Upper Tribunal
(Immigration and Asylum Chamber) **Appeal**
Numbers: VA/17835/2013

VA/17836/2013

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision and Reasons Promulgated**
On 12 October 2015	**On 2 November 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

ENTRY CLEARANCE OFFICER – ANKARA

Appellant

and

MR MORIS GELASHVILI
MISS NATIA GELASHVILI

Respondents

Representation:

For the Appellant: Mr Tom Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr Boris Gelashvili (Sponsor)

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the ECO) appeals against the decision of the First-tier Tribunal (Designated First-tier Tribunal Judge Manuell) allowing the respondents' appeals against a decision taken on 21 August 2013 to refuse entry clearance as family visitors.

Introduction

3. The respondents are citizens of Georgia, brother and sister, born there in 1997 and 1994. They applied to visit their father, Mr Boris Gelashvili ("the sponsor"), who is lawfully resident in the UK as the spouse of an EEA national.

4. The ECO accepted the respondents' identity and nationality but doubted their account as to how they were supported in Georgia by their mother and thus how their studies would continue. The ECO was not satisfied that the respondents were genuinely seeking entry to the UK as visitors or that they intended to leave the UK at the end of their visit. The applications were refused and the appeal was reviewed by an entry clearance manager on 14 January 2014 who maintained the decision.

The Appeal

5. The respondent appealed to the First-tier Tribunal and the sponsor attended an oral hearing at Richmond on 1 June 2015. The First-tier Tribunal found that the respondents met the requirements of paragraph 41 of the Immigration Rules ("the Rules") and that the basis of the refusal was unfounded. The only right of appeal was under Article 8. The judge found that there was family life between the sponsor and the respondents. The respondents remained dependents and under the control of their parents. It was entirely reasonable that the sponsor wished to receive the children in his own home and to introduce them to his life in the UK. The refusal constituted an interference with the sponsor's right to family life. The ECOs decisions were incorrect and that had a major bearing on proportionality. There was no evidence that the respondents were likely to breach their visa conditions or otherwise infringe UK law if they were permitted to visit the UK. The appeals were allowed.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law because the proportionality assessment was inadequate. The judge did not find any reasons why the sponsor could not visit the respondents in Georgia. The decision did not interfere with family life between the sponsor and the respondents.

7. Permission to appeal was granted by Designated First-tier Tribunal Judge McClure on 31 July 2015. It was arguable that the decision did not interfere with family life, rather the insistence of the respondents that they be able to exercise family life by way of a visit to the UK. It was also arguable that where the sponsor can visit Georgia, such means that the decisions are proportionately justified.

8. Thus, the appeal came before me

Discussion

9. Mr Wilding submitted that the proportionality assessment was inadequate. Paragraph 14 of the decision refers to Mostafa (Article 8 in entry clearance) [2015] UKUT 112 {IAC) and Adjei (visit visas – Article 8) [2015] UKUT 262 (IAC) but the fact that the sponsor does visit Georgia was not included in the proportionality assessment. Natia was 18 as at the date of application on 7 August 2013. There is nothing to prevent the respondents from re-applying and relying upon the judge's finding that the requirements of the Rules are met. There is no dispute as to the facts but the decision should be remade and the appeals dismissed.

10. The sponsor submitted that he has tried to obtain visit visas for the children for the last five years. Natia is very good at English language. The children want to visit the UK. The sponsor wants to bring them here for two weeks. They have a very big interest in the UK.

11. I have considered Mostafa and Adjei. The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether Article 8 of ECHR is engaged at all. If it is not, which will not infrequently be the case; the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the Rules and should not do so. If Article 8 is engaged then the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the Rules because that may inform the proportionality balancing exercise that most follow. As compliance with paragraph 41 of the Rules is not a ground of appeal to be decided by the Tribunal, any findings concerning that will carry little weight, especially if based upon arguments advanced only by the appellant. If the appellant were to make fresh application for entry clearance then the ECO will, if requested to do so, have regard to the assessment carried out by the judge but will not be bound by those findings to treat the appellant who, at least at the date of the appeal hearing, met the requirements of paragraph 41 of the Rules.

12. Mostafa is not authority for the proposition that, despite the legitimate legislative intention to remove a right of appeal against adverse entry clearance applications in visit cases on the grounds that the ECO was wrong to find the claimant did not meet the requirements of the Rules, the Tribunal can nonetheless continue to determine such issues. The point being made in Mostafa at paragraph 24 is simply that where it is established that Article 8 is in fact engaged, it will still be necessary to assess whether the claimant meets the substance of the Rules. Put another way, a person who satisfies the Tribunal that he does meet the requirements of paragraph 41 of the Rules does not succeed on that account. He still has to demonstrate that refusal represents an unlawful infringement of rights protected by Article 8. For a person who does not satisfy the requirements of paragraph 41 to succeed in an appeal there would have to be cogent and compelling reasons demanding that he should succeed.

13. The Upper Tribunal in Mostafa made it clear that it was dealing with a very narrow range of claimants. In practical terms, that is likely to be limited to cases where the relationship is that of husband and wife or other close life

partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together. It is a question of fact in each case whether relationships between adult relatives disclose sufficiently strong ties such as to fall within the scope of Article 8. There can be family life between adults but the issue will be how dependent the older relative is upon the younger ones and whether this dependency represents more than normal emotional ties. From Ghising and others [2013] UKUT 00567 (IAC), adults will need to be valuing and depending on each other for mutual support and affection. I am satisfied that this case falls within the "very narrow range" identified in the recent case law, given the fact that Moris was a child as at the date of decision and both respondents were wholly dependent upon their parents.

14. In this case, the ECO does not dispute that there is family life between the respondents and the sponsor. I find that there is nothing in the case law to the effect that visit visa appeals cannot succeed under Article 8 if the sponsor can visit the country where family members reside. The judge correctly used his findings on the Rules to inform the proportionality balancing exercise. This case was previously before the Upper Tribunal on 25 July 2014 when Deputy Upper Tribunal Bruce stated at paragraph 8 of the decision that, "*If the appellants could demonstrate that they were genuine visitors who intended to return to Georgia after three weeks, the (ECO) could hardly demonstrate that their exclusion was somehow necessary for the public interest*". I find that the decision of the judge was wholly consistent with the approach previously adopted by the Upper Tribunal in this case.

15. Whilst the judge did not explicitly refer to the sponsor's visits to Georgia it is evident that the judge was aware of those visits. The proposed visits to the UK were clearly not based upon a whim because the application process has been ongoing since at least 2013. There is no evidence that the visits will not add significantly to the time that the respondents and appellants spend together, particularly if a pattern of visits can be established. No error of law arises from the finding that the ECOs decision amounts to a substantial interference in the sponsor's right to family life with the respondents. The judge correctly took into account the legitimate wish of the sponsor to receive the respondents in his home and to introduce them to his life in the UK. I further find that no material error of law arises from the proportionality assessment.

16. Thus, the First-tier Tribunal's decision to allow the respondents' appeals under Article 8 did not involve the making of a material error of law and its decision stands.

Decision

17. Consequently, I dismiss the appeal of the ECO.

Signed Date 30 October 2015

Judge Archer
Deputy Judge of the Upper Tribunal