



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/01088/2014
OA/01092/2014
& OA/01098/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 March 2015

Determination Promulgated
On 12 March 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Rita Yeoboa
Beatrice Mensah
Emmanuela Afia Mensah
[No anonymity direction made]

Appellants

and

The Entry Clearance Officer Accra

Respondent

Representation:

For the appellants:

Mr J Chipperfield, instructed by A & P Solicitors

For the respondent:

Ms A Everett, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. These are the appellants' linked appeals against the determination of First-tier Tribunal Judge Morrison promulgated 2.9.14, dismissing their appeals against the decisions of the respondent, dated 11.12.13, to refuse entry clearance to the United

Kingdom as dependent relatives (wife, daughter and niece) of Mr Emmanuel Kwabena Mensah, a British citizen. The Judge heard the appeal on 18.8.14.

2. First-tier Tribunal Judge McWilliam granted permission to appeal on 2.1.15.
3. Thus the matter came before me on 11.3.15 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Morrison should be set aside.
5. In essence, the grounds assert that the First-tier Tribunal Judge conducted an inadequate article 8 ECHR assessment, failing to follow the Razgar stepped approach. It is also pointed out that the judge erred by repeatedly stating that he had to deal with article 8 on the basis of the circumstances appertaining at the date of hearing.
6. There is no merit in a further ground of appeal which complains that the judge failed to take account of the public interest considerations under section 117B of the 2002 Act. Mr Chipperfield explained this argument, drafted by another, as because the sponsor was financially independent it was not in the public interest to remove him. That is reading too much into 117B, which is intended to set out public interest considerations when weighing the public interest against private and family life rights in an article 8 assessment. That it is in the public interest that persons seeking to enter or remain in the UK are financially independent. If the sponsor and thus the appellant's are financially independent it may be a factor to be considered in the article 8 assessment but it is not necessary for this to be framed in a 117B consideration. As the case of Dube (ss 117A - 117D) [2015] UKUT 00090 (IAC) explained, these provisions do not represent any kind of radical departure from or 'override' of previous case law on article 8 so far as concerns the need for a structured approach, including the Razgar steps.
7. Judge Morrison found that the appellants failed to meet the specified evidence requirements of Appendix FM-SE in order to demonstrate that the sponsor's income met the financial threshold required, although the judge was satisfied that the sponsor did have the income claimed, and met other requirements as to the relationship.
8. As paragraph D of Appendix FM-SE explains, the specified evidence has to be submitted with the application and unless the evidential flexibility provisions set out there apply, the Secretary of State will not accept later documents. As it was, even at the appeal hearing documents meeting the evidential requirements had not been submitted. It follows that the appeal had to fail under the Immigration Rules.
9. That the judge was wrong to take the position as of the date of hearing rather than the date of decision is not material. Whether Beatrice, the second appellant, was an adult or had turned 18 at the date of consideration, she was allegedly still part of the family and I can see no practical difference to any article 8 family life consideration

outside the Rules simply because she has turned 18. She did not in any event meet paragraph 297 of the Rules at the date of decision and therefore there is no detrimental effect on any of the appellants by the judge's error.

10. As far as the failure of the judge to conduct a more thorough, Razgar-compliant, article 8 assessment is concerned, Mr Chipperfield was unable to demonstrate that but for the error the appeals could have been allowed under article 8 outside the Rules. That the appellants didn't meet the requirements of the Rules is a highly relevant factor to be taken into account in an article 8 assessment, but more significant is that on the appellants' case they can meet the requirements of the Rules, if only they had submitted the correct documents at the correct stage. In the circumstances, it is difficult to understand how the refusal decision could ever be considered disproportionate; it remains open to the appellants to make a fresh application marshalling all their documents. Article 8 is not a shortcut to compliance with the Rules and there is no reason why these appellants should be able to circumvent the Rules by relying on article 8, which as Judge Morrison pointed out at §31 is not a general dispensing power, citing Lord Carnwarth in Patel & Others v SSHD [2013] UKSC 72.
11. In respect of this issue, Mr Chipperfield relied on the recent case of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC). However, the present circumstances are very different to that case, where there was no right of appeal against the paragraph 41 visit visa refusal, other than on discrimination and human rights grounds. The Tribunal panel held that whilst the First-tier Tribunal Judge had been wrong to allow the appeal under the Immigration Rules, as he had no jurisdiction to do so, the fact that the appellant met the requirements of the Rules was capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. Whilst in the present appeal the First-tier Tribunal Judge was satisfied that the sponsor met the income threshold, the appellants had not in fact met the evidential requirements of the Rules. Further, there is a remedy open to the appellants which was not open to the appellant in Mostafa, to make a fresh application, which if properly made with correct evidence, would meet the requirements of the Rules and in respect of which even if refused, they have a right of appeal. It was not the fault of the Entry Clearance Officer that the appellants failed to marshal the necessary evidence to demonstrate that the sponsor's income met the Rules.
12. In the circumstances of this case, I cannot see that there was any prospect whatsoever of the appellants succeeding on article 8 grounds on the basis that the decision was disproportionate to their family life rights in the proportionality balancing exercise between on the one hand their rights and on the other the legitimate and necessary public interest in protecting the economic well-being of the UK through Immigration control.

Conclusions:

13. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the

decision should be set aside. There were errors of law, but on the facts of this case they are not material as they did not affect the outcome of the appeal.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeals remain dismissed on all grounds.



Signed:

Date: 11 March 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: the appeal has been dismissed and thus there can be no fee award.



Signed:

Date: 11 March 2015

Deputy Upper Tribunal Judge Pickup