IAC-TH-LW/AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/00573/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2014 and 8 January 2015	**On 16 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

HELENE RACHEL TCHUEMBOU EPSE TCHUENTE
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:
For the Appellant: None
For the Respondent: Mr T Melvin of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Cameroon born on 10 January 1947. She is sponsored by her son, Christian who is a British citizen.

2. On 23 December 2013 she applied for entry clearance as a family visitor to see the Sponsor. On 15 January 2014 the Respondent refused the application because he was not satisfied the Appellant met the

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requirements of the Immigration Rules (the IRs) and in particular that she would be a genuine visitor and intended to leave the United Kingdom at the end of her proposed visit as required by paragraphs 41(i) and 41(ii). He had noted that on her previous application for entry clearance which had been granted she had stated that she would stay for two weeks and in fact had stayed for more than three months.

3. Additionally, the Respondent refused the application under the general grounds of paragraph 320(7A) of the IRs because the Appellant had failed to declare that she had on three previous occasions been refused a visa by the French authorities.

The First-tier Tribunal proceedings

4. On 27 January 2014, through her then solicitors, she lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are generic and lacking in any particularity. They include a note that detailed grounds would follow but none have, although for the First-tier Tribunal hearing on 21 August 2014 the Appellant was represented and a bundle for her had been filed.

5. By a determination promulgated on 27 August 2014 Judge of the First-tier Tribunal Eldridge found the Appellant did satisfy the requirements of paragraphs 41(i) and 41(ii) of the IRs and that the Respondent had been in error when refusing the application under paragraph 320(7A). He considered the Respondent had not established that the Appellant had been dishonest and intended to misrepresent the position when she had lodged the original application for entry clearance. He cited *AA (Nigeria) v SSHD [2010] EWCA Civ.773* which concerned the effect of innocent misrepresentation in immigration law and concluded:-

> ... Under the *Razgar* five-step approach I find there is an interference with family life between mother and son. Because I find the Appellant met the requirements of paragraph 41 and the Respondent was not entitled to refuse under paragraph 320(7A), the decision cannot be lawful, justified or proportionate.

He concluded that the decision under appeal was "not compatible with Article 8" and went on to allow the appeal and make a whole fee award on the basis that a fee award should normally follow the event if an appeal was allowed.

Permission to Appeal

6. The ECO sought permission to appeal on the grounds that the Judge had failed to engage appropriately with the reasons why the Applicant had failed to leave the United Kingdom on her previous visit until long after the two weeks which she had stated she intended for her visit but within the permitted period of her leave. The Applicant had failed to explain why she had not left until much later and so the decision to refuse her entry clearance under paragraph 41(ii) was correct in law. The second ground

was that the Judge had failed to have regard to the public interest factors outlined in Section 117B of the 2002 Act and this amounted to a material error of law.

The Upper Tribunal Hearings

7. The Appellant's son, her sponsor, attended the hearing. On the date before the November hearing the Appellant's solicitors notified the Tribunal they were no longer instructed. Mr Melvin handed up additional submissions for the Respondent together with the judgments in *ZB (Pakistan) v SSHD [2009] EWCA Civ 834* and *AAO v ECO [2011] EWCA Civ 840* and the determination in *ECO Dhaka v SB [2002] UKIAT 02212* which is generally known as *Shamim Box*.

8. For the ECO Mr Melvin submitted that the Judge had not engaged with the Appellant's failure to explain why she had not left after a fortnight, being the proposed length of her previous visit to the United Kingdom.

9. The Judge had erred in considering the appeal by way of reference to the Immigration Rules because the Appellant's right of appeal was limited to human rights and racial discrimination grounds following the coming into force of the amendments to Section 88A of the 2002 Act effected by Section 52 of the Crime and Courts Act 2013 brought into force on decisions made subsequent to 25 June 2013.

10. He continued that the Judge's treatment of the claim under Article 8 outside the IRs was inadequately reasoned and there was no assessment of the proportionality of the decision under appeal to the legitimate public objectives contained in Article 8(2). The close bond between the Appellant and her Sponsor son was insufficient reason to find the decision was such an interference to family life as to engage the state's obligations under Article 8.

11. I summarised the submissions to the Sponsor in layman's terms as well as the basic principles applying to claims made under Article 8 of the European Convention. I noted to Mr Melvin for the ECO that the authorities he had submitted related mainly to removal or expulsion cases or family re-union cases, and asked what authority there was in respect of out of country visitor appeals other than the determination in *Shamim Box*. I indicated that I was concerned about a lack of authority or guidance on the application of Article 8 jurisprudence to visitor entry clearance cases and was minded to find that there was a material error of law in the First-tier Tribunal determination.

Consideration

12. I was satisfied the Judge's consideration of the appeal in relation to Article 8 of the European Convention contained a material error of law. The Judge had failed to take into account that the grounds of appeal available to the Appellant was limited to human rights and race discrimination and a

finding that the Appellant had in fact met the requirements of paragraph 41 of the IRs by itself was insufficient to show that the refusal of entry clearance was disproportionate to a legitimate public objective. The Judge's treatment of the claim under Article 8 was cursory and failed specifically to take into account the factors affecting the public interest identified in Section 117B of the 2002 Act which had come into force some three weeks before the First-tier Tribunal hearing.

13. By reason of the lack of authority I decided that the appeal should be heard in the Upper Tribunal.

The Resumed Hearing

14. The resumed hearing was set for 8 January. The Appellant applied for an adjournment because the Sponsor would not be able to attend. No explanation why he would be unable to attend was given and on 5 January 2015 the Appellant at the Sponsor's address was notified that the application for an adjournment had been refused.

15. On 8 January 2015 the Sponsor was not present. No message had been left with the reception desk at Field House and searches of the waiting areas at Field House did not disclose the Sponsor or any representative for the Appellant. I was satisfied that due notice of the time, date and place set for the hearing had been given to the Appellant in accordance with the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended and that having regard to the over-riding objective of Rule 2 and the issues raised in the grounds for appeal it was just to proceed with the hearing in the absence of the Sponsor or any representative for the Appellant.

16. Mr Melvin submitted a skeleton argument for the ECO. This referred to the restriction imposed from 25 June 2013 by Section 52 of the Crime and Courts Act 2013 the right of to appeal in cases where entry clearance for a family visit had been refused to race relations or human rights grounds.

17. The skeleton argument referred to the judgment in *Patel v SSHD [2013] UKSC 72* in which the Supreme Court noted that Article 8 of the European Convention outside the IRs was not a general dispensing ground.

18. The skeleton argument considered the Judge had failed to engage with any claim the Appellant might have had under Article 8 within the Immigration Rules and had not performed any balancing exercise in relation to the Article 8 claim outside the Rules whether there was a dependency between Appellant and the Sponsor beyond normal ties between parents and adult children and had failed to perform any exercise balancing the rights of the Appellant for respect to her private and family life against the public interest in maintaining proper immigration control. Additionally, the Judge had failed to take into account the ECO's view of the public interest in the assessment of claims engaging Article 8 as provided by Section 117B of the 2002 Act.

19. Additionally, the ECO provided evidence of the cost of family visit entry clearance applications and a copy of Standard Note SN06363 last updated 5 July 2013 from the House of Commons Library about the Abolition of Family Visitor Visa Appeal Rights.

20. Mr Melvin relied on his skeleton argument.

Findings and Consideration

21. Having heard evidence from the Sponsor, the Judge found that the Appellant did in fact satisfy the requirements of paragraph 41 and allowed the appeal against the refusal under paragraph 320(7A) of the Immigration Rules and that the Appellant did in fact meet the requirements of paragraph 41 of the Immigration Rules for the issue of entry clearance to her as a family visitor.

22. There was no challenge by the ECO to the Judge's findings that the Appellant did in fact meet the requirements of paragraph 41 of the Immigration Rules for entry clearance as a family visitor or to his decision to allow the appeal against the refusal under paragraph 320(7A) of the IRs (use of deception etc.). There was no material additional evidence about the relationship of the Appellant and the Sponsor, her son which went to suggest that the nature and quality of the relationship was anything other than that which would normally subsist between a parent and an adult child.

23. Parliament has decided that those refused entry clearance for purposes of a family visit because the Entry Clearance Officer at the Visa Post and the Entry Clearance Manager consider the applicant does not meet the requirements of paragraph 41 shall not be entitled to seek a judicial determination of the issue by way of appeal by reference to the Immigration Rules. Parliament has decided that the only grounds of appeal in such cases shall be race discrimination or Article 8; in this case, that the decision fails to respect the family life of the Appellant and her son protected by Article 8 of the European Convention outside the Immigration Rules. The Appellant has not made any allegation of race discrimination.

24. With this in mind, I adopt the approach to appeals on grounds of Article 8 in accordance with jurisprudence which comes from Strasbourg and from *Huang v SSHD [2007] UKHL 11* and subsequent judgments summarised at paragraphs 7-12 of *EB (Kosovo) v SSHD [2008] UKHL 41***.** The Appellant and her son clearly have a family life. They pursue it while the son is in the United Kingdom and the Appellant is in Ghana. They have chosen to pursue their family life in this manner for some years. The refusal of entry clearance to the Appellant to visit her son is an interference with her family life. She has on previous occasions visited her son and he has visited her.

25. Although the Appellant has been found to meet the requirements of paragraph 41 of the Immigration Rules I do not find the refusal of entry clearance in the circumstances of the Appellant and her son is a sufficiently serious interference with her family life as to engage the United Kingdom's obligations under Article 8 to respect the family life of the Appellant and her son. The son could, as he has in the past, visit the Appellant in Ghana. The Appellant could apply again for entry clearance and this time she would have the benefit of the findings of fact made by the Tribunal. The additional cost and delay are not matters which are sufficiently serious to engage the state's obligations under Article 8.

26. The consequence is that the appeal must fail on human rights grounds.

Anonymity

27. There was no request for an anonymity lowdown and having considered the appeal I find none is warranted.

NOTICE OF DECISION

The First-tier Tribunal's determination contained a material error of law. It is set aside insofar only as it relates to a consideration of the Appellant's appeal outside the Immigration Rules under Article 8 of the European Convention.

The following decision is substituted:-

The appeal is dismissed on human rights grounds.

No anonymity order is made.

Signed/Official Crest Date 15. i. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE ECO: FEE AWARD

The appeal of the Appellant has been dismissed so there can be no fee award.

Signed/Official Crest Date 15. i. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal