Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/08690/2015
HU/08698/2015

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 2nd August 2017	**On 14th August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

AGNES ARTHUR
JESLORD K O APPIAH
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellants: Mr R Sharif of Fountain Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against the decision of Judge Barber of the First-tier Tribunal (the FtT) promulgated on 6th September 2016.

2. The Appellants are citizens of Ghana born 26th March 1969 and 18th November 1997 respectively. They are mother and son and applied for entry clearance to join Augustine Appiah (the Sponsor) who is the husband of the first Appellant and the father of the second Appellant, in the UK.

3. The applications were refused on 14th September 2015.

4. With reference to the first Appellant the application was refused as the Respondent was not satisfied that her relationship with the Sponsor is genuine and subsisting, and it was not accepted that they intended to live together permanently in the UK. Reliance was therefore placed upon E-ECP2.6 and 2.10 of Appendix FM in refusing entry clearance. The application of the second Appellant was refused because the application of his mother had been refused.

5. The Appellants appealed, and the FtT heard the appeal on 23rd November 2006. The FtT heard evidence from the Sponsor, and found that the first Appellant and Sponsor have a genuine and subsisting relationship.

6. The FtT went on to consider Article 8 finding that refusal of entry clearance would deny the Appellants family life with the Sponsor in the UK. The FtT then made a finding that it would be possible for the family to enjoy family life in Ghana. The FtT found that the appeals must be dismissed pursuant to Article 8 of the 1950 European Convention on Human Rights, commenting in conclusion at paragraph 10 that if "Mrs Arthur and any members of her family wish to come to the UK they will need to re-apply ensuring that they meet the required Immigration Rules".

7. The Appellants applied for permission to appeal to the Upper Tribunal. It was contended that the only reason given for refusing entry clearance, was that it was not accepted that there was a genuine and subsisting relationship. The FtT had found that there is a genuine and subsisting relationship. It was contended that as the Immigration Rules were satisfied, the FtT had not explained why the appeal must be dismissed, and it was contended that the FtT had not understood the "current legal position in relation to Article 8".

8. Permission to appeal was granted by Judge O'Garro, and directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it should be set aside. Following the grant of permission to appeal the Respondent did not lodge a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Upper Tribunal Hearing

Error of Law

9. Mr Sharif relied upon the grounds submitted with the application for permission to appeal. I was asked to find that the FtT had adopted the wrong approach when considering Article 8, and reliance was placed upon

Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC). It was submitted that the Appellants satisfied the Immigration Rules, as the only reason for refusal related to the genuineness of the relationship, which the FtT had found to be genuine. The FtT had therefore not explained adequately or at all why the appeal was dismissed.

10. Mrs Aboni submitted that there was no material error of law in the FtT decision. I was asked to find that the FtT had made findings open to it on the evidence, and properly considered proportionality.

11. I found an error of law in the FtT decision. In my view the FtT adopted an incorrect approach when considering Article 8. It is appropriate to take into account the guidance in Mostafa in that in the case of appeals brought against refusal of entry clearance, when the appeals are based upon Article 8, the ability of the Appellants 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 refusal of entry clearance is proportionate to the legitimate aim of enforcing immigration control.

12. I found it difficult to understand paragraph 10 of the FtT decision in which it was suggested that there should be a further application made by the Appellants, to ensure that they meet the required Immigration Rules. The FtT had in fact found that the Appellants satisfied the Immigration Rules.

13. Having found that the relevant Immigration Rules were satisfied, the FtT should have gone on to consider the public interest and proportionality. The FtT failed to explain why the public interest required the appeal to be dismissed. The FtT comments in paragraph 9 that removal, having explained in paragraph 7 that this also means refusal of entry clearance, was in accordance with the law and necessary in the interests of the economic wellbeing of the country. No explanation was given as to why refusal of entry clearance was in the interests of the economic wellbeing of the country. There was no suggestion that adequate financial support was not in place. There was no refusal on financial grounds. The FtT found that any interference with family life was proportionate to a legitimate public end, but did not explain that finding.

14. Having set aside the decision of the FtT, I indicated that it would be appropriate for the decision to be re-made by the Upper Tribunal. Both representatives agreed, and had no further submissions to make, and requested that the decision be re-made on the evidence before the FtT.

My Conclusions and Reasons

15. The finding by the FtT that the first Appellant and Sponsor are in a genuine and subsisting relationship has not been challenged and is preserved. I find that their intention is to live permanently with each other.

16. The Respondent was satisfied that all other requirements of the Immigration Rules were satisfied in this case.

17. I follow the guidance in Mostafa, and I am therefore faced with a position whereby the Immigration Rules in relation to this entry clearance application are satisfied. This is therefore a weighty but not a determinative factor. I find that Article 8 is engaged. The first Appellant and Sponsor have family life as spouses, and the second Appellant is their son.

18. The Respondent's decision is a refusal of a human rights claim. I have to decide whether the decision is contrary to section 6 of the Human Rights Act 1998. In considering Article 8 I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali [2016] UKSC 60, and in so doing have regard to the guidance as to the functions of this Tribunal given by Lord Reed at paragraphs 39 to 53.

19. The burden of proof is on the Appellants to establish that Article 8 is engaged, and why the Respondent's decision will interfere disproportionately in their family life. It is for the Respondent to establish the public interest factors weighing against the Appellants. The standard of proof is a balance of probabilities throughout. Having found that the requirements of the Immigration Rules are satisfied, I move on to consider section 117B of the Nationality, Immigration and Asylum Act 2002. I have regard to the considerations therein. Section 117B confirms that the maintenance of effective immigration controls is in the public interest.

20. It is in the public interest that persons seeking to enter can speak English. The Respondent did not refuse entry clearance on the basis that the Appellants could not speak English, and therefore the Respondent must have been satisfied with their ability to speak English.

21. It is in the public interest that persons seeking to enter the UK are financially independent. The Respondent accepted that the financial requirements set out in Appendix FM, and Appendix FM-SE, were satisfied. It is therefore not the case that the Appellants would be seeking to rely upon public funds.

22. I do not find that sub-sections (4), (5), and (6) of section 117B, are relevant to this appeal.

23. It is not suggested that the Sponsor or the Appellants have a poor immigration history. There is no suggestion of criminality.

24. I place weight upon the fact that the requirements of the Immigration Rules are satisfied. I do not find that the public interest requires the Appellants to be refused entry clearance. I therefore conclude that refusal of entry clearance is disproportionate under Article 8, and therefore unlawful under section 6 of the Human Rights Act 1998. The appeals are allowed.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The appeals of the Appellants are allowed.

Anonymity

The FtT made no anonymity direction. There has been no request for anonymity made to the Upper Tribunal. I see no need to make an anonymity order.

Signed Date: 4th August 2017

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeals are allowed and I have therefore considered whether to make a fee award. I do not make a fee award. The appeals have been allowed because of evidence supplied to the Tribunal after the decision to refuse entry clearance.

Signed Date: 4th August 2017

Deputy Upper Tribunal Judge M A Hall