Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/17316/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10 November 2015

Decision & Reasons Promulgated
On 23 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

AFIA BEGUM
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER - DHAKA, BANGLADESH

Respondent

Representation
For the Appellant: Ms M. Chowdhary, instructed by Mac Solicitors.
For the Respondent: Mr N. Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 21 January 1954. She applied for entry clearance as a visitor, online, on 22 June 2013. The hardcopy of her application and her fee were received by the respondent on 10 July 2013. The specific dates are important because as of 25 June 2013 appeals against refusal of family visit visas may be brought only on human rights grounds.

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2. The appellant's husband and five children live and are settled in the UK and the evidence of her son at the hearing before the First-tier Tribunal ("FtT") was that the appellant wished to come to the UK for a period of six months to visit them.

3. The respondent refused the appellant's application for entry clearance on the basis that the requirements of Paragraph 41 of the Immigration Rules were not met. It was not accepted that she genuinely intended to leave the UK on completion of the proposed visit. The refusal of entry clearance, dated 28 July 2013, stated that her right of appeal was limited to the grounds in section 84(1)(c) of the Nationality and Asylum Act 2002.

First-tier Tribunal decision and grounds of appeal

4. The appellant appealed and her appeal was heard by FtT Judge Lobo. The FtT found that the application for entry clearance was not received by the respondent in a manner which allowed it to be processed until 10 July 2013 and therefore there was no right of appeal under the Immigration Rules.

5. The judge then considered the appeal, in the alternative, on the basis that the appellant did have a right of appeal. The FtT concluded that the appellant could not satisfy the Rules. The reasons for so finding are set out only briefly, in paragraphs [16]- [18], where it is stated:

> "16. ... The appellant has failed to address the matters raised by the respondent in the refusal.
>
> 17. There is no satisfactory evidence of the financial support which the appellant claims she receives from her relations in the United Kingdom; £725 over five years which is the equivalent to £145 per year. There is no evidence of the agricultural income which the appellant claims she is given.
>
> 18. There is no satisfactory evidence of the appellant's financial and social circumstances in Bangladesh"

6. The judge's consideration of Article 8 is equally brief. It is set out in paragraph [19] which I have reproduced in full:

> 19. The appellant enjoys a family life with her children and her husband who live in the UK, and has done so for many years, notwithstanding their geographical distance and the relationship that has clearly blossomed. There is no reason why this family life cannot continue. The refusal of the appellant's application for a visit visa does not interfere with her Article 8 rights.

7. The grounds of appeal submit:

    a. there is a right of appeal under the Immigration Rules because the relevant date is the date the application was submitted on-line, not the date the fee was paid;

    b. the judge erred in his approach to the Immigration Rules by, inter alia, applying too high a burden of proof as he sought to ascertain a specific income when the Rules do not identify a threshold requirement; and

c. the judge erred by failing to recognise Article 8 was engaged.

Consideration

8. The first issue is whether the appellant has a full right of appeal or whether, instead, her appeal is limited to Article 8 of the ECHR.

9. Under Section 52 of the Crime and Courts Act 2013, appeals against refusal of a family visit visa applied for on or after 25 June 2013 may be brought only on human rights grounds. The appellant made on online application on 22 June 2013 but did not pay the required fee until 10 July 2013. Accordingly, if the application was made on the date of the online application she has a full right of appeal but if it was made only when the fee was paid then her right of appeal is limited to human rights grounds.

10. The parties drew to my attention the following provisions in the Immigration Rules:

    Paragraph 34(G)(iv): "the date on which an application ... is made is ... where the application is made via the online application process, on the date on which the online application is submitted."

    Paragraph A34(iii)(a) "When the application is made via the relevant online process any specified fee in connection with the application must be paid in accordance with the method specified."

11. Ms Chowdhary argued that the Immigration Rules do not specify the role of a fee in validating an application and that under Paragraph 34G(iv) the relevant date when an application is made online is the date on which the online application is submitted. Mr Bramble's response was that an application is not live, and therefore cannot be said to be "submitted", until the fee has been paid.

12. Paragraph 34(G)(iv) stipulates that an online application is made on the date it is "*submitted*". Submitted is not a defined term. The plain meaning of submitted, in the context of making an online application, is that the online application is "submitted" when it is electronically transmitted to the recipient. I can see the logic in, and attractiveness of, Mr Bramble's argument (and the finding of the FtT) that for an application requiring a fee to be fully submitted, such that it can be processed, the fee must also be received. However, Paragraphs 34(G)(iv) and A34(iii) do not state that the application is not submitted until the fee is received. Taken together, and given their ordinary meaning, these Rules provide that an online application is made when it is submitted online, even if the fee is not paid at that time. Accordingly, the FtT erred in law by finding that the appellant did not have a right of appeal under the Immigration Rules. That error was not, however, material as the FtT considered the appellant's appeal under the Immigration Rules in the alternative.

13. The appellant's appeal under the Immigration Rules concerns Paragraph 41 of the Immigration Rules which sets out the requirements for leave to enter as a general visitor. These include that a visitor must be (a) genuinely seeking entry as a general

visitor for a limited period and (b) intending to leave the UK at the end of the period of the visit.

14. The appellant is a 61 year old woman living in Bangladesh whose husband and five children live in the UK. She has not visited them – and they have not visited her – for many years. She lives on agricultural land owned by her husband, using the land's crops to meet her needs. She receives financial gifts from her husband and children, although the extent of this is unclear, and she has previously been refused entry to the UK.

15. The respondent refused the appellant entry clearance on the basis that it was not accepted she intended to leave the UK after her trip. In particular it was noted that:
    a. she was previously refused entry clearance on the ground that she had more ties to the UK than Bangladesh and there has since then been no significant change in circumstances; and
    b. she had failed to provide evidence of her financial and social circumstances in Bangladesh that would establish her intention to leave the UK

16. The FtT found that the appellant had failed to address the matters raised by the respondent and that, in particular, there was no evidence of the appellant's financial and social circumstances in Bangladesh.

17. Ms Chowdhary submitted that the FtT reached its conclusion without having regard to relevant evidence, in particular:
    a. The witness statements of the appellant's children which demonstrated that money was remitted to her primarily through friends and relatives rather than through bank transfers;
    b. The witness statements of the appellant's children confirming that she would be accommodated and maintained without recourse to public funds;
    c. The bank transfer forms showing money being transferred and received by the appellant from her family in the UK;
    d. Her appellant's sons up to date bank statements showing his financial ability to support her;
    e. The appellant's up to date finances showing savings of almost £850;
    f. The official land registration documentation showing land owned by the appellant's husband and the evidence of family members that the appellant resides on her husband's ancestral lands and property, from which she is able to subsist by eating the crops grown there

18. Ms Chowdhary argued that Paragraph 41 does not lay down an explicit sum of money that the appellant must have in order to be granted entry clearance. Rather, the relevant question is whether the appellant will be able to maintain and

accommodate herself without recourse to public funding. The evidence from her husband and children that was before the FtT was such that this question should have been answered in the affirmative. Mr Bramble argued, in response, that the FtT had taken into consideration the relevant evidence and reached a conclusion open to it under the Immigration Rules.

19. The FtT's decision, although brief, demonstrates that the evidence before it was taken into consideration. It is apparent at paragraph [17] that the FtT had regard to the witness evidence pertaining to financial support for the appellant (finding it to not be satisfactory) and the circumstances of the agricultural land upon which she resides. Most importantly, the judge has considered the evidence (or absence thereof) concerning the appellant's ties to Bangladesh as opposed to the UK which goes to the heart of the issue of whether she intends to leave the UK at the end of her stay. The burden of proof lay on the appellant to show only a genuine visit was intended. Given the evidence of her close relations to and desire to be with her family in the UK, and the lack of evidence to show why her links to Bangladesh were such that she would wish to return after a visit the UK despite the clear wish on her part and on that of her children in the UK for her to be with her family in the UK, it was open to the FtT to reach the conclusion that the appellant did not satisfy the requirements of Paragraph 41.

20. I now turn to Article 8 of the ECHR. Article 8 in visitor appeals was recently considered by the Upper Tribunal in *Kaur (visit appeals, Article 8)* [2015] UKUT 00487 (IAC), where the difficulty of making a successful Article 8 claim having not satisfied Paragraph 41 was confirmed:

> "Unless an appellant can show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the rules" (see SS Congo at [40] and [56]), he is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals"

21. The FtT in this case has given Article 8 only cursory consideration and has stated that the absence of a visit visa does not interfere with the appellant's Article 8 rights. For the reasons set out below, I find that the FtT erred in its approach to Article 8 but that the error was not material.

22. Although the appellant has not seen her husband and children in the UK for many years, the evidence is that they enjoy a close relationship where the children provide financial support to her. In these circumstances I find that the ties between the appellant and her children – and certainly between her and her husband – fall within the scope of Article 8(1) and that denying the appellant the opportunity to visit her family in the UK interferes with her, and their, right to respect for family life. Refusing the appellant entry, however, is not a disproportionate interference with that right.

23. Given the appellant does not satisfy the requirement of Paragraph 41 to show she intends only a genuine visit, there is a weighty public interest in denying her entry

(having regard, in particular, to Section 117B(1) of the Nationality, Immigration and Asylum Act 2002) that only compelling circumstances will overcome. No such compelling circumstances have been shown in this case where it has been, and continues to be, open to the appellant's children and husband to visit her in Bangladesh.

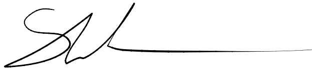
Decision

a. The appeal is dismissed.

b. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.

c. No anonymity order is made.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 16 November 2015