



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number OA/09516/2013

THE IMMIGRATION ACTS

Heard at Sheldon
On 13th August 2014
Prepared 14th August 2014

Determination Promulgated
On 20th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

MUHAMMAD TAYYAB
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr M Mohzan (Solicitor, Eurasia Legal Services)
For the Respondent: Mr N Smart (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant, who was born on the 4th of September 1993 and is a national of Pakistan, applied on the 4th of February 2013 to enter the UK as an adult dependent relative. The application was refused as it was not accepted that the Appellant met the requirements of paragraph EC-DR of Appendix FM, the reasons are given in the Refusal Notice of the 2nd of April 2013. The Appellant appealed to the First-tier Tribunal by Notice and Grounds of Appeal of the 12th of April 2013.
2. The appeal was heard by Judge Sangha at Birmingham on the 7th of February 2014. In a determination promulgated on the 12th of March 2014 the appeal under the Immigration Rules was dismissed but was allowed under article 8 on the basis that his exclusion from the UK would be disproportionate. The reasoning is considered below.
3. The Secretary of State sought permission to appeal to the Upper Tribunal in an application for permission of the 21st of March 2014. It was submitted that the Judge had not applied the approach set out in Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 (IAC) and had not identified compelling or exceptional circumstances in the Appellant's case and the Appellant's circumstances did not meet the test laid down in Kugathas [2003] EWCA Civ 31

and the need for more than the usual dependency between adults. Permission was granted by First-tier Tribunal Judge Brunnen on the 23rd of April 2014.

4. At the hearing before the Upper Tribunal the Home Office relied on the case of Shahzad (Article 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC) and referred to paragraph (vi) of the head note. NH (India) [2007 EWCA Civ 1330] related to paragraph 317 and was on the basis that the Appellant there had almost satisfied the rules, in this case there was nothing exceptional.
5. For the Appellant it was submitted that they had applied for entry clearance before but had been refused, now the Appellant's father's earnings were sufficient. The Appellant was dependent on his family and they had entry clearance, they should not be separated and lived in a different cultural system. Family life did not end abruptly at 18, the Judge had looked at it in the round and the conclusion reached was open to him.
6. At the hearing I indicated that I was satisfied that the determination was flawed by an error of law and that on the evidence the finding was not open to the Judge. I indicated that I was minded to dismiss the appeal but would hear submissions on the final disposal of the appeal. An application by the Appellant's representatives for an adjournment to provide further evidence was refused. Upper Tribunal directions had indicated that if it was intended to adduce further evidence then that should have been available at the hearing. In any event the Appellant's position under article 8 would have to be assessed at the date of the decision and changes in circumstances since then could not be considered.
7. After a short adjournment at Mr Mohzan's request to collect his thoughts he declined to make any further submissions on the Appellant's case stating that I had indicated that I had made up my mind and so he did not seek to persuade me despite the opportunity being given. In the absence of submissions from the Appellant the Home Office were not called on to reply.
8. The basic facts that the Judge had to consider were that the Appellant was born on the 4th of September 1993 and at the date of the application was about 19½ years old, and not much older at the date of the decision. He was fit and healthy adult who was either a qualified mechanic or was about to become one. He was living with those members of his family who lived in Pakistan and beyond his mother and siblings, his grandparents and other relatives still live there.
9. It was accepted that the Appellant could not meet the requirements of paragraph EC-DR and E-ECDR.2.5 of Appendix FM which cover what an adult dependent relative would have to show in order to be entitled to entry clearance. To have met those requirements he would have had to show that as a result of age, illness or disability he required long-term personal care to perform everyday tasks. There is no suggestion that the Appellant is in need of such care.
10. Gulshan and Nagre [2013] EWHC 720 (Admin) were considered in Shahzad (Article 8: legitimate aim) Pakistan [2014] UKUT 316 (IAC) where the approach to be taken was set out again. Where the rules constitute a complete code then no further consideration is required, it is only if the rules are not a complete code and there may be good arguable grounds for granting leave outside them is it necessary to consider if there are compelling circumstances not sufficiently recognised by the rules.
11. The Judge was right to find that the Appellant did not meet the requirements of the rules. reliance on the cases cited in paragraph 21, and on NH in particular was inapt, those were decisions under the old paragraph 317 and the reasoning in NH in particular relied on the extent to which the Appellant was close to the requirements but could not meet them. That could be analogous to a near miss approach which has been strongly disapproved.

12. I am not satisfied that the rules in this regard can be regarded as a complete code as submitted by Mr Smart. There is no provision within this part of Appendix FM for the consideration of exceptional circumstances and so the approach in part (vi) of Shahzad can be taken. However, consideration of article 8 issues arises only if there are arguably good grounds for granting leave where there are compelling circumstances outside the rules.
13. The Judge's principal findings are set out in paragraphs 22 and 23 of the determination. At the date of the decision the Appellant was studying to be a mechanic living at home with his mother, siblings and grandparents. The Appellant spent time with his siblings, playing and eating together and that separation would have a considerable impact on them.
14. There is nothing in those circumstances that can be regarded as being remotely unusual, demanding or compelling. The situation that they face is one brought about by the family members in Pakistan desire to live in the UK. The Judge's does not reflect the separation of the family already brought about by the decision of the Sponsor to locate himself in the UK, away from his family or the effect of the departure of the family from Pakistan on the grandparents.
15. The factors in paragraph 23 do not take the matter further. The age of the Appellant is allowed for in the rules and the observation that he was not "far beyond" the age of 18 is close to a near miss but also inaccurate, he was 19½ when he applied so some way into adult hood. I accept that family life does not stop abruptly at 18 but may continue beyond but the circumstances set out in the determination fell a long way short of the ties of more than usual strength envisaged in Kugathas.
16. While the contents of the rules relating to adult dependent relatives are not a complete code and do not preclude considerations of factors outside the rules there was nothing in the circumstances of the Appellant and his family that justified such a step being taken in this case. For the reasons given above I find that Judge Sangha erred in his approach to the Appellant's circumstances and article 8.

CONCLUSIONS

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision and I re-make the decision in the appeal dismissing the appeal of Muhammad Tayyab.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing the appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 19th August 2014