



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

Appeal Number: VA/02562/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On Thursday 20 August 2015

On Tuesday 25 August 2015

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

**MRS SANCHA RANI JABEGU
(Anonymity direction not made)**

Respondent

Representation:

For the Appellant: Mr Walker, Senior Home Office Presenting Officer

For the Respondent: Ms Praisoody, Counsel

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Entry Clearance Officer, New Delhi. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Entry Clearance Officer is technically the Appellant in this particular appeal.
2. The Appellant is a national of Nepal, born on 1 January 1945 and therefore now aged 70 years. She applied on 11 April 2014 for a visa to visit her daughter, son-in-law and two grandchildren in the UK for 6 months. That application was refused on 15 April 2014 on the basis that the Entry Clearance Officer was not satisfied that she is a genuine visitor or that she intends to return to Nepal after her visit.
3. The Appellant's appeal to the First-Tier Tribunal was allowed by Judge Joshi in a decision promulgated on 17 March 2015 ("the Decision") on the basis that the refusal of the visa was a disproportionate interference with the Appellant's Article 8 rights.
4. The Entry Clearance Officer appealed on the basis that the Judge had not provided reasons for finding that there was family life between the Appellant and her daughter's family in the UK and without that, generally, Article 8 ECHR would not be engaged. Permission to appeal was granted by First-Tier Tribunal Judge Hollingworth on the basis that the Judge's reasoning on this issue was insufficient.
5. The matter comes before the Upper Tribunal to determine whether the First-Tier Tribunal decision involved the making of an error of law.

Submissions

6. At the start of the hearing, I drew the representatives' attention to the decisions in Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC), Adjei (visit visas - Article 8) [2015] UKUT 0261 (IAC) and the Court of Appeal's judgment in Singh and anor v Secretary of State for the Home Department [2015] EWCA Civ 630 which appeared to me to be relevant to the issues in the appeal before me.
7. Mr Walker submitted that there were no issues of dependency beyond the usual emotional ties in this case so that the Judge was not entitled to find that family life existed. If there was no family life, then as the authorities suggested, since this was a visit case where the potential visitor lived outside the UK, Article 8 would not normally be engaged. The Judge had therefore fallen into error by simply accepting that Article 8 was engaged and going on to consider proportionality.
8. Ms Praisood reminded me that this was just a visit visa and that Article 8 should be judged accordingly; the Appellant is not seeking to settle in the UK. This could be a "once in a lifetime" opportunity for the Appellant who is an elderly lady to visit her family in the UK and see how they live here. She suggested that the test for whether there is a

breach in Article 8 in such circumstances should not be the same as in cases where a person sought to settle in the UK. I reminded her that case-law suggested that it was not the same test because often consideration of Article 8 in such cases would not engage Article 8 at all and the stage of a proportionality assessment would not be reached. The issue was therefore whether there was a level of dependency which led to Article 8 being engaged in this case which might have properly led the Judge to conclude that there was family life which engaged Article 8, that there would be interference with the right to respect for that family life and that the decision was disproportionate when that interference was weighed in the balance.

9. Ms Praisoody pointed to the fact that the daughter in the UK was the Appellant's only daughter, the rest of her children being sons. Although her grandchildren, now aged 16 and 18, visited their grandmother in Nepal in 2011, they were unable to return due to the cost. The cost of buying a ticket for four people to go to Nepal was more than the cost of buying the Appellant a ticket to come to the UK. She also pointed to section 55 and indicated that I should consider the impact on the Appellant's minor grandchildren.
10. She also submitted that there was unfairness to the Appellant caused by the change in the law which meant that the Appellant could no longer appeal the Respondent's decision on the basis that it was "not in accordance with the law". I pointed out that the Appellant was not without a remedy in this regard as she could bring a judicial review of the Respondent's decision if the reasoning were flawed. The reasoning could only be examined by the Tribunal though if (per Mostafa) the proportionality stage of the Article 8 assessment were reached.

Error of law decision and reasons

11. Following the submissions, I indicated that I was satisfied that there is an error of law in the Decision and would provide my reasons in writing. The representatives agreed that no further evidence or submissions were required and that I should proceed to re-make my decision on the basis of the evidence before the First-Tier Tribunal Judge and the submissions recorded in the Decision and those made to me. I now proceed to set out my reasons.
12. The reasoning in relation to Article 8 is to be found at [20] to [27] of the Decision. Paragraphs [20] to [21] set out the Judge's reasoning in relation to the first two questions to be answered by the Razgar test as follows:-

"[20]The decision in R v Secretary of State for the Home Department ex parte Swati 1986 1 All ER 717 held that a refusal of entry clearance as a family visitor can engage Article 8. I accept that the appellant is a mother of a British citizen and her refusal of entry can engage Article 8. I am satisfied that the refusal is an interference by a public authority with the exercise of the appellant's right to respect for private and family life.

