



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

Appeal Number: VA/03483/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9 April 2015**

**Determination
Promulgated
On 17 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

ENTRY CLEARANCE OFFICER - KUWAIT

and

**RAJAA BALTAJI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Mr L Tarlow of the Specialist Appeals Team

For the Respondent: Ms J Cunningham of The Taylor Partnership

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as the Applicant is a citizen of Syria born on 9 July 1959 and has been resident and working in Kuwait for some 30 years or more. On 6 May 2014 she applied to the Appellant (the ECO) for entry clearance as a visitor to visit her daughter and son-in-law and their child, her granddaughter, born in early 2014.

The ECO's Decision

2. On 8 June 2014 the ECO refused the application under reference 804051. He noted the Applicant had previously been refused entry clearance as a visitor on four occasions. He acknowledged the importance of family visits and accepted she was employed as a teacher.
3. He noted that the Applicant's daughter and son-in-law had come to the United Kingdom as student dependant and student and had subsequently applied for leave to remain in the United Kingdom outside the Immigration Rules. He concluded the Applicant did not intend to make a short visit and was therefore not genuinely seeking entry as a visitor and refused entry clearance by way of reference to paragraphs 41(i) and 41(ii) of the Immigration Rules.
4. On 3 July 2014 the Applicant lodged notice of appeal asserting she had been living in Kuwait since 1982 since which time she had been with the same employer. The grounds referred to the medical condition of the Applicant's granddaughter to which the Applicant had referred at Q.87 of her application and supplied a hospital letter to confirm it.
5. Neither the ECO's decision nor the Entry Clearance Manager's review makes reference to the Applicant's granddaughter's medical condition.

The First-tier Tribunal's Decision

6. By a decision promulgated on 12 December 2014 on the papers and without a hearing First-tier Tribunal Judge Mitchell made findings that the Applicant met the requirements of the Immigration Rules and proceeded to allow her appeal under the Rules, stating it was not necessary for him to consider her human rights claim.
7. The ECO sought permission to appeal on the basis there was an error of law in the Judge's determination because he had omitted to consider the appeal on the restricted grounds for appeal provided by Section 52 of the Crime and Courts Act 2013, which came into effect on 25 June 2013. These limit the appeal rights in respect of applications for family visit visas made on or after 25 June 2013. The grounds of appeal are limited to human rights grounds.
8. The ECO asserted the Judge had failed to consider the human rights grounds and if he had it was submitted he would have reached the conclusion that the decision did not interfere with the family life of the Applicant in a way which would engage the United Kingdom's obligations under the European Convention.
9. On 2 February 2015 Judge of the First-tier Tribunal Shimmin granted the ECO permission to appeal because the Judge had arguably erred in allowing the appeal under the Immigration Rules when grounds of appeal had been limited to breaches of human rights.

The Upper Tribunal Hearing

10. The Applicant's son-in-law attended the hearing. I supplied the parties with information I had obtained from the internet about the medical condition of the Applicant's granddaughter which Mr Tarlow said confirmed his

limited understanding of the condition. I mentioned the response for the Applicant lodged by her representatives on 27 February under Procedure Rule 24. This referred to the determination in *Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 640 (IAC)*. It made no reference to any subsequent jurisprudence and in particular *R (MM Lebanon) & Others v SSHD [2014] EWCA Civ 985* or to the decision in *Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)*.

11. Ms Cunningham quite rightly accepted that there was a material error of law in the Judge's decision on account of his failure to understand that the grounds of appeal were restricted to human rights grounds by reason of Section 52 of the Crime and Courts Act 2013 and the decision had to be set aside for that reason.
12. I indicated I intended to re-make the decision and, in so doing, would take into account the report of 2 April 2015 on the Applicant's granddaughter from Barts Health NHS Trust. It gave details of the granddaughter's present condition which appears to be not very different from the symptoms referred to in the Applicant's original application. The report goes on to detail the difficulties of travel for an individual with the condition of the Applicant's grandchild made travel outside some western European states virtually impossible.
13. Subsequent to the Judge's decision the Upper Tribunal has given guidance in the assessment of appeals against refusal of family visit visas having regard to the grounds of appeal restricted by Section 52 of the Crime and Courts Act 2013 in *Mostafa*.
14. The Judge addressed the issue of genuineness of the proposed visit and the Applicant's intention to return at para.17 of his decision and noted there was before him evidence in the form of copies of residence permits that the Sponsor and his wife had been issued residence permits as refugees until 14 May 2018. The Applicant's son is employed by the accountants, KPMG UK Limited, and works in Information Technology.
15. The Applicant has lived for many years in Kuwait but it is evident from a letter from the Applicant's daughter-in-law which was before the Judge that she and her husband had come to the United Kingdom from Syria. The evidence in the Tribunal file is sufficient on the balance of probabilities to show that the Applicant's son and daughter-in-law have been recognised as refugees and therefore their position in the United Kingdom is certain and lawful.
16. The Judge found the Applicant met the requirements of the Immigration Rules. The Upper Tribunal in *Mostafa* said:-
 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 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. 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.

17. Although the Applicant is not the partner of her grandchild's parents nor is she the parent of her grandchild but it is a relationship which is close and certainly the proposed visit is not one "based on a whim or will not add significantly to the time that the people involved spend together". The Applicant has never seen her grandchild. Given the Applicant's grandchild cannot travel to Kuwait and indeed travel anywhere outside the immediate vicinity of the hospital where she receives treatment will be difficult, if not impossible, and has a short life expectancy, I find it is disproportionate to any of the lawful objectives contained in Article 8(2) of the European Convention and in particular the economic well-being of the country and need to maintain proper immigration control for the Applicant to be refused entry clearance to visit her family in the United Kingdom.

Conclusion

18. For the reasons given that the First-tier Tribunal's decision contained a material error of law such that the decision should be set aside. There was no challenge to the findings of fact and I re-make the decision allowing the appeal of the Applicant against refusal of a family visit visa on the basis that the refusal is disproportionate to the obligation to respect the family life of the Applicant and her family.

Anonymity

19. There was no request for an anonymity order and I find none is required.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained a material error of law such that the decision is set aside. The findings of fact are preserved and the following decision is substituted:-

The appeal of the Applicant against the ECO's decision is allowed on human rights grounds.

Signed/Official Crest

Date 16. iv. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeal has been allowed and I have considered whether to make a fee award. There was limited information about the extent of the medical condition of the Applicant's grandchild before the ECO and at the date of the decision there was no guidance from the Upper Tribunal on how to construe the provisions of Section 52 of the Crime and Courts Act 2013. In these circumstances I decline to make a fee award.

Signed/Official Crest

Date 16. iv. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal