



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01452/2015

THE IMMIGRATION ACTS

Heard at: Manchester
On: 21st March 2018

Decision & Reasons Promulgated
On: 4th April 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

ENTRY CLEARANCE OFFICER, ISTANBUL

Appellant

And

MRS SHAHNAZ BAYANI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Reza Nezam, Sponsor

For the Respondent: Mr G. Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Mrs Shahnaz is a national of Iran born in 1952. On the 3rd February 2017 the First-tier Tribunal (Judge A.K. Simpson) allowed her appeal on human rights grounds. The subject of the appeal was the decision of the Entry Clearance Officer (ECO) to refuse to grant Mrs Shahnaz entry clearance as a visitor, in order that she might visit her daughter in the United Kingdom. Mrs Shahnaz argued that this was a decision that infringed the Article 8 ECHR rights of herself and her daughter; Judge Simpson agreed. The ECO has now sought, and been granted, permission to appeal against that decision.

Background and Decision of the First-tier Tribunal

2. The following facts are not in contention.
3. Mrs Shahnaz lives in Gorgan, a town in northern Iran close to the Caspian Sea. She has lived in her own property there for the past thirty years. She is a widow and until 2016 she lived with her son, a consultant anaesthetist. She retains close contact with him and his new wife, also an anaesthetist, and when they are in Gorgan they stay with her. Mrs Shahnaz has five sisters living nearby and she sees one or more of them on a daily basis. Her income derives from several sources. She has her own teacher's pension from the Ministry of Education, her late husband's pension from Bank Mellat and additional 'bonus' payments from various dividends and bonds. Her regular monthly income is approximately £750 plus additional *ad hoc* payments. She travels widely. In the past ten years she has holidayed in Turkey (five trips), Malaysia, the UAE, Thailand and Georgia. She has visited the UK twice, once with her late husband and most recently in 2012.
4. The Sponsor Mr Nezam was born in the UK. He is a dual British-Iranian national. He is married to the Appellant's daughter, Pooneh Nezam. Pooneh was very close to her mother prior to her marriage in 2011 and even after she moved to the UK in 2012 they continued to speak on a daily basis by telephone and using internet video calls.
5. In her application form dated 13th May 2015 Mrs Shahnaz had sought entry clearance as a visitor, stating that she wished to spend two months in the UK in order to be with her daughter. She explained that there was a particular reason for the trip at this time: Pooneh was heavily pregnant and wanted her mother to be with her at the time of the birth. She had lost her first child and they were both worried about the outcome of this pregnancy.
6. The ECO refused the application on the 4th June 2015. The reason given was that the ECO had identified transactions in Mrs Shahnaz's bank account the origins of which were "unclear" and which did not correspond to her stated monthly income. The ECO was not, in light of these findings, satisfied that she was a genuine visitor who intended to leave the UK at the end of her trip. Although the ECO states that he has considered the "compassionate circumstances" surrounding the trip, the decision does not expressly address human rights. In a review dated 3rd December 2015 an Entry Clearance Manager (ECM) upheld the refusal.
7. The appeal came before Judge Simpson on the 5th August 2016. She heard oral evidence from the Sponsors Mr and Mrs Nezam and had regard to the documentary evidence that was presented in respect of Mrs Shahnaz. Judge Simpson found the Sponsors to be credible witnesses. Indeed there is no indication on the face of the determination that their credibility was challenged

by the HOPO on the day. Having considered all of that evidence Judge Simpson found as follows:

- i) Mrs Shahnaz meets all of the requirements to be given leave to enter as a visitor. In particular it was found that she is a genuine visitor who intends to leave the UK at the end of her trip. The facts underpinning that finding are: Mrs Shahnaz enjoys a regular income, has close family members in Iran, that she has travelled out of Iran several times in recent years, including to the UK, and when she has done so has complied with the terms of her visa.
- ii) The ability of Mrs Shahnaz to finance the trip was not in issue since it was Mr Nezam who would pay for the entire thing; he was well able to do so.
- iii) Mrs Shahnaz is particularly close to her daughter Pooneh. They were “inseparable” prior to Pooneh’s marriage and they continue to have daily contact. Pooneh has looked to her mother for especial emotional support during a difficult time in her life. She had suffered a miscarriage in 2013 and at the time of the application for entry clearance was heavily pregnant. By the time that the appeal came before Judge Simpson that pregnancy had ended tragically, with Pooneh’s second child being still-born at term. These facts were, in accordance with the guidance in Kugathas v ECO [2003] EWCA Civ 31, capable of engaging Article 8.
- iv) In all of the exceptional compelling circumstances of this case the decision was disproportionate and the appeal was allowed.

The ECO’s Challenge

8. There are two grounds of appeal:

- i) Following amendments made by the Immigration Act 2014 there are now only three decisions that may attract a right of appeal under s82 of the Nationality, Immigration and Asylum Act 2002. One of these is a decision to ‘refuse a human rights claim’. There can only have been a decision to ‘refuse a human rights claim’ where a human rights claim has been made. It is submitted that no human rights claim was made in the application for entry clearance, and that there has been no decision to refuse on human rights grounds. There was therefore no jurisdiction for the First-tier Tribunal to hear the appeal and the decision is a nullity.

- ii) In any event the decision is wrong. Family life exists at present via video chat and telephone, and the decision does not interfere with that. The Judge does not consider whether it would be possible for the two women to have met in a third country.

Discussion and Findings

9. There is no merit in ground (i). As Mr Harrison agrees, the drafter of the grounds appears to have overlooked the assertions in the application form in respect of human rights:

“also please take into consideration that my daughter had a bad experience as I explained before, I therefore request you on the basis of human rights allow me to be by the side of my daughter” [at Q67]

And the decision of the ECM:

“I have considered the appellant’s rights under Article 8 of ECHR however I am not satisfied there are any compelling or compassionate circumstances”.

10. It is now accepted before me that Mrs Shahnaz did make a human rights claim in the course of her application for entry clearance, and although that was ignored by the ECO, it was dealt with by the ECM. There was therefore a decision to refuse on human rights grounds, and it is against that that the appeal to Judge Simpson lay. Ground (i) is therefore dismissed.
11. Ground (ii) takes issue with the substantive findings. Mr Nezam argues that the points made in this section of the grounds amount to a disagreement with the findings of the Judge, and that the ECO has here failed to identify any error of law. At paragraph 9 the grounds state:

“in any event it is the ECO’s view that the refusal does not amount to a disproportionate interference with the Appellant’s human rights”

It does not need to be said, but the ECO’s “view” was not determinative of this matter: Judge Simpson is entitled, by the statutory scheme, to take her own “view”. Mr Nezam is correct to characterise this as an argument with the outcome, rather than a point of law.

12. See further at paragraph 10 of the grounds:

“the Judge errs in finding there to be compelling circumstances such as to justify the granting of entry clearance”.

The grounds do not explain what the error might be. Before me Pooneh Nezam pointed out that the entire basis of the application had been the difficult circumstances that she found herself in. She had already lost a child and at the time of the application was extremely worried about losing a second. This had been made clear on the face of the application. That is why she wanted her mother to be with her. By the time that the appeal had come before Judge Simpson Mr and Mrs Nezam had lost a second child – and Mrs Shahnaz a second grandchild. I need not elaborate on why the appellant and sponsors might have advanced those circumstances to be “compelling”: Judge Simpson was rationally entitled to find that they were and Mr Harrison accepted that to be the case when he declined to pursue that ground.

13. The grounds raise two specific points that do merit further consideration. First, the ECO emphasises that family life is currently maintained by ‘VoIP’ and can continue to be so. Secondly, the Tribunal has failed to consider whether Mrs Shahnaz and Pooneh Nezam could meet in a third country.
14. The latter point can be dealt with briefly. It is not a matter that was raised in the refusal. Nor, as far as I can see from the determination and the record of proceedings, was it a submission made by the HOPO on the day. It is therefore hardly surprising that Judge Simpson did not deal with it. If that was an omission amounting to an error of law it is one that is immaterial. At the date of both the ECO’s decision and the appeal before Judge Simpson, Pooneh Nezam was in an advanced state of pregnancy and relied on medical advice to the effect that these were “high risk” pregnancies and that she should not therefore travel. If the two women were to see each other in person, at those points in time at least it would have to be in this country.
15. As to the matter of whether there was an interference with family life as it is presently constituted, I have had regard to the recent decisions of ECO (*Sierra Leone*) v Kopoi [2017] EWCA Civ 1511 and *Secretary of State for the Home Department* v Onuorah [2017] EWCA Civ 1757, both appeals in which the Court of Appeal considered ‘human rights appeals’ involving applications for visit visas¹. Two points arise that may be relevant to the ECO’s instant appeal.
16. The first is the restatement of the *Kugathas* principles. The Court underlined that in cases of adult relatives (other than spouses) decision-makers must look to the substance of the family life in question to determine whether there exist ties over and above the normal bonds of affection that would normally subsist between, for instance, siblings. Some form of dependency would normally be required to for Article 8 to be engaged. In Onuorah the relationship between appellant and sponsor was sibling; in Kopoi the parties were cousins. In both cases the Tribunal had accepted there to be ties of significance and affection, but not the extent that Article 8 could rationally be said to be engaged. The second point raised in these cases is whether there can be said to be a ‘lack of respect’

¹ Neither was pleaded but the decisions were handed down after the grounds were drafted and so I considered whether they would have a bearing on the ECO’s appeal.

for family life where by definition, the visit is likely to be relatively short. That is, on my reading, another way of putting the argument expressed in the grounds, that a short visit is demonstrably not necessary for these two women to conduct the relationship that they currently enjoy.

17. I have given consideration to whether, had the guidance in Kopoi or Onuorah been available to Judge Simpson, her decision would have been any different.
18. In respect of the *Kugathas* question I am satisfied that Judge Simpson understood the test to be applied: she sets it out herself at paragraph 18 of her decision. She sets out in some detail the nature of the relationship in the past, accepting the evidence that mother and daughter were exceptionally close and that prior to Pooneh's marriage they were "inseparable". She considers the evidence that since Pooneh married and moved to the UK the very close nature of that relationship has continued, with the two women speaking on a daily basis. Pooneh had described to Judge Simpson that "the emotional support that she receives from her mother is different to that that she receives from her husband" [at §10]. She has not made any meaningful friendships since her arrival in the UK. Importantly Judge Simpson emphasises that this is a relationship that must be assessed in the context of Pooneh going through what she, not unreasonably, described in court as being "the worst time of my life". At the date of the application she had already lost one child; by the date of the appeal she had lost a second. She was frightened and grief stricken and wanted her mother to be with her. There was a strong emotional dependency such that Article 8 was engaged.
19. These (unchallenged) facts bring me to the matter of interference. The ECO is correct to point out that this is a 'family life' that has thus far been enjoyed, since 2012 at least, by video chat and telephone. That it could continue in that way was not in issue. The point that was here being made however, was that there were particular circumstances, arising from this family's multiple bereavements, that meant that a personal meeting became hugely important. Both mother and grandmother had suffered that loss. Whilst Pooneh Nezam has attended court to be able to explain her anguish in person, and how essential it was to her to have her mother here, it was evident from the facts (and indeed the way that she expressed herself in her application) that Mrs Shahnaz desperately wanted to be here to be able to console her daughter in person.
20. At paragraph 30 of Kopoi Lord Justice Sales said the following:

"In my view, the shortness of the proposed visit in the present case is a yet further indication that the refusal of leave to enter did not involve any want of respect for anyone's family life for the purposes of Article 8. A three week visit would not involve a significant contribution to 'family life' in the sense in which that term is used in Article 8. Of course, it would often be nice for family members to meet up and visit in this way. But a short visit of this kind will not

establish a relationship between any of the individuals concerned of support going beyond normal emotional ties, even if there were a positive obligation under Article 8 (which there is not) to allow a person to enter the UK to try to develop a 'family life' which does not currently exist."

21. To my mind this passage illustrates how far removed this case is from the facts in *Kopoi*. This was a case where the short proposed visit would make a very significant contribution to 'family life' in the sense that in which the term is used in Article 8. Mrs Shahnaz did not seek entry clearance because it would be "nice" to meet up and visit her daughter and son-in-law in this way. She sought entry clearance to visit because of the particular circumstances that had arisen: her daughter was emotionally dependent upon her and they were unable to see each other anywhere other than the UK.
22. Having considered all of the above I am satisfied that the ECO has failed to identify any arguable error of law in the decision of Judge Simpson.

In the Alternative

23. I would ask the ECM to note that none of the positive findings of fact in Judge Simpson's decision have been challenged. I have had an opportunity to hear directly from Mr and Mrs Nezam and I entirely agree with the finding that on the balance of probabilities Mrs Shahnaz is a genuine visitor who intends to leave the UK at the end of her trip. The sole reason for refusal was that there was some additional money in her bank account that did not appear to be accounted for by her pension payments. Those transactions were satisfactorily explained before the First-tier Tribunal with reference to documentary evidence of bonds and bonuses in the pension schemes. The trip was to be paid for by Mr Nezam who had produced bank statements showing in excess of £75,000 in available funds. Mrs Shahnaz had amply demonstrated an incentive to leave the UK at the end of her visit: she has lived in her own home for three decades; she has a close relationship with her five sisters who all live close by; her son and daughter-in-law remain living in Iran; she is financially independent and absent fundamental changes to the law in Iran, will be until she dies, in receipt of two pensions. Any future applications for entry clearance as a visitor by Mrs Shahnaz should therefore be assessed in light of these findings.

Decisions and Directions

24. The decision of the First-tier Tribunal contains no error of law and it is upheld.
25. There is no order for anonymity.

Upper Tribunal Judge Bruce

24th March 2018