



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23796/2016

THE IMMIGRATION ACT

Heard at Field House
On 30th January 2018

Decision & Reasons Promulgated
On 9th February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

The Entry Clearance Officer Bangladesh

Appellant

And

Rasheda [B]
(No anonymity direction made)

Respondent

Representation:

For the Appellant: Mr Bramble Senior Home Office Presenting Officer

For the Respondent: Mr I Khan Counsel instructed by Blackrock Solicitors

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against the decision of First-tier Tribunal Judge Griffith promulgated on the 13th October 2017 whereby the judge allowed the appeal of Mrs [B] against the decision of the ECO to refuse her entry clearance to the United Kingdom.
2. I have considered whether or not it is appropriate to make an anonymity direction. Having considered all of the circumstances I do not consider it necessary to do so.

3. The respondent, Rasheda [B] date of birth 10 September 1972, is a citizen of Bangladesh.
4. The original application was made by Mrs [B] on 3 June 2016 for entry clearance to the United Kingdom as an adult dependent relative of a person present and settled in the United Kingdom under the Immigration Rules, Appendix FM, and under Article 8 of the ECHR. By decision of the 15 September 2016 the ECO refused the application. That decision was upheld on review by the entry clearance manager on 14 September 2017. Mrs [B]'s "sponsors" were her offspring, 4 adults and 1 child.
5. Mrs [B] appealed against the decision by the ECO. The appeal appeared before Judge Griffiths, who in a decision promulgated on 13 October 2017, allowed the appeal. The ECO appealed against the decision of Judge Griffiths.
6. The application for permission to appeal was considered by First-tier Tribunal Judge JM Holmes who on the 15 December 2017 gave the following reasons for granting permission:-

"4 Arguably there is no clear finding of "family life" between this adult parent and any member of the family now living in the UK, even if some a minor children of hers, and it is far from clear that such a finding should be made in the light of the evidence, and the current jurisprudence; Singh, Butt, Ghising. There was no evaluation of whether 'family life' between the Appellant and any of her minor children had been terminated or eroded by what appears to have been a tacit acceptance of the long separation.

5 Even if Article 8 was engaged by the decision, it is arguable that the Judge's approach to the assessment of proportionality failed to apply either the relevant jurisprudence, or the statutory provisions of s117A-B 2002 Act. The Judge notes real concerns over the reliability of the evidence over the true circumstances of minor children within the UK, and how they were being cared for; but also notes that social services had not seen fit to intervene. The Judge also notes that the Appellant 'does not come near meeting the requirements of the Immigration Rules for entry as an "adult dependent relative."'"

7. On the basis of the leave granted the appeal appeared before me to determine in the first instance whether or not there was a material error of law in the decision of Judge Griffiths.
8. It was accepted before Judge Griffiths that Mrs [B] could not meet the requirements of the Immigration Rules as an adult dependent relative under Appendix FM and that the appeal had to be decided on the basis of Article 8 outside the rules. I would note that at the commencement of the hearing before me I did point out that Mrs [B] could have been considered as a parent under Appendix FM but again it was accepted that she could not meet the requirements under Appendix FM for entry as a parent.
9. It is accepted that Mrs [B]'s husband, [BM], was a British citizen. There is reference in the papers to the fact that [BM] was in the UK from when he was 4 years old. It appears that certainly from 1999 (see paragraph 28 of the decision) onwards [BM] was living in the United Kingdom. There appear to be 5 children of the marriage

between [BM] and Mrs [B], (according to paragraph 5 of the decision and the entry clearance manager's review). Of those 5 children at the time of the present application 2 of them were still minors, the other 3 were adults. The offspring are British citizens and all 5 were at the time of the application and are at present living in the UK.

10. It appears that the children of the family came to the United Kingdom in two groups. According to paragraph 5 of the decision, 3 of the children came in 2009 and the remaining 2 came in February 2011. It was admitted that at various stages Mrs [B] had sought entry clearance as a spouse but her applications had been refused because she could not meet the requirements of the rules as a spouse.
11. On 17 March 2016 Mrs [B]' husband, [BM], died. It appears that the 5 children remained in the United Kingdom living in the accommodation that was the family home. As noted in paragraph 8 of the decision there was a suggestion that the 2 youngest children were known to Social Services but the enquiries by the ECO were to the contrary as their information was that social services were unable to contact the family. The suggestion that they were known to social services comes from the evidence of the sponsors and in a letter from the solicitors at page 30 of the bundle wherein it is stated first paragraph final sentence:-

"The social services report is enclosed please kindly consider this."
12. It does not appear that the report was in fact enclosed and as indicated the ECO was indicating that social services were unable to make contact with the family in the UK. Judge Griffiths did comment that evidence from social services would have assisted. Whatever the state of the evidence, there was no evidence of involvement of social services such as to evidence serious concerns as to the welfare of the children.
13. Mrs [B] made her application for entry clearance to the United Kingdom in June 2016.
14. The evidence given at the First-tier hearing is set out from paragraph 14 to 23. A number of assertions were made by the sponsors about the age and medical condition of Mrs [B]. The judge noted that the lady was only 43 years old and whilst assertions were made that she was suffering from a number of medical conditions, including depression, brain damage, blood pressure and other diseases, the judge found at paragraph 25 that there was no evidence or at least no medical evidence that she was suffering from depression or stress or any other ailments serious or otherwise. The judge did note that she had been admitted and treated in hospital for 4 days suffering from syncope [a loss of consciousness due to a fall in blood pressure] and disorientation, it is suggested, immediately after the death of her husband. However there was no evidence that she had any ongoing symptoms or that the assertions otherwise as to medical conditions were made out. The judge therefore concluded that there were no medical conditions which could bring her within the terms of the Immigration Rules. [Appendix FM paragraph E-ECDR.2.4 requires that a person must as a result of age, illness, disability, require long term personal care]. The judge

concluded in paragraph 25 that Mrs [B] did not come near meeting the requirements of the Immigration Rules.

15. The judge went on to find that Mrs [B] may be living to an extent on her own but she had the assistance of a servant, who cooked for her. It was suggested that she had no relatives in Bangladesh. However Mrs [B] was living with an uncle's family, although there were questions as to who owned the house in which she was living.
16. The evidence before the judge was to the effect that the adult offspring in the United Kingdom financially supported Mrs [B].
17. Of the children, who were minors at the date of the application, at the time of the hearing one was 18 and in full-time education and the youngest of all was in 6th form again still in education. The judge concluded that there was no evidence of social services involvement. The judge pointed out the discrepancies between what had been the result of the ECO's contact with the social services and the family and the evidence of the older offspring.
18. In coming to a conclusion the judge had taken account of the case that was cited by representative for the ECO of Britcits [2016] EWHC 956 and found that it was not relevant as it was a judicial review challenge to the legality of the rules relating to adult dependent relatives. Further the Britcits case was related to the family life and frail elderly parents of sponsors, who were settled in the United Kingdom.
19. In dealing with the issues in the case the judge took account of the fact that there was one minor child and four young adults that were living together without any parental oversight. He suggests that those circumstances are undesirable and that merely by reason of the fact that 4 of them were adults, it had to be acknowledged that there was no bright line in such circumstances concluding that there were minors and young adults without appropriate adult supervision.
20. The judge took account of the positive obligation of the United Kingdom to facilitate family reunion taking account of the best interests of the child he found that their interests and the interests of Mrs [B] outweighed the public interest in maintaining immigration control. The judge then stated that in coming to that decision he had taken account of the provisions of Section 117B. He acknowledged that the appellant did not speak English and that she was not financially independent. However he was satisfied that 2 of her offspring supported her financially and that would continue if she came to the United Kingdom and she was therefore unlikely to be a burden on the taxpayer.
21. With respect that seems to ignore the guidance given in such cases as Kugathas [2003] EWCA Civ 31 and SM & others [2015] EWCA Civ 223. The problem with many of the cases cited is that they are not dealing with the relationship between a parent and a minor child but rather dealing with the situation where adult appellants and adult parents or siblings are involved. Ghising [2012] UKUT 00160 - the appellant and sponsor were adults; Singh [2015] EWCA Civ 630 again adults; Butt [2017] EWCA Civ 184 again both the appellants were adult daughters.

22. Even Kugathas [2003] EWCA Civ 31 was again dealing with the situation in which an adult appellant and other adult family members. The guidance given in paragraph 25:

“25 Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties: see S v United Kingdom (1984) 40 DR 196 and Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471. Such ties might exist if the appellant were dependent on his family or vice versa. It is not, however, essential that the members of the family should be in the same country. The Secretary of State accepts that that possibility may exist, although in my judgment it will probably be exceptional. Accordingly there is no absolute rule that there must be family life in the United Kingdom, as the Immigration Appeal Tribunal held.”

23. In the present case one is not dealing just with adult relatives but with a child. In that respect SM may provide some guidance. In the case it was 5 children, 3 of whom were children of the sponsor and two who were nephews or nieces of the sponsor, who were seeking entry to the United Kingdom but the children were aged between 14 and 16. The children had been left in Ethiopia with relatives and friends and had been there for over 4 ½ years prior to the date of the application. The sponsor had come to the United Kingdom with her husband. Whilst it was found that on the facts of the case Article 8 was engaged Lord Justice Bean at paragraph 15 indicated that it was far from clear that the refusal of entry clearance to the appellants constituted serious interference with family life:-

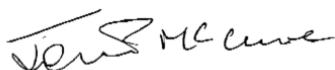
“15 I accept that Article 8 is engaged in the present case, but it is far from clear that the refusal of entry clearance to the appellants in 2009 constituted serious interference with their family life at all. The fact is that since 2004, when the youngest was 8 and the oldest was 10, the children had not been living with the sponsor, the mother of three of them and the aunt of the two others. She had left them in the care of her half brother Mohammed Sabriye both for the two years leading up to her divorce in 2006 and for the two years thereafter until he was killed in 2008, and maintained regular contact with them. By the time the application for entry clearance was made the youngest of the children was 13 and the oldest was 15. 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. As Toulson LJ observed the last time the case was before this court in the passage italicised above, 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.”

24. Similarly in SM paragraph 18 it was recognised that there was a strong emotional need to reunite the children with the sponsor who had a maternal bond with all of the children concerned. However the Court of Appeal upheld the decision to dismiss the appeal on the basis that the continued separation of the appellants from the sponsor would not prejudice their family life in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8, having regard to the factors in favour of refusal. One material factor was that it was suggested that the sponsor had not voluntarily chosen to leave the appellants but even that was not sufficient.

25. As outlined in the case law the ages of the children being considered were significantly younger at the time of the application, then the children in the present case. The period of separation since the child or children had lived with sponsor was also a significant factor. On the facts of SM separation was for a period of a little over 4 ½ years.
26. In the present case the family have chosen as they were entitled to do to live in the UK and have done so for over 6 or 7 years without the appellant.
27. In the circumstances whilst there would be a finding that family life did exist with the minor child, the judge has failed properly to assess in accordance with the case law outlined above whether it was the refusal that interfered with that family life as established by the family itself. The judge has concentrated merely on the obligation to promote family reunion and proportionality. Clearly from the case law there are other factors in determining whether or not it is the decision of the ECO that is interfering with that family life and whether taking the other factors into account it is the decision that seriously interferes with family life as established by the family itself and thereafter such outweighs the significant importance of maintaining immigration control. Not least amongst those factors is that the Immigration Rules make provisions under which an individual can seek entry to the United Kingdom and Mrs [B] could not meet the requirements of the rules and the sponsors had not lived with Mrs [B] for 6 or 7 years.
28. In the light of the matters set out the judge has made a material error of law. The only appropriate course is for the case to be remitted back to the First-tier Tribunal for a hearing afresh were a proper assessment can be made of the respective rights.
29. I have considered whether any of the findings of fact made by the judge should be preserved. It appears to me that there is no reason to go behind the findings with regard to the Immigration Rules. The remit is therefore limited to the extent the proper assessment of the article 8 rights outside the Immigration Rules.

Notice of Decision

30. I allow the appeal of the Secretary of State for the Home Department to the extent that the appeal is remitted back to the First-tier Tribunal on the basis indicated.
31. I do not make an anonymity direction



Signed

Date 5th February 2018

Deputy Upper Tribunal Judge McClure

Case law

SSHD v SS (Congo) [2015] EWCA Civ 387

In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave