



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

Appeal Number: VA/02989/2014

THE IMMIGRATION ACTS

Heard at Birmingham

**Decision &
Promulgated**

Reasons

On 3 March 2016

On 18 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

ENTRY CLEARANCE OFFICER

Appellant

and

**BILPIN KUMAR YADAV
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Chohan, Maya and Co Solicitors

For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant in this appeal was the Respondent in the appeal before the First-tier Tribunal and the Respondent the Appellant. For ease of reference I refer to them as the Entry Clearance Officer and Claimant respectively. The Claimant is a citizen of India born on 10 June 1987. On 31 March 2014 he applied for a visit visa. He was refused entry clearance on 3 April 2014. He

appealed that decision under section 82 of the Nationality, Immigration and Asylum Act 2002. His appeal was limited by section 84 (1) (c) of the same Act. His appeal was allowed by First-tier Tribunal Judge D S Borsada in a decision promulgated on 19 March 2015.

2. The Secretary of State sought permission to appeal that decision. Permission was granted by First-tier Tribunal Judge Lambert on 1 June 2015 on the basis that there was an absence of any mention in the brief decision of consideration whether the connections between the Claimant and the sponsor went beyond the normal emotional ties. It was also considered by Judge Lambert that there was arguably inadequate reasoning as to why the Entry Clearance Officer's decision was disproportionate given the availability of a fresh application.

The Grounds

3. The grounds assert that the First-tier Tribunal failed to take into account relevant case law as to the existence of family life between adult siblings. Whilst the sponsor and family are described as close family relatives in the First-tier Tribunal's decision the Judge had failed to give reasons to address the Entry Clearance Officer's concern that the Claimant was unable to answer basic questions about his cousin, the sponsor, with whom the Judge described him as having a particularly close relationship. It is argued that the finding is inadequately reasoned and is not borne out by the evidence and that the Claimant's family life was with his relatives in India, rather than those in the UK. Further, the proportionality assessment was inadequate as it did not explain why the refusal of a visa which only allowed the parties to be together temporarily would be a disproportionate interference with Article 8 rights. The Judge was using Article 8 as a general dispensing power.

The Hearing

4. Mr Mills acknowledged that Judge Bosarda dealt the appeal with before there was much case law on Article 8 and visit appeals. Only if Article 8 was engaged then the Judge needed to look at paragraph 41. **In Mostafa (Article 8 in entry clearance)** [2015] UKUT 00112 (IAC) the Upper Tribunal considered that it would only be in unusual circumstances that the refusal of entry clearance would come within 8 (1). This relationship was that of a cousin. It was not open to the Judge to find that it was properly engaged. None of the reasoning could be criticized in the plain meaning of the words but in the legal sense it was wrong. There needed to be dependency and something compelling. This was a cousin who wanted to visit. Mr Chohan had made points about ECO's in Dehli but this was not relevant. The decision should be set aside and dismissed outright.
5. Mr Chohan submitted that the case of **Mostafa** was not prescriptive. The submission was that Judge Bosarda did consider the facts and the circumstances and the fact that the ECO had gone beyond the normal remit

by exploring determinations from previous hearings. There was a coherent consideration. **Mostafa** was promulgated after the Judge's decision and it did not seek to suggest that the relationship was excluded. There was very little opportunity for him to satisfy the requirements of a visit visa in the future.

6. Mr Mills submitted that there were a number of authorities going up to Strasbourg stating that more than normal ties were are required.

Discussion and Findings

7. I have had regard to Mr Chohan's skeleton argument before coming to my conclusions in this appeal.
8. With effect from 25 June 2013, section 52 of the Crime and Courts Act 2013 amended section 88A of the Nationality, Immigration and Asylum Act 2002 so that there is no right of appeal against the refusal of entry clearance in a family visitor case except on grounds alleging that the decision shows unlawful discrimination or is unlawful under section 6 of the Human Rights Act 1998.
9. The First-tier Tribunal allowed the appeal under Article 8. The appeal before the First-tier Tribunal had proceeded by way of submissions only. The entry clearance officer had refused the application on a number of grounds, one of which was that on the basis of past interviews in relation to previous applications the Claimant was unable to answer basic questions about his claimed cousin. In the Claimant's witness statement before the First-tier Tribunal he stated that he was the sponsor Ramon-deep Manak's nephew. He said that they saw each other as brothers and that when asked to explain the relationship by the Entry Clearance Officer he said that Ramon-deep's father and his father were like cousins. He states that he did not state that his father and Ramon-deep's father were biological brothers. He then states that they were not closely related.
10. With regard to other relatives in the UK, the Claimant stated in his witness statement that he has an aunt in the UK who is his father's biological sister. The First-tier Tribunal made the following findings at paragraph 7 of the decision in relation to the existence of family life:

"Turning to the human rights appeal: I am satisfied that family life exists between the appellant and his UK relatives and in particular I accept that he has a particularly close relationship with Ramon-deep Singh Manak, his cousin. That relationship has clearly existed for a long time and given that the appellant has had several visits to the UK before, an important part of that relationship has involved 'face to face' visits. There is also the not unreasonable desire to attend family weddings in this country which he has done so in the recent past. The appellant clearly has a rich family life with his UK relatives and this has always meant visits to the UK for such special family occasions. In those circumstances I am satisfied that family life does exist in this case and that such is the nature of that interference that the operation of Article 8 has been fully engaged."

11. There was a clear issue with regard to the nature and strength of the Claimant's relationship with the sponsor. The First-tier Tribunal did not have the benefit of **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)** and subsequent cases on the application of Article 8 in entry clearance cases. However, it is settled law that the existence of family life is not confined to parents and children and may include the ties between near relatives. Family life will not normally exist between adult relatives for Article 8 (1) purposes unless there is dependency over and above normal emotional ties: see **Kugathas** [2003] EWCA Civ 31 and **Singh and Another** [2015] EWCA Civ 74. The First-tier Tribunal failed to direct itself in relation to the applicable law and made no findings to resolve the issue in relation to the nature of the relationship between the sponsor and the Claimant which was highlighted in the entry clearance decision. He did not find more than the normal emotional ties. In the circumstances the First-tier Tribunal failed to give sufficient reasons for finding that family life existed.
12. The decision of the First-tier Tribunal involved the making of an error of law. I was asked by Mr Mills to re-make the decision in the appeal by dismissing it. However, I consider that this is a case where clear findings of fact need to be made regarding the relationship between the Claimant and sponsor and his other UK relatives. The First-tier Tribunal's findings did not adequately address the matters in issue and I find that in the light of Part 7.2 (a) of the Practice Statements for the Immigration and Asylum Chamber of the First-tier Tribunal and Upper-Tier Tribunal, the extent of judicial fact finding is such that this matter should be re-heard in the First-tier Tribunal.
13. There was no direction for anonymity and none is appropriate on the facts of the case.

Notice of Decision

14. The decision of the First-tier Tribunal must be set aside and in the light of the fact finding required the appeal will be heard in the First-tier Tribunal.
15. No anonymity direction is made.

Signed

Date 18 May 2016

Deputy Upper Tribunal Judge L J Murray