Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/04162/2014

THE IMMIGRATION ACTS

Heard at Field House
On 22nd February 2016

Decision and Reasons Promulgated
On 3rd March 2016

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SHAGUFTA RAZZAQ
(No anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms. A. Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Ms M. Dogra, of counsel, instructed by Worldwise Solicitors.

DECISION AND REASONS

History of Appeal

1. The Respondent, who was born on 4 April 1947, is a national of Pakistan. On 3 June 2014 she applied for entry clearance to visit her son, who is a British national, in the United Kingdom. In particular, she asserted that she wanted to be present here when his third child was born.

2. Her application was refused under paragraph 41 of the Immigration Rules on 23 June 2014. The Entry Clearance Officer accepted that she would be

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accommodated and maintained without recourse to public funds but asserted that she had not submitted sufficient evidence to establish that she was a genuine visitor, who intended to return to Pakistan at the end of her proposed visit.

3. The Respondent appealed against this decision on 16 July 2014 It was noted that, as she had applied for entry clearance after 25 June 2013, she could only appeal on the basis that the refusal gave rise to a breach of the Human Rights Act 1994 or the Race Relations Act 1976. In particular, she submitted that the refusal to grant her entry clearance gave rise to a breach of her right to continue to enjoy a family life provided for in Article 8 of the European Convention on Human Rights.

4. The Entry Clearance Manager reviewed her grounds of appeal on 19 October 2014. He relied on *Sun Myung Moon (Human rights, entry clearance, proportionality) USA* [2005] UKIAT 00112 and submitted that the only part of the European Convention on Human Rights which she could rely upon was Article 8 and that this was only in relation to family life.

5. First-tier Tribunal Judge Ross allowed her appeal on 18 August 2015. The Appellant appealed against his decision on 26 August 2015 and First-tier Tribunal Judge Nicholson granted her permission to appeal on 28 December 2015 on the basis that private, as distinct from family life, is not a basis upon which an ECHR right of entry can be based.

Error of Law Hearing

6. The Home Office Presenting Officer stated that she relied on the Appellant's grounds of appeal. She noted that First-tier Tribunal Judge Ross had found that the Respondent had not established that she enjoyed a family life with her son and his family as there was not the necessary degree of dependence. She then submitted that the Respondent was enjoying a private life in Pakistan, which was a non-contracting state for the purposes of Article 1 of the European Convention on Human Rights. She also relied on paragraph 46 of *SS (EC)-Article 8) Malaysia** [2004] UKIAT 00091 and *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5. In addition, she submitted that there was no authority to support the proposition that entry clearance should be granted when an applicant was relying on private life rights.

7. Counsel for the Respondent then responded. She submitted that there was now case law, which confirmed that the Respondent could rely on her private life rights and referred to *Mostafa (Article 8 in entry clearance)* [2015] UKUT 00112 (IAC). She also argued that there was no limitation on the Respondent's son and family's right to enjoy a private life as they were resident in the United Kingdom.

Error of Law

8. As the Respondent applied for entry clearance after 25 June 2013, section 88A of the Nationality, Immigration and Asylum Act 2002 requires the Respondent to show that the refusal of her entry clearance was unlawful under section 6 of the Human Rights Act 1998.

9. In paragraph 14 of his decision, First-tier Tribunal Judge Ross found that "notwithstanding the closeness of the relationship between the appellant and her UK son, given that the appellant is established in Pakistan and lives in a family unit with her other sons, I do not consider that there is family life between her and the sponsor and his family". The Respondent has not cross-appealed this part of the decision. Therefore, the appeal was not concerned with whether the refusal of entry clearance breached her and her family's right to continue a family life together.

10. Instead, it concerns the question of whether the refusal to grant the Respondent entry clearance amounts to a breach of the private life aspect of Article 8. In paragraph 15 of his decision First-tier Tribunal Judge Ross found that "the concept of private life can include the maintenance of relationships between those who are other than co-habiting dependents involving normal emotional ties" and went on to find "that the development of the [Respondent's] private life and that of the sponsor and his family includes the [Respondent] being able to visit her son and her grandchildren".

11. The Home Office Presenting Officer relied on paragraph 46 of *SS (ECO-Article 8)*, which is a starred decision, in which the Tribunal found that "the ECHR rights do not extend to those outside the jurisdiction. It is by an extension of the Convention that the right to a family life has become a basis for a right of entry, but it has only become so where the family life relied on is with someone who is established within the jurisdiction. We have had no authority cited to us, domestic or ECtHR, which holds that any provisions of the ECHR other than the right to family life within Article 8 affords a basis for a right of entry. We do not regard any further extension as well founded. Private as distinct from family life is not a basis upon which an ECHR right of entry can be based".

12. The application of the ECHR in entry clearance cases was also considered by the Tribunal in *Sun Myung Moon (Human rights, entry clearance, proportionality) USA* [2005] UKIAT 00112. In paragraph 40 of this case, the Tribunal found that "the mere fact that someone is a legal person, albeit outside the territory of a member state, obviously cannot mean that he enjoys the rights conferred or obligations enforceable against a state by the ECHR". Subsequently, the Tribunal also found at paragraph 45 that "the Article 8 cases, as the IAT had itself recognised, permitted someone not in the territory to assert that his Convention rights were breached by a refusal of entry clearance, where he wished to enter to enjoy an established family life with someone already settled in the United Kingdom".

13. At paragraph 68 the Tribunal also found that "the essence of the family life, which makes it possible that the ECHR extends to some non-nationals outside of the territorial jurisdiction who seek respect for their family life with someone settled here, is the need for physical proximity between these persons. This would cover the normal relationships between husband and wife, parent and child and closely allied relationships. We did not conclude that Article 8 in this extended form covered all aspects of personal and private life, or necessarily all those relationships which could come within the notion of family life within the Convention".

14. Counsel for the Respondent argued that *Mostafa (Article 8 in entry clearance)* [2015] 00112 (IAC) supported the right for foreign nationals to rely on their Article 8 private life rights when applying for entry clearance. It is correct that in paragraph 9 of this decision the Upper Tribunal said that "if, as we find to be the case here, the claimant has shown that refusing him entry clearance does interfere with his, and his wife's, private and family lives then it will be necessary to assess the evidence to see if the claimant meets the substance of the rules". In paragraph 17, the Upper Tribunal also found that "on the facts of this case the decision to refuse the claimant entry clearance interferes with his and his wife's private and family lives".

15. Counsel for the Respondent also relied on the fact that in paragraph 24 the Upper Tribunal also found that it would be "extremely foolish to attempt to be prescriptive, given the intensely factual and contextual sensitivity of every case". However, when doing so it is necessary to note that the Upper Tribunal qualified its extension to private life cases. In particular, it found that "it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1) [in private life cases]. 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".

16. I accept that in *Mostafa* the Upper Tribunal did find that in some cases private life rights could also provide a basis for entry clearance. However, in the current case, the Respondent is relying on a relationship with an adult son. Therefore, she needs to show very unusual circumstances to succeed on the basis of the decision in *Mostafa*.

17. Counsel for the Respondent argued that each case had to be considered on its own merits and there is no dispute with this general principle. However, I find that the Respondent has failed to establish there are any very unusual circumstances in her case. The Respondent had not seen her sponsor or his wife and oldest child since 2008 and this was only because they paid a short visit to her in Pakistan. She has never visited the United Kingdom and, therefore, she has never developed a private life here in the past. In contrast, it was not disputed that the Respondent was living in Pakistan in the family home with two other sons, their wives and seven grandchildren. At most, First-tier Tribunal Judge Ross found that it would be hugely expensive, uncomfortable and not without risk for the sponsor to visit the Respondent in Pakistan.

18. However, there was no evidence to show that the family home in Lahore was in a dangerous area due to terrorism, kidnap and sectarian violence. There was also no evidence to show that any visit would have to be in summer time in Pakistan and, therefore, when the weather was very hot. Nor was there any evidence to show that the sponsor could not afford to visit the Respondent, either on his own or with his wife and children.

19. In addition, it was not asserted that the sponsor or any members of his family were suffering from any illness or disability which would prevent them from travelling to

Pakistan and, to date, they had maintained a private life with the Respondent by the use of Skype and Facetime. In addition, the Respondent was only proposing to visit the United Kingdom for six weeks and in *Mostafa* the Upper Tribunal found that, even if the proposed visit involved a husband and wife and parent and minor child, it may be necessary to show that the visit added significantly to the time they could spend together.

20. Counsel for the Respondent also submitted that, even if the approach to the Respondent's Article 8 private life rights amounted to an error of law, it was not a material error of law, as First-tier Tribunal Judge Ross did not take into account the private life rights of the sponsor and his wife and children. However, in paragraph 15 of his decision the First-tier Tribunal Judge did refer to the development of the Respondent's private life and that of her sponsor and his family. I also that similar issues arise in relation to their rights. The Respondent has never before sought entry clearance and private life has been maintained by Skype and Facetime.

21. I also note that in paragraph 14 of *Adjei (visit visa – Article 8)* [2015] UKUT 0261 (IAC) the Upper Tribunal noted that the Upper Tribunal in *Mostafa* was dealing with a very narrow range of cases. In *Adjei* the Upper Tribunal also took into account that the adult family members in that case had decided to live in different countries and there was no aspect of dependence. The same could be said in the current case.

Decision

1. The decision by First-tier Tribunal Judge Ross included material errors of law and I set it aside.
2. The Respondent's appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge, other than First-tier Tribunal Judge Ross.

Nadine Finch

Upper Tribunal Judge Finch　　　　Date: 22 February 2016