Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/01420/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 July 2015	**17 July 2015**

Before

UPPER TRIBUNAL JUDGE CRAIG
DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

ENTRY CLEARANCE OFFICER (BEIRUT)

Appellant

and

MRS SAWSAN CHAKRA

Respondent

Representation:
For the Appellant: Mr Chris Avery, Home Office Presenting Officer
For the Respondent: Ms Joanne Rothwell, Counsel, instructed by Birketts solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department in the name of the Entry Clearance Officer (Beirut). It is brought with the permission of First-tier Tribunal Judge Baker against a determination of First-tier Tribunal Judge T P Thorne (hereafter 'the Judge') promulgated on 12 December 2014. The respondent to the appeal is Ms Sawson Chakra. To avoid confusion, we refer to her hereafter as 'the Applicant' since this appeal has its origins in a Visa Application which she made in November 2012.

Background

2. The background to this appeal is uncontroversial and can be shortly stated. The Applicant, widowed in 1990, was born on 30 October 1957 and is a dual national of Syria and Lebanon, although currently residing in Iraq where she is employed by the Sheraton Hotel chain.

3. The Applicant's son, Khaled Dandachi, is a British national, married to Joanna Dandachi who is Polish. Their two children, Chloe (aged 4) and Aiden (aged 1) are both British nationals. The Applicant has worked full time since 1996 for Sheraton and at the time of the application was employed as Director of Sales and Marketing at its hotel in Damascus. The Applicant has another son who lives in Dubai but all other members of her close family live in Syria.

4. In the past the Applicant has applied for – and been granted – visit visas to come to the United Kingdom and spend time with her son and his family. She came twice in 2010, when her granddaughter Chloe was born, staying for 7 and 10 days respectively and returning to Syria on each occasion. In June 2012 she made a further application for a visit visa. This was rejected because it was accompanied by certain copy documents rather than originals. She reapplied on 18 November 2012 and this application was refused, the Entry Clearance Officer (ECO) not being satisfied that the Applicant would return to Syria. That decision was not appealed. On 26 December 2013 she made the application which is the subject matter of this appeal.

5. The stated reason for the application was in order that the Applicant might visit her grandson Aiden who was born on 19 November 2013. The Applicant's son was her sponsor. The application was refused by the ECO because:

   i. he was not satisfied that the Applicant had provided sufficient evidence of her personal and financial circumstances in Syria; and

   ii. in his assessment, the situation in Damascus meant that it was unlikely that the Applicant would leave the United Kingdom after the proposed visit.

   This decision was not changed on review, the Entry Clearance manager pointing out the Applicant's family could safely visit her in Lebanon.

The determination of the First-tier Tribunal

6. The Applicant's appeal from the ECO's refusal was heard on 5 December 2014. The Judge records in his determination the documentary evidence which he considered. He had before him a witness statement from the Applicant. Oral evidence was received from the Applicant's son, supplementing that in his witness staement.

7. The Judge properly recognised he could only consider the appeal by reference to the European Convention on Human Rights, in particular the

compatibility of the ECO's refusal with Article 8. The Judge determined that Article 8 was engaged, that there had been an interference with the Applicant's enjoyment of that right, and that the interference had been disproportionate. His conclusion, at paragraph 53 of the determination was that:

> "... in this case the prejudice to the family and private life of the [Applicant] (and the sponsor) is so serious as to amount to a breach of the fundamental right protected by Article 8."

Accordingly, the Judge allowed the appeal.

The Appeal to the Upper Tribunal

8. The principal ground advanced before us on behalf the Secretary of State concerned the first step in the Judge's analysis, namely his finding that Article 8 was engaged. This matter was dealt with in paragraph 29 of the determination where the Judge stated:

> "It is not disputed by the ECO (and I accept that it has been established) that the [Applicant] is in a genuine and subsisting relationship of mother and son with the sponsor. She is also the grandmother of his children. I therefore conclude that Article 8 ECHR is engaged."

9. At first blush, it might appear that there was a concession on the part of the Secretary of State that Article 8 was engaged. However, as Mr Avery drew to our attention, the concession went no further that the acceptance of the simple factual matters that (i) there was a blood relationship of mother and son between the Applicant and the sponsor; and (ii) that the Applicant is the grandmother of the sponsor's children.

10. The Judge then proceeded to conclude, without further discussion, that Article 8 is engaged. This conclusion was not rooted in any concession on the part of the Secretary of State but is a separate free-standing finding. The difficulty, as Ms Rothwell very fairly accepted in the course of her submissions on behalf of the Applicant, is that this paragraph of the determination is not well written and the Judge gives no reasons for reaching the conclusion that Article 8 is engaged. Ms Rothwell pointed to other paragraphs in the determination where material might be found to justify the implicit finding that Article 8 was engaged but realistically accepted that the lack of any reasoning or any express evidential findings on which the conclusion was based made the determination difficult to uphold, particularly where applicability of Article 8 lies at its very heart.

11. In our assessment, paragraph 29 of the determination discloses a clear error of law. It appears to make an assumption that whenever there is a relationship of parent and adult child and/or grandparent and minor grandchild then Article 8 is automatically engaged. For the reasons more fully explored and explained below, the issue of whether Article 8 is engaged is a fact-sensitive matter to be resolved upon a consideration of all the available evidence and the proper inferences to which it gives rise.

12. Regrettably there is nothing in paragraph 29 (or elsewhere in the determination) to indicate that the Judge undertook the necessary task of evaluating the evidence. On the contrary, the wording of paragraph 29 strongly suggests that the Judge took the view that the mere existence of a grand-parental relationship was sufficient, without more, for Article 8 to be engaged. This clear error of law means that the determination cannot stand and must be set aside. It is therefore unnecessary for us to address any of the other grounds.

Re-making the decision

13. Both the Applicant and the Secretary of State were content for us to re-make the decision. Mr Avery took the sensible and pragmatic view that we would not be assisted by any cross-examination of the Applicant's son.

14. Our starting point in re-making the decision is the fundamental question of whether Article 8 is engaged. If the mere existence of a grand-parental relationship is insufficient of itself to engage Article 8, what of the corollary that a grandparental relationship can never engage Article 8? This was the primary submission advanced on behalf of the Secretary of State, with the fall back position that even if it were capable of engaging Article 8, it did not do so in the particular circumstances of this case.

15. Mr Avery directed our attention to the judgment of Sir Stanley Burnton (with which Richards and Clarke LJJ agreed) in ***Singh v Secretary of State for the Home Department*** **[2015] EWCA Civ 630** and in particular the discussion at paragraph 24:

> "In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence of absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

Mr Avery submitted that in the context of this case there was no suggestion of any dependency as between the Applicant and her son, and in the circumstances there was nothing more than love and affection. Thus Article 8 is not engaged. He submits that as Article 8 cannot be engaged between parent and adult child, then nor can it as between grandparent and grandchild which is one step further removed and parasitic on the former.

16. Ms Rothwell placed reliance upon the decision of the European Court of Human Rights in ***Marckx v Belgium*** **(1979) 2 EHRR 330**. The full text of Article 8 provides as follows:

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Ms Rothwell directed us to paragraph 45 of the judgment which states:

> "In the Court's opinion, 'family life' within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life."

17. Mindful of the clear jurisprudence concerning parents and adult children in this context (notably ***Kugathas v IAT*** **[2003] EWCA Civ 31**), Ms Rothwell did not seek to argue that Article 8 was engaged by reference to the Applicant and her son who had chosen to leave Syria, to make his home in the United Kingdom and to start a family here. It was noted that the son had travelled to visit the Applicant but, for understandable reasons, had considered it unsafe to take his wife and children with him since their last visit to Damascus as a family in 2011. Ms Rothwell relied solely upon the relationship between the Applicant and her grandchildren.

18. We endorse and adopt the expansive definition of Article 8 as given in *Marckz* which includes the ties that can exist between grandparents and grandchildren. We reject the suggestion that such a relationship is incapable of engaging Article 8 because it is derivative upon a parent/adult child relationship which does not engage it. However, it does not necessarily follow that the existence of a grandparental relationship automatically results in Article 8 being engaged. That was the erroneous assumption the Judge seemed to make in this instance which led us to set aside his determination. It is a fact-sensitive issue to be determined on a case by case basis.

19. In this particular case, the evidence of the Applicant referred to the special bond between grandparents and grandchildren, the 'instant and unconditional love' which she experienced when she first held her granddaughter, Chloe, in her arms and her distress at being denied something similar with Aiden. She makes use of the telephone and Skype to talk with them, and we note the phone records which evidence regular and lengthy calls, none of which is disputed. The Applicant continues:

> "I love talking to Chloe. She calls me Teta Susu and when we are on Skype she will hold up pictures she has drawn and show me her new toys, but nothing can really replace seeing her face to face, sitting together and reading bedtime stories or taking her to pre-school. I look forward to teaching her some Lebanese recipes when she gets older and we can bake in the kitchen. Most of all I want to hold my new born grandson and meet him face to face."

20. The son's evidence records the two short visits of the Applicant in 2010 after Chloe's birth. He states how the Applicant had applied for a visit visa after the birth of her grandson, Aiden, as he and his wife believed it important for the Applicant to bond with Aiden as she had with Chloe. He explains his disappointment at the various refusals. He did not consider it appropriate to take his wife and children to a destination which the Foreign and Commonwealth Office regarded as unsafe. He considered but rejected travelling to a third country and spending a few days in a hotel because it would prove very costly and was not practical with a new born child. Such an arrangement, he indicated, would in any event fall short of the Applicant getting to know her grandson in his own environment, for her to spend a few days in the family home, and for them to eat together and participate in all the ordinary activities of an extended family. Examples are given of how the Applicant has played a meaningful part in Chloe's life, making her aware of her cultural inheritance, and how this is being denied to Aiden by the Applicant being unable to visit. Whilst they make very full use of telephone and Skype, this is no substitute for physical presence in the family home.

21. We consider the Applicant to be entirely genuine and sincere. We have no reason to question the truthfulness of her son. The totality of the evidence clearly indicates that the Applicant, despite the exigencies of living overseas, has developed as good and meaningful a relationship as is possible with her granddaughter and wishes to achieve the same with her grandson. On the two occasions that she was granted a visit visa in 2010, she stayed for precisely the time allowed and duly returned to Syria.

22. On the facts of this case the Applicant has demonstrated her willingness to play as significant a part in the lives of her grandchildren as is possible. This has included, so far as Chloe is concerned, two short visits to the family home where she engaged in the various mundane pleasures of being a grandmother. We are satisfied that she would have done the same in relation to Aiden had not her visa applications been repeatedly refused. Mr Avery, quite properly, did not seek to argue that Article 8 was not engaged in relation to Aiden on the basis that there had been no contact between him and the Applicant. That would have been highly unattractive since the Applicant has consistently sought such contact only to be frustrated by refusals by successive ECOs, the last of which is the subject of the present appeal.

23. In our assessment of all the evidence available to us, this is a situation where the composite right under Article 8 to respect for private and family

life is engaged. For present purposes, it is unnecessary to differentiate between the 'private' and 'family' elements.

23. It is also clear that the Article 8 right has been interfered with. The refusal of a visa effectively prevents the Applicant from having anything other than telephone/Skype contact with her grandchildren. We accept, as the Judge did, that it is not practical for the Applicant's son, daughter-in-law and grandchildren to travel to Lebanon, Syria or Iraq. We further consider that the artificiality of encounters in hotels falls short of the appropriate level of respect for private and family life which ought to extend to living in the family home and sharing in the domestic routine of grandchildren in an environment with which they are familiar amongst their own possessions.

24. That then brings us to the delicate matter of proportionality on which we received focussed and helpful submissions from both Mr Avery and Ms Rothwell. The tipping point in this balancing exercise is whether the interference is 'necessary in a democratic society', there being no dispute that the ECO's decision was in pursuance of a legitimate aim and in accordance with the law.

25. There are a number of parallels between the facts of this appeal and those in the recent decision of the Upper Tribunal in ***Mostafa (Article 8 in entry clearance)*** **[2015] UKUT 00112 (IAC),** where it was made plain that ability to satisfy the Immigration Rules was not the question to be determined but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

26. The proportionality question only falls to be addressed because of our prior finding, on the evidence, that the ECO's refusal amounted to an interference with the Applicant's Article 8 right. Had we concluded that there was no interference, it would have been unnecessary to proceed to consider proportionality. Thus, for example, in ***Adjei (visit visas – Article 8)*** **[2015] UKUT 00261 (IAC),** it was found on the facts that the relationship between the adult claimant and her adult relatives (father, step-mother and step siblings) did not disclose sufficiently strong ties so as to fall within the scope of Article 8. Accordingly in that case because the human rights ground was unarguable, the proportionality assessment was not reached.

27. In this matter, notwithstanding the refusal of the ECO to authorise the issue of a visit visa, the Judge made the following finding at paragraph 42 of his determination:

> "Bearing in mind all the evidence, (for the reasons given below) I conclude that the [Applicant] has established on the balance of probabilities that at the time the ECO took the decision (and now), she was genuinely seeking entry as a visitor for the limited period specified and that she intended to leave the United Kingdom at the end of the proposed visit."

We have no basis for reaching any other conclusion. It was not argued by Mr Avery that we should. We therefore proceed on the basis that the Applicant satisfied the substantive requirements of the Immigration Rules. It is unnecessary to rehearse the factors which led the Judge to this conclusion. They are fully set out in paragraphs 43 to 46 of his determination and include the financial matters about which some concerns had been expressed by the ECO in relation to supporting documentation.

28. It is for the Secretary of State therefore to justify the ECO's interference with the Applicant's Article 8 right and satisfy us that it is proportionate. Looking at the matter in the round, we can see no justification for the interference nor are we satisfied that it is proportionate. We can detect no lack of candour by the Applicant or her son as sponsor. They strike us, as the Judge evidently found, to be entirely genuine individuals. In this instance, the finding that the Applicant satisfies the requirements of the Immigration Rules is a particularly weighty consideration. The Applicant has an established life overseas and is currently in full time employment in Iraq. She has visited the United Kingdom in the past and did so on two occasions in 2010 for the purpose of visiting her new granddaughter. She did not outstay her visa but left as required with her son meeting his obligations as sponsor. There is no reason to suspect that the same will not be the case in relation to the proposed visit to see her grandson who will reach his second birthday this November.

29. In all the circumstances, we are satisfied that the Applicant satisfies the Immigration Rules and neither she nor her son (*qua* sponsor) have acted in a way which might undermine the system of immigration control. On the particular facts as we have found them, the refusal of entry clearance infringes Article 8 and is disproportionate.

Notice of Decision

We allow this appeal to the extent that we set aside the decision of the First-tier Tribunal. We substitute our own decision which, albeit for differently expressed reasons, allows the appeal from the ECO on human rights grounds. We make a direction that Entry Clearance as a visitor be granted to the Applicant, Sawson Chakra.

Signed
Mark Hill QC
Deputy Judge of the Upper Tribunal Dated 17 July 2015