



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05819/2015

THE IMMIGRATION ACTS

Heard at Field House
On 26 May 2017

Decision & Reasons Promulgated
On 16 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

ENTRY CLEARANCE OFFICER, ABU DHABI

Appellant

and

MRS SABIAHA AZEEM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, HOPO
For the Respondent: Mr M Murphy, Counsel

DECISION AND REASONS

1. The appellant, the Entry Clearance Officer at Abu Dhabi, has been granted permission to appeal the decision of First-tier Tribunal Judge N J Bennett allowing the appeal of the respondent who had been refused entry clearance as a visitor so that she could visit her husband, Hussain Azeem ("the sponsor").
2. The sponsor is a British citizen. At the time of the respondent's application he was studying for a Bachelors Degree at the University of East London and was expected to complete his studies on 31 May 2017.
3. The respondent wished to visit the sponsor in the United Kingdom for four months, starting in August 2015. She lived with her parents. She was married to the sponsor who was born on 28 July 1993. She was supported by the sponsor. The sponsor would pay for her accommodation, living expenses and for the ticket. The main and

sole purpose of her visit was to see the sponsor because the sponsor was a student and could not travel to Pakistan as a result of his study commitments. She was financially dependent on the sponsor, but she lived with her parents in Pakistan. She was making a human rights claim under Article 8 because the sponsor was currently a full-time student and could not travel due to his study commitments and he did not meet the financial threshold as a spouse.

4. The ECO raised two concerns; the first was that the sponsor's bank statement showed a large deposit of £16,000 on 29 May 2015 and, according to the ECO, was unable to establish the origin of this large deposit. The second concern was that the ECO was not satisfied that the respondent had shown that her ties to Pakistan were a sufficient incentive to leave the UK at the end of her proposed visit. Consequently, the ECO was not satisfied that she genuinely was seeking entry as a visitor or would leave the UK after a limited period.
5. With regard to the consideration of Article 8, the ECO considered that refusing the respondent's entry clearance application was justified and did not impact on her ability to conduct a family life as she had done up until now. There did not appear to be any insurmountable obstacles preventing her sponsor from visiting her in Pakistan as he had done before now. Having taken into account the compassionate circumstances, the ECO was of the opinion that they did not outweigh his concerns about her intentions in wishing to enter the UK.
6. The judge accepted that family life existed between the respondent and the sponsor. The judge said at paragraph 24 that the more difficult question was whether the ECO's decision interfered with their family life. On one view, it might be said that the interference was caused by the decision to marry while the sponsor was a student and, therefore, while the sponsor could not meet the financial requirements of Appendix FM, the respondent's decision merely preserved the situation brought about by this decision. The judge said however that the Upper Tribunal's decision in **Mostafa**, appeared to answer this question and went on to cite the relevant extract from **Mostafa**, which was this:

*“Undoubtedly the paradigm Article 8 entry clearance case concerns applicants seeking to join close family members for the purposes of settlement. However it cannot be excluded that where one party to a marriage is entitled to be in the United Kingdom a qualified obligation to facilitate spousal unification for the limited purpose of a short visit and sojourn may arise and does arise here. Mrs El-Sheikh wanted to return to her country of nationality (the United Kingdom) for a time and her husband wanted to be with her, not with a view to settlement but so that he could share her life and relationships in the United Kingdom. The refusal decision had a material impact on their right to enjoy family life. He did not want to settle but to visit her, and subject to permissible qualifications, he should be entitled to do that. Whilst it would almost certainly be proportionate to refuse him entry clearance if he did not comply with the rules his, and his wife's, desire to be together in her home area, albeit for purposes of a visit, are very human and understandable. Preventing that would not be a 'technical or inconsequential interference' (see Sedley LJ in **VW (Uganda)** [2009] EWCA Civ 5)*

and should be permitted, subject to the proportionate requirements of immigration control."

7. At paragraph 25 the judge considered the question of whether exclusion in the interests of enforcing effective immigration control was a proportionate interference with the respondent's family life with the sponsor. He said that the respondent's intentions about the visit were of fundamental importance because exclusion in the interests of maintaining effective immigration control would likely to be proportionate if she did not intend to honour the terms of her visa.
8. At paragraph 26 the judge said that the ECO's concerns about the respondent's intentions were understandable on the evidence before him. There was a large credit to the sponsor's bank account in the months leading up to the application which, on its face, was incompatible with his status as a student. The respondent did not appear to have any particular ties to Pakistan, now that she was married and supported by the sponsor, and the sponsor was settled here but did not appear to be able to meet the financial requirements for settlement. However, the reasons for the visit and the deposit had now been explained, which the judge accepted.
9. At paragraph 27 the judge said that the respondent had every reason to return to Pakistan before her visa expired and to apply for entry clearance as a spouse because of the disadvantages that flow from being here illegally. The judge gave examples of the disadvantages.
10. At paragraph 28 the judge said the respondent has every expectation of being able to make a successful application for entry clearance after the sponsor graduates. The sponsor will be in a position then to seek employment. As a young graduate, he has every expectation of finding employment which will pay him at least £18,600 per annum, but if, for whatever reason, he did not do this, he would be able to supplement his earnings by taking a second job. The judge said in such circumstances the respondent would be well-advised to go back to Pakistan and not to apply for leave to remain as a spouse because she would find that there were significant obstacles that stood in the way of her doing this successfully.
11. On balance, the judge was satisfied that the respondent did probably intend a short visit to see the sponsor while he was studying and unable to sponsor an application for entry clearance as a spouse and that she probably did intend to go back to Pakistan before the end of her visa.
12. The judge said as follows at paragraph 30:

"The Upper Tribunal said in Mostafa that a claimant's ability to satisfy the Immigration Rules was not determinative but that it was a weighty factor when deciding whether exclusion would be proportionate. I am unable to identify any factor which militates against granting entry clearance. I therefore find that exclusion would be disproportionate and allow the appeal under Article 8."

13. First-tier Tribunal Judge Hollingworth granted permission in the following terms:

- “1. It is arguable that the judge has fallen into error at paragraph 30 of the decision. The judge referred the claimant’s ability to satisfy the Immigration Rules not being determinative but that it was a weighty factor when deciding whether exclusion would be proportionate. The judge states that the judge was unable to identify any factor which militated against granting entry clearance. The judge then states that it was therefore found that exclusion would be disproportionate and the appeal was allowed.
2. It is arguable the judge has taken an unduly restrictive approach in considering the elements which comprise the proportionality exercise in drawing a conclusion on the basis set out at paragraph 30, immediately prior to finding that exclusion would be disproportionate. It is arguable that the judge has attached exclusive or undue weight to the factor identified at the outset of paragraph 30 before drawing the conclusions stated therein. It is arguable that the judge’s conclusion is therefore vitiated and that the proportionality exercise has not been carried out on a balanced footing. It is arguable that further factors should have been taken into account, particularly in the light of the factual matrix.”

14. Mr Whitwell relied on the grounds submitted on behalf of the ECO. He said there were two main points; the first was the judge’s failure to engage with the case as put; and the second was treating compliance with the Immigration Rules as being determinative of the appeal.
15. He submitted that the respondent has no dependent children, is supported by the sponsor, lives with her parents in Pakistan and does not work and has no savings of her own. In the light of these facts, the respondent could not comply with the maintenance requirement as a spouse. Mr Whitwell submitted that there was no engagement by the judge with the argument about the respondent’s intention to leave the UK at the end of her visit. At paragraphs 26 and 27 the judge questioned why the respondent would stay. Mr Whitwell said people do overstay. Given all the factors, he submitted that the judge did not engage with whether Section 41 of the visit Rule could be met.
16. Mr Whitwell relied on paragraph 27 of the decision in **Kaur (visit appeals; Article 8) [2015] UKUT 00487 (IAC)**. The Upper Tribunal said as follows:

- “27. This background fortifies us in our view that a judge limited by s.88A to deciding whether the refusal of entry clearance to an appellant is compatible with Article 8 cannot – and must not – avoid taking the factual situation as regards the ability of the appellant to meet paragraph 41 as a starting point. In deciding whether Article 8(1) is engaged, for example, the judge must be satisfied that there is a factual content to the claimed private and family life. If the evidence relating to the ability to meet the requirements of paragraph 41 discloses to the judge that the visitor has no real family ties or that the visitor does not genuinely intend a visit, that may have a direct material bearing on the decision as to whether Article 8(1) is engaged. Similarly, evidence regarding the applicant’s ability to meet the requirements of the Rules may sound on whether the decision constitutes

interference and also on whether, if there is interference, it is proportionate. Overall, unless an appellant can show that there are individual interests at stake covered by Article 8 'of a particularly pressing nature' so as to give rise to a 'strong claim that compelling circumstances may exist to justify the grant of LTE outside the rules' (see SS (Congo) at [40] and [56]), he is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals."

17. Mr Whitwell questioned whether there were any strong claims or compelling circumstances or evidence of a compelling nature in this case. The sponsor said that the visit could not take place during term-time. However, Mr Whitwell submitted that the visit during the holidays could not amount to a pressing nature covered by Article 8.
18. Mr Whitwell relied on paragraph 7 of the grounds which submitted that the judge failed to adequately consider the claim that the sponsor was unable to travel due to study commitments. The respondent wished to visit in August 2015 which would have fallen during the sponsor's university summer holiday. The grounds further submitted that Article 8 does not afford the choice of where family life should be pursued; in any event, it was open to the sponsor to travel to Pakistan during his university holidays. The refusal did not interfere with the family life of the respondent and the sponsor, because it did nothing to change the status quo of their family life relying on modern means of communication.
19. Mr Murphy submitted that the respondent was refused entry clearance because of the ECO's fear that she would not go back to Pakistan after the end of her visit. He submitted that the judge considered all the issues that were before him. He accepted the explanation for the deposit of the £16,000 into the sponsor's account. The ECO accepted that the marriage between the sponsor and the respondent was genuine. The judge accepted the sponsor's evidence. The judge found that the respondent has every reason to return to Pakistan. He submitted that this was a very well-reasoned decision.
20. Mr Murphy submitted that at paragraph 30 the judge was following what was said in **Mostafa**. He submitted that the judge did not say that compliance with the Immigration Rules was not determinative but that it was a weighty factor in deciding whether exclusion would be proportionate. The judge was merely citing what was said in **Mostafa**.
21. Having considered all the submissions, I find no error of law in the judge's decision.
22. I find that contrary to Mr. Whitwell's argument, the judge fully engaged with the argument about the respondent's intention to leave the UK. Indeed, Mr. Murphy submitted that the respondent was refused entry clearance because of the ECO's fear that she would not go back to Pakistan. I find that the judge fully addressed the issue of the appellant's intentions about the visit at paragraphs 25 to 29. While I accept Mr. Whitwell's submission that people do overstay their visit, the judge was satisfied that the respondent did probably intend a short visit to see the sponsor while he was studying and unable to sponsor an application for entry clearance as a

spouse and that she probably did intend to go back to Pakistan before the end of her visit [29].

23. I find that the judge was well-aware of the facts in this case, including the respondent's circumstances in Pakistan. I agree with Mr. Murphy that at paragraph 30 the judge was merely citing what was said in **Mostafa**. As the respondent's application was made under Article 8 of the ECHR, I find that the judge was considering whether the respondent's exclusion would be disproportionate. I find that the judge considered all the factors and issues before him in reaching the conclusion that it would be disproportionate to exclude the respondent from the UK.

Notice of Decision

24. I find no error of law in the judge's decision. The judge's decision allowing the respondent's appeal shall stand.
25. No anonymity direction is made.

Signed

Date: 12 June 2017

Deputy Upper Tribunal Judge Eshun