for not having considered the latter because there is no evidence before me to establish that he was made aware of such additional material as has been presented in this appeal. The Entry Clearance Officer was not aware of the reasons why the appellant had remained in Pakistan for an extended period of time. In addition since the Entry Clearance Officer's decision was made on 9th October 2012, he could not possibly have been aware of the fact that in April/May the appellant's son returned to the United Kingdom and has been settled here with his father since that date."

5. The First-tier Tribunal Judge went on to speculate that had there been a review by an Entry Clearance Manager of the case then the decision "would potentially have been very different". We use the word "speculate" advisedly. There was no evidence at all as to what an Entry Clearance Manager would or would not have done and no evidence at all as to with what material he would or would not have been provided.

6. The Tribunal judge went on then to consider the very factors which the Entry Clearance Officer did not. He did so in paragraph 25 of his determination by reference to the evidence that was before him. Most particularly and potentially crucially, he noted that Mrs Siddique had a home in the United Kingdom and, if admitted, would resume residence In the United Kingdom with her husband and son (now aged 10). Yet at the

time that the Entry Clearance Officer was considering the matter the son of the respondent to this appeal was with her in Pakistan.

7. It follows that the First-tier Tribunal Judge took into account matters that could not possibly have been before the Entry Clearance Officer because they were not circumstances appertaining at the time. Mr Hopkin on behalf of the Entry Clearance Officer goes on to point to the fact that the First-tier Tribunal Judge in his concluding remarks said this:

> "Accordingly on the totality of the evidence of the evidence before me, I am satisfied that the appellant is entitled to succeed under paragraph 19 of the Immigration Rules."

8. It is argued, and it seems to us argued with some force, that that amounted to the First-tier Tribunal Judge remaking the decision. The First-tier Tribunal Judge not only remade the decision by reference to material that could not in any circumstances have been before the Entry Clearance Officer but he did on the basis of his own view of the facts. It may be that the judge meant to say that on the totality of the evidence of the evidence he was satisfied that no reasonable Entry Clearance Officer could have refused entry to the person concerned but that is not what he actually said.

9. Finally this, the First-tier Tribunal Judge found that the appellant was entitled to succeed under Article 8 of the Convention. It is agreed on all sides that any Article 8 claim must be based on the facts that were in existence at the time of the relevant decision, i.e. in October 2012. It is perfectly plain that a highly material factor in any Article 8 decision was the presence of the respondent's son in the United Kingdom. That was not a circumstance that obtained in October 2012.

10. It follows that we agree that this decision is subject to significant and material errors of law. We have not set out the detailed factual findings of the First-tier Tribunal Judge because that has not been necessary for our decision. It is equally not necessary for us to do so in order to give any guidance as to what should happen hereafter because the order we make is that the matter should be remitted to the First-tier Tribunal for rehearing. It will be for the First-tier Tribunal at that stage to hear whatever evidence is thought to be appropriate and to make whatever decision is thought to be appropriate given the findings of fact that that Tribunal makes. It follows it is not for us to set out the facts as they appear to us to be.

11. Whether that process in fact will take place must be a matter for the parties. As Mr Hopkin on behalf of the Entry Clearance Officer sensibly pointed out, were an Entry Clearance Officer to be asked to make a decision today on the facts as now obtain, there is every prospect that the decision would be different. Mr Hopkin is not seeking to nor could he bind the Entry Clearance Officer. It is merely a sensible observation of fact. However that is a matter for the parties. All we can do is quash the

decision made by the First-tier Tribunal, allow the appeal and remit it for rehearing on the first convenient date.

Signed Date 30 October 2014

The Honourable Mr Justice Davis
(Sitting as a Judge of the Upper Tribunal)