Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: VA012042015
VA012062015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 17 May 2016	**On 23 May 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER – ABU DHABI

Appellant

and

ADMA BARJE
ABDALLA ALNAJM

Respondents

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: No representative and no appearance

DECISION AND REASONS

1. The Entry Clearance Officer appeals against a decision of the First-tier Tribunal (Judge Anthony) allowing the respondents' appeals against decisions taken on 28 January 2015 refusing to grant them entry clearance to visit their son and daughter-in-law in the UK under para 41 of the Immigration Rules (HC 395 as amended).

2. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellants are citizens of Syria and are a married couple. They were born respectively on 26 May 1956 and 1 January 1939.

4. On 21 January 2015, they each applied for entry clearance in order to visit their son and daughter-in-law in the UK. The purpose of their visit, as set out in their respective applications, was to come to the UK as their son and daughter-in-law were expecting their first child (the appellants' grandchild). The baby was due on 17 February 2015 and the appellants wished to travel to the UK on that date and indicated in their application that they intended to stay for two months.

5. At the date of the applications, the appellants were resident in the United Arab Emirates (UAE). They both indicated in their application form that they had a "residency visa" in the UAE. Together with their applications, the appellants submitted a number of documents (either to the ECO or subsequently to the ECM) including ones relating to property ownership in Syria, bank statements of the second appellant in Syria and bank statements and other supporting documents from their son, Dr Imad Najm who is a Syrian national but working as a doctor in the UK.

6. On 28 January 2015, the ECO refused each of the appellants' applications for entry clearance. The ECO refused their applications under para 41(i) and (ii) of the Immigration Rules (HC 395 as amended) on the basis that he was not satisfied that they were genuine visitors and that they intended to leave the UK at the end of their visit.

7. In relation to the second appellant (the husband of the first appellant) the ECO's reasons were as follows:

> "**The Decision**
>
> - The onus is on you to qualify for entry clearance based on your own circumstances and your own intentions. You have said that your son will help you with this visit by paying for your maintenance and accommodation whilst you are in the United Kingdom and I am satisfied that he is in a position to do so. But whilst I take that into account in assessing your proposed maintenance and accommodation in the UK, that is only one aspect of the visitor rules and this sponsorship does not satisfy me of your own intention to leave the UK on completion of your visit.
>
> - On your application form you state that you are retired and that you receive income from Properties and rental and public funds or benefits. However you have chosen to provide no evidence of this income. You have provided bank statements in your name, however it is unclear as to where the funds in this account have originated from. I am therefore unclear as to how you are supported in the UAE at this time. It also appears that you are travelling with your sole dependent family member your wife to the UK, I am therefore not satisfied that you have demonstrated that you have sufficient ties to the UAE or Syria at this time.
>
> - Given all of this I am not satisfied that your circumstances in the UAE are as you have stated which also leads me to doubt your intentions in wishing to travel to

> the United Kingdom now. As a result I am not satisfied that you are genuinely seeking entry as a general visitor or that you intend to leave the United Kingdom at the end of the period of the visit as stated by you. **41(i)(ii)**
>
> I have therefore refused your application because I am not satisfied, on the balance of probabilities, that you meet all the requirements of the relevant Paragraph(s) of the United Kingdom Immigration Rules."

8. The reasons for the refusal in respect of the first appellant (the second appellant's wife) closely mirror those reasons.

9. On 16 April 2015, the Entry Clearance Manager upheld the ECO's decisions.

The First-tier Tribunal's Decision

10. The appellants appealed to the First-tier Tribunal. Their appeals were limited to human rights grounds, in particular Art 8 of the ECHR.

11. The appellants did not seek an oral hearing and so Judge Anthony determined their appeals on the papers.

12. First, Judge Anthony accepted that the appellants met the requirements of para 41 as visitors but that this was only relevant in the context of Art 8 given the limited right of appeal. Consequently he went on to consider their appeals under Art 8.

13. Secondly, the judge found that in seeking to visit the UK to attend the birth of their first grandchild, the appellants had established that their circumstances fell within Art 8(1) as constituting "a matter of private and family life" (see para 12).

14. Thirdly, the judge found that the ECO's decision would interfere with the "family and private life rights of the appellants, their son, their daughter-in-law and their grandchild" (see para 13).

15. Fourthly, the judge found that the interference would be in accordance with the law (see para 14).

16. Fifthly, the judge noted that the ECO's decision did not invoke "any legitimate aim" (see para 15).

17. Sixthly, the judge went on to consider the proportionality of the interference with the appellants' private and family life.

18. He found the respondents decisions to be a disproportionate interference with the appellants' private and family life. At paras 17-21 he said this:

> "17. Before I go on to consider the above question, I have had regard to part 5A (Public Interest Considerations) of the Nationality, Immigration and Asylum Act 2002 (as amended by s.19 of the Immigration Act 2014). I have taken into account the public interest considerations. I recognise that the public interest in the maintenance of firm immigration control is engaged and I acknowledge that this has statutory endorsement by virtue of s.117B(1) of the 2002 Act. As regards the

other provisions of s.117B, the ECO expressed his satisfaction that the appellants' son would be able to provide them with maintenance and accommodation during their visit. Thus the public interest expressed in s.117B(3) does not arise. None of the other s.117B considerations arises.

18. Given that the public interest in the maintenance of firm immigration control is engaged, the final question to be addressed is that of proportionality. This invites consideration of, firstly, the extent and impact of the interference with the private and family life rights of the appellants and the sponsor and his family occasioned by the ECOs refusal decisions.

19. I consider that the interference is substantial and profound, given that there is no other way in which the avowed purpose of supporting the sponsor and his wife during the delivery of their first child and in the period thereafter can be achieved and the plans and intentions of the appellants have been thwarted outright. I further consider that what is proposed by the appellants, in conjunction with the others concerned, is a matter of substantial importance to them.

20. I further take into account that the proposed sojourn of the appellants in the UK will be for a modest and finite period. The final factor to be considered is that what they are proposing cannot be achieved in any other way. I have also taken into account their extensive travel history as set out in the VAF. I find that the appellants have had previous visits to the UK and have left. Applying Mostafa, I find that this is a weighty factor to be considered. On these facts and given these considerations, the public interest in maintaining firm immigration control is less potent than in other contexts. Balancing the public interest with the various facts and considerations highlighted above, I conclude that the impugned decisions represent a disproportionate interference with the right to respect for both private and family life enjoyed by the appellants and the other family members in the UK.

21. It follows that a breach of article 8 is established. Accordingly, the appeal succeeds."

19. Consequently, the judge allowed the appellants' appeals under Art 8.

The ECO's Appeal to the Upper Tribunal

20. The ECO sought permission to appeal to the Upper Tribunal. He did so on essentially three grounds.

21. First, the judge, in finding that the appellants met the requirements of para 41, had failed to take into account the deteriorating situation in Syria since their last visit and, despite having complied with the terms of their visas in the past, the judge's conclusion that the appellants had demonstrated their intention to return was flawed.

22. Secondly, the judge had erred in law, applying the relevant case law, in finding that the appellants had established family life with their adult relatives in the UK.

23. Thirdly, in assessing proportionality the judge had failed to explain why the refusal of a visa which only allowed the appellants to join their family temporarily was a disproportionate interference with their Art 8 rights.

24. On 29 January 2016, the First-tier Tribunal (Judge Fisher) granted the ECO permission to appeal.

25. Thus, the appeal came before me.

The Hearing

26. Despite having been sent notice of the hearing, the sponsor (the appellants' son) did not attend the hearing. Mr Richards, who represented the ECO invited me to hear the appeal in the absence of the appellants and sponsor.

27. Applying rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended), I was satisfied that notice of the hearing had been sent to the appellants and sponsor and that it was in the interest of justice to proceed with the hearing. I noted that the original appeal had been, at the appellants' request, determined on the papers.

28. Mr Richards submitted that the judge's decision was flawed by material errors of law. He relied on the grounds which he supplemented in his oral submissions.

29. First, Mr Richards relied upon the grounds which criticised the judge for not considering the current situation in Syria in assessing whether the appellants were genuine visitors.

30. Secondly, Mr Richards submitted that in finding that the appellants met the requirements of para 41 (as part of his reasoning in finding a breach of Art 8) the judge had failed to deal with the ECO's reasons, in particular that the appellants had not established on the basis of the submitted material that they intended to return to Syria at the end of their visit. Mr Richards submitted that the judge had not engaged with the financial and other documents which the ECO considered insufficient to establish the appellants' ties with the UAE or Syria and had merely relied upon the fact that they had left the UK on previous visits.

