Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08805/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 10th July 2017	**On 17 July 2017**
Prepared on 11th of July 2017	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS AQEELA SHABIR
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr Z Nasim of Counsel
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 2nd of June 1987. She appeals against the decision of Judge of the First-tier Tribunal Parkes sitting at Sheldon Court, Birmingham on 26th of October 2016 in which he dismissed her appeal against a decision of the Respondent dated 11th of September 2015. That decision was to refuse the Appellant's

application for entry clearance as a spouse. The Appellant wished to join her husband Mr Shabir Hussain, a British citizen ("the Sponsor") whom she married on 7th of April 2015. The Sponsor had divorced his first wife by decree absolute on 24th of October 2013.

2. The application was refused on the basis that the Respondent was not satisfied that the couple intended to live together as husband and wife. The Respondent was concerned that there was no evidence presented to show how the couple had met or what sort of contact they had enjoyed both prior to and since their marriage. The Appellant had visited the United Kingdom for 5 months in 2014 but there was no indication that she had met the Sponsor on that occasion or how the wedding came to be arranged.

The Decision at First Instance

3. The Appellant appealed and the Judge indicated in his determination that if the relationship was indeed not genuine and subsisting then the appeal must fail. Having considered the matter however, he stated at paragraph 6 of his determination: "the evidence is now significantly greater than it was before the ECO. There is more of visits by the Sponsor and they now have a daughter and it was the Sponsor who registered her birth. Given the evidence of contact between them, including the phone and other records in the papers the Appellant has shown the relationship is genuine and subsisting."

4. The Judge found that Article 8 of the Human Rights Convention was engaged and directed himself in accordance with the Razgar step-by-step approach. The 3rd question in Razgar was whether the interference with the couple's married life was in accordance with the law. The Judge commented at paragraph 8 that at the time the decision was made the evidence before the Respondent was limited and did not contain much of the information that had now been provided. The decision thus taken by the Respondent was open to him at that time and so could not be said to be unlawful. A decision maker could only proceed on the basis of the documentation and other evidence supplied and they would not be acting unlawfully if they made a decision on that basis. The fact that the evidence showed that a different conclusion would now be appropriate did not undermine the earlier decision made on more limited information. The Appellant's remedy was to reapply for entry clearance but this time putting all relevant information before the Respondent. The Judge addressed the question whether it was disproportionate to require the Appellant to make a renewed application in Pakistan. The Appellant's daughter might be able to obtain a British passport but would take some time. Neither the Appellant nor her daughter would be travelling in the near future and therefore could apply again. He dismissed the appeal.

The Onward Appeal

5. The Appellant appealed against this decision arguing that the Judge had failed to refer to Appendix FM of the Immigration Rules and had erred in dismissing the Appellant's appeal on the basis that she should make a renewed application to the Respondent. The application had been refused under the rules but the rules had been met according to the Judge who should therefore have allowed the appeal.

6. Permission to appeal was granted by Judge of the First-tier Tribunal Keane on 9th of May 2017 who found it incumbent upon the Judge to arrive at a finding in respect of the Immigration Rules in the light of the finding that the Appellant and Sponsor were party to a genuine and subsisting relationship.

7. The Respondent replied to the grant of permission by letter dated 25th of May 2017 opposing the Appellant's appeal. The Respondent argued that under the new appeal regime an Appellant could only challenge the human rights element of an application for entry clearance. As such, a finding that the Appellant met the Immigration Rules would not necessarily lead to the appeal being allowed and was not determinative of the issue in the appeal, see **Mostafa [2015] UKUT 00112**. The Judge found that the Appellant had not submitted to the Respondent the wealth of information which had been presented to the Tribunal. There would be no adverse impact upon the Appellant to require her to submit a new application and as such the decision to dismiss the appeal was not disproportionate.

The Hearing Before Me

8. In oral submissions counsel for the Appellant argued that the documentary evidence which was before the Judge had been contained in a letter dated 14th of October 2015 written by the Appellant's solicitors to the Respondent a month after the decision to refuse. The entry clearance manager had reviewed the appeal on 4th of May 2016 but noted that no new supporting documents had been submitted with the appeal papers. Nevertheless the documentation which persuaded the Judge that the marriage was genuine and subsisting had been before the Respondent even if the entry clearance manager had not engaged with those representations.

9. The issue the Judge had to decide was whether the Respondent's decision was in accordance with the law if the Appellant met the requirements of the Immigration Rules. The rules incorporated Article 8 within them and the relevant date for consideration of the facts was, as the Judge pointed out at paragraph 2 of the determination, the date of hearing. The case cited by the Respondent in the reply to the grant of

permission, **Mostafa**, could be distinguished from the facts in this case. In **Mostafa** the Appellant was a visitor and there was no right of appeal under the rules. The Judge nevertheless had allowed the appeal under the rules when the Tribunal had no jurisdiction to do so. If the decision in the instant case was wrong the only conclusion would be to allow the appeal. If the Appellant met the Immigration Rules a decision to refuse entry clearance could not be in accordance with the law. Since April 2015 the only relevant ground of appeal was a human rights appeal. This was a human rights appeal as it involved a marriage application.

