



**Upper Tribunal
(Immigration and Asylum Chamber)
VA/06971/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 22 June 2016**

**Decision Promulgated
On 6 July 2016**

Before

**UPPER TRIBUNAL JUDGE C N LANE
DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

Between

ENTRY CLEARANCE OFFICER - Abu Dhabi

Appellant

and

**Mrs HINA ADNAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr H Sayadyan, solicitor, of Gulbenkian Andonian,
solicitors

DECISION AND REASONS

1. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

2. The Entry Clearance Officer brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal against a decision of First-tier Tribunal Judge Martins, promulgated on 2 November 2015, which allowed the Appellant's appeal.

Background

3. The Appellant was born on 13 December 1991 and is a national of Pakistan.

4. On 14 October 2014 the respondent refused the appellant's application for entry clearance as a visitor to the UK for four weeks.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Martins ("the Judge") allowed the appeal against the Respondent's decision on article 8 ECHR Grounds.

6. Grounds of appeal were lodged and on 21 April 2016 Judge P J M Hollingworth gave permission to appeal stating

It is arguable that the Judge has made insufficient findings in relation to the evidential foundation for the conclusions stated at paragraph 36 of the decision in relation to family life.

The Hearing

7. Ms Isherwood, for the respondent, moved the grounds of appeal and reminded us that this case originated as an application for a visit visa and therefore has restricted rights of appeal. She told us that despite the fact that the only competent ground of appeal was on ECHR grounds, the Judge dwelt on the fact that the appellant's son is a British citizen for whom the appellant wants in education in the UK. Miss Isherwood took us to [36] of the decision. She told us that it is there that the Judge finds that the appellant satisfies all of the requirements of paragraph 41 of the immigration rules, and then, without any analysis of proportionality, makes an unreasoned finding

..... that the decision of the ECO is a disproportionate interference with the right of the appellant to enjoy family life with her in-laws in the United Kingdom.

(b) Miss Isherwood told us that the decision does not contain any meaningful findings of fact nor any analysis of the article 8 ECHR grounds of appeal, which form the only competent ground of appeal in this case. She told us that the failure to properly analyse article 8 ECHR grounds is a material error of law. She reminded us of the case of *Kaur (visit appeals: Article 8)* [2015] UKUT 00487, and urged us to set the decision aside and substitute a decision dismissing the appeal.

8. Mr Sayadyan, for the appellant, told us that the decision does not contain any errors of law, material or otherwise. He adopted the terms of the skeleton argument and argued that, in reality, the respondent was simply trying to re-litigate an appeal in which she had not been

successful. He told us that the Judge carefully analysed the grounds of appeal between [4] and [11], and that [10] clearly demonstrates that the Judge understood that the only competent argument was an appeal on article 8 ECHR grounds. He told us that the Judge clearly considers paragraph 41 of the immigration rules in line with the case of *Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC)*, and, having found that the appellant could fulfil the immigration rules, adopted those findings of fact as part of the article 8 ECHR balancing exercise. He urged us to dismiss the appeal and allow the decision to stand.

Analysis

9. In *Adjei (visit visas - Article 8) [2015] UKUT 0261 (IAC)* it was held that (i) The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether article 8 of the ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the rules and should not do so. 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; (ii) 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.

10. In *Kaur (visit appeals; Article 8) [2015] UKUT 00487* it was held that (i) In visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. Whilst judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the Human Rights Act 1998 (or shows unlawful discrimination), the starting-point for deciding that must be the state of the evidence about the appellant's ability to meet the requirements of paragraph 41 of the immigration rules; (ii) The restriction in visitor cases of grounds of appeal to human rights does not mean that judges are relieved of their ordinary duties of fact-finding or that they must approach these in a qualitatively different way. Where relevant to the Article 8 assessment, disputes as to the facts must be resolved by taking into account the evidence on both sides: see *Adjei* at [10] bearing in mind that the burden of proof rests on the appellant; (iii) Unless an appellant can show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may exist to justify the grant of leave to enter outside the rules": (see *SS (Congo) [2015] EWCA Civ 387* at [40] and [56]) he or she is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals.

