Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/19742/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 April 2015	**On 6 May 2015**

Before

Upper Tribunal Judge Southern

Between

Entry Clearance Officer (Accra)

Appellant

and

Pricsilla Adjei

Respondent

Representation:

For the Appellant: Ms A. Vigiwala, Senior Home Office Presenting Officer
For the Respondent: Ms E. Aryee of Immigration Practitioners Service LLP

DETERMINATION AND REASONS

1. The Entry Clearance Officer ("the ECO") has been granted permission to appeal against the decision of First-tier Tribunal Judge S. Taylor who, by a determination promulgated on 22 October 2014, allowed the respondent's appeal against refusal to grant her entry clearance for a family visit. To avoid confusion, I shall refer to the respondent as "the applicant".

2. The applicant, who is a citizen of Ghana born on 14 September 1982, applied for entry clearance so that she could visit her father, step mother and step siblings who live in London. She explained that she had lived as part of that family unit before they moved to the United Kingdom in 1994. She remained in Ghana because, as she was over 18 years of age when the family decided to travel to the United Kingdom, it was anticipated that she would not be able to secure entry clearance for settlement. In 2012 she made a 3 month long visit to the United Kingdom and this

time wished to stay for 6 months. She had secured unpaid leave from her employment as well as the agreement of her partner in Ghana. She did not apply for entry clearance for her 2 year old daughter because she anticipated that if she had done so it would have been assumed that she intended more than a brief family visit and so her application would be refused.

3. That application was refused by a decision of the ECO made on 15 November 2013 because the ECO was not satisfied that the claimant was a genuine visitor who intended to leave the United Kingdom at the end of the visit, nor that she did not intend to take employment.

4. Recognising that she could bring her appeal only upon grounds that refusal infringed rights protected by Article 8 of the ECHR, that was the basis upon which the applicant put her case to the First-tier Tribunal:

> "The appellant maintains that the entry clearance Officer's decision to refuse her leave to enter into the UK is against her human rights, in particular her rights under the Art 8 of the ECHR.
>
> The appellant says she has an established family life with her father Mr Adjei who is her sponsor.
>
> The appellant also says she has formed family life with her step mother and siblings in the UK.
>
> The appellant says that the ECO's decision to refuse her case is disproportionate interference to her right to family life. The appellant says that it is cheaper for her to visit her family in the UK to maintain the family life they have established than for the family to visit her in Ghana."

5. It is unambiguously clear that the decision of the judge to allow the appeal discloses material legal error. Quite properly, Ms Aryee made no attempt to suggest otherwise. That is because, despite the fact that the grounds for appealing were based, and could only be based, upon the asserted infringement of the applicant's human rights, the judge allowed the appeal on the basis that refusal was not in accordance with the immigration rules.

6. It is not altogether difficult to see why the judge, on the basis of the information before him, thought that the applicant did meet the requirements of the rules so that the ECO was wrong to conclude otherwise. The judge had regard to the earlier visit, completed in compliance with the terms of the entry clearance granted, noted that the applicant had family ties and employment in Ghana and that the applicant had arranged for her mother, who lives in Ghana, to care for her two month old child while she was away. The judge said there was no reason to doubt that the applicant's employer had granted unpaid leave for the visit so that her employment remained available upon return. The judge said:

> "On the evidence before this Tribunal I find no basis to conclude that she would seek employment in the UK or that she would not return at the end of the visit."

and concluded by saying:

"DECISION

The appeal in respect of the Immigration Rules is allowed."

7. There is no discussion in the determination, at all, of the grounds upon which the appeal was brought and it is plain that the judge has simply not engaged with, or considered, the claim under Article 8. The judge was required by s86(2) of the Nationality, Immigration and Asylum Act 2002 to determine any matter raised as a ground of appeal. What the judge in fact did was to determine a ground of appeal that was not before him and failed to determine the only ground of appeal that was before him. Therefore, the decision to allow the appeal must be set aside and made afresh.

8. Ms Aryee referred in her submissions to *Mostafa (Article 8 in entry clearance)* [2015] UKUT 112 (IAC), and invited the Tribunal to look at the conclusion of the judge in this appeal that the applicant did meet the requirements of the applicable immigration rule and to take that as a starting point for the assessment of the ground of appeal available to the applicant, which was that refusal to grant her application for a visit visa would infringe rights protected by article 8 of the ECHR.

9. That is the wrong approach. 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 the 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, the Tribunal will need to look at the extent to which the applicant is said to have failed to meet the requirements of the rule because that will inform the proportionality balancing exercise that must follow.

