**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: VA/38124/2012

**THE IMMIGRATION ACTS**

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| **Heard at Newport** | **Determination Promulgated** |
| **On 21 March 2014** | **On 30 April 2014** |
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**Before**

**MR C M G OCKELTON, VICE PRESIDENT**
**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**ENTRY CLEARANCE OFFICER - TASHKENT**

Appellant

**and**

**OLIYA YUSUPOVA**

Respondent

**Representation:**

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms G Girenock, Sponsor

**DETERMINATION AND REASONS**

1. This is an appeal by the Entry Clearance Officer against a decision of the First-tier Tribunal (Judge Knowles) which allowed Oliya Yusupova's appeal against a refusal to grant her entry clearance as a visitor under para 41 of the Immigration Rules (HC 395 as amended). For convenience, we will refer to the parties as they appeared before the First-tier Tribunal.

## Background

2. The appellant is a citizen of Uzbekistan who was born on 13 December 1928. On 10 October 2012, the appellant applied for entry clearance to visit her daughter Galina Girenok, the sponsor, who is married to a British citizen and lives in the UK.

3. On 22 October 2012, the Entry Clearance Officer refused the appellant's application on the basis that he was not satisfied that she was genuinely seeking entry for a limited period not exceeding 6 months and that she intended to leave the UK at the end of her proposed visit. Consequently, she failed to meet the requirements in paras 41(i) and (ii) of the Rules. That decision was subsequently affirmed by the Entry Clearance Manager on 8 March 2013.

4. In the notice of decision dated 22 October 2012 under the heading "Your right of appeal" it was stated that:

> "You are entitled to appeal this decision under Section 82(1) of the Nationality, Immigration and Asylum Act 2002."

5. The appellant duly appealed to the First-tier Tribunal. The sponsor appeared at that hearing and gave oral evidence. The Judge found the sponsor to be:

> "…an honest and credible witness who answered the questions put to her in an open and straightforward manner" (para 30 of his determination).

On the basis of the evidence before him, Judge Knowles accepted that the appellant's intention was not, as the ECO and ECM had concluded, to stay in the UK for 12 months but rather, as he found at para 31 of his determination:

> "she is a *bone fide* visitor who does not intend to remain in the UK for any period exceeding 6 months."

6. As a consequence, Judge Knowles allowed the appeal under the Immigration Rules, namely para 41.

7. The Entry Clearance Office sought permission to appeal on the basis that the appellant did not have a full right of appeal by virtue of s.88(2)(c ) of the Nationality, Immigration and Asylum Act 2002 which provides as follows:

> (2) A person may not appeal under section 82(1) against an immigration decision which is taken on the grounds that he or a person of whom he is a dependent –
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> ….(c) is seeking to be in the United Kingdom for a period greater than that permitted in his case by the Immigration Rules."

8. The maximum period of time for which a person may seek entry as a general visitor under para 41 of the Rules is 6 months (see para 41(i)). The Entry Clearance Officer contends in the grounds that, therefore, the appellant only had an appeal, by virtue of s.88(4) on race relations, human rights or asylum grounds. Section 88(4) provides:

> "Subsection (2) does not prevent the brining of an appeal on any otr all of the grounds referred to in section 84(1)(b), (c) and (g)."

9. Section 84(1)(b), (c) and (g) set out the grounds based upon race relations, human rights and removal in breach of the ECHR or Refugee Convention respectively.

10. The ECO was initially refused permission to appeal by the First-tier Tribunal on 5 July 2013 but on 9 August 2013 UTJ Reeds granted the ECO permission to appeal. Thus, the appeal came before us.

## Discussion

11. Before us, the sponsor pointed out that the ECO's decision of 22 October 2012 stated that the appellant had a right of appeal. That is undoubtedly correct but it is trite law to state that the Tribunal cannot by consent obtain a jurisdiction to hear an appeal which is not granted by statute or other legislative provision. It does not appear that the ECO's representative took the jurisdictional point before Judge Knowles. There is no reference to it in the summary of the Presenting Officer's submissions at paras 21-22 of the determination. Nevertheless, if Judge Knowles did not have jurisdiction then the ECO is entitled to raise it as a ground of appeal to the Upper Tribunal even though the point was not taken before the First-tier Tribunal (see Virk and Others v SSHD [2013] EWCA Civ 652).

12. It would appear, however, that Judge Knowles perfectly properly took the point for himself only to decide it in the appellant's favour. At para 27 he said this:

> "27. The respondent contends that, given the appellant's statement that she wished to stay in the UK for a period of 1 year, she cannot prove that she is genuinely seeking entry as a general visitor for a limited period not exceeding 6 months. In my view, this appeal also raises a more fundamental jurisdictional issue. Section 88(2)(c) of the Nationality, Immigration and Asylum Act 2002 provides that a person may not appeal against, inter alia, a decision to refuse entry clearance if that decision is taken on the round that the applicant is seeking to be in the UK for a period greater than that permitted by the Immigration Rules. It follows that, if I were to find that it is the appellant's intention to remain in the UK beyond 6 months, there would be no valid appeal before the Tribunal, let alone the question whether or not she had proved compliance with the requirements of Paragraph 42 of the Rules."

13. As we have already noted, he found that the appellant's intention was not to stay in the UK for a period exceeding 6 months, and, therefore, on the

basis of what he said in para 27 he concluded that he had jurisdiction to deal with the appeal and allowed it under the Rules.

14. Was the ECO's decision "taken on the ground" that the appellant was "seeking to be in the United Kingdom for a period greater than that permitted" under para 41 of the Rules?

15. In the refusal decision the ECO states:

> "The above leads me to doubt that you are genuinely seeking entry for a limited period not exceeding six months or that you intend to leave the UK at the end of your proposed visit. Therefore, on the balance of probabilities, I am not satisfied that you meet the requirements (sic) paragraph 42(i) and (ii) of HC 395".

16. The ECO did not specifically rely upon s.88(2)(c) of the 2002 Act. As we have already noted, the decision recognised on its face, that the appellant was entitled to appeal under s.82(1) of the 2002 Act without reference to any limitation on that right of appeal.

17. One view might be that s.88(2) only applies where the decision maker both identified a ground falling within sub-paragraphs (a)-(d) of sub-section (2) and then recognised the effect of s.88(2) before the decision can be said to have been "taken" on that ground. That interpretation is not, in our view, wholly without merit. If the decision maker wishes to invoke the effect of s.82(2) it might be considered entirely reasonable that the decision maker should unequivocally state that the relevant ground is being invoked. That is, however, not the wording of s.88(2) which merely requires that the decision be "taken" on the relevant ground and it is not necessary that it be "stated to have been taken" on that ground.

18. In AM (s.82(2): Restriction on Grounds) Ghana [2009] UK AIT 0002, the Asylum and Immigration Tribunal considered a case where the decision maker had relied upon a ground falling within s.88(2) but which bore no relationship to the application. There, the Secretary of State had refused the appellant's application on the basis that he was seeking to enter or remain in the UK for a purpose other than one admitted under the Immigration Rules. That is the ground in s.88(2)(d). The purpose was stated to be in order to seek medical treatment but that had been no part of the individual's application. The AIT concluded that a mistaken ground such as this, which bore no relation to the application being considered, could not have the effect under s.88(2) of restricting an individual's right of appeal to human rights, asylum and race relations grounds.

19. At [12], the AIT dealt with the Secretary of State's submission that s.88(2) applied in the following terms:

> "12. …If it is correct, it has the effect that the Secretary of State can deprive an applicant of a right of appeal against an adverse decision by asserting that the decision is made on a ground which has, as in the present case, no bearing at all on the application. We would be unwilling to accede to that view in the absence of the

> clearest statutory provisions. We recognise of course that if s 88(2) on its true construction deprived the appellant of a right of appeal in these circumstances, we are without jurisdiction to consider any grounds other than those set out in s 88(4), however obvious the mistake and however unjust the respondent's decision appears to be."

20. At [14], reflecting in part what we have said above about the statute excluding an appeal where a decision has been "taken" rather than is "stated to have been taken" on a relevant ground, the AIT continued as follows:

> "14. …One would normally expect the notice of decision to be, or to include, the authoritive indication of the grounds upon which a decision has been taken. Whilst not wishing to depart from that principle as a general rule, the wording of the statue does not in our view require us to treat the notice of decision as authoritive in every case. In the present case, although the reason is given in the notice of decision, that is a reason which appears to bear no relation to the application. Despite the wording of the notice of decision, the reason is not one upon which the decision could properly have been taken. The reason given must be a mistake. In the (we hope) unusual circumstance of this case, we have decided that we can safely ignore the assertion in the notice of decision that the ground for it was that the application was being made for a purpose not covered by the Immigration Rules. Instead, we can look at the realities of the case."

21. The AIT went on, however, to distinguish between two situations. The first is where the mistaken ground was lawfully open to the decision maker (where only limited right of appeal would therefore exist) and one which was unlawful as in AM itself (when s.82(2) did not have that effect):

> "15. This is an usual case, because the ground stated is one which does not appear to have been open to the decision maker as arising from the application that was made. Where the ground cited is one which could arise from the application, we think it very unlikely indeed that it will be right for the ground given in the notice of decision to be ignored. That is not the position here. In so far as the refusal was an appropriate – and hence lawful – response to the application, it is a refusal which must have been on grounds other than those alleged.
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> 16. To put that another way, in our judgment s 88(4)(d) restricts the grounds of appeal if the reason cited is a lawful (albeit perhaps wrong) response to the application. If the reason cited has nothing to do with the applications, s 88(2) (d) is of no effect. In the result we have concluded that the appellant's right of appeal is not restricted by s 88(2), and accordingly that we have jurisdiction to deal with all grounds."

