



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

Appeal Number: VA/05145/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
on 1st July 2015**

**Determination
Promulgated
On 6th July 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER - ABU DHABI

Appellant

and

**SHAMEEN QUDSIA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills – Senior Home Office Presenting Officer
For the Respondent: No appearance.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge O'Hagan who in a determination promulgated on the 9th February 2015 allowed the appeal against the refusal of entry clearance as a visitor.
2. Sameen Qudsia is a national of Pakistan born on the 14th February 1991 who sought entry clearance to visit her husband and sponsor. The application was refused on 3rd August 2014 as the Entry Clearance Officer (ECO) was not satisfied it was a genuine visit after which the applicant would return.

3. The sponsor appeared before the First-tier Tribunal but there was no attendance before the Upper Tribunal. Notices of the hearing were validly served. In the absence of an explanation for the lack of representation/attendance or an application to adjourn, it is in accordance with the overriding objectives and duty of fairness owed to both parties to proceed in absence.

Discussion

4. The judge was aware of the basis of refusal. The judge noted the two reasons given for the appellant before him wishing to enter as a visitor which were (i) the desire of the applicant and sponsor to see each other and (ii) the wish of the applicant to visit the UK to see whether she should seek entry for the purposes of settlement.
5. The judge set-out the Razgar questions in paragraph 14 and in paragraph 15 states that the first two of those questions may be taken together. To answer the first question required the judge to make a finding on whether family or private life recognised by article 8 exists. The judge finds it does as the applicant and her sponsor are married and maintain contact by indirect means and by the sponsor visiting the applicant in Pakistan. This is not challenged by the ECO. The second question requires the judge to consider whether the right to respect for such family life has been interfered with to a degree that article 8 is engaged. The reason it is arguable legal error can occur if the two questions are not considered separately is that family or private life can exist and continue notwithstanding the decision under appeal. In such a case the answer to the first of the questions can be 'yes' and to the second 'no'.
6. The case law regarding article 8 in entry clearance cases now includes the decision in SS (Congo) and Others: [2015] EWCA Civ 387 in which Lord Justice Richards drew a distinction in entry clearance cases, on the one hand, involving someone outside the United Kingdom who applies to come here to take up or resume family life when family life was originally established in ordinary and legitimate circumstances at some time in the past, rather than in the knowledge of its precariousness in terms of United Kingdom immigration controls and cases, on the other, where someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a right to come here. In the latter cases, the relationship will have been formed under conditions of known precariousness and it will be appropriate to apply a similar test of exceptional circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant LTE outside the Rules.
7. In SM and Others (Somalia) 2015 EWCA Civ 223 Bean LJ said it was far from clear that the refusal of entry clearance to the family reunion child appellants constituted serious interference with their family life at all.

The mother had left them in the care of her half-brother for some four years and maintained regular contact with them. Bean LJ said " The case is quite different from the more typical one where the status quo before the refusal of entry clearance or the proposed removal was or is a united family... the trauma of breaking up a family and thereby rupturing family ties may be significantly greater than the effect of not facilitating the reunion of a family whose members have become accustomed to living apart following a decision by part of the family to live elsewhere".

The material made available did not show that the impact upon refusal would be such that the family life that currently exists will be interfered with to such a degree that article 8 is engaged. As such a material legal error is made out.

8. This is not a settlement application as it is said that may be made in the future but an application for a visit. Visits have occurred in the past by the sponsor visiting the applicant in her home area and it has not been shown the effect of the decision is that such visits may be prevented.
9. Whilst it is understood the applicant may wish to see what conditions in the UK are like, the option of a settlement application is available which, if the applicant does not like life in the UK, she can avoid by returning to Pakistan.
10. Mr Mills referred to the decision of the Upper Tribunal in Entry Clearance Officer v Mostafa [2015] UKUT 00122 in which it was found at paragraph 24:

“24. It is the very essence of Article 8 that it lays down fundamental values that have to be considered in all relevant cases. 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 the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this 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. If a person’s circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8.”
11. The application under the Immigration Rules was refused as it was said the applicant had not proved she was a genuine visitor who intended to

leave the UK within the time stated for the visit or at all, based upon the reasons provided in the refusal notice. The right of appeal against the decision was limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002 which prevents an appeal challenging the merits of the decision under the Rules. The applicant had an opportunity to challenge such a finding by way of judicial review but did not do so. When assessing the article 8 element of the appeal, which is a valid ground, the inability to satisfy the Rules for the reasons stated is a relevant factor but which does not appear to have been considered by the judge.

12. The parties married when they knew they would be unable to live together as they had no legitimate expectation entry would be permitted unless they met the requirements of the Rules for the purposes of settlement or any other specified purpose. This includes any expectation they would be permitted to visit.
13. The judge arguably failed to consider the article 8 element of the appeal correctly in relation to the second of the Razgar questions and by omitting material facts and legal principles when considering the proportionality of the decision. It cannot be said the decision was within the range of those permissible on the evidence for when all factors are considered the correct outcome appears to be that the decision is proportionate. No exceptional circumstances have been shown to exist.
14. The determination is set aside, the decision remade, and the appeal dismissed.

Decision

15. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....
Upper Tribunal Judge Hanson

Dated the 3rd July 2015