



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

Appeal Number: VA/03380/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 18 August 2015**

**Decision and Reasons
Promulgated
On 9 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**WAQAS RAZA
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

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

For the Respondent: Mr Khan, instructed by Talat Naveed Solicitors

DECISION AND REASONS

- 1 This is an appeal brought by the Entry Clearance Officer, against the decision of First tier Tribunal Judge Walker dated 20 March 2015 in which he allowed the appeal brought by Mr Waqas Raza against the ECO's decision 26 May 2014 refusing him entry clearance to the visit the UK. In this decision I shall refer to the parties as they were before the First-tier, that is that Mr Raza is the Appellant, and the ECO is the Respondent.

- 2 The Appellant is a national of Pakistan and on 5 May 2014 had applied online for entry clearance to visit the UK. The Appellant is married to Zobi Waqas, a dual Pakistani/British national. They live in Pakistan, although as a British national Mrs Waqas is entitled to come and go to the UK as she pleases.
- 3 In his application form, the Appellant stated at q.17 that he intended to travel to the UK with his wife for 4 weeks from 30 May 2014 and at q.81 he stated that he wanted to visit his parents-in-law for a month to maintain stronger family ties, along with his British wife. His parents-in-law gave a sponsorship undertaking (at [A17] of the Respondent's bundle) stating that they wished to sponsor the Appellant's visit to the UK, and at [A16] there was an affidavit from the Appellant's wife, in which she stated that she along with her husband wished to proceed to the UK to her parents and other relatives as well as sightseeing for a short period of time of four weeks.
- 4 The application was refused in the decision dated 26 May 2014 on the grounds that whilst he was satisfied that the sponsors were able to maintain and accommodate the Appellant during the proposed stay, there were anomalies in the Appellant's own financial documentation, which suggested that the Appellant was not telling the truth about his own financial position, and that the Appellant had not accurately presented his circumstances or his intentions in wishing to enter the UK. The Respondent was not satisfied that the Appellant intended to leave the UK at the end of the proposed visit.
- 5 As the decision post-dated relevant amendments occurring on 23 June 2013 to rights of appeal in family visit appeals, the Appellant's appeal to the FtT was on restricted grounds, the only relevant ground in the present case being that the decision was unlawful under s.6 Human Rights Act 1998, on the ground that it amounted to a disproportionate interference with the Appellant's rights under Article 8 ECHR. There was no power for the judge to allow the appeal on the basis that the decision was not in accordance with immigration rules.
- 6 In lengthy grounds of appeal accompanying the notice of appeal IAFT-2, the Appellant's representatives made submissions principally about the Appellant's financial circumstances. It was argued that the Appellant proposed to 'proceed to the UK for the duration of 4 weeks to see his father-in-law ... and mother-in-law ... who are also sponsoring the Appellant's entry clearance in order to maintain the stronger family ties and sightseeing' (grounds, page 2). It was also argued that the decision breached "the Appellant's convention right of respect to his private and family life with his wife to see his parents-in-law in the UK under Article 8 of the ECHR' (grounds, page 3).
- 7 Before the Judge, the Appellant's wife and father-in-law gave evidence. The case that was presented to the Judge (see his para [14]) was as follows:

"14 In 2014 the Appellant's wife was pregnant. There were complications requiring her to undergo a caesarean section. As she had no female members of family to help her in Pakistan she decided to return to the UK. The Appellant's plan was to travel with her to stay for a couple of weeks and then return to his home and business in Pakistan. As he was refused then his wife returned to the UK and where she remained until the birth of her child by caesarean section. She also had other health complications and which resulted in a gallbladder operation in February 2015. She has now recovered and intends to return to Pakistan and her home there on there on 18 March 2015." (i.e. 2 days after the appeal hearing on 16 March 2015)."

8 In his findings, the judge held that:

"25 I find that the Respondent's decision has caused interference with the various individuals' family lives that will be of such gravity as to engage Article 8. The Appellant himself has been prevented from accompanying his wife a British Citizen to visit her extended family. He has also been prevented from accompanying his wife when she was experiencing problems and has also been prevented attendance and the birth of his daughter. Because of the refusal he has been separated from his wife and his daughter for some 9 months."

9 The Judge held, in light of the substantial bundle of documents filed with the Tribunal relating to his financial and tax affairs, that the Appellant's income was as claimed in the original application, and that he was able to satisfy the requirements of the rules [26] which was, in the proportionality balancing exercise, a weighty factor to be taken into account [29]. The decision was not proportionate [28], and the appeal was allowed on human rights grounds.

10 The Respondent appealed to the Upper Tribunal on grounds, as I understand them, that the Judge erred in law in:

- (i) failing to observe that the Appellant's family life with his wife was enjoyed in Pakistan; the wife chose to travel to the UK to give birth, and the separation from the Appellant was not a result of the Respondent's decision;
- (ii) the reason for the Appellant's visit to the UK was to visit his in-laws; the Judge erred in finding that the it was disproportionate to refuse a visit to these extended family members; there was no finding that family life existed between the Appellant and these extended family members.

11 In granting permission to appeal on 3 June 2015, Judge of the First tier Nicholson pointed out that under s.85A NIAA 2002 the Judge was bound to consider only the circumstances appertaining at the time of the decision, and thought it arguable that the Judge erred in accepting that the Appellant had an Article 8 connection with the UK through his wife and daughter because, as at the date of decision, the Appellant's wife was not in the United Kingdom and his daughter had not been born. It was also arguable that the judge erred, if the judge had accepted that the Appellant had an Article 8 family life with his wife's family, because there was little if

any evidence to show that the test in Kugathas was met and in any event that point was not considered by the Judge.

- 12 In submissions before me, Mr. Avery for the Respondent relied on the grounds of appeal. Mr Khan, for the Appellant, sought to argue that the judge's decision was sustainable; that the judge had not found that there was a family life between the Appellant and his in-laws, the interference with which was disproportionate; indeed, Mr Khan argued that the Appellant had not in fact applied for entry clearance to join his wife's extended family; rather, the judge had held that the Appellant was being precluded from accompanying his wife whilst she visited her extend family. Mr Khan argued that the Judge was correct in his observation at [30] that the facts of the present case were similar to those in Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC).

Discussion

- 13 I find that the judge materially erred in law in the following respects.
- 14 I find, notwithstanding Mr Khan's submission to the contrary, that the Judge did find that there was an interference with the family life between the Appellant and his in-laws. Contrary to Mr Khan's submission that the Appellant was applying for entry clearance merely to accompany his wife whilst she visited her parents and other family members, I find that the details of the Appellant's application (which I have intentionally set out in some detail above) clearly indicated that he wished to visit his in-laws, for the purposes of maintaining/strengthening family ties (and sightseeing). The Judge held at [25] that the Respondent's decision has caused interference with 'the various individuals' family lives'. I find that this impliedly amounts to a finding that there has been an interference with the Appellant's right to family life with his in-laws.
- 15 I find that that is a material error of law because there was clearly inadequate evidence before the Judge to establish that there was any family life between the Appellant and his in-laws in the first instance.
- 16 Further, I find, with reference to the issue raised at paragraph [6] of Judge Nicholson's grant of permission, that in making reference at [25] to the extended period of time that the Appellant's wife remained in the UK for the purposes of receiving treatment for a gall bladder condition, the Judge erred in law in taking into account a matter which the law prevented him from taking into account; the Appellant's wife's need for gall bladder surgery was something which post-dated the date of decision and her arrival in the UK, and was not part of the circumstances appertaining at the time for the decision.
- 17 I find that such errors are a sufficient basis to set aside the Judge's decision, which I do.
- 18 In remaking the decision, I take into account the following:

- (i) the Appellant has been found to satisfy immigration rule para 41;
- (ii) applying Mostafa; where the rules are satisfied, then preventing a third country national from entering to accompany his British wife for the purposes of a temporary visit would be something more than a 'technical or inconsequential interference' with the family life between such an appellant and his wife (Mostafa, [17]);
- (iii) such an interference is of sufficient gravity potentially to engage the operation of Article 8 (Mostafa, [18]);
- (iv) subject to two sets of considerations, there is likely to be no justification for stopping a husband joining his wife when a Tribunal is satisfied that the circumstances satisfy the requirements of the Rules (Mostafa, [21]).

19 However, one of the sets of considerations set out in Mostafa at [21] is the candour of the applicant and spouse:

" ... For example, if they had contributed to the application being refused by presenting inaccurate information or by omitting something material or committing some comparable misdemeanour. We can accept that it might be proportionate to refuse someone entry clearance whose application suffered from deficiencies such as these because good administration requires applicants to engage with the system and, further, we consider that there are duties of candour and co-operation on all applicants. There are no such failings here. The second set of considerations relates to the impact of refusal on the relationships that have to be promoted. Refusal of entry clearance will not always interfere disproportionately with such a relationship."

20 I find that the Appellant and his wife did contribute to the application being refused, by presenting inaccurate information and by omitting something material from the Appellant's application. Although the Appellant's wife asserted to the Judge in her evidence (see [14]) that she knew she was pregnant at the time of the Appellant's application for entry clearance, and indeed she appeared to assert to the Judge that the principal purpose of her visit to the UK was to give birth, and that the Appellant's visit was to be present with her for that purpose, there was no indication within the Appellant's application indicating that this was the purpose of their visit. The Respondent cannot be deemed to have disproportionately interfered with the family life between the Appellant and his wife by preventing him from supporting her through a difficult birth, when the Respondent was not informed, in the application, that this was the purpose of the Appellant's visit. The Appellant repeatedly mentioned wishing to visit for 4 weeks to further family ties with his in-laws, and nothing about a pregnancy was mentioned.

21 Further, I find that the Judge was only able to find that the Appellant satisfied the immigration rules following the submission of significant quantities of financial information which were not before the ECO at the time of the decision. The Appellant may be treated as having omitted something material from his application in that regard also.

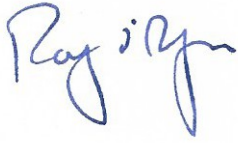
- 22 In remaking this decision, even if, according to the account now relied upon by the Appellant and his wife, the circumstances appertaining at the time of the decision were that the sponsor was pregnant and she wished the Appellant to be present with her in the UK at the time of the birth, I cannot take into account the later complication in her health that she required gall bladder surgery, as that issue post dated her arrival in the UK and was not part of the circumstances appertaining at the date of decision.
- 23 I find that there is no family life between the Appellant and his in-laws, there being no evidence of any such family life capable of supporting such a finding.
- 24 In the circumstances, I find, notwithstanding that the Appellant met the immigration rules for visitors at the date of decision, and that the Respondent's decision was capable of amounting to an interference with the Appellant's family life with his wife, of sufficient gravity potentially to engage the operation of Article 8, this is an example of a case where the refusal of entry clearance was not disproportionate.
- 25 If I am wrong about the existence of a material error of law in the present decision, and if instead the decision of the First tier judge should be upheld, I was informed that the Appellant's wife had indeed return to Pakistan on 18 Much 2015 and is therefore now living back in Pakistan with the Appellant.
- 26 Upon receiving a decision of the Tribunal allowing an appeal, the ECO is entitled to consider whether, since the original decision there has been a change in circumstances. An ECO is not entitled to go on fishing expeditions in an attempt to subvert the outcome of a successful appeal, but they are entitled to take into account whether at the date they come to consider how to implement the Tribunal's decision, whether the applicant continues to satisfy the immigration rules. In the present case, it can no longer be said that refusal of entry clearance would amount to a disproportionate interference with the family life between the Appellant and his wife by preventing him from being present in the UK whilst she gives birth, as she has already given birth and has returned to Pakistan.

Decision

- 27 (i) The decision of the First tier Tribunal involved the making of a material error of law.
- (ii) The decision of the First tier Tribunal is set aside.
- (iii) I remake the decision, dismissing the Appellant's appeal on human rights grounds.
- 28 The Tribunal regrets the time taken to produce the present decision.

Signed:

Date: 2.2.16

A handwritten signature in blue ink, appearing to read "P. O'Ryan". The signature is written in a cursive style with a large initial 'P' and a long, sweeping underline.

Deputy Upper Tribunal Judge O'Ryan