Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/00695/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On: 28 May 2015

Decision and Reasons Promulgated
On 12 June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KINETIBEB AREGA KASSA
(no anonymity direction made)

Respondent

Representation
For the Appellant: Mr D Mills, Home Office Presenting Officer
For the Respondent: Mr M McGarvey, McGarvey Immigration and Asylum

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Keane in which he allowed the appeal of Mr Kassa, a citizen of Ethiopia, against the Entry Clearance Officer's decision to refuse to grant leave to enter as a family visitor. I shall refer to Mr Kassa as the Applicant, although he was the Appellant in the proceedings below.

2. The Applicant applied for entry clearance as a family visitor on 22 October 2013. His application was refused on 20 December 2013. The Applicant exercised his right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Keane

on 5 December 2014 and was allowed by virtue of Article 8 ECHR. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Pirotta on 13 February 2015 in the following terms

> "The grounds of the Application were that the IJ had failed to identify the correct basis of the appeal, made a material error on the ambit of § 41 of the Immigration Rules where the right to appeal was limited by s.84 (1) (c) of the Nationality, Immigration and Asylum Act 2002. The IJ had used Article 8 as a general dispensing power to override the criteria of the Immigration Rules and limitation on the right of appeal.
>
> The evidence before the Court showed that the Appellant did not meet the criteria of the Immigration Rules, the limited right of appeal was granted but the IJ did not apply the correct approach and limit the ambit of the appeal. The reasons given for the IJ's decision amount to a decision that refusal interfered with the family life of the Appellant and Sponsor, but without considering the balancing exercise necessary and permitted interference with family rights, which the Appellant and Sponsor had not exercised in the United Kingdom before, or the fact that they could exercise family life elsewhere if they chose.
>
> The Determination discloses an arguable material error of law. There is merit to the application."

3. At the hearing before me Mr Mills appeared to represent the Secretary of State and Mr McGarvey represented the Applicant and submitted a written skeleton argument. A section 24 response was filed by the Applicant dated 21 May 2015.

Background

4. The history of this appeal is detailed above. The facts, not challenged, are that the Applicant was born in Ethiopia on 28 November 1977. He is married to the Sponsor, Naomi Cantor, who is a British citizen. The application for entry clearance was made on 22 October 2013 to the British Embassy in Stockholm as the Applicant was resident in Sweden where he was studying for an LL.M in Human Rights. The application showed that the Applicant intended to travel on 22 December 2013 and a detailed statement submitted with the application explained that he wished to spend Christmas with the Sponsor and her parents Mr and Mrs Geoffrey Cantor.

5. The Applicant had a significant immigration history and had been refused entry clearance as a visitor previously. This history was referred to in the detailed statement submitted with the application and although this statement was referred to in the Entry Clearance Officer's refusal the application was refused on the basis that the Applicant had used deception on a previous occasion. The refusal referred to paragraph 320(7B) of HC395 and stated that any future applications would automatically be refused until 31 October 2021.

6. At the First-tier Tribunal hearing the Entry Clearance Officer was not represented. The Sponsor and Mr and Mrs Cantor were present on the Applicant's behalf. The Judge heard evidence from all three and having done so made findings of fact

detailed at paragraphs 6 and 7 of his decision. This findings included a specific finding (see paragraph 7) that the Applicant did not use deception and did not make false representations in the application for entry clearance that was refused in Nairobi on 31 October 2011. Having made these findings the Judge considered and allowed the appeal by virtue of Article 8 ECHR.

7. The grounds of appeal to the Upper Tribunal do not challenge the findings of fact made by the First-tier Tribunal. They assert a material misdirection of law by the making of an inadequate proportionality assessment. The grounds assert that the Judge was wrong to find that the decision under appeal interfered with family life within the meaning of Article 8, that the decision does not interfere with the established pattern of family life and that the Judge failed to explain adequately why preventing the Applicant and Sponsor being together temporarily was a disproportionate interference with Article 8 rights.

Submissions

8. On behalf the Secretary of State Mr Mills said that he could not rely on all of the grounds of appeal to the Upper Tribunal and added that he did not suggest that the decision was perverse. It was clear that family life existed and that the Entry Clearance Officer had accepted that the decision constituted a limited interference however such interference was not of sufficient gravity to engage Article 8. No adequate reasons had been given for the finding that the refusal of Entry Clearance for a two week visit was of such gravity as to engage the Convention. Article 8 was being used a general dispensing power and this was a misdirection in law.

9. Having read the skeleton argument I did not ask Mr McGarvey to address me. I said that there was no error of law revealed and I reserved my written decision.

Error of law

10. The grounds of appeal to the Upper Tribunal assert a material misdirection in law and, as accepted by Mr Mills, do not assert any perversity in the decision.

11. Dealing with the grounds as put forward paragraphs 3 – 5 do not advance any argument at all. There is the statement that if family life does not exist then Article 8 will not be engaged. That is a statement of the obvious but there is no suggestion in this case that family life does not exist. Paragraphs 4 and 5 are mere statements of disagreement with the Judge's decision as are paragraph 7 and 8. The only part of the grounds which can in reality be seen as a challenge of any sort to the decision is paragraph 6. This suggests that the proportionality assessment is inadequate because it does not explain why the refusal of a visa which only allows the parties to be together temporarily is a disproportionate interference with their Article 8 rights adding that there is no assessment as to why the Sponsor cannot visit the Applicant in Sweden or a third country.

12. An examination of the decision clearly demonstrates the fallacy of these arguments. In the first place there can be no doubt that the Judge was aware that the grounds of

appeal were limited to the Human Rights Convention. At the outset of his decision (paragraph 1) he states

> "At the hearing I was solely concerned to resolve the issue whether the respondent's decision to refuse to grant entry clearance engaged the United Kingdom's obligations and the appellant's rights under the Human Rights Convention".

The Judge goes on to examine in detail the contentions of both the Entry Clearance Officer and the Applicant as well as the evidence and the submissions put forward at the hearing.

13. The recent decision of the Upper Tribunal in Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC) emphasises that the first question to be addressed in a visitor appeal where only human rights grounds are available is whether Article 8 is engaged at all. Where, as in this instance, the Judge finds that Article 8 is engaged

> "… the Tribunal will need to look at the extent to which the claimant is said to have failed to meet the requirements of the rule because that will inform the proportionality balancing exercise that must follow".

The clear *ratio* of Adejie is that where Article 8 is not engaged compliance with the Immigration Rules is not an issue before the Tribunal. Where it is engaged compliance with the rules is capable of being a weighty factor that must be assessed.

14. In making his findings of fact the Judge examines the reasons for refusal. He was clearly correct to do so. Whereas this was not an Immigration Rules appeal Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) is authority for the proposition

> "… that the underlying merits of an application and the ability to satisfy the Immigration Rules, although not the question before the Tribunal, may be capable of being a weighty factor in an appeal based on human rights but they will not be determinative."

15. In this case the Judge having made findings of fact that deal with the question of whether the Applicant satisfied the requirements of the Immigration Rules goes on to explain why Article 8 is engaged. In doing so he goes through the Razgar [2004] INLR 349 HL criteria (paragraph 8) and finds that there is family life and that the interference has consequences of such gravity to engage Article 8. In making this assessment the Judge refers specifically to the fact that the visit proposed was one of only two weeks but it is also clear that his decision was informed by the fact that underlying the decision was the Respondent's assertion that the Applicant would be prevented from visiting the United Kingdom until 2021.

16. The assertion that the Judge's reasoning is inadequate either in respect of the gravity of the interference or in respect of the proportionality balancing exercise is, quite simply, not made out. The reasoning is detailed clear and comprehensive. There is no error of law disclosed.

17. Finally it is perhaps pertinent to comment upon the Secretary of State's assertion that the Judge used Article 8 as a general dispensing power to override the criteria of the

Immigration Rules and limitation on the right of appeal. This is in my judgement an ill founded assertion. In the first place where an Appellant meets the criteria of the Immigration Rules, even where their is no right of appeal, a decision made that an Appellant meets those criteria cannot by any stretch of the imagination be to override those rules. As recognised in Mostafa it may well be pertinent to the Article 8 proportionality decision to examine whether an Appellant meets the requirements of the rules and, where he does it may well be a weighty factor. Secondly where Article 8 is engaged it is perverse to assert that by so doing the Tribunal is in some way overriding the limitation on the right of appeal. Where an applicant meets the requirements of the Immigration Rules his application should be granted. Entry Clearance Officers should not use the limitation on the right of appeal to avoid granting entry clearance to applicants who meet the requirements of the rules.

18. My conclusion from all of the above is that the decision of the First-tier Tribunal contains no error of law material to the decision to allow the appeal. The appeal of the Secretary of State is therefore dismissed.

Summary

19. The decision of the First-tier Tribunal did not involve the making of a material error of law. I dismiss the Secretary of State's appeal and the decision of the First-tier Tribunal stands.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal