Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/02645/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 30 April 2015	**On 7 May 2015**
Prepared 30 April 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

O. K.
(ANONYMITY DIRECTION MADE)

Appellant

And
ENTRY CLEARANCE OFFICER WARSAW

Respondent

Representation:
For the Appellant: Sponsors
For the Respondent: Mr Mangion, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, a citizen of the Ukraine born on 5 June 1980, applied for leave to enter the United Kingdom for two months as a family visitor to her parents in law, declaring an intention to travel with her husband and son, who are both British citizens.
2. The Respondent refused entry clearance to the Appellant by decision made on 17 March 2014 by reference to paragraph 41 (i)(ii)(vi)(vii) of the Immigration Rules. The Notice of Decision informed the

Appellant that her right of appeal was limited to the grounds identified in s84(1)(c) of the 2002 Act. She appealed that decision, although she requested that the appeal be determined upon the papers before the Tribunal without a hearing. The Respondent raised no objection to that.

3. The grounds of appeal made no reference to unlawful discrimination, but they can and should be read as asserting that the decision was unlawful under s6 of the Human Rights Act 1998. The ECM reviewed the decision to refuse entry clearance on that basis on 10 October 2014, but chose to uphold it.
4. The appeal was heard and allowed on 16 December 2014 in a decision promulgated on 9 January 2015 by First Tier Tribunal Judge NMK Lawrence.
5. By a decision of First Tier Tribunal Judge Robertson dated 13 February 2015 the First Tier Tribunal granted the Respondent permission to appeal on the basis it was arguable there had been a failure by the Judge to dispose of the appeal pursuant to the restricted grounds permitted by s88A of the 2002 Act (as amended), because the Judge had made no explicit reference to the Article 8 rights of any person in the course of his decision.
6. The Appellant has filed no Rule 24 Notice. Thus the matter comes before me.

The challenge to the decision

7. I remind myself that s85A of the 2002 Act applied to the evidence admissible upon the appeal, and of the guidance upon the proper approach to Article 8 cases involving applications for leave to enter that is to be found in Mostafa (Article 8 in entry clearance) [2015] UKUT 112, and SS (Congo) [2015] EWCA Civ 387.
8. At first sight the decision under appeal is one that does no more than allow the appeal on the basis of a finding that the Appellant had demonstrated that she met the requirements of the Immigration Rules at the date of decision. If that were all that the decision had done, then it is plain that such an approach would have constituted an error of law.
9. It was not in dispute that the Appellant had a genuine and subsisting marriage with a British citizen, and that as a result she was the mother of A, a boy born in the UK on 28 September 2007, who was six years old at the date of decision. It was also not in dispute that she had a genuine and subsisting parental relationship with A and her parents in law. In the circumstances it could not have been in dispute (and neither the ECO, nor the ECM

sought to place it in dispute) that the refusal of entry clearance was an interference in the ability of all of those individuals to pursue their "family life" together. If A was to travel to the UK to visit his paternal grandparents, which as a British citizen he could do as of right, then the Appellant would be prevented from accompanying him as a mother of a six year old would ordinarily do. It was in the best interests of the child to form and strengthen a relationship with his paternal grandparents, and that relationship would in turn benefit from the formation and strengthening of a relationship between his mother and his paternal grandparents. It followed, as the Upper Tribunal set out in Mostafa [9] that Judge Lawrence was obliged to assess the evidence to decide whether the Appellant met the substance of the Immigration Rules as she claimed she did, or whether she did not, as the Respondent had claimed.

10. The Respondent raises no complaint either in the grounds, or before me, to the effect that it was not open to Judge Lawrence to make the findings of fact that he did on the evidence that was before him. The Judge noted that the Appellant had previously been granted a two year multi entry visa, allowing multiple visits of up to six months in duration, and that she had always complied with the requirements of the Immigration Rules, and her visa in the past. He was entitled to conclude, as he did, that this was powerful evidence suggesting that her declared intentions for this proposed trip were genuine. He noted (and indeed it was not in dispute before him) that she had both her own extended family, and a home, and a job, to return to in the Ukraine. In short he was perfectly entitled to reach the conclusions that he did in relation to the issues of fact raised by paragraph 41 (i)(ii)(vi)(vii) of the Immigration Rules, of which the Respondent had not been persuaded.

11. The Judge did not fall into the error identified in Virk & Others [2013] EWCA Civ 652, or Mostafa [11], and thus did not purport to allow the appeal under the Immigration Rules. The Judge simply stated that he allowed the appeal, without specifically and expressly identifying the basis upon which he was doing so. There was however only one legitimate ground that was advanced, which was the Appellant's reliance upon the human rights ground.

12. Since the Article 8 rights of a number of different individuals (all of whom were British citizens) were engaged by the refusal decision, it fell to the Respondent to justify the interference with those rights

as one that was proportionate. The Judge was plainly not persuaded that there was any lack of candour on the part of the Appellant in the course of her application, and nor am I. There was no other possible basis left upon which the Respondent could seek to do so in the light of the findings of fact that had been made in relation to paragraph 41.

13. It followed therefore that the Judge was obliged to allow the human rights appeal, and in my judgement that was what he sought to do when stating simply that he allowed the appeal. He could of course have made his reasoning more plain, but ultimately I am not persuaded that the Respondent has established that the decision discloses any material error of law in the Judge's approach, that requires it to be set aside and remade.

DECISION

The Decision of the First Tier Tribunal which was promulgated on 9 January 2015 did not involve the making of an error of law in the decision to allow the appeal on human rights grounds that requires that decision to be set aside and remade, and that decision is accordingly confirmed.

I direct in accordance with the authority of Fenuyi [2002] UKIAT 6785 that any endorsement that has been made upon the Appellant's passport to the effect that she has been refused leave to enter the United Kingdom should be further endorsed to the effect that such refusal was successfully appealed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes

Dated 30 April 2015