11. Between [4] and [11] the Judge discusses the grounds of appeal. Between [13] and [29] the Judge summarises the evidence lead at the hearing. It is not until [31] the judge commences his “findings and conclusions”, and then only devotes 9 paragraphs to combined findings and conclusions.

12. In his findings, the Judge dwells on paragraph 41 of the immigration rules; it is only at [36] that the Judge makes any reference to article 8 ECHR grounds. At [36] the Judge finds that the appellant meets the requirements of paragraph 41 of the immigration rules, and says that because the appellant meets the immigration rules the decision is a disproportionate interference with the appellant’s right to respect for family life.

13. The difficulty with the decision is that there are no findings of fact focusing on article 8 ECHR. That difficulty is compounded by the absence of an analysis of the proportionality of the decision & the absence of any clear finding that family life within the meaning of article 8 ECHR exists for the appellant in the UK.

14. We find that those failings in the decision are material errors of law. We must therefore set the decision aside. Although we set the decision is set side, there is sufficient material before us to enable us to make our own findings of fact and substitute our own decision.

Findings of fact

15. The appellant is a citizen of Pakistan born on 13 December 1991. On 28 April 2012 the appellant married her husband. 15 November 2013 the appellant’s husband was diagnosed with lung cancer. The appellant’s husband was immediately admitted to hospital, where he remained until he died on 24 May 2014. The appellant’s late husband’s remains were repatriated to Pakistan on 29 May 2014, where his funeral rites were carried out.

16. The appellant has one child, born on 6 September 2014; he is a British citizen and has always lived with the appellant in Pakistan. The appellant’s late husband’s brothers and sisters, and his mother, all live in the UK. The appellant’s mother-in-law has travelled to Pakistan to visit the appellant and her son five times since September 2014. The appellant’s mother is in her mid-50s.

17. The appellant lives in Pakistan with her parents and her son. The appellant is in paid employment. The only relatives the appellant has in the UK are her brothers and sisters in law and her mother-in-law. The appellant is in almost daily contact with her in-laws using the Skype messaging service.

Discussion

18. The first question is whether or not family life within the meaning of article 8 ECHR exists for the appellant or her son in the UK. For the appellant, it is argued that she and her son enjoy family life with her brothers and sisters in law and her mother-in-law. Neither the appellant nor her son had ever lived in the UK, nor have they ever lived with the appellant's brothers and sisters in law nor the appellant's mother in law.

19. The appellant is an adult. All of her in-laws are adults. There is no evidence before us of anything more than the normal emotional ties between the appellant and her in-laws. They have always lived separately but they maintain contact by instantaneous messaging services.

20. The appellant's son was born in 2014. He recently celebrated his second birthday. He has always lived with his mother and his maternal grandparents in Pakistan. In so far as family life within the meaning of article 8 of the 1950 convention exists it exists for the both the appellant and her son within their own family unit in Pakistan. The appellant fails to discharge the burden of proving that family life within the meaning of the 1950 convention exists for either the appellant or her son in the UK.

21. The respondent's decision has no impact at all on the family life of either the appellant or her son. The appellant and her son (together with the appellant's parents) remain together. The appellant can receive visits from her late husband's family in Pakistan. The established contact by telephone on Skype messaging services continues.

22. The appellant's appeal cannot succeed because we find that the appellant does not establish family life within the meaning of article 8 of the 1950 convention in the UK. If we needed to go further and assess proportionality, we would have to find that the respondent's decision does not amount to a disproportionate breach of any of the rights enshrined in the 1950 convention

- (a) because of the remoteness of the relationship between the appellant (together with her son) and the appellant's in-laws;
- (b) because the decision does not create separation. Separation has always existed;
- (c) because the appellant's in-laws can (& do) visit the appellant in Pakistan, and
- (d) because the decision does not stop the appellant from submitting a renewed application for a visit visa.

Decision

23. The decision of Judge Martins promulgated on 2 November 2015 is tainted by a material error of law. We must set the decision aside.

24. We substitute the following decision.

25. The appeal against the Entry Clearance Officer's decision dated 14 October 2014 is dismissed.

Signed

Date: 6th July 2016

Deputy Upper Tribunal Judge Doyle