Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/13846/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 03 September 2014	**On 03 October 2014**

Before

The President, The Hon. Mr Justice McCloskey

Between

ECO (MANILA)

Appellant

and

MIN JUNG CHO

Respondent

Representation:

Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
Respondent: Dr Colin Venters, The Sponsor, was in attendance and addressed the Tribunal.

DETERMINATION AND REASONS

Introduction

1. This appeal to the Upper Tribunal has its origins in a decision made by the Entry Clearance Officer (Manila, The Philippines - hereinafter the "*ECO*") whereby the Respondent's application for an entry clearance visa was refused. The Respondent challenged this decision, successfully, by

appeal to the First-Tier Tribunal ("*the FtT*"). The ECO appeals, with permission, to this Tribunal.

The Impugned decision

2. This is dated 10 July 2013. I preface my summary thereof with the factually uncontentious observation that the Respondent is a national of South Korea, aged 40 years, who is the unmarried partner of the sponsor (identified above), a British national resident and working in the United Kingdom. On 27th June 2013, the Respondent, in her application for a "(General) Long Term Visitor Visa (2 year)", represented that the main purpose of her proposed visit to the United Kingdom was to visit the Sponsor and that she intended to stay for a period of six months.

3. In refusing her application, the ECO, having noted that the Respondent's daughter was intending to accompany her mother and was in the process of applying for a British Passport, stated:

> "*It is not unreasonable to expect that you would wish to be with your partner permanently and the fact that your child will have a British Passport means that she too can stay there indefinitely. You have no job or assets in Korea to leave the UK for. The fact that you have applied for a two year visa indicates you plan yet further stay* [sic] *in the UK even after the initial period of six months. I am not satisfied that you will not use this visit visa as a means of de facto residence, which is not permitted.* ***I am not satisfied that you are genuinely seeking entry to the UK as a general visitor but more that you might visit Korea from the UK where you will reside with your family***."
>
> [Emphasis added.]

The decision maker added that the Respondent should consider an application under Appendix FM of the Immigration Rules. This decision was reviewed by the Entry Clearance Manager. Regrettably, a complete copy of this document has not been provided. However, I shall assume that it adds nothing material and, clearly, it affirmed the original decision.

The Decision of the FtT

4. In its decision, the FtT noted, accurately, in [7]:

> "*The Respondent refused the Appellant's application because the Appellant had applied for a two year visa rather than a six month visa and he suspected that she would use the visa as a means of obtaining residence.*"

The Judge then rehearsed the evidence of the sponsor, which was that the Respondent intended to continue to live in South Korea with their daughter but wished to visit the sponsor in the United Kingdom with regularity: hence the application for a two year visa. The Judge continued:

> "*He* [the sponsor] *said that with hindsight they had complicated the position by applying for a two year visa when the Appellant could simply have travelled to the United Kingdom with their daughter in the same way as she had in 2012* [evidently for a six month period] *without the necessity of applying for a visa.*"

Next, the Judge noted that the ECO's representative declined to question the sponsor and, further, had no submissions to make, continuing:

> "*It was clear that he acknowledged that the Appellant would have been able to enter into the United Kingdom for a period of six months without any visa requirements as she is a South Korean national.*"

Here, it would appear, the Judge was referring obliquely to the relevant provisions of the Immigration Rules. Having noted that the ECO's representative did not seek to uphold the refusal decision, the Judge pronounced himself satisfied (in terms) that the refusal reasons were unsustainable and allowed the appeal.

5. I draw attention to the terms in which permission to appeal was granted:

> "*The grounds of appeal maintain that the appeal was decided under the Immigration Appeals (Family Visitor) Regulations 2012 and that the Appellant did not meet the family visitor relationship requirements. Moreover that the appeal should have been limited to grounds referred to in section 84(1)(b) and (c) of the Nationality, Immigration and Asylum Act 2002 .....*
>
> *It is clear that the Judge accepted that the Appellant was an unmarried partner and as such she did not fall within the proscribed* [sic] *relationships as defined in the Regulations .....*
>
> *There is an arguable error of law.*"

It is at once apparent that both the grounds of appeal and the grant of permission are based on certain statutory provisions which do not feature anywhere in either the impugned decision of the ECO or that of the FtT.

Statutory Framework

6. By virtue of section 82(2) of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"), immigration decisions which may be

challenged by appeal to the FtT include a refusal of entry clearance. The permitted grounds of appeal are listed in section 84 which, for present purposes, provides in material part:

> "*(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds .....*
>
> *(b) That the decision is unlawful by virtue of section 19B of the Race Relations Act 1975 .....*
>
> *(c) That the decision is unlawful under section 6 of the Human Rights Act 1998 .....*"

The subject matter of section 88A is "Ineligibility: entry clearance". In its original incarnation, introduced by section 29(1) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, It provided:

> *"88A Ineligibility: entry clearance*
>
> *(1) A person may not appeal under section 82(1) against refusal of entry clearance if the decision to refuse is taken on grounds which -*
>
> *(a) relate to a provision of immigration rules, and*
>
> *(b) are specified for the purpose of this section by order of the Secretary of State.*
>
> *(2) Subsection (1) -*
>
> *(a) does not prevent the bringing of an appeal on either or both of the grounds referred to in section 84(1)(b) and (c), and*
>
> *(b) is without prejudice to the effect of section 88 in relation to an appeal under section 82(1) against refusal of entry clearance."*

7. A substituted section 88A was introduced, with effect from 01 April 2008, by section 4 of the Immigration, Asylum and Nationality Act 2006. It provided:

> *"88A Entry clearance*
>
> *(1) A person may not appeal under section 82(1) against refusal of an application for entry clearance unless the application was made for the purpose of—*

(a) visiting a person of a class or description prescribed by regulations for the purpose of this subsection, or

(b) entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.

(2) Regulations under subsection (1) may, in particular—

(a) make provision by reference to whether the applicant is a member of the family (within such meaning as the regulations may assign) of the person he seeks to visit;

(b) provide for the determination of whether one person is dependent on another;

(c) make provision by reference to the circumstances of the applicant, of the person whom the applicant seeks to visit or on whom he depends, or of both (and the regulations may, in particular, include provision by reference to—

(i) whether or not a person is lawfully settled in the United Kingdom within such meaning as the regulations may assign;

(ii) the duration of two individuals' residence together);

(d) make provision by reference to an applicant's purpose in entering as a dependant;

(e) make provision by reference to immigration rules;

(f) confer a discretion.

(3) Subsection (1)—

(a) does not prevent the bringing of an appeal on either or both of the grounds referred to in section 84(1)(b) and (c), and

(b) is without prejudice to the effect of section 88 in relation to an appeal under section 82(1) against refusal of entry clearance."

Next, by section 52 of the Crime and Courts Act 2013, section 88A was substituted for a second time, with effect from 25 June 2013, in these terms:

"88A Entry clearance

(1) A person may not appeal under section 82(1) against refusal of an application for entry clearance unless the application was made for the purpose of–

[...]

(b) entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.

(2) Regulations under subsection (1) may, in particular–

[...]

(b) provide for the determination of whether one person is dependent on another;

(c) make provision by reference to the [circumstances of the applicant or of the person] on whom he depends, or of both (and the regulations may, in particular, include provision by reference to–

(i) whether or not a person is lawfully settled in the United Kingdom within such meaning as the regulations may assign;

(ii) the duration of two individuals' residence together);

(d) make provision by reference to an applicant's purpose in entering as a dependant;

(e) make provision by reference to immigration rules;

(f) confer a discretion.

(3) Subsection (1)–

(a) does not prevent the bringing of an appeal on either or both of the rounds referred to in section 84(1)(b) and (c), and

(b) is without prejudice to the effect of section 88 in relation to an appeal under section 82(1) against refusal of entry clearance."

Finally, it may be noted that when section 37 of the Immigration Act 2014 is commenced, Section 88A will be repealed.

8. The exercise of the Secretary of State's power under section 88A(1) of the 2002 `Act, as substituted by the 2006 Act, is contained in the Immigration Appeals (Family Visitor) Regulations 2012 ("*the 2012 Regulations*"), which came into operation on 09 July 2012. These apply to all entry clearance applications made after that date. **T**hey devise a regime whereby certain persons are "*prescribed for the purposes of section 88(1)(a) of the Nationality, Immigration and Asylum Act 2002 (entry clearance)*". The model which follows identifies two different persons. The first, "P", is identified by reference to circumstances, being a person settled in the United Kingdom who has not been granted asylum or humanitarian protection. The second person in the equation, "A" (the putative visa visitor), is identified by reference to a series of possible relationships with "P". There is a lengthy menu of such relationships. They include a relationship involving "P" and "A" "*…. that is akin to a marriage or civil partnership for at least the two years before the day on which A's application for entry clearance was made; and (b) such relationship is genuine and subsisting":* per regulation 2(4)(a) and (b). In passing, previously there were comparable regulations under earlier legislation.

9. The Respondent's application for entry clearance was considered, and refused, under paragraph 41 of the Immigration Rules. This provision of the Rules specifies the requirements to be satisfied by a person seeking leave to enter the United Kingdom as a "*general visitor*". The requirements germane in the context of the present appeal are that the applicant –

> "*(i) is genuinely seeking entry as a general visitor for a limited period as stated by him, not exceeding 6 months …… and*
>
> *(ii) intends to leave the United Kingdom at the end of the period of the visit as stated by him; and does not intend to live for extended periods in the United Kingdom through frequent or successive visits …..*"

The main elements of the other specified requirements are that the applicant does not intend to work in the United Kingdom, can finance the return journey, is aged 18 years or over and, if admitted, will not require recourse to public funds for the purposes of maintenance and accommodation.

10. The evolution of section 88A of the 2002 Act yields the following analysis:

(a) In its original incarnation, section 88A was designed to limit the grounds upon which an appeal could be pursued against a refusal

of entry clearance decision. This was to be achieved through the medium of an order of the Secretary of State which would exclude from appeal decisions made on certain grounds under the Immigration Rules, while preserving an appellant's right to appeal against decisions allegedly vitiated by race discrimination or infringement of Convention rights. However, this model was never established, since the Secretary of State's power to make an order to this effect was not exercised. As a result, section 88A was redundant throughout the entirety of its existence.

(b) The second version of section 88A, operational from 01 April 2008, established a different model. It empowered the Secretary of State to make regulations restricting the statutory right of appeal against refusal of entry clearance decisions to applications made for the purpose of visiting a person of a prescribed class or description or entering as the dependent of a person in prescribed circumstances. The Secretary of State's power was exercised by making the 2012 Regulations, which came into force on 09 July 2012 and applied to all entry clearance applications made on or after that date.

(c) The power conferred on the Secretary of State to make regulations under section 88A, as substituted with effect from 25 June 2013, has not been exercised. As a result, appeals against refusal of entry clearance decisions continue to be governed by the 2012 Regulations.

(d) Section 88A will be repealed when section 37 of the Immigration Act 2014 comes into effect.

11. The appeal before this Tribunal proceeded on the basis that the Respondent is a "*family member*" of the sponsor, within the compass of regulation 2(3) and (4). This was not disputed on behalf of the ECO. One of the cornerstones of the ECO's grounds of appeal is the following statement:

> "*These regulations* (viz the 2012 Regulations) *do not include those visiting unmarried partners.*"

This, as demonstrated above, is a misstatement of the law. Based on this misstatement, the next paragraph of the grounds enshrines a contention that the Respondent's right of appeal to the FtT was restricted to race discrimination and human rights grounds. This too is misconceived.

12. In summary, the 2012 Regulations establish a limited class of persons who enjoy the full range of statutory rights of appeal against refusal of entry clearance decisions. The application of the statutory framework to the present case is uncomplicated. The sponsor ("P") is a person settled

in the United Kingdom, while the Respondent ("A") is, by common consent, in a relationship with the sponsor that is akin to marriage and has existed for at least the period of two years preceding the date of her entry clearance application, 27 June 2013. Thus the Respondent, by virtue of the provisions of the 2012 Regulations highlighted above, is a member of the qualifying class. I repeat: this key fact is not in dispute. It follows that there is a fundamental misconception in both the grounds of appeal and the grant of permission to appeal. This should have been apparent from the mismatch between the grounds of appeal and the terms of the impugned decision: see [3] *supra*. Furthermore, there is a clear misstatement of the law in the grant of permission to appeal: see [5] *supra* . Being an unmarried partner as defined by the 2012 Regulations, the Respondent did qualify as a person enjoying an unlimited right of appeal against the impugned decision. Thus there was no basis for granting permission to appeal. It follows that the decision of the FtT is unimpeachable.

DECISION

13. Accordingly, I dismiss the appeal and affirm the decision of the FtT.

Signed

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE
UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 September 2014