IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/16654/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th March 2015	**On 15th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR KASSIM SHAHASI SHEHE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NAIROBI

Respondent

Representation:
For the Appellant: Mr C Yeo (Counsel)
For the Respondent: Ms L Kenny (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Thorne, promulgated on 25th April 2014, following a hearing at Hatton Cross on 9th April 2014. In the determination, the judge allowed the appeal of Mr Kassim Shehe. The Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male and a citizen of Kenya. He was born on 3rd March 1989. He appealed against the decision of the Respondent dated 16th July 2013 to refuse him entry clearance as a visitor under paragraph 41 of HC 395 in order to visit his UK Sponsor, Mr Adam Salkeld, with whom he is in a relationship.

The Judge's Findings

3. In his witness statement, the Appellant states that he worked for the ICWE in a freelance capacity since 2010, and that "he missed the Sponsor and wanted to be able to visit him and his friends and family in the UK" (paragraph 19). The judge also heard from the Sponsor, Mr Salkeld, and observed that, "I found him to be a reliable and honest witness. His account was inherently plausible, internally consistent and accorded with the available documentary evidence. His credibility was not challenged in cross-examination" (paragraph 20).

4. The judge noted how the Sponsor had invited the Appellant to visit him in the UK and that, "he said it was difficult for him to visit the Appellant in Kenya because of work commitments in the UK and also because it was illegal to be openly gay in Kenya" (paragraph 21). There was evidence before the judge that the Sponsor himself was a man of substance, "earning about £100,000 a year. He produced recent HMRC tax returns and a letter from his accountants dated 1st April 2014 which supported what he said." Moreover, there was documentary evidence "of the fact that he owned properties in London and Wales" (paragraph 24).

5. It was in these circumstances that the judge considered the law. He observed that,

> "my task on an appeal on an ECHR ground against the decision of the primary official decision maker, refusing leave to enter or remain in the UK, was to decide whether the challenged decision was unlawful as incompatible with an ECHR right or compatible and so lawful" (paragraph 29).

6. The judge then went on to say that, "the first task of the Appellate Immigration Authority was to establish the relevant facts …" (paragraph 30).

7. The judge then held that he was satisfied that, as far as the Appellant was concerned, "that at the time the ECO took the decision, he was genuinely seeking entry as a visitor for the limited period specified and that he intended to leave the United Kingdom at the end of the proposed visit" (paragraph 46).

8. The judge also held that, "I accept the Sponsor is in a subsisting relationship with the Appellant as claimed and that the Sponsor can provide sufficient accommodation and maintenance. For reasons given above I found the Sponsor to be an honest and reliable witness …" (paragraph 47).

9. With respect to the Appellant himself in Kenya, the judge observed that,

> "I am satisfied that the Appellant has sufficient links with the home country so as to establish a motive to return. I accept that he is gainfully employed running his own freelance business on the tourist industry of east Africa and that he has no motive or intention to stay in the UK" (paragraph 48).

The judge observed the letters from ICWE that backed up the story of the Appellant with respect to his employment there.

10. It is in these circumstances that the judge concluded that, "it is pure speculation to say that this Appellant lacks a motive and intention to return" because "he has every motive and intention to return to his family and business in Kenya" (paragraph 49).

11. There was one additional factor in favour of the Sponsor, namely, that "he has successfully sponsored visitors to the UK before" and the judge is clear that, "there is in my judgment no reason to suppose that he would allow this Appellant to overstay now" (paragraph 50).

12. The judge accordingly then proceeded, having established the facts, to apply the provisions of ECHR to the facts and to consider the legal position in relation to the Appellant's alleged rights under human rights law. The judge concluded that, "the Appellant has a family and private life with the Sponsor which requires respect under the ECHR …" (paragraph 53). The judge also referred to the case of **Chikwamba [2008] UKHL 40** to state that,

> "It seems to me that refusing the Appellant's appeal in these circumstances (where I am satisfied that he was a genuine visitor who could be maintained and accommodated without a drain on the public purse) and requiring him to reapply would be wholly disproportionate and Kafkaesque in the extreme" (paragraph 54).

13. The appeal was allowed.

Grounds of Application

14. The grounds of application state that the appeal was under Article 8 only but the judge made findings of fact as if considerations under paragraph 41 of the Immigration Rules remained in issue, and this amounted to an error of law. Secondly, the grounds stated that any reasoning in the determination justifying consideration of the Appellant's Article 8 rights outside the provisions contained in Appendix FM of the Rules had to first satisfy the requirements set down in **Gulshan**, and the judge showed no evidence of this.

15. A Rule 24 response was entered dated 26th November 2014, by Mr Yeo. It is measured and well crafted. It clearly states that no identifiable or comprehensive error of law has actually been identified in the Grounds of Appeal. The judge's factual findings are unchallenged. The judge had not allowed the appeal under the Immigration Rules. The judge allowed the appeal under Article 8 ECHR.

The Hearing

16. At the hearing before me, Mr Yeo helpfully handed up the latest Upper Tribunal determination in this area, namely, the case of **Mustafa (Article 8 in entry clearance) [2015] UKUT 00112**. Mr Yeo submitted that a copy of this had been sent last week to the Respondent Secretary of State. Ms Kenny confirmed that she had a copy of this decision. It was, however, Ms Kenny's appeal on behalf of the Respondent Secretary of State. She addressed both of the Grounds of Appeal in her initial application.

17. First, she submitted that following the new Rules with respect to visitors, the only way that an appeal could be allowed would be for breach of human rights or discrimination law. The judge was aware of this. He set out at paragraph 28 that, "I can only consider this appeal by reference to Article 8 of the European Convention on Human Rights". The judge also went on at paragraph 31 to then specifically refer to Article 8 and the issue of proportionality. However, in making his findings of fact, the judge then has regard to paragraph 41 of HC 395 considerations that are specific to what is required by the Immigration Rules. For example, the judge states (at paragraph 46) that, "he was genuinely seeking entry as a visitor for the limited period specified".

18. Second, these considerations are not relevant, and cannot inform a decision to allow the appeal, under Article 8 of the ECHR. It is in this context that the judge then goes on to apply the House of Lords decision in **Chikwamba**, and to say that, "he is and was always a genuine visitor who could be maintained and accommodated …". The judge was plainly influenced by the Immigration Rules and should not have been. This was a human rights appeal under the ECHR.

19. Third, if the judge was then going to look at the position under Article 8 ECHR, then, as **Gulshan** makes clear, he had to be able to demonstrate why it was necessary to go outside the Immigration Rules so as to be allowing the appeal under freestanding Article 8 ECHR. This the judge had not been able to do.

20. For his part, Mr Yeo submitted that the reasoning of the Respondent Secretary of State, as submitted by Ms Kenny, was confused and convoluted. On the one hand it was being said that the Rules were not relevant and ought not to have been taken into account. On the other hand, it is said that the Rules should have been the primary focus, and only if the appeal did not succeed under the Rules, could one go outside the Rules and look at freestanding Article 8 jurisprudence, but that in that event, one would need to be able to show exceptional circumstances and a proper justification, for allowing the appeal under Article 8. None of this, submitted Mr Yeo, made sense.

21. The proper approach was set out by the Upper Tribunal in Mustafa, where UTJ Perkins, in anticipating the rule changes that were to come into effect on 6th April 2015, explains how human rights appeals are to be considered in visitor cases. What that case makes clear is that, whereas an appeal cannot be allowed under the Immigration Rules, because appeal rights have now been removed for visitors under the Immigration Rules, where a judge proceeds to allow the appeal under Article 8 ECHR,

> "the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such a refusal is proportionate to the legitimate aim of enforcing immigration control".

That was made clear in the head note. It was salutary to bear it in mind, submitted Mr Yeo.

22. Second, any suggestion that the Appellant had to show "exceptional circumstances" was misconceived, because, as Mustafa makes clear, if the Appellant met the

Immigration Rules, though an appeal could not be allowed under the Immigration Rules, this was a relevant factor that went directly to the "proportionality" of the decision in question, such that it was superfluous then to embark upon a consideration of "exceptional circumstances". In **Mustafa**, submitted Mr Yeo, the judge had made the mistake which the instant judge did not make. In **Mustafa**, the judge allowed the appeal specifically under the Immigration Rules. Judge Thorne, in this case, however, specifically did not allow the appeal under the Immigration Rules. He allowed it under Article 8. His decision was impeccable in its logic.

23. In reply, Ms Kenny submitted that **Mustafa** does not contradict the case put forward by the Respondent Secretary of State. For example, **Mustafa** makes it clear that there is a duty of "candour" upon the Appellant and that if an Appellant "had contributed to the application being refused by presenting inaccurate information or by omitting something material …" then this would go against the Appellant. In this case the Appellant did not submit all the documents in the first instance. They were made available only at the appeal. Moreover, in **Mustafa** the Tribunal made it clear that the relationship had to be one that was not just "based on a whim" or was not one that "will not add significantly to the time that the people involved spend together" (paragraph 24). In this case, the Sponsor could visit the Appellant in Kenya and so it was unclear why Article 8 had to be engaged in the manner alleged. Mr Yeo interjected to say that there had been no application to amend the grounds and these were new points that were being raised.

No Error of Law

24. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCA 2007) such that I should set aside the decision. My reasons are as follows. The judge's approach in this determination is not only clear and comprehensive, but is indeed impeccable in its logic in emphasising that the appeal cannot be allowed under the Immigration Rules, because appeal rights have been removed under the Rules, but can only be allowed under Article 8 ECHR. The judge against this background, then proceeds to make findings of fact.

25. In so doing, it is clear that these findings of fact have not been challenged at all by the Respondent Secretary of State, but it is also clear that the judge then finds that the balance of proportionality considerations fall in favour of the Appellant because the Appellant "was genuinely seeking entry as a visitor for the limited period specified" only (paragraph 46). These are considerations that arise from the Immigration Rules, but, are "capable of being weighty, though not determinative, factors when deciding whether such refusal is proportionate".

26. This principle arises directly from the Upper Tribunal's recent determination in **Mustafa**. From 25th June 2013, Section 52 of the Crime and Courts Act 2013 has amended Section 88A of the Nationality, Immigration and Asylum Act 2002, so that there is no right of appeal against refusal of entry clearance in family visitor cases except on grounds alleging that the decision shows unlawful discrimination or is unlawful under Section 6 of the Human Rights Act 1998.

27. In this case, Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002, has been amended to the effect that, "that the decision is unlawful under Section 6 of the Human Rights Act 1998 … as being incompatible with the Appellant's Convention rights" before a right of appeal will accrue.

28. The judge in this case was perfectly mindful of the legal jurisdiction in which he was operating. He also made findings of fact which were not dissimilar to findings made in **Mustafa**.

29. In **Mustafa**, the Tribunal held that the claimant husband, who was intending to visit his sponsoring wife in the UK, "has shown that refusing him entry clearance does interfere with his, and his wife's, private and family lives" and that "it will be necessary to assess the evidence to see if the claimant meets the substance of the Rules. This is because … the ability to satisfy the Rules illuminates the proportionality of the decision to refuse him entry clearance" (paragraph 9).

30. In **Mustafa**, the Tribunal held that the denial of entry clearance "would have a significant impact on the claimant's right to enjoy family life", and that the claimant "had strong ties" with his home country, and that these ties were ones "arising from his being in regular, rewarding work and … living there" (paragraph 10). The same has as much been found by Judge Thorne with respect to the Appellant. The judge was entitled to do so. The judgment by IJ Thorne ends with the observation that, "it will only be in very unusual circumstances" that Article 8 will not be relevant when cases involve "close life partners or a parent and a minor child" (paragraph 24).

31. Once the judge had found that the Appellant and the Sponsor were in a subsisting relationship and were close to each other and wanted to continue in this relationship Article 8 became directly relevant. The judge was entitled to conclude as he did. There is no error of law here.

Notice of Decision

32. There is no material error of law in the original judge's decision. The decision shall stand.

33. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 7th April 2015