Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/03249/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Determined**
on 3 November 2015	**on 16 November 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HAWA SANNEH

Appellant

and

ENTRY CLEARANCE OFFICER, ACCRA

Respondent

Representation:
For the Appellant: No legal representative; sponsor, Shera Sidibeh, present
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Gambia, born on 15 May 1957. By application dated 13 May 2014 she sought a long term (5 year) family visitor visa. Her main address and contact details in the UK were through her daughter, a UK citizen living in Edinburgh. The applicant is the headmistress of a primary school. The purpose of her visit was "spending time with my children, I see them once every year."

2. The Entry Clearance Officer refused the application by notice dated 30 May 2014. The decision notes that the appellant had a previous visa for the same purpose.

However, the ECO holds that evidence of funding is insufficient, and is not satisfied by the appellant's account of her current circumstances in the Gambia that she would leave the UK after her visit. Her bank statement, credits and balances do not correspond with her declared monthly income from her employment, and she has received a cash payment equivalent to £8,065 without providing details. "I recognise that your sponsor proposes to bear the cost of your visit. However, I must take into account your personal and economic circumstances in your home country … In the absence of further documentation I cannot be satisfied … that your financial circumstances are as documented."

3. As advised in the notice of decision, the only relevant ground of appeal in this case is "…. that the decision is unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the Human Rights Convention) as being incompatible with the appellant's Convention rights" (section 84(1)(c) of the 2002 Act).

4. Thus, even if the appellant were to show that her case was a good one by the terms of the Immigration Rules, she would still have to satisfy human rights grounds in order to succeed.

5. In her grounds of appeal to the First-tier Tribunal the appellant said:

> 'The appellant's daughter and sponsor … is a British citizen and resides in the UK … It is plausible that her … mother is able to visit her provided she provides all the required documents … and doesn't exceed the time limit …
>
> The appellant has other children that reside legally in the UK and she has come to visit them consecutively year after year from 2009 except the past 2 years … she has never overstayed her visa …
>
> … The appellant … has been running a nursery school for the past 22 years, enjoys good health and social relations with the community as well as serving as a senior member of local and international bodies … [and] has no intention of residing permanently in the UK.'

6. On receipt of the grounds of appeal, an Entry Clearance Manager maintained the adverse decision in terms of a review dated 23 December 2014. The copy of that review which the respondent has provided comprises 2 pages. They are not numbered and do not read continuously. The second page begins in the middle of a sentence. If the review contained any reasoning, it has gone missing. Page 2 contains a request that any evidence provided in future should be afforded little weight. That part is plainly formulaic, referring to the appellant as "he".

7. The appeal came before First-tier Tribunal Judge Matthews to be decided "on the papers". Although the appeal was limited to human rights grounds, the judge's determination, promulgated on 26 January 2015, correctly made findings in relation to the Immigration Rules, because these are relevant to any proportionality exercise.

8. On the basis of evidence considered in particular at paragraphs 13, 14, 15 the judge found that the application did meet the requirements of the Immigration Rules. That appears to be an impeccable conclusion. In the Upper Tribunal, Mrs Saddiq did not suggest that there was anything wrong with it.

9. The judge then turned to Article 8, and found that the appellant and sponsor being mother and daughter, Article 8 was engaged.

10. The determination goes on at paragraph 25:

> "I note the pressing need for fair application of immigration control and the ability of the appellant and sponsors still to remain in contact or to enjoy each other's company in Gambia. I do not find the proposed interference to be disproportionate and I find that the respondent by setting out and applying the Rules as they are drafted has sought to sufficiently provide for, foster and facilitate Article 8 ECHR rights as required."

11. The judge then held that the appellant had "not discharged the burden of proof" and dismissed the appeal.

12. The appellant sought permission to appeal to the Upper Tribunal, pointing out that she intended to visit her family during the summer vacation, that she had made similar visits in compliance with the Rules, that she had adequate financial resources coupled with support from her children and that her children could accommodate her. All those contentions are consistent with the favourable factual findings in the determination.

13. On 30 July 2015 First-tier Tribunal Judge Nicholson granted permission to appeal. He noted that the judge had found that Article 8 was engaged, and said:

> "Given the obvious contradictions in the judge's decision – in finding that the respondent had applied the Rules … when rejecting the application, despite apparently finding that the Rules were met – the grounds are arguable.
>
> Neither *Mustapha* (Article 8 in entry clearance) [2015] UKUT 112 nor *Adjei* (visit visas – Article 8) [2015] UKUT 0261 had been decided at the time of the judge's decision but both are relevant. *Mustapha* decided that ability to meet the requirements of the Rules was relevant when considering proportionality. *Adjei*, however, decided that there was no need to consider proportionality if Article 8 was not engaged … Should this appeal proceed further, it is difficult to see on what basis Article 8 could in fact be engaged and the final outcome may well be inevitable. Nonetheless, since it was accepted by the judge that Article 8 was engaged and there is an arguable error of law related to proportionality, permission should be granted."

14. The sponsor, Shera Sidibeh, explained that the appellant has 4 children, all adult and all now legally residing in the UK. 3 of them are citizens. She has 3 grandchildren here, 2 daughters of the sponsor, and the daughter of the sponsor's sister. The first member of the family came to the UK in 2004. The UK family members all visit Gambia from time to time. They stay with their mother. She and their father divorced many years ago. He now lives in the USA. The appellant has visited the UK 3 or 4 times since 2009. The sponsor takes care of ticket and accommodation

arrangements. The appellant visits during the school summer holidays. The present application was quite expensive, and they are all disappointed with the outcome.

15. Mrs Saddiq referred me to a further case – *Kaur* (visit appeals; Article 8) [2015] UKUT 487. *Kaur* holds that the starting point must be the state of evidence about the appellant's ability to meet the requirements of the Rules, but disputes of fact relevant to the Article 8 assessment must also be resolved, bearing in mind that the burden is on the appellant. Unless an appellant can show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may exist to justify the grant of leave outside the Rules" an appellant is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals.

16. Mrs Saddiq said that the judge should not have found that Article 8 was engaged, but to the contrary. On that basis, the appeal ought to have been dismissed. There being no error in the outcome, the determination should be left to stand.

17. I reserved my determination.

18. The judge found that the requirements to the Rules were met. That is no longer an issue. The judge also found that Article 8 was engaged. Based on those 2 findings, it is difficult to make sense of the eventual outcome. The judge refers to the "pressing need for fair application of immigration control" but that must be served by granting applications which meet the terms of the Rules, not by refusing them.

19. The burden of proof is on the appellant, but the final decision did not depend on discharging any burden. There was no remaining dispute of fact. What was required was a fact-sensitive judgment, but not resolution of a matter of proof.

20. The conclusion of the determination cannot be reconciled with its earlier findings. I do not find that it should be left to stand on the basis that the same outcome was inevitable, because:

    (a) a decision should rest on some rational foundation;

    (b) if the respondent wished to rely on grounds on which she had been unsuccessful in the First-tier Tribunal, that should have been stated in response to the grant of permission as required by the Tribunal Procedure (Upper Tribunal) Rules 2008, rule 24(3)(e). The respondent made no challenge prior to the hearing in the UT to the finding that Article 8 was engaged;

    (c) the outcome was at least within the margins of debate.

21. *Mustapha* suggests that successful cases are not likely to extend beyond the relationships of husband and wife or other close partners or parent and minor children, but neither *Mustapha* nor any other authority says "never". The borderline between family and private life depends on the facts. Whether that borderline is crossed is significant, but not resolutive of whether Article 8 is engaged.

22. The appellant's family comprises her children and grandchildren who are all in the UK. Her proposed visits are not based on any whim, but on relationships which must be the most important in her life and of high importance to all her descendants. Her family may all variously visit Gambia, but the most efficient way to maximise contact must be by one person visiting here.

23. I think the facts of this case were sufficient to justify the judge's finding that Article 8 was engaged. Particularly in absence of a properly framed challenge by the respondent, I see no justification for setting that finding aside.

24. On the undisturbed findings that the requirements of the Immigration Rules were met and that Article 8 was engaged, the outcome should have been that the appeal was allowed. This is not a case like *Kaur* where an appellant faced with an adverse visit visa decision seeks to succeed outside the Rules. It is difficult to see what public interest there might be in maintaining a decision which has been *wrongly* reached in terms of the Rules, in a case where Article 8 is engaged. That is why the conclusion in the First-tier Tribunal determination reads so oddly. There was no "pressing need for fair application of immigration control" to justify dismissing the appeal.

25. The determination of the First-tier Tribunal is **set aside**. The appeal, as originally brought to the First-tier Tribunal, is **allowed** on human rights grounds.

26. No anonymity order has been requested or made.

Upper Tribunal Judge Macleman

13 November 2015