



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

Appeal Number: VA/02149/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 5 April 2016**

**Decision Promulgated
On 12 April 2016**

Before

Upper Tribunal Judge Southern

Between

ENTRY CLEARANCE OFFICER (Abu Dhabi)

Appellant

And

AKHTAR AZIZA SYEDA RIZVI

Respondent

Representation:

For the Appellant: Mr P Wilding, Senior Home Officer Presenting Officer
For the Respondent: .No representative

DECISION

1. The Entry Clearance Officer ("ECO") has been granted permission to appeal against a decision of First-tier Tribunal Judge O'Rourke who, by a decision promulgated on 19 January 2016, allowed Mrs Rizvi's appeal against refusal to grant entry clearance as a visitor. The decision to refuse entry clearance was made on 26 February 2015 and so Mrs Rizvi was able to challenge the decision only on the basis that refusal brought about an impermissible infringement of rights protected by Article 8 of

the ECHR.

2. Although the respondent does not have legal representation in this appeal, as was the case before the First-tier Tribunal, her son, Dr Syed Khurram Raza, attended and spoke on her behalf.
3. The ECO refused the application for entry clearance for a number of reasons. On the basis of the evidence provided the income of Mrs Rizvi's son, who was to sponsor and fund the proposed visit, could not be verified; given her history of previous extended stays in the United Kingdom, he was not satisfied that a brief family visit was all that was genuinely intended; the applicant's own circumstances in Pakistan, including the whereabouts of her husband, were uncertain which reinforced concerns about her intentions.
4. The judge was satisfied that the ECO was correct to conclude that Mrs Rizvi could not meet the requirements of the immigration rules. This was because, having reviewed her history of previous visits, he was satisfied that she had not correctly identified her intentions in securing previous grants of entry clearance as a visitor, recording at paragraph 16 of his decision :

"I find, therefore, that the Appellant's intention has not been to visit UK, but effectively reside here for large parts of each year and thus she has failed to comply with the rules."

5. In reaching that conclusion the judge made a number of clear findings of fact:
 - a. In the past four years Mrs Rizvi had spent no less than 28 months in the United Kingdom;
 - b. During those visits there had been no concerns about maintenance and accommodation, and no reason to suppose there would be during any future visit;
 - c. Mrs Rizvi's husband also held a valid visit visa;
 - d. The duration of her intended stay as set out in her application was "a best guess" and could well be more than the two months stated;
 - e. Mrs Rizvi has three sons living in the United Kingdom each of whom continue to visit her in Pakistan "in rotation";
 - f. Mrs Rizvi's brother, Mr Sued Rizvi, has serious health problems and if not granted entry clearance for this visit, she may not see him again before his death in the United Kingdom.
6. The judge found that article 8 of the ECHR was engaged:

"I do consider, in this case that there has been an interference with the right to respect for family life as, in the connection between the Appellant and her son, there are exceptional circumstances, such as dependency

and long periods of cohabitation. I also note that the Appellant wants to visit her elderly and very ill brother.”

And went on to give the following reasons for finding that such interference would be disproportionate:

“... it is entirely possible that the appellant will not be able to see her brother before his death and her brother will not have the comfort of the visit of his only sister.”

“It is uncontested that the Appellant has always, in the past, complied with visa requirements...”

“Her sons clearly have been able to more than adequately support and accommodate her.”

“A short-term visa would allow her to comfort her brother at perhaps the end of his life, without allowing her to repeat her previous pattern of effective shared residence.”

7. And so, on that basis, the judge allowed the appeal on human rights grounds.
8. The grounds upon which the ECO has been granted permission to appeal are that if the judge is to be taken as having found that family life existed between Mrs Rizvi and her adult relatives in the United Kingdom then he was wrong to do so. Therefore, article 8 was not even engaged. In purporting to strike a balance between the competing interests in play, the judge failed to have proper regard to the fact that she had not disclosed her true intention in seeking entry clearance. Family life was not established between Mrs Rizvi and her brother for the purposes of article 8 and she received regular visits from her sons and so the refusal did not interfere with that pattern of visits.
9. I have no doubt at all that the judge made a material error of law in arriving at his decision to allow this appeal. First, there is no sustainable finding that family life existed between Mrs Rizvi and her brother, and nor could there be as that was not conceivably established on the evidence. Second, although at paragraph 19 of the decision the judge said that there were “exceptional circumstances, such as dependency and long periods of co-habitation”, nowhere in the decision is to be found any reasoning to support such conclusion. Therefore, it was not open to the judge to allow the appeal on human rights grounds on the basis of the relationships with either her sons either. Her sons had established a pattern of regular visits to her in the past that would continue in the future and so there was no rational basis for allowing the appeal of someone who could not meet the requirements of the rules on human rights grounds on that basis. The judge has failed altogether to have regard to the public interest arguments in play. As was observed by the Upper Tribunal in *Kaur (visit appeals; Article 8)* [2015] UKUT 261 (IAC) at paras 24 and 25:

“ 24. It is also important to bear in mind that there are two dimensions to the way in which the immigration rules serve the public interest: not just on the general level, by setting out a regulatory framework of immigration control and thereby establishing “a reasonable relationship with the requirements of Article 8 in the ordinary run of cases” (SS (Congo) at [40]); but also on the particular level, by establishing in any individual case why a grant of entry clearance is not in the public interest. Accordingly we are entitled to consider that when a visit is refused because of failure to meet the requirements of paragraph 41, that ordinarily shows that it is not considered in the public interest for a visit to be granted in those circumstances.

25. Against this background, the need (emphasised in Adjei) to look at the extent to which the applicant is said to have failed to meet the requirements of the rules is important for an additional reason. For if an applicant has failed to meet the rules, that is apt to demonstrate that the refusal is in the public interest at a general and particular level.”

10. Having found as a fact that Mrs Rizvi had, to put it as generously as possible, misused the visitor route to entry clearance in the past so that that the application was correctly refused under the immigration rules, and having failed to identify any sustainable basis upon which it could be demonstrated that protected family life had been established, either with her adult sons or with her brother, it was not reasonably open to the judge to find that this appeal could succeed on the basis of rights protected by article 8 of the ECHR. Further, the only real point identified by the judge as speaking in the respondent’s favour was the fact that there had been significant periods of cohabitation with her sons in the United Kingdom but, of course, it was precisely because she had done so while present with leave granted for a brief family visit that the application was found to be one that fell to be refused under the immigration rules. It was a clear error of law, also, for the judge to leave out of account in assessing proportionality of the refusal the fact that the failure to meet the requirements of the rules in those circumstances spoke cogently against the grant of leave as a visitor on the basis of article 8 rights.
11. For these reasons the decision of the judge to allow the appeal is set aside and a fresh decision must be made to allow or to dismiss the appeal.
12. Dr Raza was invited to make submissions in respect of the respondent. He accepted that as the real intention was for his mother to live permanently with him and his brothers at their family home in the United Kingdom, the application for a visit visa was not the appropriate one to make. He recognised that as the real intention was that his mother should reside permanently in the United Kingdom at the home shared by his brothers and himself, the appropriate application was for entry clearance as a dependant relative. He is satisfied that such an application would meet the requirements of the applicable rule, given

that he could point to the fact that they had accommodated his mother in the family home for 28 months during the last four years during which period she had been maintained comfortably without recourse to public funds. He explained how that would be a more satisfactory way of providing for his mother, in any event. While reliance had been placed on securing lengthy periods of residence in the United Kingdom on the basis of applications for entry clearance as a visitor, it had been necessary for him or one of his brothers to accompany his mother on her return to Pakistan to await the grant of a fresh visit visa before returning to the United Kingdom. This involved considerably unnecessary expense as well as disruption of the family life of the brother concerned.

13. Why, then, did the respondent not simply apply for entry clearance as a dependant relative? The answer provided by Dr Reza is one that is discouraging. He explained that although the family was financially secure and so could comfortably meet any financial requirements of the immigration rules and there was ample and clearly satisfactory accommodation and support available for his mother, it was generally recognised that it was extremely difficult to secure a dependant relative visa and the likelihood was a refusal that would have to be challenged on appeal, which could take a year to be resolved. Meanwhile, the respondent was anxious to be able to travel to the United Kingdom because her brother is seriously ill and she, as his only sister, is intent upon seeing him before his death.
14. Having heard at some length from Dr Raza I have no hesitation, at all, in finding him to be a witness of complete integrity who has disclosed with commendable frankness the true position as it presents itself. Even though he now properly accepts that the application was correctly refused under the immigration rules, I have no doubt whatsoever that in bringing his mother to stay for extended periods on the basis of securing entry clearance as a visitor he had no intention, and nor did she, of acting in a way that was contrary to the terms of the visa granted or exploitative. He points out that his mother has never overstayed any period of leave granted and would not do so in the future.
15. However, I can see no proper basis for allowing the appeal against refusal of entry clearance as a visitor, because entry clearance is not sought for that purpose but so that the respondent can remain with her relatives in the United Kingdom. On the basis of the evidence provided today by Dr Reza it may well be that it is now possible to put forward evidence of special dependency such as is required to establish the existence of protected family life between the respondent and her sons. That takes the respondent no further in this appeal because it cannot be the case that rights protected by article 8 could be deployed to secure the grant of leave as a visitor when that is not the nature of the leave in fact sought.
16. It is to be hoped and expected that if the respondent now submits

the application that is the appropriate one for her to pursue, as a dependant relative, the Entry Clearance Officer will take note of the need for a rapid decision so that, if granted, the respondent can travel to the United Kingdom to see her brother while that is still a possibility. The respondent and her sons will also need to ensure that they are fully sighted upon the current requirements to be met and that sufficient evidence is provided in support of the application. In that regard they will wish to consider carefully the current published guidance in the IDIs. In particular, they will, no doubt, ensure that evidence is provided of the reason for and the nature of the support provided to their mother when participating in the pattern of visiting now established by the appellant's sons and why, for example, it was not considered sufficient to provide the financial resources for someone else to provide that support to the respondent in Pakistan.

Summary of decision:

17. First-tier Tribunal Judge O'Rourke made an error of law such as to require that his decision to allow the appeal is set aside.
18. I substitute a fresh decision to dismiss Mrs Rizvi's appeal against refusal to grant entry clearance as a visitor.

19. Signed



Date: 5 April 2016

Upper Tribunal Judge Southern