Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00082/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 17th March 2017	**On 12th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

ENTRY CLEARANCE OFFICER (ISLAMABAD)

Appellant

and

MR TAHIR MEHMOOD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr. D Mills, Home Office Presenting Officer
For the Respondent: Not represented

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against the decision of First-tier Tribunal Judge Meyler promulgated on 4th May 2016. The appellant before me is the Entry Clearance Officer (Islamabad) and the respondent to this appeal, is Mr Tahir Mehmood. However, for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal ("F*t*T"). I shall

in this decision, refer to Mr Mehmood as the appellant, and the Secretary of State as the respondent. Although the appellant was not represented, his wife and sponsor, Suriya Jan did appear before me.

2. In her decision promulgated on 4th May 2016, F*t*T Judge Meyler concluded that the appellant's sponsor is not a national of another EEA member state, was never married to an EEA national and had never exercised EU Treaty rights. She concluded that the sponsor and appellant have no rights arising out of EU law but went on to conclude that the decision to refuse the appellant entry to the UK, amounts to a disproportionate lack of respect for the rights of all those affected by the decision under Article 8 of the European Convention.

3. Permission to appeal to the Upper Tribunal was granted by F*t*T Judge Hodgkinson on 14th September 2016. At the conclusion of the hearing before me, I announced that I agreed with the respondent that there was a material error of law in the decision of F*t*T Judge Meyler and that having considered the submissions made by the parties, I would remake the decision, dismissing the appeal. I said that I would give the reasons for my decision in writing. This I now do.

4. The underlying decision that was the subject of the appeal before the F*t*T was the decision of the respondent dated 14th May 2015 to refuse the appellant's application for an EEA family permit. The appellant had applied for an EEA family permit to join his sponsor, Suriya Jan and Mohammed Musa Tahir in the UK as a spouse and carer respectively. The application was considered by the respondent under Regulations 9, 11(5) and 12(2) of the Immigration (European Economic Area) Regulations 2006.

5. The appellant was not represented at the hearing before the F*t*T. The sponsor did attend and she gave evidence in English. At paragraphs [11] and [12], the Judge states:

> *"11. I asked the sponsor a number of questions which led me to the conclusion that she was not a national of another EEA member state, was never married to an EEA national and had never*

exercised EU Treaty rights. The EEA form completed was a simple mistake on the part of the appellant. The appellant had previously used the correct form and paid the correct fee on 9 March 2015 when her son was ill but his application had been refused. The current application was submitted on 1 May 2015.

6. Having concluded at paragraph [12] of her decision that the sponsor and appellant have no rights arising out of EU law, the Judge directed that she could only determine the appeal under Article 8 of the European Convention on Human Rights as both the application and decision postdate 6th April 2015.

7. The Judge's assessment of the Article 8 claim is to be found at paragraphs [24] to [41] of her decision. The Judge did not refer to the requirements of Appendix FM of the Immigration Rules or the extent to which, if any, the requirements of the rules could not be met. Without having considered the requirements of the immigration rules, the Judge found, at [24], that there is a gap between the rules and Article 8 and that there are relevant, weighty circumstances that are not fully provided for within the rules, which take this case outside the class of cases which the rules properly provide for. Having taken all matters into account, the Judge concluded that it is unreasonable or disproportionate to ask the sponsor to move to Pakistan with all or some of her children, in order to continue her family life with the appellant. The appeal was therefore allowed.

8. The respondent submits the Judge materially erred in law by allowing the appellant's appeal outside the immigration rules and on Article 8 grounds, when his application was in fact an application for a family permit under Regulation 12 of the Immigration (European Economic Area) Regulations 2006. The respondent relies on the Tribunal's decision in **SZ (Applicable Immigration Rules) Bangladesh [2007] UKAIT 00037** which held that there is no general duty on the Tribunal to consider whether a claimant's case might have succeeded on a different basis from that on which the application was made.

9. Mr Mills submits the application made by the appellant here, was clearly an application made under the EEA Regulations. The method adopted - the making of

an EEA application rather than an application for leave to enter the UK as a spouse, would enable an applicant to make an application without payment of the relevant fee, and without giving the respondent any proper opportunity of considering whether the requirements of the immigration rules are in fact met. Whether or not the rules are met, and if they are not met, the reasons why they are not met, is also relevant to any assessment of the Article 8 claim. He submits that the applicant made an application on the wrong basis, and the proper approach to such cases, as noted in **SZ** is that the appeal should be dismissed, and the appellant should make a fresh application under the rules.

10. Mrs Jan accepts that the appellant did not make the application under the immigration rules but made an application under the EEA Regulations. She submits that at the time the application was made, they did not realise the error, and she accepted that there is no reason why an application for entry clearance under the immigration rules, with all the supporting evidence, cannot be made.

11. In **SZ**, the Tribunal held that in the generality of cases, it will be obvious from the application which immigration rule (or rules) must be considered and as a result, the Tribunal's scope of enquiry will be circumscribed and focussed upon a clearly applicable rule. The Tribunal recognised that there could be situations where there is an obvious link or connection between one rule and another, and therefore that will mean that there is an obligation on the Tribunal to consider and apply another rule if fairness requires it to do so. However, the appellant here, did not fail to apply under the correct rule. He wished to come to the UK to join his sponsor under the immigration rules, but he made an application for an EEA family permit. The appellant made an application that, as the Judge correctly noted, was bound to fail.

12. In my judgment, the appeal before the F*t*T was limited to a consideration of whether the appellant was able to satisfy the EEA Regulations. As is clear from the decision of the F*t*T, the Entry Clearance Officer made the only decision which was open to him. It was clearly lawful. The proper course is for the appellant to make

the correct application so that the respondent can properly decide whether the appellant is able to meet the requirements of the immigration rules by reference to Appendix FM, and if not, whether it is appropriate for the appellant to be granted leave to enter outside the immigration rules, on Article 8 grounds.

13. Crucially, the appellant has a remedy for his present difficulties under the Immigration Rules. He simply has to make an application under the relevant rules. In my judgment, where there is a clear procedure to be followed, and an appellant has chosen not to follow it, it is very hard to envisage circumstances in which it would be proportionate to allow the Immigration Rules to be circumvented, by relying on Article 8.

14. The decision of the F*t*T contains a material error of law and is therefore set aside. I remake the decision, dismissing the appeal.

Notice of Decision

15. The decision of the F*t*T contains a material error of law and is set aside.

16. I remake the decision, dismissing the appeal.

17. No anonymity direction is made.

Signed Date 8th June 2017

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

I have set aside the decision of the F*t*T and dismissed the appeal, and so there can be no fee award.

Signed

Deputy Upper Tribunal Judge Mandalia