IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/05173/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 December 2015	**On 7 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER - ABUJA

Appellant

and

MRS CHIOMA GOODNESS ONUORAH
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Respondent/Claimant: Mr P Saini, Counsel instructed by Gans & Co Solicitors LLP
For the Entry Clearance Officer: Mr L Tarlow, Specialist Appeals Team

DECISION AND REASONS

1. The Specialist Appeals Team brings an appeal on behalf of an Entry Clearance Officer (Abuja) from the decision of the First-tier Tribunal (Designated First-tier Tribunal Judge Manuell sitting at Richmond Magistrates' Court on 21 April 2015) allowing on Article 8 grounds the claimant's appeal against the decision to refuse her entry clearance for the purposes of visiting her brother and his family in the United Kingdom. The First-tier Tribunal did not make an anonymity direction, and I do not

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consider that the claimant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 29 June 2015 Upper Tribunal Judge Deans sitting as a Judge of the First-tier Tribunal refused permission as the judge had made a specific finding at paragraph [12] as to interference with family life, and he had given adequate and viable reasons for this decision. The application indicated disagreement with the decision, but the grounds did not disclose an arguable error of law.

3. On a renewed application to the Upper Tribunal, Upper Tribunal Judge Storey took a different view. On 13 August 2015 he granted permission to appeal for the following reasons:

> "It is arguable that the judge erred in concluding that Article 8(1) was engaged or (if it was) in failing when conducting a proportionality assessment to have regard to the relative strength of the Article 8(1) ties."

The Hearing Before, and the Decision of, the First-tier Tribunal

4. At the hearing before Judge Manuell the claimant was represented by Counsel, and there was no appearance by a Presenting Officer on behalf of the Entry Clearance Officer. The judge received oral evidence from the sponsor, Mr Franklin Onuorah. He adopted his witness statement dated 9 April 2015. He said in summary that the purpose of his sister's visit was to keep up the family connection. His sister had recently married but it was inconvenient for her husband to travel and he was happy for her to make the trip alone. Mr Onuorah had lived in the UK for eleven years and none of his family had ever been to see him. He was married with two young children. The claimant was employed, and would be returning to work after her visit.

5. In his subsequent decision, Judge Manuell set out his findings at paragraphs [10] onwards which I reproduce below:

> "10. The tribunal was satisfied that Mr Onuorah was an honest witness. The tribunal accepts his evidence in full. In particular, the tribunal is satisfied that his sister has strong ties Nigeria in the form of her marriage and her employment. The tribunal is satisfied that the Appellant intends to return to Nigeria at the conclusion of her brief visit to the United Kingdom. Had there been a right of appeal against the decision under the Immigration Rules, paragraph 41, the tribunal would have had no hesitation in allowing it.
>
> 11. There is, however, only a right of appeal to the First-tier Tribunal under Article 8 ECHR. The Appellant lives in Nigeria and so has no family life in the United Kingdom, or at least once which is maintained at a distance and which the refusal decision was argued not to interfere with. There is, however, rather more to the appeal than that.
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> 12. **<u>Beoku-Betts v Secretary of State for the Home Department</u> [2008] UKHL 39** shows that in Article 8 ECHR family life cases the

family life of all persons affected by the decision must be taken into account. The evidence showed that at least one British Citizen is directly affected by the Entry Clearance Officer's decision, namely the Appellant's brother Mr Onuorah, as well as his British Citizen children. The particular form of family life which the Appellant enjoys with her brother is necessarily limited as they are both adults with their own families but nonetheless the connection between them is real. The tribunal finds on the facts of the appeal that the refusal decision is an interference with the family life of persons in the United Kingdom. The fact that it is also an interference with the Appellant's family life is not relevant as she is not present in the United Kingdom.