31. Thirdly Mr Richards submitted, the judge had failed properly to apply case law such as Kugathas v SSHD [2003] EWCA Civ 31 and Ghising and Others [2013] UKUT 00567 (IAC) in concluding that the appellants had family life with their adult family in the UK.

32. Fourthly, Mr Richards submitted that the judge was wrong in para 20 to conclude that the public interest was "less potent" because the appellants, on the judge's view, met the requirements of para 41 of the Immigration Rules.

33. Fifthly, relying on the grounds, Mr Richards submitted that the judge's finding that any interference with the appellants' private and family life was disproportionate was flawed.

34. Mr Richards invited me to find that there was a material error of law and to remake the decisions dismissing each of the appellants' appeals.

Discussion

35. Let me deal first with an initial point raised in respect of the Judge's finding that the appellants met the requirements of para 41 as visitors.

36. As I have already indicated, the appellants could only appeal on human rights grounds, in this context, under Art 8. The judge was clearly aware that the appellants had no appeal under the Immigration Rules. The Judge was, nevertheless, correct to consider whether the appellants met the requirements of para 41 at the date of decision in applying Art 8.

37. Whether the appellants met the requirements of the Immigration Rules was relevant in assessing the proportionality of the ECO's decisions providing they could establish an interference with their private and family life.

38. On the basis that they did, the judge correctly cited the decision of the Upper Tribunal (McCloskey J and UTJ Perkins) in Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) where, summarised in the head note, it is stated:

> "In the case of 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 and weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control."

39. The relevance of individuals meeting the requirements of the Immigration Rule was subsequently affirmed by the Upper Tribunal in Kaur (visit appeals; Article 8) [2015] UKUT 487 (IAC) (UTJ Storey and DUTJ Bagral). There, the UT noted, as set out in the head note, that:

> "The starting-point for deciding [whether a breach of Article 8 is established] must be the state of the evidence about the appellant's ability to meet the requirements at paragraph 41 of the Immigration Rules."

40. However, the Upper Tribunal went on to state:

> "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 LTE (leave to enter) outside the Rules': (See SS (Congo) [2015] EWCA Civ 387 at [40] and [50] he or she is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals."

41. There was, therefore, nothing wrong in the judge once he reached the issue of proportionality in stating, in effect, that the appellants' ability to satisfy the requirements of the visitor rules was a "weighty factor" (at para 9 of his determination). The judge cited Mostafa at para 9, as he did in para 20 when he stated that: "T[t]e public interest in maintaining firm immigration control is less potent than in other context". Despite Mr Richards' submission, that statement seems to me to be no more than a reflection of the "weighty" factor that flowed from the judge's finding the appellants met the requirements of the visitor rule.

42. Thereafter, the crucial questions are:

(1) Did the judge err in law in concluding that the appellants met the requirements of the Immigration Rules?; and

(2) In applying Art 8 did he wrongly find that their "private and family life" was engaged and interfered with for the purposes of Art 8?

43. As regards the Immigration Rules, the relevant provisions (at that time) were in para 41 of the Rules which provided as follows:

> "The requirements to be met by a person seeking leave to enter the United Kingdom as a general visitor are that he:
>
> (i) is genuinely seeking entry as a general visitor for a limited period as stated by him, not exceeding six months … ; and
>
> (ii) intends to leave the United Kingdom at the end of the period of the visit as stated by him; …"

44. Turning to Mr Richards' first submission based upon the grounds: the grounds criticise the judge for not taking into account the fact that in Syria the situation had deteriorated considerably since the appellants' last visit. The implication is, I apprehend, that the appellants were not seeking to enter as genuine visitors but rather to escape the current upheaval in Syria.

45. The difficulty with the argument as put in the grounds is that there was no evidence before the judge, presented by the ECO, as to the situation in Syria. It was not a matter relied upon by the ECO or the ECM. It was not for the judge to seek out evidence to support an argument not even relied upon by the ECO. Although the appeal was determined on the papers, it was open to the ECO to make written submissions and, indeed, to request an oral hearing. Neither was, as far as I can tell, pursued by the ECO. I am not, therefore, satisfied that the judge erred in law in failing to take into account the situation in Syria upon which he had no evidence and on which the Entry Clearance Officer's decisions do not rely.

46. In any event, the appellants were not living in Syria. The evidence before the judge (and indeed the ECO) was that the appellants were living in the UAE where they had residency visas. They gave a residential address in the UAE although they did indicate that they had only lived at that address for two months. There was no evidence before the judge that the appellants could not continue to live in the UAE if they came to the UK and, at the end of their visit, left the UK in accordance with the conditions of their leave. There was evidence that they each had a "residency visa".

47. Consequently, I reject the submission that the judge erred in law in failing to consider the current situation in Syria in reaching his positive findings.

48. Secondly, Mr Richards relied upon a matter not expressly raised in the grounds. I will nevertheless consider the submission as put by Mr Richards arising, perhaps, obliquely from the challenge to the judge's factual finding under the Rules.

49. The ECO and ECM were not satisfied that the documents submitted by the appellants showed sufficient "ties" with Syria or the UAE to satisfy the requirement that they were genuine visitors who intended to leave the UK at the end of the visit.

50. I accept that the judge did not deal with the ECO's concerns in relation to the bank statements and the source of funds in the second appellant's account which, the ECO stated, the source of which was "unclear". The ECO was also not satisfied as to how the appellants supported themselves in the UAE.

51. In the absence of an oral hearing, the ECO's case before the judge should, in general, be taken as that set out in the refusal decision supplemented by any further submission. The Judge should, therefore, have addressed the reasons for the Entry Clearance Officer's refusal. However, that failure was not, in my judgment, material to the Judge's ultimate finding.

52. There was evidence before the judge that the appellants were supported in the UAE (where they were retired) by income from properties and rents and public funds or benefits. At question 71 of his application, the second appellant refers to a monthly income from the former of £460 and in respect of the latter of £100. The second appellant also says that his family members provide a monthly income of £150. Contrary, therefore, to what was said by the ECO in his decisions the appellants' ability to support themselves in the UAE was demonstrated in the evidence in their application.

53. Further, the second appellant's bank accounts show three monthly payments into his account in a Syrian bank under the heading "Interest Capitalization transactions" each payment in matched by a debit for "withholding tax". These bank statements cover the period 29 June 2014 until 31 December 2014 shortly before the applications were made on 21 January 2015.

54. In my judgment, the ECO's dissatisfaction with this evidence was unsubstantiated. The second appellant's evidence about his income was set out and the regularity of payments into his account (together with tax deductions) offers up no sinister implication that these are payments over a six month period designed to bolster the appellants' appearance of having funds available to them. I should, of course, point out that the appellants' evidence was that their son in the UK was paying for their trip to the UK.

55. There was, in truth, little if anything in the documents to sustain a doubt as to the credibility of the appellants. In my judgment, had the judge considered this evidence and the ECO and ECM's reasons for finding it unsatisfactory, he could only have come to one conclusion, namely that the evidence taken as a whole demonstrated that the appellants were financially able to support themselves currently in the UAE: a conclusion consistent with his finding that they were genuine visitors.

56. In fact, of course, in accepting the genuineness of the appellants' visit to the UK the judge took into account their impeccable history of previous visits, namely complying with the requirements of their leave and returning home at the end of the visit. The appellants also had a substantial record of travelling which is set out in their applications and which the judge was entitled to take into account in reaching a finding on whether they were genuine visitors who intended to leave the UK at the end of their visit.

57. Further, the purpose of their visit was entirely understandable. Their son and daughter-in-law were shortly to have their first child which was the appellants' grandchild. There was nothing more natural than them wishing to visit to support their son and daughter-in-law at the time of, and shortly after, the birth of their grandchild.

58. For these reasons, I am satisfied that the judge did not materially err in law in reaching his finding that the appellants met the requirements of the Immigration Rules.

59. For the avoidance of doubt, were I to remake the decision I would find, on a balance of probabilities, that the appellants were genuine visitors who intended to leave the UK at the end of their period of visit and that, therefore, they met the requirements of para 41.

60. The next issue is whether the judge was entitled to find that Art 8 was engaged on the basis of the private and family life of the appellants and their family in the UK.

61. Mr Richards argued that the judge was not entitled to make that finding as it had not been established that the relationship with their son and daughter-in-law in the UK was other than one of "normal emotional ties" and no element of dependency beyond that normally existing between adult family members.

62. In reaching his finding, the judge referred to and applied the Upper Tribunal's decision in Abbasi and Another (Visits – Bereavement – Article 8) [2015] UKUT 00463 (IAC) which stated that:

> "The first question for the tribunal is whether the benefit, or facility which the Secretary of State is requested to confer – in this case, an entry visa for the specific and time limited purpose advanced – is protected by Article 8. If this yields an affirmative answer, the second question is whether the impugned decision interferes with the claimant's right to respect to private and/or family life. If this question also is answered affirmatively, the enquiry then shifts to the territory of Article 8(2), raising the third question, namely whether any of the specified legitimate aims is engaged. If this produces a negative answer a breach of Article 8 is thereby established. On the other hand, if a legitimate aim is identified, the fourth, and final question to be addressed is whether the interference is a proportionate means of promoting the aim in question. It is in this context and at this stage that issues relating to the extent and impact of the interference will be considered in the balancing exercise."

63. Having set out a decision of the Strasbourg Court noting that the existence of "family life" was essentially a question of fact depending upon the "real existence in practice of close family ties", the judge continued at para 12 as follows:

> "Firstly, applying the structured approach as set out above in Abassi to the factual matrix, I consider that the benefit which the appellants are seeking of the respondent, that is a visit to the UK to attend the birth of their first grandchild does indeed constitute a matter of private and family life protected by article 8(1)."

64. Of course, the case of Abbasi was in an entirely different context. There, the intended visit was in order to mourn with family members the recent death of a close relative. Nevertheless, the approach of the Tribunal in Abbasi is informative. In Abbasi, the Tribunal concluded that the purpose of the visit in that case engaged Art 8(1) as constituting "a matter of private and family life". Just as matters relating to death, burial and mourning and associated rights are capable of falling within Art 8 as an aspect of private and family life (if not the latter most certainly the former), so in my judgment is the provision of support by parents for their adult children at the time of the birth of their grandchildren which equally is capable of falling within the protection of Art 8.1. It reflects a cultural and social norm of "family" which features widely throughout the world. It is important aspect of the role of families at one of the most vital times in many people's lives. It is at least and aspect of the family members' "private life".

65. In my judgment, the judge was entitled to find that the appellants visit to the UK engaged Art 8 as falling within a matter of their private and family life protected by Art 8.1.

66. Before turning to the judge's consideration of proportionality, I note what the judge said at para 15 that: "The impugned decisions of the ECO do not invoke any legitimate aim". It is clear to me what the judge meant here is that the ECO in his decisions had not stated what legitimate aim was in play. The judge was not, in my view, stating that he (the judge) concluded that no legitimate aim was engaged. That is clear from what he says at para 17 onwards of his determination (set out above) where he recognises that the public interest in the maintenance of firm immigration control is engaged by virtue of s.117B(1) of the Nationality, Immigration and Asylum Act 2002.

67. In assessing the proportionality of the decisions, the judge had found that the appellants met the requirements of the Immigration Rules. That was, as the judge correctly stated, a "weighty factor" in assessing proportionality. It was not, however, determinative. The judge did not fall into the error of thinking it was. In para 17, as I have set out above, he considered the application of s.117B of the 2002 Act. At paras 19 and 20, he found that the interference with the appellants' private and family life and that of their family was "substantial and profound". The point made by the judge was, of course, that the purpose of the visit could not be achieved other than by the appellants coming to the UK. There was no question of the appellants' son and daughter-in-law travelling to the UAE in order to give birth to the appellants' grandchild. This was not a case where the appellants wished to visit family in a

situation where it was equally possible for the family in the UK to visit the appellants abroad. The purpose of the visit could only be achieved if the appellants came to the UK. That was a powerful factor, in the light of the appellants meeting the requirements of the Immigration Rules as visitors, in their favour. The judge was entitled to conclude, in my judgment, that the interference was disproportionate. They had a strong claim of a pressing nature given the "substantial and profound" interference with the private and family life of the appellants and their son and daughter-in-law. The judge's finding was not irrational or otherwise unsustainable in law.

68. For these reasons, I am satisfied that the judge was entitled to find that the ECO's decisions breached Art 8.

69. The unfortunate fact is, however, that it is now May 2016 and the appellants wished to visit the UK in February 2015 (over fifteen months ago) when their grandchild was due to be born. Nevertheless, the judge was required (as am I) to consider the appellants' appeal as at the date of decision and, for the reasons I have given, he did not materially err in law in allowing the appellants' appeals under Art 8 and those decisions stand.

70. Accordingly, the ECO's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal
23 May 2016

TO THE RESPONDENT
FEE AWARD

In allowing the appeals, the judge made whole fee awards in respect of the two fees that were paid or were payable. I see no reason to interfere with that decision which stands.

Signed

A Grubb
Judge of the Upper Tribunal
23 May 2016