



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

Appeal Number: VA/05452/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 5 August 2015

Promulgated

On 14 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

ENTRY CLEARANCE OFFICER - PRETORIA

Appellant

and

**ALIN MICHAEL CURTIS
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Wilding of the Specialist Appeals Team

For the Respondent: Mr Philip Curtis, Sponsor

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as “the Applicant” is a citizen of South Africa born on 1 May 1973. He is sponsored by his brother Philip. On 12 August 2014 he applied to the Appellant (the ECO) for entry clearance to visit his brother and his family in the United Kingdom. On 29 August 2014 the ECO refused the application because he was not satisfied the Applicant had significant ties in South Africa and did not intend to take

employment in the United Kingdom. The application was refused by way of reference to paragraphs 41(ii) and (iii) of the Immigration Rules.

2. On 9 September 2014 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). By reason of Section 52 of the Crime and Courts Act 2013, the only grounds for appeal are human rights grounds.
3. The grounds state the decision is the second refusal of the Applicant for entry clearance as a family visitor and is on the same grounds as the previous refusal. They assert the Applicant owns no assets except a car and that he works at the Blue Marlin Hotel owned by the Sponsor and his wife. The Applicant's mother lives in a retirement home some 500 metres from the Blue Marlin Hotel. The Applicant would return to South Africa and his work after his family visit. Reference is made to the Applicant's socio-economic situation of which no details are given and to the Human Rights Act 1998.
4. On 11 November 2014 the Entry Clearance Manager reviewed the decision and stated that no new evidence had been submitted and repeated that the Applicant's monthly income and his reliance on family members to supplement his income meant the Applicant had not satisfactorily demonstrated that a short visit was commensurate with his economic circumstances.

The First-tier Tribunal's Decision

5. By a decision promulgated on 27 April 2015 Judge of the First-tier Tribunal Trevaskis allowed the appeal on human rights grounds by way of reference to Article 8 of the European Convention and the State's obligation to respect an individual's private and family life.
6. The Judge recorded that at the hearing it was conceded on the basis of evidence provided by the Sponsor that the Applicant met the requirements of paragraph 41 of the Immigration Rules. He went on to find that the Sponsor is the only sibling of the Applicant with whom he is able to have any contact and there was a strong bond between the Applicant and the Sponsor's children. He found at paragraph 20 of his decision that there was a degree of emotional dependence between the Appellant and his brother which is greater than that which normally exists between adult siblings. At paragraph 26 he concluded that the factors in favour of the interference with family life are "clearly and substantially outweighed by those against such interference". He went on to allow the appeal on human rights grounds.
7. The ECO sought permission to appeal and on 19 June 2015 Judge of the First-tier Tribunal Grimmett granted permission because it was arguable the Judge had erred in his assessment of the "usual emotional ties". The grounds had referred to jurisprudence about the nature of emotional ties and cited *Kugathas v SSHD [2003] EWCA Civ.31* in which it was held that:-

“20. ... neither blood ties nor the concern and affection that ordinarily go with them are, by themselves altogether ... enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8.

...

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

The ECO asserted that on this basis the Judge’s assessment was based on a material misdirection of law.

The Upper Tribunal Hearing

8. The Sponsor and his wife attended the hearing. They left their two children outside the hearing room. The youngest, a daughter aged 8 at some point entered the hearing room and I was informed that the other child, a son aged 14 had Special Needs and was confined to a wheelchair. The Sponsor explained this made travel to South Africa for the Sponsor and his family utterly impracticable.
9. I explained to the Sponsor the very limited and specific focus of an error of law hearing and the procedure I would adopt for the hearing.
10. Mr Wilding submitted that the Judge’s conclusion at paragraph 20 of his decision that:-

... the Appellant and the Sponsors are a close family; Mr Curtis is the only sibling with whom the Appellant is able to have any sort of contact; there is also a strong bond between the Appellant and the Sponsors’ children, which will be weakened by the denial of more regular contact ... (and) there is a degree of emotional dependence which is greater than that which normally exists between adult siblings

...

amounted to a material error of law when considered in the light of the learning in *Kugathas*. The Judge had failed to show there was a degree of dependence which in the light of the learning in *Kugathas* was enough to show that the decision amounted to a sufficient interference with family life such as to engage the State’s obligations under Article 8(1) of the European Convention. Properly, the Judge should have found that there was no such interference with family life. On this basis the ECO did not seek to challenge the Judge’s assessment of the proportionality of the decision because as stated in the grounds for permission to appeal the correct position was that the decision did not amount to an interference with private and family life sufficient to engage the State’s obligations under Article 8.

11. It was evident that Mr Wilding for the ECO had recognised that the Applicant and indeed the Sponsor were unrepresented and had endeavoured to put the submissions by the Judge's decision contained a material error of law in as straightforward and simple non-legal terms as practicable. I endeavoured to repeat or explain the submissions so that the Sponsor should be able to understand as best as possible in the circumstances so as to enable him to make such representations as he wished to make.
12. Notwithstanding my earlier explanation of the focus of an error of law hearing, the Sponsor started to give evidence about his family and the Applicant's background. As it soon emerged the background was unusual and in the circumstances I considered it best to let him continue.
13. He said the ECO had focused on his brother's financial circumstances in South Africa but had not appreciated that he, the Sponsor, would pay all the costs of the Applicant's visit and return to South Africa. The Judge had found that the Applicant's circumstances were unlikely to change and the Sponsor submitted that in the light of this the State's obligations under Article 8 were engaged because the Applicant would on this basis never be able to visit the Sponsor and his family in the United Kingdom. There was no reason to consider that the Applicant would not return to South Africa.
14. The Applicant and the Sponsor were the two youngest of five siblings. They had all grown up in the same children's home where they had been taken when the Applicant was about 3 or 4 and the Sponsor was aged 2. One brother was married and living in the United Kingdom but contact had been lost long ago. Another brother had died some twenty years ago and their sister had married and gone away from her home area some twenty years ago and he did not know where she now lived.
15. The Applicant had attended a Special Needs School. The Sponsor said that he was "more manual than academic". He was unable to manage his financial affairs. The Sponsor maintained an account in his own name in South Africa in respect of which arrangements had been made for the Applicant to draw down from it. He was employed as a maintenance man at the family owned Blue Marlin Hotel. He lived in the hotel where he was on stand-by for any emergencies. Their mother lived nearby in a retirement flat which the Sponsor had bought for her when she and the Applicant had moved from Durban.
16. He had sent the Applicant SAR25,000 in May 2014 for his birthday with the intention that he should buy a car. The Sponsor drew my attention to the description of the relevant entry on his South African bank statement shown to the ECO with the application which states "Happy Birt..". He added that the Applicant had bought a car but had subsequently sold it because it needed costly repairs. The Sponsor explained that as to what was left of the money he had come to an arrangement with the Applicant that he should use it to help his partner and to pay for his visits to her in Johannesburg.

17. Subsequent to his placement in a children's home the Sponsor had met his father only once when the Sponsor was aged about 16. He had subsequently discovered that his father was now dead. He said that given their common history and the Applicant's personal issues he was in effect the Applicant's father.
18. The ECO had not considered the substantial benefits in kind which the Applicant enjoyed. His accommodation on site was provided free as well as his meals. What he received by way of salary was entirely disposable income. He also regularly checked on their mother who lived close by. The Applicant and their mother had previously lived in Durban but the Applicant had lost his job there and after he had been unemployed for some two years the Sponsor had arranged for him to move to the Blue Marlin Hotel in Scottburgh and had bought his mother a nearby retirement flat.
19. Mr Wilding for the ECO had no questions to put to the Sponsor and no further submissions to make.

Error of Law Findings and Consideration

20. I asked the Sponsor if the background evidence about the family which he had given had been before the First-tier Tribunal Judge. I noted that at the hearing before the Judge the Sponsor had not given evidence but his wife had. She responded that what her husband had said had not seemed relevant to her at the time of the First-tier Tribunal hearing.
21. The Judge erred at paragraph 20 of his decision because he did not address the jurisprudence in *Kugathas* about normal adult relationships or give adequate reasons for his conclusion. In the light of the limited information before him, as recounted by the Sponsor's wife and the learning in *Kugathas* his finding that the State's obligations under Article 8 were engaged because the decision amounted to sufficient interference with the private and family life of the Applicant and his family was a material error of law. That part of the Judge's decision dealing with the Article 8 claim should be set aside. The findings in relation to paragraph 41 of the Immigration Rules should stand, at least so far as they are relevant to the appeal in relation to the assessment of the proportionality of the ECO's decision to the legitimate public end of the maintenance of proper immigration control: see paragraph 24 of *Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)*.
22. Both parties agreed that I should re-make the decision without hearing further argument.

The Standard and Burden of Proof

23. The standard of proof is the civil standard that is on the balance of probabilities. The burden is on the Applicant. Only evidence relating to matters on or before the date of the decision under appeal may be taken into account.

Findings and Consideration

24. I found the Sponsor to be a reliable and credible witness. Rightly and properly there was no challenge made to the Sponsor's evidence.
25. Looking at the evidence in the round and noting that the Applicant at the date of the decision was aged 41 and is emotionally dependent, as well as financially dependent because of his employment in the family owned hotel. I find the evidence shows that the Applicant's relationship with his brother is one which crosses the *Kugathas* threshold. The Sponsor is not only the Applicant's brother but also in effect his father. The Appellant experiences difficulty in managing various aspects of his life for which the Sponsor accepts responsibility. They have shared their early life which included many vicissitudes which fortunately most people do not experience, and this will have additionally increased the bond between them both as siblings and also as brother and surrogate father. I am satisfied there are elements of emotional dependency of the Applicant on the Sponsor which involve more than just usual emotional family ties between adults.
26. Adopting the five step process for the assessment of Article 8 claims endorsed in *R (Razgar) v SSHD [2004] UKHL 27*, I find that there is family life between the Applicant in South Africa and the Sponsor and his family in the United Kingdom. The decision under appeal amounts to an interference with that family life because of the impact it has on the way that family life will be conducted in the future as explained by the Sponsor and the consequences of such interference are in all the circumstances of sufficient gravity to engage the State's obligations under Article 8. There was no suggestion that the interference would be otherwise than in accordance with the law or that it would not be pursuant to the lawful objective necessary in a democratic society in the interests of the economic well-being of the country which includes the maintenance of proper immigration control.
27. The issue remains whether the decision is in all the circumstances proportionate.
28. In assessing the proportionality of the decision under appeal, I have to consider, amongst other matters, the factors outlined in Section 117B of the 2002 Act. The Applicant is able to speak English and will not have recourse to public funds because his travel to and from the United Kingdom and his maintenance and accommodation during his stay in the United Kingdom will be met entirely by the Sponsor, his brother. Looking at the evidence in the round, and that I have found the nature of the relationship between the Applicant and his brother exceeds the *Kugathas* threshold, I conclude that the refusal of entry clearance for a family visit by the Applicant is disproportionate to the public interest and the need to maintain proper immigration control. Consequently the appeal succeeds on human rights grounds.

Anonymity

29. There had been no request for an anonymity direction before the First-tier Tribunal and no request for anonymity was made to the Upper Tribunal. Having considered the appeal I find that anonymity is not necessary.

NOTICE OF DECISION

The First-tier Tribunal's decision contained a material error of law and is set aside insofar as it deals with the Applicant's appeal on human rights grounds. The decision is re-made allowing the appeal of the Applicant. Consequently, the appeal of the ECO is dismissed.

Signed/Official Crest

Date 11. viii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE ECO: FEE AWARD

The Applicant's appeal has been allowed on the basis of evidence which was not put before the ECO. In these circumstances I do not find it appropriate to make a fee award.

Signed/Official Crest

Date 11. viii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal