



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

Appeal Number: VA/17183/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 19 December 2014**

**Decision & Reasons Promulgated
On 27 January 2015**

Before

**THE PRESIDENT, THE HONOURABLE MR JUSTICE M^CCLOSKEY
UPPER TRIBUNAL JUDGE PERKINS**

Between

ENTRY CLEARANCE OFFICER - CAIRO

Appellant

and

**MEDHAT MOHAMED IBRAHEM MOSTAFA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mrs S E Medhat El Sheikh, Sponsor

DECISION AND REASONS

1. There is no need for any order restricting publication of any facts relating to this case and we make no order.
2. The appellant, hereinafter “the Entry Clearance Officer”, has permission to appeal a decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter “the claimant”, against a decision of the Entry Clearance Officer on 5 September 2013 refusing him entry clearance to

the United Kingdom for the purpose of a family visit. He said that he wanted to visit his wife who is a British citizen ordinarily resident in the United Kingdom but the Entry Clearance Officer was not satisfied that the claimant satisfied the requirements of paragraph 41(i) and (ii) of HC 395. In short the Entry Clearance Officer was not satisfied that the claimant intended a visit for the limited period stated by him or intended to leave the United Kingdom at the end of the period of the visit.

3. The Entry Clearance Officer's decision informed the claimant that his right of appeal was limited to the grounds identified at Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002, that is to say "that the decision is unlawful under Section 6 of the Human Rights Act 1998 ... as being incompatible with the appellants' Convention rights."
4. Although the grounds of appeal to the First-tier Tribunal clearly expressed disagreement with the Entry Clearance Officer's finding that the claimant did not intend to return after the visit they additionally and unequivocally relied on Article 8 of the European Convention on Human Rights. This approach was echoed in the skeleton argument which also developed the suggestion in the grounds that the findings of fact reflected an approach that was contrary to policy. The closing paragraphs of the skeleton argument refer to the decision being "not in accordance to (sic) the Immigration Rules, namely paragraph 41, not in accordance to (sic) the law and not in accordance with Article 8 of the ECHR."
5. It is therefore slightly surprising that the First-tier Tribunal Judge allowed the appeal "under the Immigration Rules" but made no finding on the ground raising Article 8 of the European Convention on Human Rights ("ECHR").
6. Predictably this was challenged by the Entry Clearance Officer who was given permission to appeal by an Upper Tribunal Judge. The grounds of appeal before the Upper Tribunal point out that, with effect from 25 June 2013, section 52 of the Crime and Courts Act 2013 amended section 88A of the Nationality, Immigration and Asylum Act 2002 so that there is no right of appeal against refusal of entry clearance in a family visitor case except on grounds alleging that the decision shows unlawful discrimination or is unlawful under Section 6 of the Human Rights Act 1998. This is wider than the limited grounds identified in the "Refusal of Entry Clearance" but nothing turns on this.
7. The Entry Clearance Officer's grounds continue at paragraph 6:

"Where there is a right of appeal on one of these grounds the First-tier Tribunal must only consider those grounds, it is not open to the First-tier Tribunal to consider whether the decision is in accordance with the Immigration Rules or otherwise in accordance with the law."

We remind ourselves that section 85A of the 2002 Act applies and although the Tribunal can consider evidence that was not in existence, or

not produced, at the date of decision it can only consider additional evidence of “circumstances appertaining at the time of the decision”.

8. Notwithstanding the way his case was pleaded (see above) Mr Jarvis made it plain that it was *not* his case that the First-tier Tribunal was bound by the findings of fact made by the Entry Clearance Officer. Those findings could be challenged in an appeal which had to be decided on the evidence. There were restrictions on that evidence, in this case restrictions limiting the evidence to matters in existence at the time of the decision but there was no basis on which the Tribunal could make a decision except by evaluating the evidence. If the evidence led the Tribunal to conclude that the claimant did in fact satisfy the requirements of the Rules then that is what the Tribunal should decide.
9. Here the First-tier Tribunal noted that the claimant and his sponsor were married and further found that the claimant intended only a short visit after which he would return to Egypt. Such a finding should not be made lightly in a case involving a husband and wife who might very often be expected to want to live together but here the claimant had strong ties with Egypt including those arising from his being in regular, rewarding work and his children living there. Additionally the sponsor had property in Egypt and had organised her affairs to spend long periods of time there. Further, although there have indeed been “widespread changes” in Egypt in recent times, as contended by the Entry Clearance Officer, the evidence showed that this claimant lived safely in a tourist area that was substantially unaffected and continued to attract tourists.
10. None of these findings was challenged in the grounds. This was not an oversight. The findings were reasoned and made after hearing evidence where both parties were represented. There is no basis for considering them anything other than entirely reasonable conclusions based on the totality of the evidence.
11. Nevertheless the First-tier Tribunal had no basis for allowing the appeal “under the Immigration Rules”. There was no power in law to entertain an appeal on those grounds. Out of an abundance of caution Mr Jarvis reminded us, following the decision in **Virk & Ors v SSHD [2013] EWCA Civ 652**, that the parties cannot agree to the Tribunal exercising a jurisdiction that has not been given it by Parliament. The contrary was not suggested and this is, of course, correct. Mr Jarvis submitted that the decision to allow the appeal under the Immigration Rules was clearly wrong in law.
12. The claimant’s wife, Mrs El Sheikh, was supported by a friend but neither of them claimed to be legally qualified. She had taken advice from the claimant’s former representatives. She read out some of that advice to us but did not make any argument against the points outlined above.
13. We are quite satisfied that the First-tier Tribunal was wholly wrong to allow the appeal in the way that it did and we set aside the decision. It had no

power to entertain a ground of appeal alleging that the decision was not in accordance with the Immigration Rules, still less to allow the appeal on that ground. It did have the power to consider a ground of appeal contending that the decision was incompatible with the claimant's convention rights but it neglected to consider that ground even though it was clearly raised.

14. This means that the original appeal by the claimant has to be resolved, including his reliance on human rights grounds, in a remaking exercise.
15. Mr Jarvis submitted that we should follow the approach outlined by the House of Lords in the case of **R v SSHD ex parte Razgar [2004] UKHL 27**. While we are familiar with this decision, this is an occasion when we do consider it appropriate to set out the five tests identified by Lord Bingham of Cornhill:
 - (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
 - (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
 - (iii) If so, is such interference in accordance with the law?
 - (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
 - (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?"
16. Mr Jarvis could not argue against the suggestion that excluding the claimant interfered with his and his wife's right to respect for family life. We regard it as settled law that in an Article 8 balancing exercise the rights of all those closely affected, not only those of the claimant, have to be considered. It is our view that the decision in **Shamin Box [2002] UKIAT 02212** is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by the decision. Where one party to a marriage is entitled to be in the United Kingdom we consider that a qualified obligation to facilitate spousal unification for the limited purpose of a short visit and sojourn may arise.
17. We have no hesitation in saying that on the facts of this case the decision to exclude the claimant interferes with his and his wife's private and family lives and the interference is of sufficient gravity potentially to engage the operation of Article 8. None of this was seriously disputed before us.

18. Mr Jarvis, who was taking conspicuous care in a case where the claimant was not professionally represented, suggested that, if we made that finding, we should proceed to conclude that the decision of the Entry Clearance Officer not in accordance with the law. We do not agree that such a decision would always be “not in accordance with the law”. Plainly that would be the case if the decision complained of was, for example, perverse but here the decision may have been permissible on the evidence before the Entry Clearance Officer but decided differently by the First-tier Tribunal which had the benefit of more illuminating and extensive evidence. Nevertheless the First-tier Tribunal was clearly right to ask itself if the claimant satisfied the requirements of the Immigration Rules because it had to decide the human rights grounds and a decision on whether the claimant satisfied the requirements of the rules would illuminate the Article 8 balancing exercise.
19. Here the First-tier Tribunal has decided that the claimant satisfied the requirements of the Rules. We have no basis for reaching any other conclusion.
20. We must now ask ourselves if excluding the claimant by refusing to give him entry clearance for the specific and limited purpose sought interferes disproportionately with the private and family lives of the claimant and his wife.
21. In these circumstances the Entry Clearance Officer must justify the interference and satisfy us that the interference is proportionate. We can see no justification for stopping a husband joining his wife when their circumstances satisfy the requirements of the Rules unless, for example, they had contributed to the erroneous initial decision by presenting inaccurate information or by omitting something material or committing some comparable misdemeanour. We can accept that it might be proportionate to exclude someone whose application suffered from deficiencies such as these because good administration requires applicants to engage with the system and, further, we consider that there are duties of candour and co-operation on all applicants. There are no such failings here.
22. It follows that the First-tier Tribunal should have allowed the appeal not under the Immigration Rules but on Article 8 grounds. This is what we do.
23. We have considered carefully the effect that this decision could have in other cases. Plainly this will mean that the underlying merits of an application and the ability to satisfy the Immigration Rules, far from being excluded, are likely to be a central issue in an appeal based on human rights but they will not be determinative. They will only be relevant if the interference is such as to engage Article 8(1) ECHR and a finding by the Tribunal that an appellant does satisfy the requirements of the rules will not necessarily lead to a finding that the exclusion is disproportionate to the proper purpose of enforcing immigration control. However it is likely to

be a strong reason for allowing the appeal that must be weighed with the others facts in the case.

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. 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.

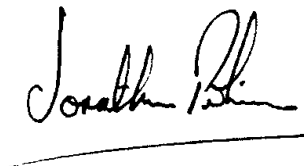
Notice of Decision

We therefore allow the appeal of the Entry Clearance Officer to the extent that we set aside the decision of the First-tier Tribunal. We substitute this decision allowing the appeal of the claimant against the decision of the Entry Clearance Officer under Article 8 ECHR.

Fee Award

In the circumstances we make no fee award.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 23 January 2015