Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/01923/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 July 2015	**On 14 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS KWAWOUO
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr S Kandola, Specialist Appeals Team
For the Respondent: Mr Yeo, Counsel instructed by Direct Access

DECISION AND REASONS

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer (post reference ACCRA\818681) from a decision of the First-tier Tribunal allowing on Article 8 grounds the claimant's appeal against the decision of the Entry Clearance Officer to refuse her entry clearance as a

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family visitor to the United Kingdom for a period of two months. The First-tier Tribunal did not make an anonymity direction, and I do no consider that the claimant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

The Grant of Permission to Appeal

2. On 10 March 2015 First-tier Tribunal Judge Astle granted permission to appeal for the following reasons:

> "1. The Respondent seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Cooper) promulgated on 19 January 2015 whereby it allowed the Appellant's appeal against the decision of an entry clearance officer refusing clearance for a visit.
>
> 2. The grounds assert that family life will not normally exist between adult siblings, parents and adult children. If it does not exist then Article 8 will not normally be engaged. It is argued that the decision does not interfere with family life. The decision does not interfere with the existing pattern of family and private life and the proportionality assessment carried out by the Judge is inadequate. Because he could not allow the appeal under the Rules, he used Article 8 as a general dispensing power.
>
> 3. It is arguable that the Judge's conclusion in paragraph 35 that family life exists is inadequately reasoned. Permission is therefore granted."

The Background

3. The background to this appeal is that the claimant is a national of Cameroon, whose date of birth is 16 February 1959. In her application form, she said she was a self-employed subsistence farmer earning 75,000 FCFA per month from all sources of employment or occupation after tax. She said she wished to travel to the UK to visit her daughter, grandchildren and her partner since they could not come to Cameroon themselves.

4. In an invitation letter which was enclosed with the application, Mr Paul Kameni Tchameni said he was inviting the claimant, the mother of his partner, to visit the UK for a brief period of time. He was a recognised refugee from Cameroon. Before he left Cameroon, he was married to the claimant's daughter and they had a child together. His wife and child had joined him in the UK under family reunion rules. His wife had given birth to a second child, who had been born in the UK on 24 August 2013. The claimant now wished to visit and spend time with her daughter and grandchildren. He continued:

> "Please note that given the circumstances which led to our departure from Cameroon it is impractical for us to return. Hence the only way Madame Kuawouo can see her daughter and grandchildren is to visit

the UK. I would thus be grateful if you can adequately consider the human rights aspects of this application."

5. On 12 March 2014 the Entry Clearance Officer gave his reasons for refusing to issue the claimant with entry clearance. She did not provide any evidence to demonstrate her circumstances in Cameroon. She had failed to demonstrate that she had sufficient ties to Cameroon. He recognised that her sponsor had proposed to bear the costs of her visit. But he had to take into account her personal and economic circumstances in her home country, in the absence of further documentation, he was not satisfied she had accurately presented her circumstances or intentions in wishing to enter the UK. He refused the application by reference to sub-paragraphs (i), (ii), (vi) and (vii) of paragraph 41 of the Rules.

6. In the grounds of appeal she said that the decision violated her human rights under Article 8 ECHR. She had six children. She had not seen her eldest daughter since she had left Cameroon in early 2011 to join her husband, who had been granted refugee status in the UK. The circumstances which led them to leave Cameroon were very unpleasant and inhospitable, and the threats against them still persisted. Thus they could not return to the Cameroon. Family life existed between her and her daughter because of their strong family bond. They were regularly in touch by telephone, and they sent her money for her upkeep. The refusal of a visa prevented her from visiting the UK to see her daughter and grandchildren, and they could not travel to Cameroon to visit her. This would lead to them losing touch forever. The decision was also not proportionate to the need to maintain effective immigration control because her daughter and her husband were gainfully employed in the UK, and they had a home with sufficient room for her, and they would pay for her return travel expenses. Also, she intended to leave the UK at the end of her short visit. As explained in her visa application, she was married to her husband, and she also had other grown up children and lots of extended family in Cameroon, as well as her private life and social activities. She was not used to the ways of the western world and she did not speak English. She would not be able to relate to life in the UK or want to live there long term.

7. On 10 September 2014 the Entry Clearance Manager gave his reasons for upholding the refusal decision. The claimant stated she received financial support from the sponsor. The evidence provided with the ground of appeal did not corroborate such support, nor did it confirm her claimed circumstances in Cameroon. Article 8 did not give the claimant an automatic right to pursue her family and private life in the UK and there appeared to be no obstacle to them meeting in a third country.

8. The claimant asked for the appeal to be determined on the papers. For the purposes of the appeal, the claimant's solicitors filed witness statements from the claimant's daughter and son-in-law. The claimant's daughter said that she had moved to the United Kingdom in March 2012 by way of refugee family reunion. Because of the persecution which had caused her husband Paul to flee Cameroon (in 2009) she was afraid that if

she returned to the country she would be victimised by the authorities. So she could not return with her two children to visit her mother. She desperately longed to see her. She was in touch with her regularly. She called her on her mobile phone about twice a week. Her mother did not have access to the internet. She also sent her money and pictures of herself and her children whenever she could find someone travelling to Cameroon.

9. In his witness statement, Mr Tchameni said that he had applied for refugee protection because of the persecution he had suffered at the hands of the police and government authorities in Cameroon. He was out on bail and had been charged with criminal offences when he fled the country.

10. In his subsequent decision, the judge noted that in the grounds of appeal the claimant said that as a result of her son-in-law's problems in Cameroon, he was always unavailable. So her daughter and grandson lived with her for extended periods for their safety, and as a result she grew to develop a special affection for them.

11. The judge went on to make the findings which I have set out verbatim below.

> "31. Although the relevant Immigration Rule is that contained in paragraph 41, the Appellant only has a right of appeal against the Respondent's decision on human rights and race relations grounds. Consequently the issue for determination in this appeal is whether the decision by the Respondent breached the rights under Article 8 of the ECHR of the Appellant or any other person.
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> 32. I find the content and tenor of the application form and supporting letter, the grounds of appeal and, in particular, the three witness statements attached to the Notice of Appeal to be convincing and credible.
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> 33. I note that the Respondent has not challenged any of the factual claims made, such as the fact that the Sponsor is a refugee or that his wife and elder child joined him under the family reunion provisions relating to refugees. Consequently I accept that the Sponsor himself cannot be expected to return to Cameroon. Whilst no details have been provided of the circumstances which led to the Sponsor acquiring refugee status, the proposition that the Sponsor's wife and children could not safely return to Cameroon themselves seems to me, on the balance of probabilities, to be legitimate; it is commonplace that where a person subject to persecution is out of the reach of his persecutors, he can be attacked indirectly through his immediate family members. I conclude therefore that there is no realistic possibility for the Appellant's daughter and children to return to Cameroon to enable her to spend time with them, and in the case of the younger child to see him for the first time.

34. Whilst the appeal is not specifically about whether all the requirements of paragraph 41 of the Immigration Rules were met, I am satisfied on the evidence before me that they were. Given my findings as to credibility above, I am satisfied that the Appellant is a genuine visitor who will return to Cameroon at the end of her stay, and can be maintained and accommodated in the United Kingdom without recourse to public funds.

35. I accept that the Appellant, her daughter and her grandchildren do enjoy a form of family life, albeit currently only by telephone communication, and I am satisfied that the Respondent's decision therefore engages Article 8. The decision is clearly lawful and made in pursuit of the legitimate aim of maintaining effective immigration control. So the question is whether the decision is proportionate in pursuit of that aim.

36. I accept that he decision does not interfere in a direct way with the family life as it is currently enjoyed, in that it does not make a difference to its continuation in that form. However there is also an obligation on a state to show proper respect for family life. In this case, given the inability of the Appellant's daughter and children to come to Cameroon to see her, and given my findings that the requirements of paragraph 41 of the Immigration Rules had in fact been met, I consider in these particular circumstances that the decision to deny the Appellant the opportunity to visit her daughter, the Sponsor and their children in the United Kingdom demonstrates a disproportionate lack of respect for the rights of all those parties to enjoy family life, and is therefore in breach of Article 8 of the ECHR."

The Error of Law Hearing

12. At the hearing before me, Mr Kandola relied on the argument advanced in the application for permission to appeal. Article 8 was not engaged, because there was no interference of family life. There needed to be further elements of dependency involving more than emotional ties for there to be family life between an adult child and his parents. Also, the refusal of entry clearance did not interfere with the existing pattern of family and private life. The proportionality assessment was inadequate. The judge did not explain why the refusal of a visa which only allowed the parties to be together temporarily was a disproportionate interference with her Article 8 rights. Also there was no consideration that the claimant and the sponsors might meet in a third country. Mr Kandola relied on **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)** and **Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC).**

13. On behalf of the claimant, Mr Yeo referred me to his Rule 24 response. He submitted that **Adjei** did nothing to undermine the judge's conclusions on the facts of this case. Whether family life exists for the purposes of Article 8 is a flexible and fact sensitive exercise. **Adjei** was distinguishable on the facts. Mr Yeo took me through the various authorities contained in an

additional authorities' bundle which he had compiled, including **Singh v Secretary for the Home Department [2015] EWCA Civ 630**. At paragraph 25, Sir Stanley Burnton, giving the leading the judgment to the court said:

> "However, the debate as to whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case, I am agreement with Solomon LJ's comment when refusing permission to appeal, the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in **AA**, in the judgment which I found most helpful, the facts to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the court is whether those factors lead to the conclusion it would be disproportionate to remove the applicant from the United Kingdom. I reject Mr Malik's submission that the Upper Tribunal Judge's assessment of proportionality was flawed because she, on his case wrongly, based it on the appellant's private life rather than on their family and private life. In my judgment, she took all relevant factors into account, and a conclusion on proportionality is not able to challenge. Indeed, I go further, in my judgment, no reasonable Tribunal, on the facts found, could properly have come to a different conclusion."

14. The judge continued in paragraph 26:

> "However, for the sake of completeness, I add that in my judgment the judge correctly found the appellants had no family life in this country to which Article 8 applies. They are independent and working. Their siblings, who are younger, are in India, and their mother understandably spends as much or more time in India than in this country. There is no evidence of anything beyond the normal bonds of affection, part possibly for some financial support of the family in India. That support cannot lead to a finding of a family life in this country, which is the only family life for which the appellants contended."

15. In reply, Mr Kandola submitted that **Singh** assisted the respondent's error of law challenge. The judge had not given adequate reasons for finding that there was family life between the claimant and the sponsors. Love and affection was not enough. If private life, rather than family life, was being relied upon, it was less compelling. He submitted that, consistent with the guidance given by the Court of Appeal in **SS (Congo) [2015] EWCA Civ 387** at 33, the judge needed to, but failed, to identify compelling circumstances which supported a grant of entry clearance to a visitor on Article 8 grounds outside the Rules.

Discussion

16. The conclusion which I draw from **SS (Congo)** is that the judicial decision maker has a wider discretion to grant Article 8 relief outside the Rules in a

LTE case than he does in an LTR case. This is because there is no Section EX.1 for LTE cases, whereas there is for LTR cases. Thus, as the court observed at paragraph 34, the LTR Rules are more generous for applicants than the LTE Rules. Since the inability to carry on family life elsewhere is not a factor which is taken into account under the LTE Rules, it is potentially a compelling factor which comes into play in an Article 8 assessment outside the Rules where entry clearance is being sought. On the other hand, as the court also recognised at paragraph 38, the requirements upon the state under Article 8 are less stringent in the LTE context than they are in the LTR context. Refusal of entry clearance maintains the status quo, whereas refusal of leave to remain threatens family life which already exists and is currently being carried on in the United Kingdom.

17. In **Mostafa**, the Tribunal held that in appeals brought against refusal of entry clearance under Article 8 ECHR, the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, 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.

18. There is no challenge by way of appeal to the judge's finding that the claimant satisfies the requirements of paragraph 41 that were put in issue by the Entry Clearance Officer. The issue is whether the consequences of the refusal decision are of such gravity as to engage Article 8.

19. Although the claimant's daughter comes into the category of a close relative, as do the claimant's grandchildren, there is not the additional element of dependency which establishes family life for the purposes of Article 8. The fact that the adult sponsors remit money to the claimant in Cameroon is not enough to create dependency, especially when the claimant herself relies on her strong ties to relatives in Cameroon, including her husband and other children living there, as providing her with a sufficient incentive to return to Cameroon on the completion of her short visit.

20. As submitted by Mr Yeo, the present case is distinguishable from that of **Adjei**, where Upper Tribunal Judge Southern made the following finding at paragraph 15:

> "There is no good reason why the UK based relatives cannot visit the claimant in Ghana if they wished to do so. The claimant's father has visited her on three occasions since he left Ghana on 1994 to move to London."

21. The fact that the sponsors cannot, as the judge found, make a family visit to Cameroon means that the interference consequential upon the refusal decision is more serious than would otherwise be the case. Although meeting in a safe third country is a possible alternative solution, it would be very expensive and impractical. The cost of the entire family staying in hotel accommodation for two months in a safe third country would be

considerable, and it is unlikely that the adult sponsors could be away from the United Kingdom for that period of time due to work commitments.

22. Although the judge did not discuss family reunion in a third country, I do not consider that his decision on Article 8 is thereby flawed. It was open to the judge to find on the facts that Article 8(1) was engaged, even if it was the family members' private life rights which were being interfered with, rather than family life in the **Kugathas** sense: see **Singh** *supra* at [25]. Once the hurdle of engagement of Article 8 had been surmounted, it was open to the judge to find the interference was disproportionate, notwithstanding the theoretical possibility (which the judge did not expressly consider) of family reunion taking place in a safe third country. It was open to the judge to find that the decision was disproportionate for the reasons which he gave, namely the inability of the claimant's daughter and children to come to Cameroon to see her, and given his findings that the requirements of paragraph 41 of the Rules had in fact been met.

23. In conclusion, having reviewed the relevant law, I find that on the particular facts of this case the judge has given adequate reasons for finding in the claimant's favour under Article 8 ECHR, and that no material error of law is made out.

Notice of Decision

The decision of the First-tier Tribunal allowing the claimant's visit visa appeal on Article 8 ECHR grounds does not contain an error of law, and accordingly the decisions stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson