IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/17133/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 October 2014	**On 5 November 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ENTRY CLEARANCE OFFICER-ABU DHABI

Appellant

and

SAKINA BI

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Not represented. Sponsor attends.

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Entry Clearance Officer ("ECO"). However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Pakistan born on 18 November 1959. She made an application for entry clearance as a visitor, that application having a date of 27 June 2013 on the visa application form ("VAF") itself but recorded as having been received by the respondent on 3 July 2013. For the purposes of this appeal the actual date is not material.

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3. In a decision dated 15 July 2013 the ECO refused the application. The basis of the refusal was that the appellant had not provided any evidence of support that she is said normally to receive from her husband, and her son in the UK. It was also said that she had not provided evidence as to her husband's whereabouts, employment, income or his ability to support her. The ECO concluded that the appellant had not established that her personal and financial circumstances in Pakistan are as she had made them out to be and had provided little evidence of any social or economic ties to Pakistan, or in relation to any close family she may have there. It was concluded that there was little to encourage the appellant to leave Pakistan at the end of the period of the visit to the UK. Thus, it was decided that she had not established that she was genuinely seeking entry as a visitor to the UK or that she intended to leave the UK at the end of the visit.

4. Her appeal against that decision came before First-tier Tribunal Judge Ghaffar on 16 June 2014. At that hearing, the sponsor Mr Hussain Abid, the appellant's son, attended and gave evidence.

5. Judge Ghaffar made findings of fact in favour of the appellant, concluding that the appellant lived in Pakistan with her family, is supported by her sons and is in receipt of a pension. Notwithstanding what appeared on the Visa Application Form in terms of the appellant having stated that her husband lived with her, he accepted that he had in fact passed away and that the appellant was in receipt of a pension from him. He accepted the appellant's explanation as to the completion of that form. He made various other findings and ultimately came to the conclusion that the appellant had established that she intends a family visit to the UK and that she would return at the end of the period of the visit.

6. The Secretary of State sought permission to appeal against the judge's decision on the basis that, in fact, the appellant's right of appeal was limited to race discrimination and human rights grounds. This, it was contended, is the effect of section 52 of the Crime and Courts Act 2013 ("the Crime and Courts Act"). Permission to appeal was granted on that basis by a Judge of the First-tier Tribunal.

7. At the hearing before the First-tier Tribunal the appellant was not legally represented, and was not represented at the hearing before me. There was no interpreter at the hearing before me. By coincidence, the day prior to the hearing before me I made a decision that no interpreter was required, given that the issue was one of law and it was not expected that any oral evidence would be given. In the event, at the hearing before me there was a friend of the sponsor who attended and assisted the sponsor to understand the proceedings. Nevertheless, I offered the sponsor the opportunity of having the hearing adjourned so that he could have the benefit of a court appointed interpreter. The sponsor however, was clear that he wanted the hearing to proceed.

8. At the end of the hearing I informed the sponsor that my provisional view was that the First-tier Judge had made an error in law and that it was likely that I would change his decision and dismiss the appeal. In more formal language, I have decided that the decision of the First-tier Tribunal does involve the making of an error on a point of law such as to require the decision to be set aside to be re-made.

9. The point in issue is in fact a relatively straightforward one in legal terms. For present purposes, I have taken the date of the application for entry clearance as 27 June 2013. On 25 June 2013, section 52 of the Crime and Courts Act 2013 came into force. It made certain amendments to the (amended) section 88A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The new, amended, section 88A of the 2002 Act, from 25 June 2013, so far as material, now provides as follows:

> **"88A Entry clearance**
>
> (1) A person may not appeal under section 82(1) against refusal of an application for entry clearance unless the application was made for the purpose of–
>
> (a) **…**
>
> (b) entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.
> …
> (3) Subsection (1)–
>
> (a) does not prevent the bringing of an appeal on either or both of the grounds referred to in section 84(1)(b) and (c), and
>
> (b) is without prejudice to the effect of section 88 in relation to an appeal under section 82(1) against refusal of entry clearance."

10. Section 88A(1)(a), which is deleted by virtue of the Crime and Courts Act, related to "visiting a person of a class or description prescribed by regulations". That, in effect, with the regulations that were made, allowed for appeals in family visitor cases.

11. The meaning of "the bringing of an appeal on either or both of the grounds referred to in section 84(1)(b) and (c)" in section 88A(3)(a) above is that appeals on race discrimination or human rights grounds may still be brought in an appeal against a refusal of entry clearance, even where it is not an appeal of a type concerning entering as a dependant (as set out in section 88A(1)(b) above).

12. The Crime and Courts Act 2013 (Commencement No.1 and Transitional and Saving Provision) Order 2013, (S.I. 2013 No.1042) ("the Commencement Order"), amongst other provisions of the Crime and Courts Act, brought section 52 into force on 25 June 2013. Article 4 of that Order provides that section 52 only applies to an application for entry clearance made on or after 25 June 2013.

13. This appeal is 'caught' by the amendment to the 2002 Act. The effect of the Crime and Courts Act and the Commencement Order is that the grounds of appeal in this case are limited to race discrimination and human rights grounds.

14. However, Judge Ghaffar purported to decide the appeal with reference to paragraph 41 of the immigration rules. Although no doubt the amendment brought about by the Crime and Courts Act was not specifically brought to his attention, the ECO's decision does in fact refer to a limited right of appeal. (The question of whether there was a period of time when by legislative oversight the race discrimination ground was deleted from the 2002 Act does not need to be discussed here). The fact is, the First-tier judge had no jurisdiction to consider the appeal under the immigration rules. In these circumstances, I am satisfied that he erred in law and that that error of law requires the decision to be set aside. The decision then requires re-making in the Upper Tribunal, it not being appropriate to remit the matter.

15. Whilst it is, at least in general terms, apparent from the grounds of appeal before the First-tier Tribunal that the appellant does refer to her "human rights", nothing specific is indicated in terms of how the decision would involve an interference with her human rights.

16. The only aspect of human rights that could be in play is the right to family life under Article 8 of the ECHR. Private life rights under Article 8 in these circumstances could not conceivably apply. There was no evidence before the First-tier Tribunal to the effect that the appellant's relationship with her son in the UK, who was born, according to the VAF, on 20 May 1979, amounts to a relationship of anything other than a normal relationship between parent and adult child. There is nothing to indicate that there are features of that relationship that extend beyond normal emotional ties between such family members. Similarly, there was no evidence before the First-tier Tribunal, or indeed before me, to the effect that the appellant has family life with any person in the UK. Her family life appears to be firmly rooted in Pakistan.

17. It is not necessary, or indeed appropriate, for me to determine the issue of whether the appellant does genuinely intend a visit and intends to leave the UK at the end of the period of the visit. In any new application that will be a matter for the ECO to consider.

18. In the circumstances, considering the only conceivable ground of appeal that is available to the appellant, the appeal under Article 8 of the ECHR is dismissed.

Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made, dismissing the appeal under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek 10/10/14