IAC-AH-DH-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: VA/06248/2014
VA/06251/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 4th April 2016	**On 19th April 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR FAWAD AHMED FAHAD (FIRST APPELLANT)
MRS AMTUL MUKARAM (SECOND APPELLANT)
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: No appearance
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of the two Appellants to the Upper Tribunal against a decision of the First-tier Tribunal (Judge Clapham) promulgated on 24th September 2015

dismissing their appeals against the decisions of an Entry Clearance Officer of 31st August 2014 refusing to grant them entry clearance to come to the UK as visitors.

2. The two Appellants are nationals of Pakistan and are married to each other. Fawad Ahmed Fahad (hereinafter "the first Appellant") was born on 12th October 1982 and Amtul Mukaram (hereinafter "the second Appellant") was born on 10th February 1984. They applied, simultaneously, for entry clearance in August 2014 and indicated that they wished to visit a UK based brother of the first Appellant for compassionate reasons for a period of two weeks. It was said that the two Appellants had four dependent children though I cannot see that any applications were made on behalf of any of them. It was indicated that the first Appellant had full-time employment as a manager with a firm called Supernet Limited. Although it was not obvious from the way in which the entry clearance application forms had been completed, the brother they were proposing to visit was Mr Ihsan Ahmad Muneeb who is, very sadly, now deceased. Reference was also made in the application to another brother of the first Appellant one Arshad Mahmood.

3. The Entry Clearance Officer did not interview either of the Appellants. Instead, the applications were considered and refused on the basis of the documentation which had been provided. Both applications were refused because, in short, the Entry Clearance Officer considered that the two had failed to demonstrate that they were genuinely seeking entry as visitors and had failed to demonstrate that they intended to leave the UK at the end of the proposed visit. The Entry Clearance Officer's specific concerns related largely to matters surrounding the financial standing of the first Appellant. In this context, the Entry Clearance Officer said that he had failed to demonstrate how he had managed to accrue funds which equated to 21 times his stated monthly income. He had indicated the cost of the visit to him to amount to some £1,000 but had not demonstrated that the proposed expenditure was commensurate with his circumstances. It was these matters which caused the Entry Clearance Officer to doubt the genuineness of each of the applications and to cause him to conclude that the requirements of paragraph 41(i) and(ii) of the Immigration Rules were not met.

4. The two Appellants appealed. They did so in reliance upon Article 8 of the European Convention on Human Rights (ECHR). In the grounds it was explained, amongst other things, that the first Appellant's now deceased brother had been in an accident at work. Specifically it was said that there had been an explosion at his place of work and that his "whole body is burned". It was suggested that, in these circumstances, refusal represented a disproportionate interference with Article 8 rights. Pausing there, I note that there is in the documentation before me an undated letter written by a GP (the brother's GP) in which it is stated that he had sustained "massive burns to the whole body" following an incident where he works. I am not sure when it was that that letter was obtained and submitted but it seems it must have been available to Judge Clapham when he made his decision.

5. Returning to the narrative, the lodging of the two appeals led to matters being reconsidered by an Entry Clearance Manager but the decision was not altered in any

way. The Entry Clearance Manager does, in his reconsideration, make reference to there being compassionate circumstances but does not refer to them specifically or in any detail. Since the decisions were unaltered the appeals proceeded.

6. Neither Appellant requested an oral hearing and the appeals were decided on the papers. Oddly, although the judge's determination indicates the appeal was considered on the papers on 4th June 2015, the determination was not promulgated until 24th September 2015. I am not sure why that was but I do not think anything turns on it.

7. The judge, in what it is fair to describe as a very brief determination, found that the requirements of the Immigration Rules (the ones placed in issue by the Entry Clearance Officer) were not met with respect to either Appellant and also found that any interference with Article 8 rights was proportionate. The judge's reasoning with respect to the Rules was as follows;

> "3. The Entry Clearance Officer acting on behalf of the Respondent refused the applications on the basis that although the application forms stated that the first named Appellant is employed as a manager at Supernet Limited, the Appellant (then the applicant) had not demonstrated that he has leave from work or that he has a role to return to. Further, the bank statements submitted showed a closing balance which equated to 21 times his stated monthly income. The Entry Clearance Officer therefore was not satisfied that the employment of the first named Appellant and income are as claimed or that the funds in the bank account are genuinely available for use. Moreover, the Entry Clearance Officer noted that the Appellants' claimed expenditure on the trip amounted to over two times disposable income for a ten day trip to the United Kingdom. In all of the above, the Entry Clearance Officer did not consider that the Appellants were genuine visitors to the United Kingdom who would return at the end of the period of their proposed visit.
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> 4. I make no order in connection with anonymity.
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> 5. It is for the Appellants to establish their case, the standard of proof being the balance of probabilities. Otherwise, the appeals fail.
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> 6. The Grounds of Appeal are limited in this case to particular matters. In particular they are limited to Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002.
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> 7. The applications were refused by an Entry Clearance Manager on 3rd March, 2015 and he upheld the decisions. As I am limited in the matters to which I can address myself, it seems to me that both the Entry Clearance Officer and the manager had certain concerns in connection with the financial evidence of the Appellants. These concerns appear to me to be justified and it is for the Appellants to discharge the burden of proof. I have a good deal of sympathy with the circumstances concerning the original applications, but the fact of the matter is that the documentation regarding the financial matters was simply inconsistent and lacking."

8. And as with Article 8 his reasoning was as follows;

> "8. I am also conscious that the Appellants state that their rights are breached in terms of Article 8. Article 8 is not an absolute right. Every country has a right to maintain immigration controls. The refusals are proportionate and it is for the Appellants to ensure that the correct and sufficient documentation is exhibited. I suggest that in any future applications, the Appellants ensure that full disclosures regarding their financial circumstances are made."

9. Hence the appeals failed. However that was not the end of the matter because the Appellants applied for and obtained permission to appeal to the Upper Tribunal. The salient part of the grant of permission reads as follows;

> "2. The Appellants had a right of appeal on human rights grounds only.
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> 3. The judge did not determine whether the Appellants had an Article 8 family life connection with the United Kingdom or whether Article 8 was engaged. The judge dismissed the appeals under Article 8 on the basis that the refusals were proportionate as it was for 'the Appellants to ensure that the correct and sufficient documentation' was exhibited. In respect of the documentation, the judge simply recorded the concerns of the Entry Clearance Officer and stated that the concerns appear to be justified, without further explanation.
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> 4. The grounds contend amongst other things that the judge failed to consider the financial evidence submitted by the Appellants and failed adequately to address Article 8.
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> 5. Whilst the Appellants' ultimate prospects of succeeding on these appeals is very limited, they are entitled to have their appeals properly considered and to know how the decision has been arrived at. It is arguable that it is insufficiently clear from the decision how the decision has been reached bearing in mind the summary approach to Article 8 and the lack of reasoning in relation to the documents."

10. There was then a hearing before the Upper Tribunal (before me) so that it could be considered whether or not the judge had erred in law and, if so, what should flow from that. The Appellants, of course, being out of the country, were unable to attend. They were not represented before me. The Respondent was represented by Mrs R Pettersen. Mrs Pettersen acknowledged that there were shortcomings in the determination and said she would not oppose its setting aside. I decided I would set it aside for reasons which are explained below. Matters then proceeded to remaking. Mrs Pettersen, here, submitted that matters turned upon proportionality. In this context, she argued that there was not enough material to make out a compelling case in favour of the two Appellants because the brother who had been the victim of the accident clearly had other family in the UK who were assisting him.

11. I decided to set the decision aside for a number of reasons. In this context, the judge, although he appreciated the right of appeal was under Article 8, did consider whether or not the requirements of the Immigration Rules were met. Following what was said in **Mostafa (Article 8 in entry clearance) [2015] UKUT 112 IAC** and **Adjei**

(Visit visas – Article 8) [2015] UKUT 261 IAC he was correct to do so as a prelude to and as a part of his Article 8 consideration. However, the two Appellants had filed a considerable amount of documentation concerning their financial standing in Pakistan including bank statements, payslips evidencing the first Appellant's employment and evidence of payment of tax on earnings. The judge did not refer to that documentation albeit that it did have potential relevance to the bases upon which the two applications had been refused. The judge could have considered the evidence and rejected it but it seems to me that he was required to demonstrate he was aware of it and had considered it before reaching his conclusions as to the disputed parts of the Immigration Rules. In not doing that he did err.

12. Further, the judge did not appear to undertake his own assessment as to the merits of the Entry Clearance Officer's reasoning with respect to the Immigration Rules. As was pointed out in the grant of permission, he appeared to simply observe that the concerns of the Entry Clearance Officer, in that regard, appeared to be justified. It does not seem to me that it was necessarily obvious that the concerns were justified. For example, it is not obvious that having a sum of money in a bank account equating to 21 times one's monthly income is suspicious nor is it obvious that the spending of £1,000 was likely to be disproportionate bearing in mind the particular circumstances which the two Appellants said justified the visit (the clearly significant injuries to the brother). Thus, I conclude that the judge has failed to give any reasons of substance for his decision to the effect that the requirements of the Immigration Rules were not met. I appreciate that the appeal was on human rights grounds but, as indicated, a consideration of what the position was under the Rules was a starting point and was of potential relevance to the article 8 issue and that consideration had to be undertaken properly.

13. Further still, the clearly significant injuries to the unfortunately now deceased brother of the first Appellant represented a clearly relevant matter with respect to Article 8 of the ECHR and, but for a passing reference to "the circumstances concerning the original applications" that does not seem to have been taken into account when deciding the question of proportionality.

14. For all of the above reasons I did set the decision aside.

15. As to remaking, Mrs Pettersen, as indicated, expressed the view that matters did turn upon proportionality but said that there were not compelling circumstances such as to render the refusal of entry clearance disproportionate with respect to the Appellants. The fact that she did acknowledge that matters turned on proportionality was a recognition or acceptance by her that Article 8 was engaged. Otherwise, she would not have said matters boiled down to a proportionality assessment.

16. As to the position under the Rules, I do not see that having 21 times one's monthly income in accrued funds is, of itself, suspicious and it does seem to me that, on the face of it, it might well be thought that significant expenditure is justified in order to visit a close relative who has received serious and what was quite possibly

appreciated to be at the time, life threatening injuries. In addition, the first Appellant has supplied bank statements dating back to early 2014, which demonstrate regular income and expenditure, and which do not seem to me to betray any suspicious pattern. There is, as indicated, evidence regarding the payment of tax which, on the face of it, appears to be genuine and which was not at any point the subject of any specific challenge. There are payslips which, again, do not appear to be suspicious on the face of it and there is also a letter from Supernet confirming the first Appellant's employment, his job title and the date of commencement of that employment. Again, I see nothing suspicious about it. On the material before me, therefore, I conclude that the Entry Clearance Officer's concerns regarding the financial standing of the two Appellants and, seemingly, the genuineness of the documentary evidence they have produced in that regard are not made out. I also take the view that, in the circumstances it is very readily understandable that the two Appellants would wish to visit the first Appellant's brother. I conclude, therefore, that both the first and the second Appellant have successfully demonstrated that they are genuine visitors and that they do have the requisite intention to leave the UK at the end of the proposed visit.

17. If the two Appellants had a right of appeal under the Rules, therefore, on the above findings, they would both succeed. However, that is not the case. Their appeal is limited to Article 8 grounds. In light of what is said in **SS (Congo) [2015] EWCA Civ 387** and **Kaur (Visit appeals; Article 8) [2015] UKUT 487 IAC** I take the view that it is necessary for the two Appellants to demonstrate that there are compelling circumstances or circumstances of a particular pressing nature such as to justify their being granted entry clearance and that, if they are unable to do that, they will not succeed under Article 8.

18. In this context, the two Appellants were wishing to see a close relative who had what I think it is fair to say at the dates of application and decision, life threatening injuries. Mrs Pettersen, in effect, accepted that Article 8 was engaged and I proceed on that basis. Clearly, any interference with Article 8 rights brought about by the refusal of entry clearance is lawful and is in pursuance of a legitimate aim so the remaining issue is that of proportionality. A part of that consideration is my finding that the two Appellants do satisfy the requirements of the Immigration Rules but that is certainly not nearly enough of itself. However, whilst I accept it will ordinarily be very difficult to demonstrate in the context of a visit visa application and appeal that any interference with Article 8 rights is disproportionate, this is an unusual case. There clearly were compassionate circumstances of a specific nature. Indeed, in looking at the circumstances as they stood as at the decision date, I do conclude that there were compelling circumstances or, put another way, circumstances of a particularly pressing nature which, bearing in mind the obvious extent of the injuries, demonstrated, that on the particular facts of these two appeals, the interference with Article 8 rights was disproportionate.

19. In light of the above, therefore, in remaking these decisions, I allow the appeals of each claimant.

20. In truth, though, I am not sure whether the two Appellants will derive any practical benefit from my allowing of their appeals. They both wished to visit the first Appellant's brother and, of course, sadly he has passed away. That certainly represents a significant change in circumstances since the date of the decisions under appeal. I do note, though, that the refusal of a visa to foreign nationals seeking to enter the UK for a finite period for the purpose of mourning with family members the recent death of a close relative is capable of constituting a disproportionate interference with the rights of the persons concerned under Article 8 and have in mind the decision in **Abbasi and another (Visits – bereavement – Article 8) [2015] UT 463 IAC**. It may be, therefore, that the Entry Clearance Officer, in these particular circumstances, might feel able to issue visas to the first and second Appellant despite the relevant post-decision change in circumstances. However, I do not seek to make any direction about that.

Notice of Decision (First Appellant)

The decision of the First-tier Tribunal involved the making of an error of law. I set aside its decision. I remake the decision and, in so doing, I allow the Appellant's appeal against the Entry Clearance Officer's decision to refuse entry clearance.

Notice of Decision (Second Appellant)

The decision of the First-tier Tribunal involved the making of an error of law. I set aside its decision. I remake the decision and, in so doing, I allow the Appellant's appeal against the Entry Clearance Officer's decision to refuse entry clearance.

Anonymity

I make no anonymity directions. None have been sought.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

As these appeals have succeeded and as it appears to me that there was material before the Entry Clearance Officer and the Entry Clearance Manager which might reasonably have been thought to weigh in favour of the two Appellants, I have decided to make a full fee award with respect to both appeals.

Signed Date

Upper Tribunal Judge Hemingway