



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: VA/05055/2014

THE IMMIGRATION ACTS

Heard at Birmingham
On 13 August 2015

Decision and Reasons Promulgated
On 18 August 2015

Before

UPPER TRIBUNAL JUDGE PITT

Between

ENTRY CLEARANCE OFFICER - NAIROBI

Appellant

and

MUAWIA MOHAMED OSMAN

Respondent

Representation:

For the Appellant: Mr Smart, Senior Home Office Presenting Officer

For the Respondents: Mr Chohan, instructed by Citadel Immigration Law Practice

DECISION AND REASONS

The Appeal

1. This is an appeal by the Entry Clearance Officer against a determination promulgated on 30 April 2015 of First-tier Tribunal Judge James which allowed a visit visa appeal under the provisions of paragraph 41 of the Immigration Rules.
2. For the purposes of this decision, I refer to the Entry Clearance Officer as the respondent and to Mr Osman as the appellant, reflecting their positions before the First-tier Tribunal.

3. The appellant is a national of Sudan, born on 29 May 1980.
4. The appellant applied for entry clearance to visit his brother in order to donate a kidney.
5. The application was refused on 5 February 2014. The application was refused as it was not found that the appellant had shown that he was related as claimed to the sponsor. The evidence of the appellant's employment was not found to be reliable. The sponsor's bank statement did not show that he could afford to pay for the cost of the appellant's travel and maintenance in the UK. Paragraphs 41 (i), (ii), (vi) and (vii) were not found to be met.
6. Judge James allowed the appeal under the Immigration Rules, finding that the appellant was the brother of the sponsor, was employed in Sudan as claimed and that his brother could pay for his visit.
7. It was common ground before me that this was an error where the only permissible grounds of appeal are those at section 84(1)(b) and (c) of the Nationality, Immigration and Asylum Act 2002 which are race discrimination or human rights grounds. The First-tier Tribunal had no jurisdiction to allow the appeal under the Immigration Rules.
8. Mr Chohan sought to defend the decision, maintaining that the error was not material where, given the findings of the First-tier Tribunal, the appeal had to be allowed under Article 8. I could not agree where, in my judgement, there was nothing approaching a substantive Article 8 consideration here, not even an assessment of whether the appellant and sponsor had shown that they had a family life. It could not be said that the outcome of the appeal would have been the same had the judge decided the case correctly on an Article 8 ECHR basis only.
9. I therefore set aside the decision and re-made it after hearing submissions from the parties. My approach to the Article 8 assessment remains that as set out in R (Razgar) v SSHD [2004] UKHL 27 and Huang v SSHD [2007] UKHL 11 but with the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002 being applied in any proportionality assessment.
10. I reminded myself that the case of Adjei (visit visas - Article 8) [2015] UKUT 0261 (IAC) states:

"For a person who does not satisfy the requirements of para 41, to succeed in an appeal there would have to be cogent and compelling reasons demanding that he should succeed."
11. It was common ground that the first key issue here was whether the appellant and sponsor had shown that they had a family life for the purposes of Article 8 ECHR.
12. In the case of Adjei (visit visas - Article 8) [2015] UKUT 0261 (IAC) it was stated that it is likely to be only "infrequently" that family life can be made out in the context of a visit visa.

13. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) [24], the Presidential panel said as follows on the assessment of family life in the context of a visit visa application:

“It would therefore be extremely foolish to attempt to be prescriptive, given the intensely factual and contextual sensitivity of every case. Thus we refrain from suggesting that, in this type of case, any particular kind of relationship would always attract the protection of Article 8(1) or that other kinds of relationship would never come within its scope. We are, however, prepared to say that it will only be in very unusual circumstances that a person other than a close relative will be able to show that refusal of entry clearance comes within the scope of Article 8(1). In practical terms it is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together. In the limited class of cases where Article 8(1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate.”
14. Both cases accord with the learning in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) that a finding of family life is fact specific.
15. From the evidence before me it was entirely clear that the appellant and sponsor are brothers. That is their consistent evidence, it is the view of the transplant team at the Queen Elizabeth Hospital in Birmingham and the reason why, after appropriate tests, he has been identified as the only viable kidney donor for the sponsor.
16. It is also my view that there is family life here. In the ordinary course of things there may well not be a family between adult brothers, additionally so when they live in different countries. It is in my judgement uncontentious, however, that when a sibling becomes very ill, as is undisputed here, that can be a time when relationships and dependency become more intense such that adult siblings can be said to have a family life. That is what has happened here. The relationship of the brothers is additionally close and more dependent here where the appellant is the only person identified as a suitable donor for his brother. On the particular and unusual facts of this case, I find far more than usual emotional ties and dependency such that there can be said to be family life that engages Article 8 ECHR, even in the context of a visit visa application.
17. The parties approached the case on the basis that if family life was shown, the only remaining issue was proportionality.
18. I remind myself that the maintenance of immigration control is a central and primary factor in the assessment of proportionality. This appellant’s application under the Immigration Rules has not succeeded and that is a central, very weighty factor against him.

19. The provisions of section 117B of the Nationality, Immigration and Asylum Act 2002 must also be applied:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

...

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

20. I have dealt with the primacy and weight of the public interest above where the appellant has not succeeded under the Immigration Rules.
21. Nothing before me suggests that the appellant speaks English so that must be weighed against him.
22. The funds provided by the sponsor to pay for the visit were not disputed before me. A sum of over £3,000 has been collected to pay for his visit. Accommodation is to be provided for free by the sponsor. It did not seem to me that the cost of the kidney transplant could be weighed against the appellant where it arises from the need of the sponsor, not the appellant, and that the NHS will only have to provide intensive

kidney dialysis for many years if the transplant does not take place. I was satisfied that the appellant is financially independent such that he will not be a burden on the tax payer.

23. The other 117B factors are not readily applicable in the context of an entry clearance made in these circumstances and where no children are concerned.
24. I also noted that there was no challenge in the grounds or the submissions before me to the substantive findings of Judge James that the provisions of the Immigration Rules were met here. That appeared to me to be a correct approach on the part of the respondent, the evidence of the appellant and sponsor being consistent and supported by documentary evidence, the signatures on the appellant's employment letters being relatively similar in my view as they appeared to Judge James and not sufficient to show that the appellant was not employed in Sudan.
25. What impact does the fact of the Immigration Rules being found to have been met have on the weight to be attributed to the public interest in the proportionality assessment?
26. The head note of Mostafa states:

"In the case of appeals brought against refusal of entry clearance under Article 8 ECHR, the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being *a weighty, though not determinative, factor* when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control (my emphasis)."
27. But Adjei says something different at paragraph 2 of the head note:

"2. As compliance with para 41 of HC 395 is not a ground of appeal to be decided by the Tribunal, any findings concerning that *will carry little weight*, especially if based upon arguments advanced only by the appellant. If the appellant were to make a fresh application for entry clearance the ECO will, if requested to do so, have regard to the assessment carried out by the judge but will not be bound by those findings to treat the appellant as a person who, at least at the date of the appeal hearing, met the requirements of paragraph 41 (my emphasis)."
28. Adjei does not say that no weight arises from an assessment of the Immigration Rules are met, however,


"If Article 8 is engaged, the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow. Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) is not authority for any contrary proposition."

This seems to provide some scope, albeit limited by the reference to "little weight" above, for a situation where there is no failure in fact to meet the requirements of the Immigration Rule.

29. It seems to me that some weight must attract to the appellant if he can show to my satisfaction that he did, in fact, meet the Immigration Rules at the date of the decision. The Immigration Rules are the respondent's expression of what constitutes the public interest by way of effective immigration control. What I take from the case law is that an assessment that the Immigration Rules were, in fact, met cannot, without significantly or exceptionally more, lead to the decision being disproportionate.
30. It is my judgement that there is more here and that this is a very compelling situation indeed. The appellant is the only person identified by the specialist team in the UK as a donor for his brother. Everything is ready for his visit in order to proceed to a transplant operation. His brother's quality of life will be significantly enhanced as a result. All those concerned indicate in their evidence, including the medical team, that they are entirely aware of the importance that the procedure must be completed within the 6 month period of the appellant's entry clearance and of the imperative that he return at the end of that period.
31. For those reasons, I find that the decision amounts to a disproportionate interference with the family life of the appellant and sponsor and allow the appeal under Article 8 ECHR.

Decision

32. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.
33. I re-make the appeal, allowing it under Article 8 ECHR to the extent that the appellant has shown that he was entitled to entry clearance as a family visitor.

Signed: 
Upper Tribunal Judge Pitt

Date: 13 August 2015