



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: VA/01616/2015

THE IMMIGRATION ACTS

Heard at Field House
on 2 November 2017

Decision & Reasons Promulgated
on 23 November 2017

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MD KAPTAN MIAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT (ENTRY CLEARANCE
OFFICER)

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by Hamlet Solicitors LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Moore (FtJ), promulgated on 14 November 2016, dismissing the Appellant's appeal against the Respondent's decision dated 4 March 2015 refusing him entry clearance as a visitor.

Factual Background

2. The Appellant is a national of Bangladesh, date of birth 1 January 1959. In 2010 his wife entered the United Kingdom as a visitor, together with the Appellant, both having been issued with entry clearance as visitors. While in the United Kingdom the Appellant's wife applied for a certificate of an entitlement to a right of abode, which was issued in May 2011. In his 2010 visitor application the Appellant told the entry clearance officer (ECO) that he intended to stay in the UK for 4 weeks but he remained for 3½ months. His wife did not return to Bangladesh.
3. In 2015 the Appellant applied for entry clearance to visit his wife and adult daughter, both of whom are resident in the United Kingdom. The Respondent was not satisfied that the Appellant provided a satisfactory explanation for staying longer than the period indicated in his earlier application. Nor was the Respondent satisfied that the Appellant was self-employed, or that he received his claimed income. As the Respondent was not satisfied that the Appellant presented a complete and accurate picture of his personal and economic circumstances in Bangladesh, she was not satisfied that he planned to leave the UK at the end of his visit or that he was genuinely seeking entry as a general visitor.
4. The Appellant appealed this decision but could only do so on the limited grounds that the decision was unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to human rights Convention) as being incompatible with his Convention rights.

The decision of the First-tier Tribunal

5. Having first satisfied himself that he had jurisdiction to consider the grounds, the judge then heard evidence from the Appellant's wife (there was no witness statement from the Appellant himself). The judge noted the explanation provided by the Appellant's wife for her husband staying 3½ months (he had several other close relatives and wanted to visit all of them), and that he now wanted to visit her because she was suffering from depression and back pain, problems that started around 2012/2013. The Appellant had not sought to visit his wife around that time, or thereafter, because she had planned to return to Bangladesh but later changed her mind. The Appellant previously visited the UK in 2007 and complied with the conditions of his entry clearance. He had 3 daughters in Bangladesh aged 21, 18 and 16, and a married son 29 years old. The wife stated that the Appellant looked after them in Bangladesh and would continue to do so until his daughters got married. When the Appellant previously entered the United Kingdom in 2010 his business was managed by his oldest son, and that would still be the case. The Appellant's wife was unable

to visit Bangladesh because of her own “personal commitment and adverse health conditions”.

6. At paragraph 17 the judge stated his satisfaction that the Appellant’s self-employment, income and family circumstances were as claimed. The judge accepted that the Appellant had a business in a local bazaar earning the equivalent of £200 a month, and that he received additional rental income from properties. The judge was additionally satisfied that the Appellant lived with his 3 single daughters and had done so for many years.
7. At paragraph 18 the judge noted that the Appellant remained in the UK in 2010 for longer than initially stated. *“I therefore find it surprising that if it was the Appellant’s intention to visit all his close relatives, including 4 sisters and 2 brothers in the UK, that this was the reason that he actually stayed 3½ months rather than 4 weeks.”* The judge appeared to doubt the wife’s claim to have originally planned to return to Bangladesh, and stated that, if she had changed her mind, there was *“no reasonable explanation”* why the Appellant did not visit her in the UK soon after 2012/2013.
8. At paragraph 20 the judge was not satisfied that the Respondent’s decision amounted to an interference with the Appellant’s right to respect for family life. This was supported by reference to the wife’s decision to live in the UK and the absence of any reasonable explanation why the Appellant chose not to visit the UK prior to his application in 2015. Nor was the judge satisfied that the wife provided any reliable evidence why she could not visit him and her daughters in Bangladesh. In arriving at this decision, the judge briefly considered the medical evidence from the Whitechapel practice and the wife’s medical condition. The judge noted that the refusal of the appeal would result in the Appellant remaining in Bangladesh and continuing to live with his 3 daughters and running his business. There would therefore be no material change for the Appellant and he and his wife could continue to communicate in the same manner as they had done the previous 6 years.
9. At paragraph 22 the judge stated, *“Having considered all the evidence before me, and presuming article 8 was engaged, I am satisfied that the decision of the Respondent was lawful on the grounds of effective immigration control, and the decision a proportionate one.”*
10. At paragraph 23 the judge stated, *“I am not satisfied that the Appellant is genuinely seeking entry and intends to leave the UK at the end of that visit.”*

The grounds of appeal and the error of law hearing

11. The grounds contend that the judge failed to properly apply the principles established in *Mostafa (Article 8 in entry clearance)* [2015] UKUT 00112 (IAC), failed to consider that the Appellant previously visited the UK in compliance

with the immigration rules, failed to consider the explanation in the covering letter accompanying the application for the Appellant's longer visit in 2010, and, having found that the Appellant's circumstances in Bangladesh were as claimed, that he was not then entitled to refuse the appeal on human rights grounds.

12. Upper Tribunal Judge Bruce granted permission in the following terms.

Although no express finding is made it would appear that the Tribunal proceeded on the basis that the Appellant is a genuine visitor. The appeal is dismissed on the ground that there is no interference in his family life because his wife can visit him in Bangladesh. It is arguable that in making that finding the tribunal has failed to give reasons: it is arguable that it has not engaged with the sponsors assertion that she is unable to travel for medical reasons.

13. At the error of law hearing Mr Karim submitted that the Respondent had not taken issue with the timing of the Appellant's visitor application (this was a point raised by the judge on the day of the hearing), and that the judge failed to properly consider the wife's medical conditions, including the evidence that she was suffering from anxiety and depression because she missed seeing her husband. Mr Melvin provided a copy of *Kopoi* [2017] EWCA Civ 1511 and submitted that the medical evidence did not show that the wife was unable to travel and that the judge was entitled to raise the credibility concerns at the hearing.

Discussion

14. I am satisfied, for the following reasons, that the decision does contain material errors of law. At paragraph 5 the judge accepted that the Appellant was closely related to his family in the UK, and in particular his wife and daughter. The judge then says, "*I am satisfied that human rights are engaged, notwithstanding that this is a visitor Visa application and not for the purposes of settlement.*" The judge then makes reference to *AG (Eritrea) v SSHD* [2007] EWCA Civ 801, which establishes that, while an interference with private or family life must be real if it is to engage article 8(1), the threshold of engagement (the "minimum level") is not a specially high one. The judge then indicates that article 8(1) may be engaged. These observations appear at variance with the judge's conclusion, at paragraph 20, that the refusal of entry clearance does not amount to an interference with the Appellant's right to respect for family life. The decision appears to contain two inconsistent findings as to whether Article 8(1) is engaged. While the judge may have been attempting to outline his jurisdiction to consider the appeal on human rights grounds at paragraph 5, it remains insufficiently clear why he found, on the one hand, that article 8(1) was engaged, but then later found it was not engaged.

15. The judge sought to support his conclusion that there was no interference with article 8 by reference to the absence of any reasonable explanation as to why the Appellant chose not to visit the UK from the time that his wife developed her medical problems until his application in 2015, and the absence of reliable evidence demonstrating why she could not visit him in Bangladesh. The Respondent did not however rely on the absence of any visitor application made between 2012/13 and 2015 as a reason for doubting the Appellant's intentions, either in her Reasons For Refusal Letter or the Entry Clearance Manager's review. The judge appears to have raised this issue during the hearing. While a judge is unarguably entitled to raise concerns in respect of a person's intentions during a hearing, including new issues, procedural fairness dictates that the person is given an opportunity to provide an explanation before it is held against them. As the Appellant was in Bangladesh he was not given an opportunity to provide an explanation for the delay in making a visitor application between 2012/13 and 2015. Although the Appellant's wife offered an explanation (she planned to visit Bangladesh but changed her mind after the onset of her medical problems), the Appellant himself had no opportunity to explain why he did not attempt to visit his wife until 2015.
16. Nor is it satisfactorily clear how the adverse credibility findings that the judge appears to have made in respect of the explanation offered by the Appellant for staying longer than 4 weeks in 2010, and the explanation offered on behalf of the Appellant by his wife for not applying to visit the UK between 2012/13 and 2015, undermine the Appellant's claimed intentions in light of the judge's findings that the Appellant's circumstances in Bangladesh were as claimed. In particular, the judge does not explain why he concludes that the Appellant is not genuinely seeking entry to the UK as a visitor in circumstances where the Appellant has to care for 3 single daughters in Bangladesh, including a minor.
17. For these reasons I am satisfied that the judge has materially erred in law. In all the circumstances, and having regard to the views of the parties, it is appropriate to remit the case back to the First-tier Tribunal for a completely fresh hearing, all issues at large, before a judge other than judge of the First-tier Tribunal Moore.

Notice of Decision

The First-tier Tribunal decision is vitiated by material errors of law. The case is remitted to the First-tier Tribunal for a fresh (de novo) hearing, all issues open, to be heard by a judge other than Judge of the First-tier Tribunal Moore.



22 November 2017

Signed
Upper Tribunal Judge Blum

Date