Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/06293/2014

THE IMMIGRATION ACTS

Heard at IAC Manchester	**Decision and Reasons Promulgated**
On 1 April 2016	**On 13 April 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RIZWANA IMTIAZ

Respondent

Representation:

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Sponsor in person

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD). However, for the purposes of this decision, I shall refer to the SSHD as the respondent and Mrs Imtiaz as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Pakistan, born on 3 July 1960. She applied for entry clearance to the United Kingdom as a family visitor. Her application was refused on 13 August 2014. The application was refused under paragraph 320(7A) of the immigration rules on the grounds that the appellant had failed to disclose all her family members living in the UK, as she had only declared her son in her application form. The refusal was also under paragraph 41 of the rules, on the grounds that the respondent was not satisfied that the appellant was genuinely seeking entry only as a visitor and that she intended to leave the UK at the end of her stay. The respondent was also not satisfied that the appellant's circumstances in Pakistan were as claimed, noting a large unexplained deposit in her husband's bank account.

3. The appellant lodged an appeal against that decision. It was asserted in the grounds that there was no intention to deceive, but the appellant had only mentioned her son since he was the only family member she was intending to visit. An explanation was also given for the source of the deposit in her husband's account. In response to the appeal the respondent maintained the decision and did not consider that it was in breach of the appellant's Article 8 rights.

4. The appellant's appeal came before the First-tier Tribunal on 15 April 2015 and was allowed by Judge Nicol in a decision promulgated on 15 May 2015. The judge noted that the right of appeal was limited to the grounds in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002 and therefore considered the appeal under Article 8 of the ECHR. The judge accepted that the appellant, by naming only her son in her application form, had not intended to deceive the Entry Clearance Officer. He also accepted that her circumstances in Pakistan were as claimed, that her intentions in visiting the UK were genuine and that she had no intention of remaining in the UK after her visit. He accepted that she was able to meet the financial requirements of the immigration rules, through her husband. The judge concluded that family life existed between the appellant and her sponsor, that there were exceptional circumstances justifying a grant of leave outside the immigration rules and that the refusal of entry clearance was disproportionate. He allowed the appeal on Article 8 grounds.

5. Permission to appeal to the Upper Tribunal was sought by the respondent on the basis that the judge's finding that family life existed between the appellant and her sponsor was contrary to relevant caselaw such as Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and Ghising & Ors (Ghurkhas/BOCs : historic wrong; weight) (Nepal) [2013] UKUT 567; that the judge's proportionality assessment was inadequate; and that the judge had given inadequate reasons for concluding that the appellant had not intended to deceive the ECO.

6. Permission to appeal was initially refused, but was subsequently granted on 10 September 2015.

7. The sponsor, the appellant's son, appeared before me at the hearing. He was not legally represented. His concern was the decision made under paragraph 320(7A) and the automatic ban arising from paragraph 320(7B) which would prevent his mother from re-applying to visit him. He said that she had not intended to deceive the ECO and had simply misunderstood what was being asked when she filled out the application form. Mr McVeety accepted that the judge's decision on paragraph 320(7A) had not been challenged by the respondent in the grounds and he accepted that the refusal under that paragraph should be overturned. However, with respect to the decision under Article 8, he submitted that the judge had erred in law and had failed to explain why Article 8 was engaged, in the light of the decision in Ghising and the recent case of Kaur (visit appeals; Article 8) [2015] UKUT 487.

8. I then advised the sponsor that the judge's decision on Article 8 could not stand and had to be re-made by dismissing the appeal, but that the decision under paragraph 320(7A) and (7B) would not be maintained by the respondent.

Conclusions

9. As Mr McVeety properly submitted, the judge, in finding that Article 8 was engaged on the basis of the appellant's family life, had failed to engage with the principles in Kugathas and Ghising. He had failed to identify any dependency existing between the appellant and sponsor so as to give rise to a conclusion that family life existed between adult family members. Indeed, there was no evidence of such dependency before him.

10. The Upper Tribunal, in the case of Kaur, referred to previous decisions in Mostafa (Article 8 in entry clearance) [2015] UKUT 112 and Adjei (visit visas – Article 8) [2015] UKUT 261, both of which addressed the application of Article 8 in family visitor cases. The Tribunal, in all those cases, made it clear that Article 8 had to be engaged in the first place, in order for a visit appeal to be able to succeed on such grounds and, in Mostafa, said at [24] 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…"

11. In the circumstances, therefore, Judge Nicol had clearly failed to explain his conclusion that Article 8 was engaged. There was no evidence to suggest that it was.

12. Furthermore, even if Article 8 was engaged, the appellant would still have to demonstrate compelling circumstances justifying a grant of leave outside the rules. That was made clear in Kaur, where the Tribunal said at [27] that:

> "Overall, 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 outside the rules" (see SS (Congo) at [40] and [56]), he is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals."

13. Again, the evidence before the judge did not indicate that any such circumstances existed.

14. Accordingly Judge Nicol plainly erred in his approach to Article 8. There was no evidence before him to show that, even if Article 8 was engaged, there were circumstances existing justifying a grant of leave outside the immigration rules. Accordingly his decision cannot stand.

15. In re-making the decision, I do not accept that Article 8 is engaged. Whilst there are clearly family ties between the appellant and her son, there is no evidence of dependency to show that the ties are anything other than the normal ties between adult family members. Even if Article 8 was engaged it is clear that the appellant has not been able to show that the respondent's decision was in any way disproportionate or that it amounted to a breach of her right to respect for her family life under Article 8 of the ECHR. Whether or not the requirements of the immigration rules under paragraph 41 have been found to be met, that alone is not sufficient to outweigh the public interest so as to justify a grant of leave outside the rules on Article 8 grounds.

16. In re-making the decision, I therefore dismiss the appeal on human rights grounds. I would emphasise again, however, that as Mr McVeety accepted, the refusal under paragraph 320(7A) is not upheld.

DECISION

17. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside and the SSHD's appeal is allowed. I re-make the decision and substitute a decision dismissing Mrs Imitiaz's appeal on Article 8 grounds.

Signed

Upper Tribunal Judge Kebede