Upper Tribunal
(Immigration and Asylum Chamber)

Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Re-Promulgated

On 19 December 2014

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Before

MR JUSTICE M C CLOSKEY, PRESIDENT

UPPER TRIBUNAL JUDGE PERKINS

Between

ENTRY CLEARANCE OFFICER, CAIRO

Appellant

and

MEDHAT MOHAMED IBRAHEM MOSTAFA

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

Respondent: Mrs S E Medhat El Sheikh, Sponsor

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.

DECISION AND REASONS

1.
There is no need for any order restricting publication of any facts relating to this case and we make no order.

2.
The appellant, hereinafter "the Entry Clearance Officer", has permission to appeal a decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter "the claimant", against a decision of the Entry Clearance Officer on 5 September 2013 refusing him entry clearance to the United Kingdom for the purpose of a family visit. He said that he wanted to visit his wife who is a British

citizen ordinarily resident in the United Kingdom but the Entry Clearance Officer was not satisfied that the claimant satisfied the requirements of paragraph 41(i) and (ii) of HC 395. In short the Entry Clearance Officer was not satisfied that the claimant intended a visit for the limited period stated by him or intended to leave the United Kingdom at the end of the period of the visit.

3.
The Entry Clearance Officer's decision informed the claimant that his right of appeal was limited to the grounds identified at Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002, that is to say "that the decision is unlawful under Section 6 of the Human Rights Act 1998 … as being incompatible with the appellant's Convention rights."

4.
Although the grounds of appeal to the First-tier Tribunal clearly expressed disagreement with the Entry Clearance Officer's finding that the claimant did not intend to return after the visit they additionally and unequivocally relied on Article 8 of the European Convention on Human Rights. This approach was echoed in the skeleton argument which also developed the suggestion in the grounds that the findings of fact reflected an approach that was contrary to policy. The closing paragraphs of the skeleton argument refer to the decision being "not in accordance to (sic) the Immigration Rules, namely paragraph 41, not in accordance to (sic) the law and not in accordance with Article 8 of the ECHR."

5.
It is therefore slightly surprising that the First-tier Tribunal Judge allowed the appeal "under the Immigration Rules" but made no finding on the ground raising Article 8 of the European Convention on Human Rights ("ECHR").

6.
Predictably this was challenged by the Entry Clearance Officer who was given permission to appeal by an Upper Tribunal Judge. The grounds of appeal before the Upper Tribunal point out that, with effect from 25 June 2013, section 52 of the Crime and Courts Act 2013 amended section 88A of the Nationality, Immigration and Asylum Act 2002 so that there is no right of appeal against refusal of entry clearance in a family visitor case except on grounds alleging that the decision shows unlawful discrimination or is unlawful under Section 6 of the Human Rights Act 1998. This is wider than the limited grounds identified in the "Refusal of Entry Clearance" but nothing turns on this.

7.
The Entry Clearance Officer's grounds continue at paragraph 6:

"Where there is a right of appeal on one of these grounds the First-tier Tribunal must only consider those grounds, it is not open to the First-tier Tribunal to consider whether the decision is in accordance with the Immigration Rules or otherwise in accordance with the law."

We remind ourselves that section 85A of the 2002 Act applies and although the Tribunal can consider evidence that was not in existence, or not produced, at the date of decision it can only consider additional evidence of "circumstances appertaining at the time of the decision".

8.
Notwithstanding the way his case was pleaded (see above) Mr Jarvis made it plain that it was not his case that the First-tier Tribunal was bound by the findings of fact made by the Entry Clearance Officer. Those findings could be challenged in an appeal where the evidence was relevant. There were

restrictions on that evidence, in this case restrictions limiting the evidence to matters in existence at the time of the decision but there was no basis on which the Tribunal could make a decision except by evaluating the evidence.

9.
Clearly there can be no question of entertaining an appeal on grounds alleging that the decision was not in accordance with the law or the immigration rules. These are not permissible grounds. However 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. This is because, as is explained below, the ability to satisfy the rules illuminates the proportionality of the decision to refuse him entry clearance.

10.
Here the First-tier Tribunal noted that the claimant and his sponsor were married and further found that the claimant intended only a short visit after which he would return to Egypt. These findings were not made without good reason. They clearly considered that refusal of entry clearance would have a significant impact on the claimant's right to enjoy family life: the claimant had strong ties with Egypt including those arising from his being in regular, rewarding work and his children living there. Additionally the sponsor had property in Egypt and had organised her affairs to spend long periods of time there. Further, although there have indeed been "widespread changes" in Egypt in recent times, as contended by the Entry Clearance Officer, the evidence showed that this claimant lived safely in a tourist area that was substantially unaffected and continued to attract tourists.

11.
Nevertheless we agree with Mr Jarvis that the First-tier Tribunal had no basis for allowing the appeal "under the Immigration Rules". There was no power in law to entertain an appeal on those grounds. Out of an abundance of caution Mr Jarvis reminded us, following the decision in Virk & Ors v SSHD [2013] EWCA Civ 652,that the parties cannot agree to the Tribunal exercising a jurisdiction that has not been given it by Parliament. The contrary was not suggested and this is, of course, correct. Mr Jarvis submitted that the decision to allow the appeal under the Immigration Rules was clearly wrong in law.

12.
The claimant's wife, Mrs El-Sheikh, was supported by a friend but neither of them claimed to be legally qualified. She had taken advice from the claimant's former representatives. She read out some of that advice to us but did not make any argument against the points outlined above.

13.
We are quite satisfied that the First-tier Tribunal was wholly wrong to allow the appeal in the way that it did and we set aside the decision. It had no power to entertain a ground of appeal alleging that the decision was not in accordance with the Immigration Rules, still less to allow the appeal on that ground. It did have the power to consider a ground of appeal contending that the decision was incompatible with the claimant's Convention rights but it neglected to consider that ground even though it was clearly raised.

14.
This means that the original appeal by the claimant has to be resolved , including his reliance on human rights grounds, in a re-making exercise.

15.
Mr Jarvis submitted that we should follow the approach outlined by the House of Lords in the case of R v SSHD ex parte Razgar [2004] UKHL 27. While we are familiar with this decision, this is an occasion when we do consider it appropriate to set out the five tests identified by Lord Bingham of Cornhill :

(i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(iii) If so, is such interference in accordance with the law?

(iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(v) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

16.
Mr Jarvis could not argue against the suggestion that excluding the claimant interfered with his and his wife's right to respect for family life. We regard it as settled law that in an Article 8 balancing exercise the rights of all those closely affected, not only those of the claimant, have to be considered. It is our view that the decision in Shamin Box [2002] UKIAT 02212 is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by the decision. Undoubtedly the paradigm Article 8 entry clearance case concerns applicants seeking to join close family members for the purposes of settlement. However it cannot be excluded that where one party to a marriage is entitled to be in the United Kingdom a qualified obligation to facilitate spousal unification for the limited purpose of a short visit and sojourn may arise and does arise here. Mrs El-Sheikh wanted to return to her country of nationality (the United Kingdom) for a time and her husband wanted to be with her, not with a view to settlement but so that he could share her life and relationships in the United Kingdom. The refusal decision had a material impact on their right to enjoy family life. He did not want to settle but to visit her, and subject to permissible qualifications, he should be entitled to do that. Whilst it would almost certainly be proportionate to refuse him entry clearance if he did not comply with the rules his, and his wife's, desire to be together in her home area, albeit for purposes of a visit, are very human and understandable. Preventing that would not be a "technical or inconsequential interference" (see Sedley LJ in VW (Uganda) [2009] EWCA Civ 5) and should be permitted, subject to the proportionate requirements of immigration control.

17.
We have no hesitation in saying 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 and the interference is of sufficient gravity potentially to engage the operation of Article 8. None of this was seriously disputed before us.

18.
Mr Jarvis, who was taking conspicuous care in a case where the claimant was not represented professionally, suggested that, if we made that finding, we should proceed to conclude that the decision of the Entry Clearance Officer not in accordance with the law. We do not agree with that submission for two reasons. Firstly, such a decision might not be "not in accordance with the law". It

might reflect a sensible finding on the evidence produced to the Entry Clearance Officer even if the Tribunal came to a different conclusion on the totality of the evidence it had to consider. Secondly, and much more importantly, there is no power to entertain an appeal on the grounds that the decision is "not in accordance with the law" and so there is no point in the Tribunal addressing the question. Nevertheless the First-tier Tribunal was clearly right to ask itself if the claimant satisfied the requirements of the Immigration Rules because it had to decide the human rights grounds and a decision on whether the claimant satisfied the requirements of the rules would illuminate the Article 8 balancing exercise.

19.
Here the First-tier Tribunal has decided that the claimant satisfied the substantive requirements of the Rules. We have no basis for reaching any other conclusion.

20.
We must now ask ourselves if refusing the claimant entry clearance by refusing to give him entry clearance for the specific and limited purpose sought interferes disproportionately with the private and family lives of the claimant and his wife.

21.
In these circumstances the Entry Clearance Officer must justify the interference and satisfy us that the interference is proportionate. Subject to two sets of considerations we can see no justification for stopping a husband joining his wife when a Tribunal is satisfied that their circumstances satisfy the requirements of the Rules. The first relates to their candour. For example, if they had contributed to the application being refused by presenting inaccurate information or by omitting something material or committing some comparable misdemeanour. We can accept that it might be proportionate to refuse someone entry clearance whose application suffered from deficiencies such as these because good administration requires applicants to engage with the system and, further, we consider that there are duties of candour and co-operation on all applicants. There are no such failings here. The second set of considerations relates to the impact of refusal on the relationships that have to be promoted. Refusal of entry clearance will not always interfere disproportionately with such a relationship.

22.
It follows that the First-tier Tribunal should have allowed the appeal not under the Immigration Rules but on Article 8 grounds. This is what we do.

23.
We have considered carefully the effect that this decision could have in other cases. Plainly this will mean that the underlying merits of an application and the ability to satisfy the Immigration Rules, although not the question before the Tribunal, may be capable of being a weighty factor in an appeal based on human rights but they will not be determinative. They will only become relevant if the interference is such as to engage Article 8(1) ECHR and a finding by the Tribunal that an appellant does satisfy the requirements of the rules will not necessarily lead to a finding that the decision to refuse entry clearance is disproportionate to the proper purpose of enforcing immigration control. However it may be capable of being a strong reason for allowing the appeal that must be weighed with the others facts in the case.

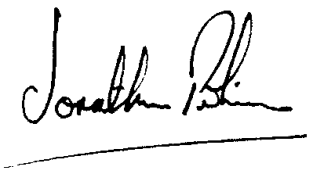
24.
It is the very essence of Article 8 that it lays down fundamental values that have to be considered in all relevant cases. It would therefore be extremely foolish to attempt to be prescriptive, given the

intensely factual and contextual sensitivity of every case. Thus we refrain from suggesting that, in this type of case, any particular kind of relationship would always attract the protection of Article 8(1) or that other kinds of relationship would never come within its scope. We are, however, prepared to say 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 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. 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.

Notice of Decision

We therefore allow the appeal of the Entry Clearance Officer to the extent that we set aside the decision of the First-tier Tribunal. We substitute this decision allowing the appeal of the claimant against the decision of the Entry Clearance Officer under Article 8 ECHR.

Fee Award



In the circumstances we make no fee award.

Signed	
Jonathan Perkins Judge of the Upper Tribunal	Re-Dated 5 March 2015