



IAC-AH-DH-V1

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

Appeal Number: OA/10858/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17 December 2015**

**Decision & Reasons Promulgated
On 7 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**NIVETHIKA ALAGESWARAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:

For the Appellant: Mr D Coleman of Counsel instructed by Tamil Welfare Association

For the Respondent: Mr S Staunton of the Specialist Appeals Team

ERROR OF LAW DECISION AND REASONS

The Appellant

1. The Appellant, Nivethika Alageswaran, is a citizen of Sri Lanka born on 28 December 1989. On 17 August 2013 she married Balasingham Alageswaran, a naturalised British citizen. They are both Tamils.
2. On 18 November 2013 she applied to the Respondent for entry clearance as the wife of a British citizen resident in the United Kingdom.

3. On 12 August 2014 the Respondent under reference 1584976 refused the application by reference only to a finding that the Appellant had not shown her husband met income threshold requirements of paragraph EC-P.1.1 of Appendix FM to the Immigration Rules. The Respondent considered there were no exceptional circumstances which might engage the United Kingdom's obligations under Article 8 of the European Convention.

The First-tier Tribunal Proceedings

4. On 9 September 2014 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds asserted the Respondent had incorrectly assessed the evidence of the husband's income and had applied the wrong test, that of exceptionality, to assess whether the State's obligations under Article 8 were engaged.
5. By a decision promulgated on 26 June 2015 Judge of the First-tier Tribunal Thanki dismissed the appeal on all grounds.
6. On 5 October 2015 Judge of the First-tier Tribunal McDade granted the Appellant permission to appeal on the basis that the Judge had overlooked the two letters from the Respondent to the Appellant requesting additional information about her husband's income which had been sent to the wrong address. This might have led to unfairness such that had further evidence been supplied the Judge might have come to a different decision. By a notice of 13 October 2015 served pursuant to Rule 24 of the Tribunal (Upper Tribunal) Procedure Rules 2008 the Respondent reserved his position because he did not have access to the Respondent's file.

The Upper Tribunal Proceedings

7. The Appellant's husband attended the hearing. The representatives for both parties informed me they agreed that the correspondence sent by the Respondent to the Appellant requesting additional documents to establish whether her husband was earning sufficient to meet the income threshold requirements of the Immigration Rules for entry clearance as a spouse had not been properly served because of deficiencies in the description of the address to which the correspondence was sent.
8. They invited me to find there was a material error of law in the First-tier Tribunal's decision and to set it aside and find that the Respondent's original decision had not been in accordance with the law and to remit it to the Respondent to enable him to make a lawful decision. Both representatives confirmed they agreed this.

Findings and Consideration

9. I find the grounds upon which permission to appeal was granted are made out. I am satisfied that the enquiries made by the Respondent of the Appellant had been inaccurately addressed with the consequence that she

had not had the opportunity to submit the missing evidence to complete the series of documents which she had submitted with her application.

10. Additionally, I note that the Judge at paragraphs 35 and 38 applied the provisions of Sections 85A(3)(b) and (4) of the 2002 Act relating to the admissibility of evidence in an appeal under the "Points Based System". This was not an appeal under the Points Based System and evidence subsequent to the date of the application was admissible although subject to the restrictions described in *DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 00038*.
11. The consequence of the Judge's decision is infected by an error of law such that it should be set aside. The Respondent having sought, quite properly, to exercise the discretion referred to in paragraph D(f) of Appendix FM-SE of the Immigration Rules. The effect of not properly addressing correspondence to the Appellant is that having exercised such discretion the Respondent then made the decision under appeal before the exercise of that discretion could have been given any efficacy so as to render the decision not in accordance with the law.
12. I conclude, as suggested and agreed by both parties, that the decision of the Respondent was not in accordance with the law and the matter should be remitted to the Respondent for a lawful decision to be made.

Anonymity

There was no request for an anonymity direction and having heard the appeal I do not consider one is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained an error of law such that it should be set aside.

The decision of the Entry Clearance Officer is not in accordance with the law and the matter is remitted for a lawful decision to be made.

Anonymity direction not made.

Signed/Official Crest

Date 23. xii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeal has been allowed to the extent that it is remitted. There was no application for a fee award. I have considered the position and do not consider it appropriate to make any fee award. A fully documented application in the first place might well have obviated the need for the Respondent to consider exercising his discretion and making further enquiries.

Signed/Official Crest

Date 23. xii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal