IAC-AH-KEW-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/03518/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28th August 2015

Decision & Reasons Promulgated
On 18th September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS SHAZIA FARRUKHFOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Bexson, Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan born on 25th August 1948. The Appellant had applied through the Entry Clearance Office New Delhi for entry clearance to visit the United Kingdom for six months. Her application was considered under paragraph 41 of the Immigration Rules and was refused by the Entry Clearance Officer on 30th May 2014. The Appellant lodged Notice of Appeal on 20th June 2014 stating that she had a genuine intention to visit her son, grandson and family in the United Kingdom and that the appeal engaged Article 8 of the European Convention on Human Rights.

© CROWN COPYRIGHT 2015

2. The appeal came before Judge of the First-tier Tribunal Morris sitting at Taylor House on 12th February 2015. In a determination promulgated on 24th February 2015 the Appellant's appeal was dismissed.

3. On 24th March 2015 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 11th May 2015 Judge of the First-tier Tribunal Page granted permission to appeal. Judge Page noted that this was a limited appeal under Section 84(1)(c) of the 2002 Act and that the permission to appeal had identified an arguable material error of law at paragraph 1 where it was complained that the judge's brief findings at paragraph 15 of the decision did not fully engage with the approach to be taken under Article 8. Judge Page noted that the evidence of the Appellant's son was that the family could not return to Afghanistan to visit the Appellant there, so no contact could take place between the Appellant and her son unless entry clearance was granted for a visit. Judge Page considered that it was arguable that the First-tier Tribunal Judge had at paragraph 17 of his decision focused on the issue of dependency which was not the central issue in the appeal, neither was the Appellant's standard of living in Afghanistan. He noted that the central issue under Article 8 in this appeal was whether it was proportionate to prevent the Appellant having contact with her son and her son's family in the United Kingdom with a face-to-face visit. The appeal was not being considered under the Immigration Rules but under Article 8 so this was a central issue and that as this central issue had arguably not been adequately addressed he granted permission to appeal.

4. On 15th May 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24 and contended that there would have to be clear evidence to support the assertion that the Sponsor could not visit Afghanistan and further contrary to the assertion contained in the grant of permission it was not the case that there could not be face-to-face contact without the Appellant being granted entry clearance as there was clearly the opportunity for the family to meet in a country neighbouring Afghanistan. In any event the Secretary of State contended that this would appear a private life matter and as such not of significant consequence to engage Article 8.

5. It is on that basis that the appeal comes before me. The Appellant appears by her instructed Counsel Ms Bexson. Ms Bexson is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Avery.

Submissions/Discussion

6. Ms Bexson relies on the Grounds of Appeal and the Entry Clearance Manager's review when the issue of whether or not the Appellant's son was prevented visiting her in Afghanistan was considered. She submits that there is an issue in the Appellant's son returning to visit her in Afghanistan on the basis that he was employed as an interpreter in Afghanistan and therefore would be on a security list which would place

him at risk if he were to attempt to visit. She submits that this is not mentioned at paragraph 17 of the determination and submits that because of the Appellant's son's previous occupation this was an exceptional case under Article 8 which should be allowed. Her second argument relates to the position of the Appellant's grandchildren whom she reminds me are a daughter aged 18 who had not seen her grandmother, the Appellant, for sixteen years and the Sponsor's son who was 14 and had never seen his grandmother and that the purpose of the visit was for the Appellant to celebrate her granddaughter's 18th birthday with her family in the UK. She submits that it would not be possible for them to meet in Afghanistan and it is difficult for them to keep in touch on a long-term basis by electronic means and submits that there is an argument that the children's rights to see respectively their mother and grandmother were being breached and that this is a point that has not been addressed by the judge at paragraph 17 when in considering Article 8 he has given a very brief determination. She submits that the judge's approach has been to look solely at the issue of dependency and that this was not a key issue in the case.

7. Mr Avery responds by stating that the judge has albeit briefly, given due and proper consideration to the appeal under Article 8. The first question to be considered is whether Article 8 is engaged and the judge has found that Article 8 was not engaged. He relies on the authority (albeit not specifically referred to by the First-tier Tribunal Judge) of *Adjei (visit visas –Article 8) [2015] UKUT 00261 (IAC)*. He submits that the rationale therein has been considered by the judge (albeit that authority was not before him) and that the judge has found that Article 8 was not engaged. Further he contends that the judge was correct in his approach to see if dependency was relevant and as to whether there was family life and he made findings that he was entitled to. He submits that there is no error in the decision as the judge did not having made his findings that Article 8 was not engaged, need to address the approach adopted at paragraphs 14 and 15 of *Adjei* and that the judge had made adequate reasons for his findings and that the determination discloses no material error of law.

8. Ms Bexson in response contends that it is an error of law not to have found that Article 8 was engaged and that it was an issue of contact between the Appellant, her son and grandchildren not just an issue of dependency. She points out that this is a genuine case where for security reasons where they meet is of some importance. She asked me to set aside the decision, to find that there is a material error of law and to remake the decision allowing the appeal.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

The Relevant Case Law

11. It is appropriate to give due consideration to the relevant case law and to see to what extent, even though it is not referred to the principles therein were considered by the First-tier Tribunal Judge.

In *Adjei (visit visas –Article 8) [2015] UKUT 00261 (IAC)* it was held:

> "1. 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 may need to look at the extent to which the claimant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow. *Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC)* is not authority for any contrary proposition.
>
> 2. As compliance with para 41 of HC 395 is not a ground of appeal to be decided by the Tribunal, any findings concerning that will carry little weight, especially if based upon arguments advanced only by the appellant. If the appellant 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 appellant as a person who, at least at the date of the appeal hearing, met the requirements of paragraph 41."

12. In *Kaur (visit appeals: Article 8) [2015] UKUT 00487 (IAC)* it was held:

> "1. In visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. Whilst judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the Human Rights Act 1998 (or shows unlawful discrimination) (see *Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)* and *Adjei (visit visas – Article 8) [2015] UKUT*

0261 (IAC)), the starting-point for deciding that must be the state of the evidence about the appellant's ability to meet the requirements of paragraph 41 of the immigration rules.

2. The restriction in visitor cases of grounds of appeal to human rights does not mean that judges are relieved of their ordinary duties of fact-finding or that they must approach these in a qualitatively different way. Where relevant to the Article 8 assessment, disputes as to the facts must be resolved by taking into account the evidence on both sides: see *Adjei* at [10] bearing in mind that the burden of proof rests on the appellant.

3. Unless an appellant can show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may exist to justify the grant of LTE [Leave to Enter] outside the rules": (see *SS (Congo) [2015] EWCA Civ 387* at [40] and [56]) he or she is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals."

Findings

13. The above authorities set out the approach to be made when considering the issues of Article 8 in visit visa appeals. It is not necessary for the First-tier Tribunal to distinguish between family and private life. I acknowledge that the findings of the judge are limited to those set out at paragraph 17 of his determination. The judge heard the evidence and made findings that the Appellant had not shown, on the balance of probabilities any family life with the Sponsor's wife or children and had having given due consideration to the evidence found that the Appellant had not shown on the balance of probabilities that family life exists. Those were findings that were open to the judge. Whilst I note what Ms Bexson submits the judge was entitled to find Article 8 was not engaged and her submission that it was an error not to make such a finding (bearing in mind the judge heard the evidence in his conclusions) can amount to little more than disagreement and does not show that there was a material error of law.

14. Having made that finding the judge was not required to embark upon an assessment of the decision of the Entry Clearance Officer as is clearly set out as a rationale in *Adjei*. Whilst the judge has not specifically gone on to refer to it the guidance in *Kaur* shows that it would be necessary for the Appellant to show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may justify the grant of leave to enter outside the Rules". That guidance following the decision in *SS (Congo) [2015] EWCA Civ 380* states that unless such a threshold is reached an Appellant is exceedingly unlikely to succeed and that that proposition must hold good in visitor appeals.

15. The judge did not err in not going on to consider such an approach. He gives his reasons having heard the evidence as to why he considers Article 8 is not engaged. Those were reasons that the judge was entitled to reach. In such circumstances the decision discloses no material error of

law and it is not necessary, nor appropriate, to consider whether the Appellant and the Sponsor and his children can/should meet in India or any other third country. I acknowledge that such a finding will be a disappointment to the Appellant and to the Sponsor but it is the role of the Upper Tribunal to consider whether there is any material error of law in the First-tier Tribunal's decision. The First-tier Tribunal Judge heard the appeal and the facts. In such circumstances I am satisfied that the First-tier Tribunal Judge made findings, albeit brief, that were open to him and as such the Appellant's appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal does not disclose a material error of law and the appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris