



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: VA/04325/2014

**THE IMMIGRATION ACTS**

Heard at Field House, London  
On 12 October 2015

Decision and Reasons Promulgated  
On 2 November 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

ENTRY CLEARANCE OFFICER - ABU DHABI

Appellant

and

MRS NAHEED SHAHZAD

Respondent

**Representation:**

For the Appellant: Mr Tom Wilding, Senior Home Office Presenting Officer

For the Respondent: Mr Bilal Hussain, Counsel, instructed by Hammad Hussain Gilani

**DECISION AND REASONS**

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.
2. The appellant (hereafter the ECO) appeals against the decision of the First-tier Tribunal (Judge Shamash) allowing the respondent's appeal against a decision taken on 2 July 2014 to refuse entry clearance as a family visitor.

## **Introduction**

3. The respondent is a citizen of Pakistan born in 1964. She applied to visit her adult son ("the sponsor") who was a Tier 1 migrant with leave to remain in the UK until June 2015. He applied for indefinite leave to remain in April 2015. He had a wife and new born daughter in the UK. The respondent stated in her visa application form that she had five sons and two daughters from her first husband who died in 2003. She married her second husband in 2006 and was supported by him. She had a total monthly income of about £415-£435.
4. The ECO accepted the respondent's identity and nationality and that the sponsor could support her in the UK but concluded that there was a lack of documentation regarding the respondent's circumstances in Pakistan and there was little to encourage her to leave upon completion of her visit. The application was refused and the appeal was reviewed by an entry clearance manager who noted that the respondent was widowed, not in employment and had no demonstrable form of income, savings or property. There were no details of why Article 8 rights had been breached by the decision.

## **The Appeal**

5. The respondent appealed to the First-tier Tribunal and the sponsor attended an oral hearing at Taylor House on 20 April 2015. The First-tier Tribunal found that the respondent met the requirements of paragraph 41 of the Immigration Rules ("the Rules") and that the basis of the refusal was unfounded. The only appeal was under Article 8. The judge found that there was family life between the sponsor and the respondent. In those circumstances it was for the ECO to justify that the interference in family life was proportionate. This was a short visit and the respondent had ample ties in Pakistan. She had five children and three grandchildren in Pakistan. This was a short visit to see a grandchild. It could not be argued that the sponsor could visit Pakistan because his passport was with the Home Office. It was important for family members to be able to visit their children when they choose to settle away from home so that family ties and a sense of family could be maintained.

## **The Appeal to the Upper Tribunal**

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in finding that there was family life between the respondent and the sponsor in the absence of additional dependency beyond normal emotional ties. The judge also failed to consider Adjei (visit visas – Article 8) [2015] UKUT 0262 (IAC). Meeting the requirements of the Rules is not enough. The sponsor was not present and settled in the UK and his application for indefinite leave to remain was not made until 4 April 2015.
7. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 10 August 2015. It was arguable that the judge had allowed the appeal under Article 8 using it as a general dispensing power due to restricted appeal rights. Permission was granted on all grounds.

8. Thus, the appeal came before me

### Discussion

9. Mr Wilding submitted that the judge had failed to give any reasons for the finding that Article 8 family life existed between the sponsor and the respondent and the proportionality assessment was inadequate. Paragraph 27 of the decision inaccurately summarises Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) because it is not correct to say that the ECO must justify any interference in family life as proportionate. The judge did not engage with why the decision was disproportionate. The sponsor's passport was not with the Home Office as at the date of decision. There are at least three material errors of law and the decision is manifestly wrong.
10. Mr Hussain submitted that the passport has been with the Home Office for at least 7 months. The sponsor's father died at 47 and the mother wants to see the sponsor and the grandchildren. The sponsor is still waiting for his passport and cannot go to Pakistan to visit his mother. The respondent is lonely, there is contact and money is being sent. Mr Hussain invited me to take judicial notice of relevant case law and uphold the decision of the First tier Tribunal.
11. I have considered Mostafa and Adjei. The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether Article 8 of ECHR is engaged at all. If it is not, which will not infrequently be the case; the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the Rules and should not do so. If Article 8 is engaged then the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the Rules because that may inform the proportionality balancing exercise that most follow. As compliance with paragraph 41 of the Rules is not a ground of appeal to be decided by the Tribunal, any findings concerning that will carry little weight, especially if based upon arguments advanced only by the appellant. If the appellant were to make fresh application for entry clearance then the ECO will, if requested to do so, have regard to the assessment carried out by the judge but will not be bound by those findings to treat the appellant who, at least at the date of the appeal hearing, met the requirements of paragraph 41 of the Rules.
12. Mostafa is not authority for the proposition that, despite the legitimate legislative intention to remove a right of appeal against adverse entry clearance applications in visit cases on the grounds that the ECO was wrong to find the claimant did not meet the requirements of the Rules, the Tribunal can nonetheless continue to determine such issues. The point being made in Mostafa at paragraph 24 is simply that where it is established that Article 8 is in fact engaged, it will still be necessary to assess whether the claimant meets the substance of the Rules. Put another way, a person who satisfies the Tribunal that he does meet the requirements of paragraph 41 of the Rules does not succeed on that account. He still has to demonstrate that refusal represents an unlawful infringement of rights protected by Article 8. For a person

who does not satisfy the requirements of paragraph 41 to succeed in an appeal there would have to be cogent and compelling reasons demanding that he should succeed.

13. The Upper Tribunal in Mostafa made it clear that it was dealing with a very narrow range of claimants. In practical terms, that is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together. It is a question of fact in each case whether relationships between adult relatives disclose sufficiently strong ties such as to fall within the scope of Article 8. There can be family life between adults but the issue will be how dependent the older relative is upon the younger ones and whether this dependency represents more than normal emotional ties. From Ghising and others [2013] UKUT 00567 (IAC), adults will need to be valuing and depending on each other for mutual support and affection.
14. The judge cannot be criticised for failing to consider Adjei because that decision was not promulgated until 6 May 2015. However, the judge has given no reasons for the finding at paragraph 27 that there was family life between the sponsor and the respondent. That is a material error of law. The judge also took into account the fact that the sponsor's passport was with the Home Office as at the date of hearing. That is a further material error of law because the judge should have considered the fact as they were at the date of decision, when the sponsor had his passport and could travel freely to visit the respondent. The judge further erred in law by stating at paragraph 27 that wherever an appellant meets the requirements of the Rules then it is for the ECO to justify that the interference is proportionate.
15. I have proceeded to remake the decision. In this case, the sponsor had been living in the UK for 10 years and the respondent has never visited the UK. There is no finding that the respondent is dependent upon the sponsor and she has many children in Pakistan. There is no evidence of anything more than usual emotional ties between the sponsor and the respondent. They have clearly not lived together for many years. The sponsor is a wholly independent and mature adult with his own family unit. Considering the authorities cited above, there is nothing to justify a finding that the sponsor and respondent enjoy family life together. The respondent has no private life in the UK. The respondent's appeal therefore fails at the first hurdle identified in Adjei.
16. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under Article 8 involved the making of an error of law and its decision cannot stand. I substitute a fresh decision to dismiss the respondent's appeal against refusal to grant her entry clearance as a visitor.
17. There is nothing before me to suggest that the findings of the judge in relation to the Rules were incorrect as at the date of hearing and the ECO should give appropriate weight to those findings in the event of any future application. The respondent is well established in Pakistan with her second husband and extensive family network. There is no evidence of any intention to settle in the UK.

**Decision**

18. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision by dismissing the respondent's appeal against the decision of the ECO.

Signed

Date 30 October 2015

A handwritten signature in black ink, appearing to read 'C. Archer', written in a cursive style.

Judge Archer  
Deputy Judge of the Upper Tribunal