22. In our judgment, Judge Knowles was wrong to conclude that s.88(2)(c) did not apply on the basis that he found that the respondent had wrongly (albeit lawfully) come to the conclusion that the appellant intended to stay in the UK for longer than 6 months. In this appeal, we are satisfied that the ECO did take the decision, at least in part, on the ground that the

appellant was "seeking" to be in the UK for a period greater than that allowed by the Rules. Section 88(2) applied even though Judge Knowles considered that, on the evidence before him, the appellant was not seeking to visit the UK for a period longer than 6 months. Consequently, the appellant only had a limited right of appeal by virtue of s.88(4) which, for the purposes of this appeal, meant that her appeal was limited to human rights grounds.

23. The question then is whether the appellant had relied upon human rights grounds? The notice of appeal refers to a supporting document which is attached and dated 17 November 2012. In that letter the sponsor (on behalf of the appellant) puts forward *inter alia*, the circumstances of the appellant including her intention not to come to the UK for longer than permitted under the visitor rule. The letter described the appellant as being 83 years of age and that the sponsor provides $200 per month to her mother out of rental income of a flat inherited by the sponsor in Tashkent. It also points out that the appellant's other daughter is her only other relative in Uzbekistan but she is now visiting her husband in Moscow for a time. The letter goes on to contend that the appellant's family home and roots are in Uzbekistan. However, she is old and lonely and currently without the support of her other daughter. The sponsor points out that it is the sponsor's intention to bring the appellant to the UK, in part, "to provide her with the temporary safe protection of family".

24. At the hearing, we explored with Mr Richards who represented the ECO whether it could properly be said that the appellant had, in fact, appealed relying upon Article 8 of the ECHR. It seems to us that the sponsor in this letter is asserting the right of the appellant to enjoy, albeit temporarily, family life with the sponsor in the UK. It is not necessary for an individual, in order to rely upon human rights grounds, to refer explicitly to a particular right or provision in the European Convention. Where grounds are drafted by legal representatives, it would be usual to expect such reference if reliance is put upon the European Convention but when, as here, an appellant's case is drafted by a lay person without legal help it is the substance rather than the form of the grounds which is more significant. In our judgment, in the particular circumstances of this appeal, it is entirely proper to conclude that the appellant was (through the statement of the sponsor) relying implicitly upon Article 8 of the ECHR.

25. Consequently, we are satisfied that there was a valid appeal before the First-tier Tribunal limited to Article 8 grounds.

## **Re-Making the Decision**

26. Judge Knowles did not, of course, consider Article 8 and it falls to us to determine the appeal under Article 8. The appellant cannot raise the Immigration Rules as a ground because of s.88(2)(c) of the 2002 Act.

27. The burden of proof is upon the appellant to establish on a balance of probabilities that Art 8.1 is engaged in that the decision interferes with

her private and family life. Thereafter, it is for the Entry Clearance Officer to establish that any such interference is justified under Art 8.2.

28. Has the appellant established that the decision interferes with her private and family life?

29. In addition to the evidence that was before Judge Knowles, we also have a further letter from the sponsor dated 28 May 2013. There, the sponsor gives a little more information concerning her sister who left to support her husband in Moscow in September 2012. The letter states that the appellant's sister lived about 50 yards from the appellant's home. The sponsor and her sister agreed to look after their mother in turn depending on who was available to support her at any time. The sponsor explains that that was why she and her husband applied for a one year multiple entry visit visa so that they could look after the appellant as the need arose. The sponsor has been employed in the UK for 9 years working as a carer for elderly people.

30. Given all the circumstances of the appellant including her age, that she is currently living alone though normally supported by her daughter in Uzbekistan and is receiving $200 per month from the appellant (which supplements her pension), we are satisfied that family life exists between the appellant and sponsor and further that the ECO's decision interferes with that family life so as to engage Article 8.

31. Turning to the justification of any such interference under Article 8.2, the interference is clearly "in accordance with the law". The central question is whether it is proportionate in furtherance of a legitimate aim and that involves balancing the public interest against the interests of the individuals. In that regard, Judge Knowles made a number of clear findings including that the appellant is a *bone fide* visitor and will not remain in the UK for any period exceeding 6 months. He concluded that the appellant met the requirements of para 41 of the Rules. Given that, there is, in our judgment, nothing of substance to weigh against the interference with the family life of the appellant and sponsor in the furtherance of effective immigration control as an aspect of the legitimate aim of furthering the economic well being of the country.

32. In these circumstances, we are not satisfied that the ECO has established that the public interest outweighs the interference with the family life of the appellant and sponsor. Thus, we are satisfied on a balance of probabilities that the decision breaches Article 8 of the ECHR.

## **Decision**

33. For the above reasons, the First-tier Tribunal's decision to allow the appeal under the Immigration Rules involved the making of an error of law and we set it aside.

34. We remake the decision allowing the appeal under Article 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

Date:

**TO THE RESPONDENT**
**FEE AWARD**

We make no fee award. We agree with the First-tier Tribunal Judge's decision and reasons that no fee award should be made on the basis that it accepted in the grounds of appeal that the application could have been clearer, in which case, the respondent's decision might well have been different and the costs of bringing the appeal should therefore lie with the appellant.

Signed

A Grubb
Judge of the Upper Tribunal

Date: