IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/03644/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 11 November 2015 **On 9 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS MAVIS PFENDE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: The Sponsor in Person

DECISION AND REASONS

1. This is an appeal by an Entry Clearance Officer against a decision by First Tier Tribunal Judge Norton-Taylor, allowing the Respondent's appeal against a decision by an Entry Clearance Officer refusing to issue her with a visit visa.

2. The Respondent is a national of Zimbabwe born on 12 June 1952. On 28 May 2014 she applied for entry clearance as a family visitor to visit her daughter and two grandchildren. This application was refused on 20 June 2014 with reference to paragraph 320(7A) of the Immigration Rules on the

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basis that false representations had been made in the form of a false bank statement that had been produced as part of the visa application. Reference was also made to a document verification report which the Entry Clearance Officer said that was held on file.

3. The Respondent appealed. Her appeal was limited by virtue of Section 88A to human rights grounds only and on 26 August 2014 the Duty Judge decided that the grounds of appeal made sufficient reference to Article 8 that the Tribunal had jurisdiction to hear the appeal.

4. The appeal then came before First-tier Tribunal Judge Norton-Taylor on 20 April 2015 at Hatton Cross. The appeal was on the float list and there was no representative on behalf of the Entry Clearance Officer. The Sponsor, who is the Respondent’s daughter, attended and gave evidence. She was unrepresented. In a decision dated 22 April 2015, First-tier Tribunal Judge Norton-Taylor allowed the appeal.

5. The judge noted at paragraph 7 that the burden of proving the facts in relation to paragraph 320(7A) was upon the Secretary of State and the applicable standard was that of a balance of probabilities. He further directed himself that the burden was upon the Respondent in respect of all other matters to the same standard of proof. In relation to paragraph 320(7A) the judge directed himself in light of the decision in AA (Nigeria) [2010] EWCA Civ 773 that the Secretary of State must discharge the burden of showing that the Respondent or a third party acting on her behalf had a dishonest intention when making false representations. Crucially at [13] the judge noted that there was no document verification report in the Secretary of State’s bundle nor were the impugned bank statements submitted. The judge also heard evidence from the Sponsor, who, as he records at [15], adamantly denied that any false documents had been submitted with the application.

6. As a consequence the judge at [17] found that the Secretary of State had entirely failed to prove her case that any documents submitted by the Respondent were false and he found that no false representations were in fact made and no evidence had been adduced to support the ’s case.

7. The judge then went on to consider the appeal with regard to paragraph 41 of the Immigration Rules and found at [20] that the Respondent has rental and pension income in Zimbabwe and there was a very good reason for the proposed visit, i.e. to attend the Sponsor’s graduation. He went on to find at [21] that the Respondent would have returned to Zimbabwe in compliance with the conditions of entry clearance and that the Sponsor would be able to accommodate and maintain her mother without recourse to public funds, paragraph 22.

8. He also noted at [24] that the Sponsor and her two children had recently visited Zimbabwe, which, he found, provided a clear indication that the desire and intention to maintain family ties not only between the

Respondent and the Sponsor but most importantly between the Respondent and her grandchildren in the United Kingdom.

9. The judge then considered the recent decision in Mostafa [2015] UKUT 00112 (IAC) and he noted that the President had found that Article 8 had an important role to play when viewed in the context of family visits and this should be applied purposefully especially when children are concerned. He went on to find at paragraph 26 that there was family life between the Respondent and the Sponsor and/or the Sponsor's children and at [27] that the decision of the Entry Clearance Officer interfered with or failed to respect family life to a sufficiently serious extent in order to engage Article 8 as the decision prevented the family from being able to come together. He found that the decision of the Entry Clearance Officer was premised upon an allegation of dishonesty and had not been supported by any evidence. He then proceeded to allow the appeal both on the basis that the Respondent satisfied all the requirements of paragraph 41 of the Rules and in light of this it was difficult to see how the entry clearance refusal could be said to be justified under Article 8(2).

10. The Secretary of State on behalf of the Entry Clearance Officer made an application for permission to appeal in time on 1 May 2015. The grounds in support of the application asserted that family life would not normally exist between adult signatures, parents and adult children, absent dependency representing more than the normal emotional ties, and reliance was placed on the case of Kugathas [2003] EWCA Civ 31.

11. The grounds further asserted that the judge erred in failing to make any clear finding on whether or not there was a financial dependency and even if there was this does not amount to a dependency to a sufficient degree to ground a finding that family life exists. Absent dependency, family life arguably does not exist and there was therefore no need to address proportionality and the judge erred in law in proceeding to the proportionality assessment.

12. It was further submitted that the proportionality assessment was inadequate as it does not explain why the refusal of the visa which allows the parties to be together only temporarily is a disproportionate interference with Article 8.

13. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 16 June 2015 on the basis that both grounds were arguable. The judge noted that the Entry Clearance Officer did not challenge the finding that she had failed to discharge the burden of proving that false representations had been made in support of her application, so essentially the grounds were limited to the manner in which Judge Norton-Taylor dealt with Article 8.

14. At the hearing before me on 11 November 2015, the Sponsor again appeared unrepresented and the Entry Clearance Officer was represented by Ms Fijiwala. I heard detailed submissions from Ms Fijiwala in line with the grounds in support of the application for permission to appeal. She

also very helpfully handed up two further decisions of the Upper Tribunal that postdate the decision in Mostafa. The first of these is the case of Adjei [2015] UKUT 0261 (IAC), which was heard on 21 April 2015 and promulgated on 6 May 2015. The facts in Adjei are distinct from the facts in this case. In particular, the claimant in that case wished to visit her extended family in the United Kingdom. Whilst she had a 2 year old daughter she did not apply for entry clearance on her behalf, so the application was just in relation to visiting her father, stepmother and stepsiblings.

15. Since the decision in Adjei, the Upper Tribunal on 28 July 2015 considered the case of Kaur [2015] UKUT 00487 (IAC) and in a decision promulgated on 25 August 2015 looked at the previous decisions in Mostafa and Adjei, considered whether they were consistent with each other and concluded at [29] that they were. In particular they considered whether compliance with paragraph 41 of the Rules would or would not carry weight in respect of an assessment of this kind in respect of Article 8 and they held that, even if a person meets the requirements of paragraph 41, this does not necessarily establish that they win under Article 8 because it may not be engaged. The Upper Tribunal went on to find on the facts of that case that there were family ties established between the Appellant, who was a widow and her family in the United Kingdom. There was also evidence that she had income and further relatives in India.

16. I find that there are strong similarities between this case and the case of Kaur in respect of the Article 8 aspect of that case. It is, however, distinguishable on the basis that Mrs Kaur did not meet the requirements of paragraph 41 of the Rules. Bearing in mind all the case law, I uphold Judge Norton-Taylor's finding that family life was engaged and that the decision to refuse entry clearance was not proportionate. Thus he did not materially err in law in allowing the appeal. The basis of the refusal was essentially with reference to paragraph 320(7A) of the Rules and the judge found that the Entry Clearance Officer had not discharged the burden of proving this, absent any evidence before him. He was clearly entitled to reach this finding, which has not been challenged by the Entry Clearance Officer.

17. The Judge correctly directed himself in respect of the decision in Mostafa at [23] and [24] and I note in particular that whilst there reference is made to the types of family relationship which does not necessarily include grandparents and grandchildren the case of Marckx v Belgium [1979] 2 EHRR 330 does establish that family life can subsist between grandparents and grandchildren. He correctly directed himself at [31] that, whilst the Respondent was not a spouse but the mother and grandmother of the Sponsor and her children, given his finding that family life was established and an interference with that family life was made out, a "weaker" form of family life tie could not provide justification pursuant to Article 8(2), given that the Respondent met the requirements of the Rules.

18. Therefore, whilst Judge Norton-Taylor did not have the benefit of the decisions of the Upper Tribunal in Adjei and Kaur I find that this would not have made any material difference to his decision and he was entitled to rely on the decision of the Upper Tribunal in Mostafa. In those circumstances the judge was not required to give further deference to the Entry Clearance Officer’s view of where the public interest lay and bearing in mind that the issue concerned family life the requirements of Section 117B are not necessarily material and would not have made a difference to his decision.

19. For these reasons I dismiss the appeal by the Entry Clearance Officer and uphold the decision of First-tier Tribunal Judge Norton-Taylor allowing the appeal by Mrs Pfende.

Notice of Decision

20. The Entry Clearance Officer’s appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Chapman