10. In this appeal it appeared to the judge that the applicant, notwithstanding refusal of her application, in fact met the requirements of the applicable immigration rule. That issue was not before the judge. It was not open to the applicant to bring a challenge on that basis and there was no challenge in that regard pleaded in the grounds of appeal which asserted only that refusal of entry clearance would bring about an infringement of Article 8 of the ECHR. Therefore there was no reason at all for the ECO to seek to defend his decision on the basis that the applicant should be treated as someone who had not met the requirements of the applicable immigration rule, which is paragraph 41 of HC 395. The ECO was not represented before the judge. This meant that the judge has based his findings of fact upon the case of one party only, as advanced at the hearing and not identified in the grounds of appeal, the other party having no notice of the challenge being pursued.

11. In those circumstances the findings of fact carry very little weight. If the claimant were to make a fresh application for entry clearance 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 applicant as a person who, at least at the date of the appeal hearing, met the requirements of paragraph 41.

12. That approach accords with the legal framework established by primary legislation which makes clear that there is no longer a right of appeal before the Tribunal

against an adverse decision by an ECO in a visit visa case except on human rights or race relations grounds.

13. Nor is that approach inconsistent with *Mostafa (Article 8 in entry clearance)* [2015] UKUT 112 (IAC), the head note of which states:

> "In the case of appeals brought against refusal of entry clearance 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 refusal is proportionate to the legitimate aim of enforcing immigration control."

That is because *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 applicant did not meet the requirements of the rules, the Tribunal can nonetheless continue to determine such issues. The point being made in *Mostafa* is simply that where it is established that Article 8 is in fact engaged, it will still be necessary to assess whether the applicant meets the substance of the rules:

> "In the limited class of cases where Article 8 (1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate. If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8."

Put another way, a person who satisfies the tribunal that he does meet the requirements of para 41 of HC 395 does not succeed on that account. He still has to demonstrate that refusal represents an unlawful infringement of rights protected by Article 8 of the ECHR. For a person who does not satisfy the requirements of para 41, to succeed in an appeal there would have to be cogent and compelling reasons demanding that he should succeed.

14. The Tribunal made clear in *Mostafa* that it was dealing with a very narrow range of applicants:

> "… In practical terms this 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."

15. In this case the position is entirely different. The relationship between the claimant and her father and step mother is one between adult relatives that discloses no aspect of dependency or of being any different from what might be expected between such relatives. There is no evidence of any particularly strong relationship between the claimant and her step siblings both of whom are now over 21 years of age. There is no reason why those relationships cannot be maintained in the way that relatives who have chosen to live in different countries manage to do. There is no good reason why the UK based relatives cannot visit the claimant in Ghana if

they wish to do so. The applicant's father has visited her on 3 occasions since he left Ghana on 1994 to move to London.

16. Ms Aryee submitted that this was a close family and that it was essential that the applicant be allowed to visit her relatives in the United Kingdom in order to maintain and develop those close family relationships.

17. It is a question of fact in each case, of course, whether relationships between adult relatives disclose sufficiently strong ties such as to fall within the scope of Article 8. Ties between young adults who have yet to establish their own family life separate from their parents may constitute family life: see *Nasri v France* (1995) 21 EHRR 458. But this applicant has established her own family life in Ghana with her partner and their daughter and while her adult siblings in the United Kingdom have not yet done so, it is established by *Advic v United Kingdom* 20 EHRR CD 125 that the protection of Article 8 does not extend to links between adult siblings living apart for a long period where they were not dependant upon each other. There is no evidence of such dependence between these siblings or step-siblings. Finally, it is well established that there must be more than the normal emotional ties between adult relatives for family life to exist for the purposes of article 8 of the ECHR: *Kugathas v IAT* [2003] EWCA Civ 31.

18. It is clear that the circumstances of this applicant and her relatives in the United Kingdom do not give rise to family life for the purposes of article 8 of the ECHR and so the grounds of appeal advanced before the Tribunal are simply unarguable.

19. For these reasons the appeal to the Upper Tribunal of the Entry Clearance Officer is allowed and I substitute a fresh decision to dismiss the applicant's appeal against refusal to grant her entry clearance as a visitor.

Summary of decision:

20. The Judge of the First-tier Tribunal made an error of law and his decision to allow the appeal is set aside.

21. I substitute a fresh decision to dismiss the appeal.

Signed

Upper Tribunal Judge Southern

Date: 21 April 2015