10. In response the Presenting Officer accepted that since 6th of April 2015 the only right of appeal was on human rights grounds. There were no reported cases on the point that counsel for the Appellant was raising. One way to read the new right of appeal provisions was indeed as submitted by counsel for the Appellant but the issue had not been clarified in the courts. Whether the ratio in **AS Somalia** (that Article 8 in an out of country case was to be decided at the date of decision) still stood was also to be clarified. For the Appellant counsel argued that the new appeal provisions contained in the 2002 Act had changed that position.

Findings

11. This appeal raises a short point, although not one without difficulty, on the issue of proportionality in Article 8 appeals. The application for entry clearance was refused by the Respondent because the Respondent was not satisfied that the Appellant and Sponsor were in a genuine and subsisting marriage. On the basis of the evidence before the Respondent that was an understandable decision and the Judge at first instance found no error in it. On the basis of further evidence which post-dated the decision the Judge found that the Appellant and Sponsor were in a genuine and subsisting marriage. The Appellant argues that her solicitors supplied this further evidence after the date of decision but before the entry clearance manager reviewed the papers. It does not appear that the further evidence which proved the marriage was genuine and subsisting was before the entry clearance manager when he reviewed the matter some months later.

12. That was unfortunate because had the evidence been before the entry clearance manager it may not have been necessary to have had these proceedings at all. The Judge did not deal with that point but proceeded on the assumption that he was seeing evidence which the Respondent had not seen. The appeal had been accepted by the Tribunal as a valid human rights appeal. The issue was whether the appeal had to be considered outside the Immigration Rules as a human rights only appeal because there was no appeal under the rules. Alternatively, as counsel sought to argue before me, the rules themselves were a statement of human rights and therefore if a wrong decision had been taken (in this case to find that the marriage was not genuine and

subsisting when it was), then the decision could not be in accordance with the law.

13. This argument begs the question whether the Immigration Rules incorporate Article 8 or whether they are a statement of how the Respondent proposes to discharge her functions in the light of her obligations under Article 8. If counsel for the Appellant is correct then any attempt to restrict appeal rights arising from adverse decisions taken under the Immigration Rules will fail because such decisions will always have a right of appeal. This would severely affect legislative attempts to control appeal rights. Counsel did not submit a skeleton argument to support his oral submissions and both parties agreed there is no decided case law on this point. I would be very reluctant to be drawn into allowing this appeal on the basis of a potentially floodgates decision that overturns the legislative intention.

14. Section 85 (4) of the 2002 Act provides that on an appeal against a decision to refuse a human rights claim the Tribunal may consider any matter which it thinks relevant to the substance of the decision including a matter arising after the date of the decision. This suggests that the Tribunal may consider the situation at the date of hearing. At that date in this case it was established that the Appellant and Sponsor were in a genuine and subsisting marriage.

15. Rather than finding that the Respondent's decision was not in accordance with the law, the better course in my view is to find that the decision was not proportionate to the human rights engaged since the effect of the decision was to keep the Appellant and Sponsor apart when they were in a genuine and subsisting marriage and had a child who was potentially a British citizen. I would not be prepared to find that a decision taken by the Respondent at a time when only limited information had been made available to him was not in accordance with the law because subsequently it was shown on further evidence that the decision was incorrect. To that extent I agree with the Judge at first instance.

16. I also take the point raised by the First-tier Judge when granting permission that it was incumbent upon the First-tier Tribunal to make a decision based on the finding that there was a genuine marriage. The Respondent's decision to refuse admission to the Appellant interfered with the Appellant and Sponsor's family life and in all the circumstances was disproportionate to the legitimate aim pursued. I do not accept that there was no legitimate aim in this case. The entry clearance manager had not seen the further representations made but Islamabad is a busy post and there may be a number of reasons for that not all of which would reflect badly on the Respondent.

17. Since the Appellant could meet the rules the provisions as to very compelling circumstances that need to be shown when applying outside

the Rules would not apply thus the Judge might well have been right in saying that it was not particularly onerous for the Appellant to reapply. She would have to pay a further fee but the delay in waiting for a further decision from the Respondent might well be no greater than the delay in processing an appeal through the Tribunal. However, the Appellant did not have to show very compelling circumstances, she merely had to show that she could comply with the rules and that the decision was disproportionate under Article 8. This she could do. I find that the decision was disproportionate in all the circumstances and therefore allow the appeal under Article 8.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I remake the decision by allowing the appeal.

Appellant's appeal allowed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 11th of July 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

The Judge at first instance made no fee order. Given that the information which led to the appeal being ultimately allowed before me was not before the Entry Clearance Officer at the date of decision, I too would not make a fee order in this case.

Signed this 11th of July 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge