Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/03604/2016**

THE IMMIGRATION ACTS

Heard at Field House
On 22 March 2018

Decision & Reasons Promulgated
On 29 March 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

AKHTAR ZAZAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr B Malik, Counsel, instructed by Calicess Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Obhi (the judge), promulgated on 15 June 2017, in which he dismissed the appellant's appeal against the respondent's decision dated 18 February 2016 refusing to grant her an EEA Family Permit on the basis that she failed to meet the requirements of regulations 6 and 7 of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

2. The appellant is a national of Afghanistan, date of birth 23 August 1967. On or around 22 January 2016 she made an application for an EEA Family permit based on her relationship with her son's wife, Ms Gita Burkevica, a Latvian national residing in the UK. An application for a Family Permit was also made

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by Rahnaz Zazai (RZ), the appellant's daughter, on the basis that she was an extended family member within the terms of regulation 8 of the 2006 Regulations.

3. The respondent was not satisfied that Ms Burkevica was a qualified person because there was said to be unsatisfactory and discrepant information in respect of her employment, which was said to be with a franchise of the Nisa retail business. Nor was the respondent satisfied that Ms Burkevica's income was above the primary earnings threshold of £155 per week. Neither was the respondent satisfied that the appellant was dependent on the EEA national within the terms of regulation 7.

4. RZ's application was refused on 24 February 2016 for reasons almost identical to those of the appellant. The refusal additionally stated that the documentation submitted did not demonstrate that RZ was related to the appellant as claimed. At the end of the decision the respondent asserted that the application did not attract a right of appeal under regulation 26(3) as she failed to supply any evidence that she was related as claimed to her EEA national sponsor.

5. Both the appellant and RZ lodged notices of appeal to the First-tier Tribunal. In a decision dated 1 June 2016 and headed "decision on preliminary issue-validity", Judge of the First-tier Tribunal D Birrell concluded that RZ failed to produce ID evidence as required by regulation 26(3) and that there was no right of appeal against that decision. The First-tier Tribunal issued the judge's decision in a document headed 'Notice of Appeal where there is no relevant decision Etc.' The document read,

> "The decision against which you are seeking to appeal is not one against which there is an exercisable right of appeal to the First-tier Tribunal or is one where the notice of appeal falls within rule 22(2) (a) of the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014. Accordingly the notice of appeal you have lodged is invalid and the Tribunal will take no further action in relation to it. "

6. The Tribunal file created following the lodging of RZ's Notice of Appeal (reference number EA/03606/2016) had a label placed on it that stated, 'No Valid Appeal, Do Not List'.

The decision of the First-tier Tribunal

7. Despite the fact that RZ had no valid appeal, and the issuance of a notice to that effect pursuant to rule 22 of the 2014 Procedure Rules, the judge included RZ's appeal number in her decision and referred to RZ as "the second appellant". Although wrongly stating, at [16], that there were two appeals before her, the judge did find that the respondent's decision in respect of RZ carried no valid right of appeal. The judge stated that the appellant had a right of appeal as she was a family member, "whereas the 2nd appellant comes within Regulation 8." This however was not the basis upon which Judge Birrell found that RZ had no right of appeal.

8. The judge proceeded to consider the documentary evidence relating to Ms Burkevica's employment and the oral evidence from the appellant's son. This included documents indicating that Afghan Limited, a company that previously held the Nisa franchise, had sold its business franchise to Devons (London) Limited. The judge was surprised that there was nothing from Nisa, the franchisor business, and found it remarkable that the franchised company did not appear to have certain minimum standards such as the payment of wages being in line with the national practice. The judge was amazed that cash payments were being made. The judge found the documentary evidence and the statement from Ms Burkevica confusing. The judge noted Ms Burkevica's assertion that she had been working for Direct Clean Ltd since September 2016 but found it curious that she described her cleaning job with reference to her "previous one" where she was "doing replenishing and cleaning" as this was inconsistent with the description of her previous job in a letter dated 18 March 2016 from Devons (London) Limited. The judge was not satisfied that Ms Burkevica was exercising treaty rights as a worker.

9. The judge then proceeded to consider the issue of dependency. In light of her previous credibility concerns the judge focused on the fact that the appellant stated she was 'single' and that if her husband had been missing since 2001 the application form should have made this clear. The judge found it remarkable that the appellant's son was unable to explain the circumstances of his disappearance despite the fact that he would have been 11 years old at the time. The judge then focused exclusively on Ms Burkevica's income concluded that she was simply not in a position to maintain the appellant and her sister in law.

The grounds of appeal and the error of law hearing

10. The grounds maintained that the judge's findings in relation to Ms Burkevica's employment were perverse, that she had a fundamental misunderstanding of the nature of franchised businesses, that she failed to take into account relevant evidence and made factual errors amounting to errors of law. It was further submitted that she applied to the wrong test for dependency.

11. In granting permission the First-tier Tribunal found it arguable that the judge made perverse findings in relation to Ms Burkevica's employment and that she misapprehended material evidence. It was additionally arguable that the judge failed to properly direct herself in respect of the correct test for dependency. It was further arguable that the judge erred in declining to consider RZ's appeal following **MK** [2017] EWCA Civ 1755.

Discussion

12. At the outset of the 'error of law 'hearing Mr Bramble conceded that the judge erred in declining to consider RZ's appeal on the basis of **MK**. During the course of the 'error of law' hearing Mr Bramble conceded that the judge

materially erred in law in her assessment of Ms Burkevica's employment for the reasons detailed in Ground one of the grounds of appeal. Mr Bramble then conceded Grounds 2 and 3, both of which relate to the judge's assessment of the issue of dependency. In light of the respondent's concessions it is not necessary for me to dwell in any great detail on the identified errors of law. For reasons that will however become apparent I do not find that the purported concession in respect of RZ's appeal can have any material bearing on the matter before me as there was simply no appealable decision before the judge capable of being appealed to the Upper Tribunal.

13. I deal briefly with the judge's assessment of Ms Burkevica's employment. The judge inaccurately cited passages from Ms Burkevica's statement and relied on this inaccuracy in finding her employment incredible. Contrary to what was said at [18] of the judge's decision, Ms Burkevica never claimed that Afghan UK Limited was owned by Nisa (Devons ltd). The letter of 18 March 2016 that the judge appeared to believe was being attributed to Nisa was clearly not issued by the franchisor but rather by the franchisee. There was no rational basis for the judge to find it surprising that the franchisor company had not submitted any evidence relating to Ms Burkevica. I accepted the assertion in the grounds that the franchisee is a separate entity in law and has separate responsibilities for its own profits, losses and staff. It is not apparent that the judge considered the wage slips relating to Ms Burkevica's claimed employment with Direct Clean Ltd when concluding that the EU national was not working. In holding that Ms Burkevica's description of her cleaning job was inconsistent with that described in the letter from Devons (London) Limited dated 18 March 2016, the judge failed to consider that the letter from Devons (London) Limited described her 'main duties' and that this was not, on its face, inconsistent with Ms Burkevica's evidence.

14. I deal briefly with the judge's findings in respect of the dependency issue. The judge only considered the financial circumstances of Ms Burkevica when determining whether the appellant was a dependent. However, in **Yunying Jia v Migrationsverket**, Case C-1/05 (at [43]) the CJEU indicated that the material support could be provided by the EEA national 'or his or her spouse'. By failing to consider the financial circumstances of the appellant's son the judge misdirected herself in respect of the dependency test. Furthermore, the judge approached the question whether the appellant's husband was still alive (a point raised by her for the first time at the hearing) mindful that she already had other credibility concerns (see [21]). Given that the judge's other adverse credibility findings are unsafe, there is a danger that her conclusion relating to the appellant's husband was improperly contaminated by her earlier credibility findings.

15. Having conceded that the decision is vitiated by material legal errors, it was accepted by both representatives that the matter would need to be remitted for a fresh hearing.

RZ's position

16. Although I gave a preliminary indication at the hearing that the judge erred in law in concluding that RZ had no valid appeal before her following the judgement in **MK**, it has become apparent on closer inspection of the files that the First-tier Tribunal declined to accept jurisdiction in a preliminary decision issued under rule 22 of the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014 as long ago as 1 June 2016. Moreover, this preliminary decision did not rely on **Sala (EFMs: Right of Appeal)** [2016] UKUT 00411 (IAC).

17. The decision of Judge Birrell was a preliminary decision. A decision not to accept a notice of appeal under the First-tier Tribunal Procedure Rules is a 'preliminary' decision and is therefore an 'excluded decision' for the purposes of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 and cannot be appealed (**Ved and another (appealable decisions; permission applications; Basnet)** [2014] UKUT 00150 (IAC)). Despite Judge Obhi's inclusion of RZ's reference number in her decision, it is abundantly clear that the appeal lodged by RH did not advance beyond the "screening stage" where it is considered by a Duty Judge sitting in Leicester. In these circumstances, and have regard to the decisions in **JH (Zimbabwe) v SSHD** [2009] EWCA Civ 78, **Abiyat & Others (Rights of appeal)** [2011] UKUT 00314 (IAC) and **R(Mobeen) v SSHD** (JR/9632/2016), I am entirely satisfied that there was no appealable decision before Judge Obhi capable of being the subject of a permission application to appeal to the Upper Tribunal.

18. It has not been necessary to recall the parties to deal with this point. The law and the facts are both clear. The First-tier Tribunal was unarguably entitled to issue a preliminary decision on 1 June 2016 pursuant to rule 22 holding that there was no valid appeal and that no further action would be taken. Judge Obhi had no jurisdiction to consider the jurisdictional point. As the decision dated 1 June 2016 was a preliminary one there is no right of appeal to the Upper Tribunal. RZ may seek to judicially review the decision dated 1 June 2016, although she is significantly out of time to do so. The First-tier Tribunal however does not have jurisdiction to entertain an appeal by RZ.

<u>**Notice of Decision**</u>

The First-tier Tribunal's decision contains material legal errors.
The case is remitted back to the First-tier Tribunal, for a full fresh hearing, before a judge other than Judge of the First-tier Tribunal Obhi.

Signed

27 March 2018
Date

Upper Tribunal Judge Blum