The appellant's family life in the United Kingdom consists of her daughter, son-in-law and grandchildren. She also has children and grandchildren in Nepal.

[21] I have considered whether such interference will have consequences of such gravity as potentially to engage Article 8. I am persuaded that the consequences for the appellant and her family if she is not permitted to enter as a visitor will be grave. She will not be able to see her daughter, son-in-law and grandchildren in the United Kingdom"

13. There is no prior consideration of the case-law concerning the issue of when family life can be said to exist between adults. As stated by the Court of Appeal in Singh:

"In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8...It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more."

14. It is of course accepted that the Appellant has family ties with her daughter and her daughter's family in the UK. However, family ties do not automatically equate with family life for the purposes of Article 8. There is also an issue whether the interference is sufficiently grave as to engage Article 8. The issue of whether there is family life was simply not considered by the Judge. Although the judgment in Singh is more recent, the jurisprudence pre-dating it makes clear that it is more than just a blood tie which is required when dealing with the issue of whether family life exists between adults. There is no indication that the Judge addressed her mind to this.

15. The Judge cannot be faulted for failing to refer to the cases of Mostafa and Adjei since neither was reported prior to the date of the hearing. However, based on those decisions, there is a clear error of law also in the assumption (without reasoning) that Article 8 is engaged in a case such as this. At [24] in Mostafa, the Tribunal recorded 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. "

The decision in Adjei makes the point even more clearly at [9] as follows:-

"...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...."

Decision and reasons

16. Having found that there is an error of law in the Judge's finding that family life exists in this case and that Article 8 ECHR is therefore engaged, I therefore set aside the Judge's findings in relation to Article 8 ECHR and I go on to re-make the decision.
17. The evidence is set out at [8] to [12] of the Decision and I have also had regard to the written evidence submitted by the Appellant which consists of a one page letter to the Entry Clearance Officer from the Appellant dated 28 March 2014 and a four page statement from the Appellant's son-in-law. I do not repeat what is said in the Decision in relation to the evidence as there is no dispute as to the facts. In short summary, the Appellant's daughter lives in the UK with her husband and two children. The Appellant's son-in-law is in the British army and until 2007 was travelling extensively but the family has been mainly settled in the UK since then. The Appellant has one other son who has been temporarily working in the UK and whose wife remains in Nepal and three other children living in Nepal along with their children.
18. The evidence in Mr Sireng's statement is to the effect that the Appellant's entire family life is in Kathmandu and that the Appellant wishes to continue to live there and has no intention of not returning at the end of her visit. I obviously do not read Mr Sireng's statement as suggesting that he is intending to determine the issue of law as to family life from what he says but it is clear that the majority of the Appellant's family are in Nepal. Mr Sireng also says however that the Appellant "plays a significant part in all our lives, especially that of my children and wife". Unfortunately, there is no elaboration on that statement. I accept Ms Praisoody's submission that there is an emotional tie between the Appellant and her daughter in the UK, particularly since she is the only daughter and the rest of the children are male. However, there is simply no evidence on which I can find that there is any particular dependency. Any financial dependency in Nepal is on the Appellant's son as set out in the Appellant's letter and not on her daughter's family in the UK.
19. It is also clear from the evidence given to the First-Tier Tribunal that the family in the UK can visit the Appellant in Nepal and have done so in the past. I accept what is said at [12] of the Decision that it is "much easier" (and cheaper) for the Appellant to come to the UK than for the family to go to Nepal but there is no evidence that this is not possible. I also accept Ms Praisoody's submission that there is a difference between the family visiting Nepal and the Appellant being able to visit her family in the UK and see how they live here. However, whilst I do not seek to downplay the importance of this for the Appellant or her family in the UK, none of the foregoing provides a reason for a finding that a family life exists between the Appellant and her daughter and her daughter's family in the UK or that the refusal of the visa amounts to such a grave interference with her life as to engage Article 8 ECHR.

20. Ms Praisoody submitted that section 55 is engaged by the fact that at least one of the Appellant's grandchildren in the UK is a minor. Again, though, there is no evidence as to the impact on the Appellant's grandchildren of their grandmother being unable to visit them in the UK. Whilst I can readily accept that the Appellant's grandchildren might be pleased to receive a visit from their grandmother in the UK, there is simply no evidence that there is any welfare impact on the Appellant's grandchildren generated by the refusal of the visa. They live with their parents in the UK and will continue to do so. As noted above, they can visit their grandmother in Nepal and have done so in the past.

21. For the above reasons, I dismiss the Appellant's appeal under Article 8 ECHR.

DECISION

The First-tier Tribunal Decision did involve the making of an error on a point of law.

I set aside the Decision

I re-make the decision in the appeal by allowing the Entry Clearance Officer's appeal and therefore dismissing the Appellant's appeal.

Signed



Date 21 August 2015

Upper Tribunal Judge Smith