13. The Entry Clearance Officer's decision is in accordance with the law, in the sense that there was power to make it. The key issue in the **Razgar** **[2004] ULHL 27** analysis for the tribunal is proportionality; see **Mostafa (Article 8 in entry clearance)** **[2015] UKUT 112 (IAC)**. While there was power to make the decision, the tribunal finds that the decision was incorrect and that the Appellant's application should have been allowed. That must have a major bearing on proportionality, in that the tribunal finds that the Appellant would have complied and will comply with her visa conditions. The public interest under Article 8.2 ECHR is satisfied because there was no evidence to show that the Appellant is likely to breach her visa conditions or otherwise infringe United Kingdom law if she is permitted to visit the United Kingdom for a brief period as she declared she intended."

The Hearing in the Upper Tribunal

6. At the hearing before me to determine whether an error of law was made out, Mr Tarlow adopted the line of reasoning contained in the renewed application for permission to appeal. It is established case law that family life within the meaning of Article 8 would not normally exist between adult siblings, parents and adult children. Where family life does not exist, generally Article 8 will not be engaged. **Kugathas v SSHD** **[2003] EWCA Civ 31** said at paragraph [25] that because there is no presumption of family life, family life is not established between an adult and his surviving parent or other siblings "unless something more exists than normal emotional ties". Reference was also made to paragraph [20] of **Kugathas** where the following was said:

> "Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on these grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8."

7. None of the criteria identified in authorities such as **Kugathas** appeared to be met in the present case, because the claimant was found to have strong ties to Nigeria in the form of marriage. Therefore the claimant did not have family life with her family in the UK, such as to engage Article 8.

8. On behalf of the claimant, Mr Saini adopted and developed the extensive Rule 24 response which had been settled by Mr Michael Biggs of Counsel. Contrary to the argument made in the grounds of appeal, whether family

life exists for the purpose of Article 8 ECHR is a question of fact and degree, and there are no firm rules or presumptions applicable when a court is required to determine whether such family life exists: see for example **Gissing (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC)** at paragraphs [50] to [62], affirmed on appeal at paragraphs [45] and [46] (in **Gissing [2013] 1WLR 24546**). In assessing whether family life exists, it must be recalled that the family life interests of others must be considered where appropriate: **Beoku-Betts v SSHD [2008] UKHL 39**.

9. The First-tier Tribunal Judge was entitled to conclude that there was family life which engaged Article 8 ECHR in all the circumstances of the case. The First-tier Tribunal was entitled the deference afforded to any judicial finding of fact or exercise of discretion on appeal.

10. In the alternative, it was clear that the claimant's and the sponsor's respective private life rights were interfered with by the decision appealed against in these proceedings, and therefore Article 8 ECHR was engaged on the basis of an interference with relevant private life. The settled threshold for engaging Article 8 ECHR private life is not difficult to surpass: **AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 80** per Sedley LJ at paragraph 28.

11. Mr Saini referred me to the following passage in **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)** at paragraph [16]:

> "We regard it as settled law that in an Article 8 balancing exercise the rights of all those closely affected, not only those of the claimant, have to be considered. It is our view that the decision in **Shamin Box [2002] UKIAT 02212** is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by the decision. Undoubtedly the paradigm Article 8 entry clearance case concerns applicants seeking to join close family members for the purposes of settlement. However it cannot be excluded that where one party to a marriage is entitled to be in the United Kingdom a qualified obligation to facilitate spousal unification for the limited purpose of a short visit and sojourn may arise and does arise here. Mrs El-Shiekh wanted to return to her country of nationality (United Kingdom) for a time and her husband wanted to be with her, not with a view to settlement but so that he could share her life and relationships in the United Kingdom. The refusal decision had a material impact on their right to enjoy family life. He did not want to settle but to visit her, subject to permissible qualifications, he should be entitled to do that. Whilst it would almost certainly be proportionate to refuse him entry clearance if he did not comply with the Rules his, and his wife's, desire to be together in her home area, albeit for purposes of a visit, are very human and understandable. Preventing that would not be a 'technical or consequential interference' (see Sedley LJ in **VW (Uganda) [2009] EWCA Civ 5**) and should be permitted, subject to the proportionate requirements of immigration control."

12. Mr Saini submitted that, on the facts found by Judge Manuell, the interference consequential upon the unmeritorious refusal of a visit visa to the claimant was not technical or inconsequential.

13. Mr Saini also drew my attention to **<u>Abasi and another</u> (visits – bereavement – Article 8) [2015] UKUT 463 (IAC)**, a decision of the President sitting with Deputy Upper Tribunal Judge Doyle in Glasgow. Paragraph 1 of the head note reads as follows:

> "The refusal of a visa to foreign nationals seeking to enter the United Kingdom for a finite period for the purpose of mourning with family members the recent death of a close relative and visiting the grave of the deceased is capable of constituting a disproportionate interference with the rights of the persons concerned under Article 8 ECHR."

14. The appellants were nationals of Pakistan, aged 29 and 21 years respectively. They applied for entry clearance for a visa to enter the United Kingdom for a period of four weeks to visit their grandfather's grave and to mourn with family members here. Their appeals on Article 8 grounds were dismissed by the First-tier Tribunal as the effect of the refusals was not to amount to a breach of the right to family life under Article 8. The appellant's close family members, including their parents, were in Pakistan, and that was where they had established family life. They had family members who had chosen to settle in the UK, including three uncles, but the appellants did not have an established family life in the UK.

15. After reviewing a number of Strasbourg authorities, the Upper Tribunal reached the following conclusion at paragraph [11];

> "As the decided cases of the EctHR make clear, the FTT's decision that the appellants' appeals did not fall within the ambit of Article 8 ECHR is unsustainable. The judge's error was driven by an impermissibly narrow approach to the scope of Article 8 protection and a concentration on the appellants' family life in Pakistan, to the exclusion of both their family ties in the United Kingdom and the central purpose of their proposed visit. The essence of the error was a failure to recognise that the particular aspect of private and family life invoked by the appellants was capable of being encompassed by Article 8 ECHR. The protection, or benefit, which they were asserting had the potential of being protected by Article 8 ECHR."

16. The Tribunal continued in paragraph [12]:

> "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."

17. In one of the authorities considered by the Tribunal, a mother asserted a failure by the domestic authorities to discharge their positive obligation to ensure effective respect for her private and family life, invoking the principle that:

> "[B]iological and social reality prevail over a legal presumption which … flies in the face of both established facts and the wishes of those concerned without actually benefitting anyone (my emphasis)."

18. On the particular facts, the Tribunal found at paragraph [13] that applying the Strasbourg jurisprudence to the factual matrix, the benefit or facility which the appellants were seeking of the Secretary of State constituted a matter of private and family life protected by Article 8 ECHR, and that the decisions of the ECO refusing the appellants' visas plainly interfered with the family and private life rights of the appellants and other family members in the UK:

> "In this context, we consider it appropriate to take into account the several members of the family unit affected by the ECO's decisions."

19. Mr Saini submitted that the significance of this decision is that it shows it is not necessary for the foreign national seeking entry clearance for the purposes of a visit to have more than normal emotional ties with family members here in order for Article 8 to be engaged.

Discussion

20. Two different themes are discernible in the domestic jurisprudence relating to Article 8 claims in the context of family visitors. Support for the restrictive approach taken by the Specialist Appeals Team in the instant appeal is to be found in another passage of **Mostafa** and also in the decision of Upper Tribunal Judge Southern in **Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC)**

21. At paragraph [17] of **Adjei,** which was promulgated on 6 May 2015, Upper Tribunal Judge Southern said:

> "It is a question of fact in each case, of course, whether relationships between adult relatives disclose sufficiently strong ties such as to fall within the scope of Article 8. Ties between young adults who have yet to establish their own family life separate from their parents may constitute family life: see Nasri v France 21 EHRR 458. But this claimant has established her own family life in Ghana with her partner and their daughter and while her adult siblings in the United Kingdom have not yet done so, it is established by Advic v United Kingdom (1995) 20 EHRR CD125 that the protection of Article 8 does not extend to links between adult siblings living apart for a long period where they were not dependent upon each other. There is no evidence of such dependence between these siblings or step-siblings. Finally it is well established that there must be more than the normal emotional ties between adult relatives for family life to exist for the purposes of Article 8 of the ECHR: Kugathas v IAT [2003] EWCA Civ 31"

22. At the beginning of paragraph [24] of **Mostafa** the Presidential panel said:

> "It is the very essence of Article 8 that it lays down fundamental values that have to be considered in all relevant cases. It would therefore be extremely foolish to attempt to be prescriptive, given the intensely factual and contextual sensitivity of every case. Thus we refrain from suggesting that, in this type of case, any particular kind of relationship would always attract the

> protection of Article 8(1) or that other kinds of relationship would never come within its scope. We are, however, prepared to say that it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this 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."

23. But support for a more elastic approach is discernible in other passages from the authorities relied on by Mr Biggs and Mr Saini on behalf of the claimant.

24. Where a person is seeking entry clearance for the purpose of settlement, and he cannot bring himself within the relevant requirements of the applicable rules, there is no good reason to depart from the orthodox requirement that for such a person to maintain a family life claim outside the Rules, the **Kugathas** dependency criteria must be met.

25. However, where a person is only seeking entry clearance for a limited purpose such as a short visit, satisfaction of the **Kugathas** dependency criteria is wholly antithetical to such a person being granted admission under the Rules, as the incentive for him to return to his home country is objectively much weaker than is the incentive for him to remain in this country with the family member on whom he is emotionally dependent. In addition, provided that the applicant complies with the requirements of a visit visa, there is no potential downside from an immigration control perspective, whereas a person admitted for the purposes of settlement is potentially a future burden on the taxpayer.

26. In conclusion, I am not persuaded that on the current state of the law Judge Manuell misdirected himself in finding that Article 8(1) ECHR was engaged (on family and/or private life grounds), and in thus answering questions one and two of the **Razgar** test in favour of the claimant. There was sufficient evidence before him to find that the prospective interference was more than technical or inconsequential. The claimant did not have an established family life with the sponsor and his family in the United Kingdom, as the judge acknowledged. But this was not an essential requirement, contrary to what is asserted in the grounds of appeal.

27. Once the judge found that Article 8(1) was engaged, as it was open to him to do, there was no error in him failing to balance the strength of the claim under Article 8(1) against the public interest consideration arising under Article 8(2).

28. It is true that, as stated by the Tribunal in **Mostafa** at paragraph [23], a finding by the Tribunal that an appellant satisfies the requirements of the Rules would not necessarily lead to a finding that the decision to refuse entry clearance is disproportionate to the proper purpose of enforcing immigration control.

29. But on the facts found by the judge, neither of the two negative considerations discussed by that Tribunal in **Mostafa** at paragraph [21] was in play. The claimant had not contributed to the application being refused by presenting inaccurate information or by omitting something material or committing some comparable misdemeanour.

30. Another relevant consideration identified by the Tribunal in **Mostafa** at paragraph [21] is the impact of a refusal on relationships that "have to be promoted". The Tribunal observed that refusal of entry clearance will not always interfere disproportionately with such a relationship.

31. Judge Manuell was not clearly wrong to proceed on the premise that the relationship between British national children and their Nigerian aunt should be promoted, and similarly that the sibling relationship between the adult claimant and the adult sponsor should also be promoted.

32. Given that the claimant satisfied the requirements of the Rules for entry clearance as a visitor, the refusal decision thwarted the wishes of those concerned without actually benefitting any one, including the general public. Although the family ties between the claimant and the sponsor were weak (having regard to the fact that neither was emotionally dependent on the other), there was no countervailing public interest in maintaining the claimant's exclusion as a temporary visitor.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson