



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: VA/14395/2013

THE IMMIGRATION ACTS

Heard at Field House

On 4th July 2014 and 1st September 2014

**Determination
Promulgated**

On 15th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

**SHAHDIA PARVIN
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondent: On 4th July 2014 Mr H Mahmud of Immigration and Work Permit

On 1st September 2014 Mr B Thomas, acting as agent for Immigration and Work Permit

DETERMINATION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (ECO) appeals against a determination of Judge of the First-tier Tribunal Metzer promulgated on 2nd February 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal. I will refer to her as the Claimant.
3. The Claimant is a national of Bangladesh born 31st December 1975 who applied for entry clearance to the United Kingdom as a visitor. She wished to visit Fakir Islam (the Sponsor) who she described as her uncle.
4. The application was refused on 9th June 2013 with reference to paragraph 41(i), (ii), (vi), and (vii). The ECO was not satisfied that the Claimant was genuinely seeking entry as a visitor for a limited period nor that she intended to leave the United Kingdom at the end of the visit. In addition the ECO was not satisfied that the Claimant would maintain and accommodate herself adequately out of resources available to her, without taking employment or having recourse to public funds, or be maintained and accommodated adequately by relatives or friends. The ECO was not satisfied that the Claimant would be able to meet the cost of an onward or return journey. The ECO contended that the right of appeal was limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). Those grounds relate to the decision being unlawful under section 6 of the Human Rights Act 1998, as being incompatible with the Claimant's Convention rights.
5. The Claimant appealed contending that the decision was not in accordance with the law, a discretion should have been exercised differently, and that the decision was contrary to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
6. The appeal was heard by Judge Metzger on 27th January 2014, who did not consider Article 8 of the 1950 Convention, but after hearing evidence from the Sponsor, allowed the appeal under the Immigration Rules.
7. The ECO applied for permission to appeal to the Upper Tribunal contending that Judge Metzger had materially erred in law in not appreciating that the refusal of entry clearance did not attract a full right of appeal because the application for entry clearance had been made after 9th July 2012 when The Immigration Appeals (Family Visitor) Regulations 2012 came into force. This meant that because an uncle was not included in these regulations, the Claimant did not have a full right of appeal against refusal of entry clearance.
8. Permission to appeal was granted by Judge of the First-tier Tribunal Davis on 2nd May 2014 and directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such the decision should be set aside.

The Upper Tribunal Hearing 4th July 2014

9. Mr Mahmud, on behalf of the Claimant accepted that Judge Metzger had materially erred in law and that the decision must be set aside.
10. This concession was rightly made, and I set aside the decision of the First-tier Tribunal as Judge Metzger had erred as contended by the ECO. The Claimant would only have been entitled to a full right of appeal against

refusal of entry clearance if she was seeking to visit a person referred to in The Immigration Appeals (Family Visitor) Regulations 2012, and the Sponsor did not fall into any of the categories referred in those regulations. Judge Metzger should only have considered the appeal with reference to Article 8.

11. Having set aside the decision of the First-tier Tribunal, both representatives indicated that they were ready to proceed so that the decision could be re-made. I decided that it was appropriate to re-make the decision in the Upper Tribunal, and that it was not appropriate to remit the appeal to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statements.
12. I was told that the Sponsor wished to give evidence and did not need an interpreter. The Sponsor gave his evidence-in-chief by adopting the contents of his undated witness statement. That statement may be briefly summarised as follows.
13. The Sponsor described the Claimant as his niece and noted that the ECO had expressed doubts about the length of her stay. The Sponsor confirmed the Claimant would not stay more than four weeks in the United Kingdom. In relation to concerns about finance the Sponsor explained that the Claimant has a share in her family business. He stated that he had raised the Claimant and regarded her as being like a daughter and they have strong ties. The Sponsor has been granted refugee status in the United Kingdom and therefore cannot visit Bangladesh and he and the Claimant have not seen each other in the last five years. The Sponsor confirmed the Claimant intended a genuine family visit to the United Kingdom.
14. The Sponsor was not asked any questions by Mr Mahmud but upon being cross-examined by Mr Whitwell, it very soon became apparent the Sponsor did in fact need the assistance of an interpreter. As an interpreter was not available, it was not possible to proceed with the hearing which had to be adjourned part-heard.

The Upper Tribunal Hearing 1st September 2014

15. At the commencement of the hearing I ascertained that there was no difficulty in communication between the Sponsor and interpreter and the language was Bengali. The Sponsor was then cross-examined by Mr Whitwell. I have recorded all questions and answers in my Record of Proceedings and will not repeat them in full here.
16. In brief summary the Sponsor said that he keeps in contact with the Claimant by telephone and Skype once a week and sometimes more often. The Sponsor had lived at his current address since 12th May 2013 and could not satisfactorily explain why the Claimant in her application for entry clearance dated 20th May 2013 had listed his address as his previous address which he had left in May 2012.

17. The Sponsor confirmed his relationship to the Claimant as being her father's cousin, and therefore accepted that he and the Claimant are second cousins.
18. The Sponsor came to the United Kingdom on 8th October 2009 and was granted refugee status in December 2010. He accepted that if the appeal was not successful the Claimant could make a further application for entry clearance.
19. The Sponsor was not re-examined by Mr Thomas. In answer to some questions I put by way of clarification the Sponsor stated that the Claimant's parents are still alive although her father is seriously ill. The Claimant lives with her brother and her parents and other family members. The Sponsor said that the Claimant had started living with him when she was 9 or 10 years old and lived with him for eight or nine years. He then said that she had in fact lived with him until he left Bangladesh in 2009 although they lived close to her parents and she used to go and see her parents.

The Submissions of the ECO

20. Mr Whitwell made succinct submissions contending the Sponsor and Claimant had not established family life and therefore Article 8 was not engaged. In the alternative, if family life was engaged, refusal of entry clearance was proportionate. There was nothing preventing the Claimant from making a further application for entry clearance.

The Submissions of the Claimant

21. Mr Thomas was equally succinct in making submissions. He contended that the evidence proved that the Claimant intended a genuine visit to the United Kingdom for a period of four weeks and that the Claimant and Sponsor had lived together for a very substantial period of time and because the Sponsor could not visit the Claimant in Bangladesh because of his refugee status, the appeal should be allowed with reference to Article 8 outside the Immigration Rules.
22. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

23. As this is an appeal against refusal of entry clearance I must consider the circumstances appertaining at the date of refusal, that being 9th June 2013.
24. It is accepted on behalf of the Claimant, that she cannot satisfy the requirements of paragraph 276ADE of the Immigration Rules in relation to private life, nor the requirements of Appendix FM of the Immigration Rules in relation to family life.
25. The starting point for my consideration must however be the provisions of the Immigration Rules that deal with family and private life. The Claimant does not in any event rely upon private life as a ground of appeal. She

could not succeed with reference to paragraph 276ADE, which sets out the requirements to be met by an applicant for leave to remain on the grounds of private life. The Claimant is not in the United Kingdom and has not made a valid application for leave to remain. Her application is for entry clearance. It is therefore clear that the Claimant cannot satisfy the requirements of paragraph 276ADE.

26. It is also clear that the Claimant cannot satisfy the requirements of Appendix FM in relation to family life. This is because the Claimant is not applying for entry clearance as a partner, as a child, as a parent, nor as an adult dependent relative. There is no provision within Appendix FM for entry clearance to be granted to an individual wishing to visit her second cousin in the United Kingdom.
27. Having concluded that the appeal cannot succeed with reference to either paragraph 276ADE or Appendix FM, I have to decide whether Article 8 should be considered outside the Immigration Rules. On this issue the Court of Appeal stated in paragraph 135 of MM (Lebanon) v SSHD [2014] EWCA Civ 985;

Where the relevant group of IRs [Immigration Rules], upon their proper construction provide a “complete code” for dealing with a person’s Convention rights in the context of a particular IR or a statutory provision, such as in the case of “foreign criminals”, and the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to “exceptional circumstances” in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a “complete code” then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.

I have also considered the Upper Tribunal decisions Gulshan [2013] UKUT 00640 (IAC) and Shahzad [2014] UKUT 00085 (IAC). Those decisions indicate that after applying the requirements of the Immigration Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the rules.

28. In my view there are no such compelling circumstances which are not recognised by the Immigration Rules, as this is an appeal against refusal of entry clearance as a visitor, and the Claimant wishes to visit a second cousin, and her application is not to settle in the United Kingdom. She is entitled to make a further application for entry clearance. However, if I am wrong in considering that there are no compelling circumstances not recognised by the rules, I now go on to consider Article 8 outside the rules. This involves firstly considering whether family life has been established between the Sponsor and Claimant so as to engage Article 8 which for ease of reference I set out below;
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a

democratic society in the interests of national security, public safety or the economic well-being 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.

The Claimant and Sponsor are both adults. The Claimant was 37 years of age at the date of refusal of entry clearance. I accept that the Claimant and Sponsor are related, in that the Sponsor is the Claimant's father's cousin. I also accept that the Claimant lived with the Sponsor in Bangladesh and regarded him as being like a father, although her own father is still alive and she lives with her parents and other family members at present. The Claimant is not dependent upon the Sponsor. She stated in her Visa Application Form that her brother would be paying for her travel to the United Kingdom. She also stated that she has her own income in Bangladesh. The Court of Appeal in Kugathas [2003] EWCA Civ 31 considered family life between adults and stated in paragraph 25;

Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties.

29. In Ghising (Family life - adults - Ghurkha policy) [2012] UKUT 00160 (IAC) the Upper Tribunal found that there is no general proposition that Article 8 can never be engaged when the family life it is sought to establish is between adult siblings living together. There should be no blanket rule with regard to adult children, and each case should be analysed on its own facts to decide whether or not family life exists, within the meaning of Article 8(1). Each case is fact sensitive.
30. In this appeal, the Sponsor and Claimant are not a parent and adult child nor are they siblings. I accept that they wish to visit each other, but this does not amount to family life that would engage Article 8(1).
31. However if I am wrong in reaching the conclusion that Article 8 is not engaged, I go on to consider Article 8 in the light of the five stage approach advocated in Razgar [2004] UKHL 27 which involves answering the following questions;
 - (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, would 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 well-being 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?
32. If Article 8 is engaged, I find that the interference with family life is in accordance with the law as the Claimant could not satisfy the requirements of paragraph 41 of the Immigration Rules, and has no right

of appeal against that decision, except on Article 8 grounds. Any interference is necessary in the interests of maintaining effective immigration control, which is necessary to maintain the economic well-being of the country.

33. The issue then, is whether the decision to refuse entry clearance is proportionate. In considering proportionality I have to have regard to the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002 which in summary state that the maintenance of effective immigration control is in the public interest, and it is in the public interest that persons who seek to enter or remain in the United Kingdom are able to speak English, and are financially independent. In this appeal no evidence has been given of the Claimant's ability to speak English, and the burden of proof is on the Claimant. The reason for attaching weight to financial independence is so that the individual is not a burden on the taxpayer and is better able to integrate into society in the United Kingdom. That however is not the Claimant's case, as she contends that she only intends a four week visit.
34. In my view, the ECO's decision to refuse entry clearance is proportionate. It is not appropriate to disregard the provisions of the Immigration Rules and to allow the visit to the United Kingdom based upon Article 8. As was stated by the Supreme Court in paragraph 57 of Patel and Others v SSHD [2013] UKSC 72;

57. It is important to remember that Article 8 is not a general dispensing power.

35. The Claimant is entitled to make a further application for entry clearance and if the appropriate documentary evidence is submitted to satisfy the requirements of paragraph 41, then entry clearance as a visitor may be granted.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The Claimant's appeal is dismissed.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed

Date 2nd September 2014

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed

Date 2nd September 2014

Deputy Upper Tribunal Judge M A Hall