Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02390/2019**

THE IMMIGRATION ACTS

Heard at Bradford	**Decisions & Reasons Promulgated:**
On 25 October 2019	**On 20 November 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

HANA [A]

(ANONYMITY NOT DIRECTED)

Appellant

and

THE ENTRY CLEARANCE OFFICER
(FCO Number: 1085458)

Respondent

Representation:
For the Appellant: Mr P Shea (Counsel)
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 24 June 2019, following a hearing of 18 June 2019, and which it sent to the parties on 26 June 2019. The tribunal decided to dismiss the claimant's appeal against the entry clearance officer's decision of 7 January 2019 refusing to grant her entry clearance to come to the United Kingdom (UK), for the purposes of or with a view to settlement.

2. The background circumstances are a little unusual and so I shall take some time to set them out. The claimant was born on 1 February 1990 and is a female and a Yemeni national. She has two children. Those children were born on 13 May 2008 and 28 February 2011 respectively. It is not disputed that, unlike the claimant, they are both British citizens. As I understand it they have that citizenship as a result of the citizenship of their father. He is married to the claimant but that marriage has broken down.

3. The claimant made her application for entry clearance in the United Arab Emirates where I am told she, and the two children, continue to reside having obtained an initial grant of limited leave which, according to Mr Shea, has subsequently been extended for a further temporary period.

4. The tribunal recorded a number of agreed facts in its written decision of 24 June 2019. Those included an acceptance that the claimant and her husband had separated in 2016 as a result of his having physically and mentally abused her; that he had made attempts to kidnap the children despite the claimant having legal custody as a result of Court Orders which she had obtained in the Yemen; that the claimant and the children had fled Yemen to Egypt and had then gone from Egypt to the United Arab Emirates; that the claimant and her children do not wish to return to the Yemen on account of prevailing conditions in that country and the fear of the claimant's husband; that the claimant has a family friend who would be able to accommodate her and the two children in the UK; and that one of the children has a medical condition relating to her kidneys as well as psychological difficulties.

5. The entry clearance officer who refused the application had considered it primarily under the Immigration Rules which permit an adult parent to join a child who is already in the UK. That, of course, is not quite the position here. Having decided that the relevant requirements were not met he went on to consider whether there were exceptional or compassionate circumstances such as to justify the giving of entry clearance in any event. As to that, the entry clearance officer said this:

> "Exceptional circumstances
> It has also been considered whether your application raises any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of entry clearance to the United Kingdom outside the requirements of the Immigration Rules. You have not raised any such exceptional circumstances, so it has been decided that your application does not fall for a grant of entry clearance outside the rules. With regard to family life, I am satisfied that the family life that exists between you and your children can continue unaffected by this decision.
>
> Compassionate factors
> You do not fall for a grant of entry clearance outside the Immigration Rules on the basis of compassionate factors".

6. When the tribunal heard the appeal on 18 June 2019, Mr Shea, who had also represented the claimant at that stage as well as before me, had not sought to argue that the claimant was able to meet the requirements contained within Appendix FM to the Immigration Rules relating to parents joining children in the UK. Rather, he had argued that the appeal should succeed under a possibly quite obscure provision which was clearly designed to ensure, along with certain other provisions, that the Immigration Rules are Article 8 ECHR compliant. That provision is GEN 3.2 which relevantly provides as follows:

> GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
> (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.
> (3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2.

7. Sub-paragraph (4) does not have application in this case.

8. In explaining in concise terms why it was dismissing the appeal the tribunal said this:

> "7. I must first consider whether the Appellant has family life in the United Kingdom. The answer is that she does not. As such, refusal of entry clearance does not interfere with her family life in the United Kingdom. Further, her family life is with her children and she lives with her children. Refusal of entry clearance does not therefore interfere with that family life. As such, this appeal cannot succeed, whether it be within the Immigration Rules, within any exceptions to the Rules or outside of the Rules, as there is no interference with family life by refusing entry clearance".

9. An application for permission to appeal to the Upper Tribunal followed. Permission was granted and the granting Judge relevantly said this:

> "2. There is some arguable merit in the ground that it was open to the judge to consider, and decide, whether the decision to refuse entry clearance to the appellant and her children resulted in unjustifiably harsh consequences for the appellant's British children. The submission was made at [5], but the judge did not reach a conclusion on whether the circumstances of the appellants were sufficient to result in unjustifiably harsh consequences as part of the proportionality assessment under Article 8. Permission to appeal is granted".

10. Permission having been granted the case was listed for a hearing before the Upper Tribunal (before me) so that it could be decided whether the tribunal had erred in law and if it had, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative for their valued assistance.

11. Mr Shea, for the claimant, argued that GEN 3.2 does not require there to be existing family life <u>in the UK</u> (my underlining) as the tribunal had appeared to think. So, it had erred in misconstruing that provision. On the assumption that he was right about that and given the accepted factual background Mr Shea urged me to set aside the tribunal's decision and to go on to remake the decision in the claimant's favour. Mrs Pettersen, for the respondent, acknowledged

that the tribunal had accepted a number of facts which might, on one view, be thought to assist the claimant. But she argued that, as I understand it, GEN 3.2. did not permit a tribunal, as opposed to an entry clearance officer, to exercise what she submitted amounted to a discretionary power to grant entry clearance. She drew my attention to the tribunal's observation that although it had itself accepted the agreed facts, the entry clearance officer had not done so.

12. I have decided the tribunal erred in law through misconstruing GEN 3.2. I have set out the relevant wording above. That provision, for it to apply, requires it to be demonstrated that there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 because such refusal would result in unjustifiably harsh consequences either for a claimant or for that claimant's partner, a relevant child or another family member whose Article 8 rights would be impacted by refusal. I agree with Mr Shea, that the provision does not actually require there to be pre-existing family life in the UK. Nor does it require that any interference with Article 8 rights be interference with already existing family life in the UK. On that basis I have concluded that I should set aside its decision.

13. As indicated, Mr Shea asked me if I were with him on the error of law issue, to go on to remake the decision on the material before me. Mrs Pettersen (subject of course to my deciding to set aside the tribunals decision) did not seek to dissuade me from doing so. This is not a case where additional evidence is required given the tribunal's acceptance of a number of important background factual circumstances. Further, there is no real possibility of receiving oral evidence from the claimant at any future hearing given her geographical location. So, I have concluded it is appropriate for me to remake the decision on the basis of the material currently before me.

14. The case has been argued, on behalf of the claimant, solely under GEN 3.2. That then is what I have focussed upon in remaking the decision.

15. It seems to me that the first thing I have to ask myself is whether the claimant's application for entry clearance otherwise (that is to say without a consideration of GEN 3.2) meets the requirements of Appendix FM or Part 9 of the Immigration Rules. But it is common ground that it does not. So, it is necessary for me to go on to consider GEN.3.2 (2).

16. As to that, I think I should first consider whether the refusal of entry clearance has resulted in unjustifiably harsh consequences for either the claimant herself or for her two British citizen children whose Article 8 rights are impacted by the refusal decision. It is true that the claimant and the two children are currently enjoying (if that is the right word) family life together in the United Arab Emirates. But the two children are British and are entitled to take advantage of that citizenship by coming to and living in the UK. In my judgment the refusal of entry clearance, notwithstanding the current unity of the three family members, does result in unjustifiably harsh consequences because it means they must either remain, for as long as they might be permitted to do so, in a country where they have no permanent right to reside and on the basis of the limited information before me no expectation that they will attain such a right, or they will have to return to Yemen where, in light of the acceptance by the tribunal of the claimed factual background, there must be some risk (since it has happened before) that the father will attempt to kidnap the children. That, if it happened of course, would result in a separation of the children and their mother. Living in circumstances where their immigration status is uncertain and they might have to move at any time (if entry clearance is not granted) to Yemen where there is the risk of kidnap and consequent separation does, in my view, affect the Article 8 rights not only of the claimant but, perhaps more importantly, the rights of the British citizen children.

17. In light of the above I would conclude that the circumstances in this case are indeed exceptional and would, in the particular circumstances of this case, render refusal of entry clearance a breach of the Article 8 rights of, at least, the British citizen children, who will, if entry clearance is not granted to the claimant, be denied the right to reside in their country of citizenship with their own mother.

18. So, having decided to set aside the tribunal's decision, I have also decided, in the most unusual circumstances of this case, to remake the decision on the basis that the requirements set out at GEN 3.2 are met.

Decision

19. The decision of the First-tier Tribunal involved the making of an error of law. That decision is set aside.

In remaking the decision, the Upper Tribunal allows the claimant's appeal from the entry clearance officer's decision of 7 January 2019 refusing to grant her entry clearance to come to the United Kingdom.

Anonymity

I make no anonymity direction.

M R Hemingway
Judge of the Upper Tribunal
Dated: 18 November 2019

To the respondent
Fee award

Although I have allowed the appeal I have decided not to make a fee award. None was sought and I do not think, in the unusual circumstances of this case, the entry clearance officer can be criticised for arriving at the decision he did on the material before him.

M R Hemingway
Judge of the Upper Tribunal
Dated: 18 November 2019