IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: VA/01287/2014
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 April 2014	**On 28 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS DEEPA
MR DAVINDER KUMAR
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr Y Budhirajy, Sponsor

DECISION AND REASONS

1. The Secretary of State is the appellant and Mrs Deepa and Mr Kumar the respondents but it is convenient to refer to the parties as they were before the First-tier Tribunal. The appellants' appeals against refusal of entry clearance to them as visitors were allowed by First-tier Tribunal Judge Waygood ("the judge") in a decision promulgated on 12 December 2014. The judge found as a fact that the requirements of the Immigration Rules

("the rules") in paragraph 41 were met and took this finding into account in an Article 8 assessment. He also found that the appellants enjoyed close family relationships with their son and sponsor, Mr Y Budhirajy and with their daughter-in-law (his wife) and grandchildren.

2. In his Article 8 assessment, the judge took into account guidance given in **Razgar [2004] UKHL 27, Shamin Box [2002] UKIAT 02212** and other authorities. In the particular circumstances of the case, having found that Article 8 was engaged, he came to the conclusion that refusal of entry clearance amounted to a disproportionate response. In his weighing of the competing factors, he had regard to section 117B of the Nationality, Immigration and Asylum Act 2002.

3. The Secretary of State applied for permission to appeal, contending that the judge made a material misdirection of law. Refusal of entry clearance did not interfere with the family lives of the appellants and Article 8 was not engaged. The existing pattern of contact between the appellants and their relatives here could be continued by means of telephone calls and Skype messaging. In any event, the proportionality assessment was inadequate and there was no explanation why the refusal of a visa amounted to a disproportionate interference with Article 8 rights. The judge did not consider that the sponsor might visit the appellants in India or in a third country.

4. In a rule 24 response prepared by the appellants' solicitors on 19 March 2015 reliance was placed upon **Mostafa [2015] UKUT 00112 (IAC).** The judge did not materially err. On the contrary, his reasoning was consisted with guidance given in that case.

Submissions on Error of Law

5. At the outset, I explained to Mr Budhirajy the procedure to be followed. He confirmed that he understood that he would have an opportunity to respond to Mr Walker's submissions, made on behalf of the Secretary of State.

6. Mr Walker said that the rule 24 response unsurprisingly referred to **Mostafa**. It was fair to say that the judge's approach led to a conclusion similar to the one reached by the Presidential Panel in **Mostafa**. The appellants had not overstayed their visas in the past. The Secretary of State contended that the appeals ought not to have been allowed and that the proportionality assessment was not adequate. On the other hand, the judge clearly had considered Article 8 in some detail.

7. Mr Budhirajy said that the family was tightly knit. He wanted his parents to visit and then return to India. They had visited in the past and not overstayed. The processes were very lengthy and nearly a year had passed since the applications for entry clearance. The family had wished to make a fresh application and were told that this was possible but, on the other hand, that a fresh application would only be accepted if the

appeals were withdrawn. Mr Budhirajy said that his wife was expecting a child in July 2015.

8. Mr Walker had nothing to add to his submissions or to the written grounds.

Conclusion on Error of Law

9. The decision was promulgated in mid-December 2014, about two months before the Presidential Panel's decision in **Mostafa** came into the public domain. The judge appears to have anticipated the reasoning in **Mostafa**, in concluding that whether the requirements of paragraph 41 are met or not is not the determinative question, although a finding that those requirements are met may be relevant in the assessment of proportionality. He put emphasis on the strength of the family life claimed to exist between the claimants and their sponsor here.

10. The decision is very detailed and contains summaries of the evidence heard by the judge and the submissions made by the appellant's counsel and the Presenting Officer. It is clear that the judge's finding that the appellants and their sponsor and his family together enjoyed close family life ties was open to him. The grounds fail to show any error of law in this regard. As the judge followed the approach in **Mostafa**, presciently, he did not err in taking into account the requirements of the immigration rules and, again, I find that his factual finding that the requirements were met was open to him. He went on to find that the appellants' human rights were engaged. Again, that will not always be the case in family visit appeals but the grounds fail to identify an error of law here.

11. In **Mostafa**, the Presidential Panel held that it would only be in very unusual circumstances that a person other than a close relative would be able to show that 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 parent and minor child, and even then Article 8 will not necessarily be engaged in cases where the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together. The relationships in issue in the present appeal are not those of husband and wife or parent and minor child. As noted earlier, however, the judge made a particular finding of fact that the relationships between the appellants and their relatives here were close. He took into account the frequency of visits over the years. I find that he did not materially err in law in finding that Article 8 was engaged, in the light of his findings of fact.

12. In the grounds, the proportionality assessment is criticised as being insufficient. In particular, it is said that the judge gave no consideration to a possible visit by the sponsor to the appellants in India or a third country. In fact, the judge did consider this point, for example in paragraph 41, where he took into account evidence from the sponsor that visits to India would be difficult because of work commitments and the young age of the grandchildren. The judge did not treat this aspect as determinative, which

would no doubt have been an error, but it was clearly material and he took it into account in his overall assessment. Having found that Article 8 was engaged, he weighed the competing interests at paragraphs 43 to 51. The balancing exercise has been carefully conducted and is thorough. The grounds do not identify any error of law here. Again, the judge's approach appears to be on all fours with the Presidential Panel's analysis in **Mostafa**.

13. In summary, although a different conclusion may well have been reached by a different judge, the overall finding that the appeal fell to be allowed on Article 8 grounds was supported by a cogent prior assessment. The decision of the First-tier Tribunal contains no material error of law and shall stand.

Notice of Decision

13. The decision of the First-tier Tribunal shall stand.

Signed Date **7 April 2014**

Deputy Upper Tribunal Judge R C Campbell

Anonymity

There has been no application for anonymity and I make no direction on this occasion.

Signed Date **7 April 2014**

Deputy Upper Tribunal Judge R C Campbell