



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: VA/07704/2014

THE IMMIGRATION ACTS

Heard at Field House
On 19th July 2016

Decision & Reasons Promulgated
On 20th July 2016

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

ENTRY CLEARANCE OFFICER - ABU DHABI

Appellant

and

MR UTA ULLAH KHAN
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr W Walker, Senior Home Office Presenting Officer
For the Respondent: Ms S Azhar, instructed by Monk and Turner Solicitors LLP

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Pakistan born on 26th July 1935. He is therefore 80 years old. He wished to come to the UK to visit his six children and their spouses, and his eight grandchildren who live in this country as well as some more distant relatives.
2. The claimant applied for entry clearance to come to the UK as a visitor on 25th August 2014. His appeal against the decision of the entry clearance officer dated

28th August 2014 refusing him a visit visa was allowed by First-tier Tribunal Judge Wellesley-Cole in a determination promulgated on the 1st March 2016.

3. Permission to appeal was granted by Judge of the First-tier Tribunal JM Holmes on 9th June 2016 on the basis that it was arguable that the First-tier judge had erred in law in failing to determine the appeal on the basis that the only right of appeal against refusal of a visit visa is (since 25th June 2013) on human rights grounds, and in failing to determine the appeal with reference to the relevant human rights law principles or case law.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

5. Mr Walker relied upon the grounds of appeal. In these it was argued that the First-tier Tribunal had erred in law by failing to make findings as to whether an Article 8 ECHR family life relationship existed between the claimant and sponsor. It was argued further that there was no evidence that such a relationship of dependency going beyond normal emotional ties, as required by the case law (see MS (Article 8 – Family Life –Dependency – Proportionality) Uganda [2004] UKAIT 00064, Kugathas v SSHD [2003] EWCA Civ 31, ZB (Pakistan) v SSHD [2009] EWCA Civ 834 and GHISING & ORS [2013] UKUT 00567) was present to make such a finding. In addition even if family life had been found to exist there was no evidence that there would be an interference with that family life due to the finding at paragraph 12 of the decision of the First-tier Tribunal that the UK based family visit the claimant in Pakistan regularly. In addition, if refusal of entry clearance were found to interfere with the right to respect to family life, the proportionality assessment is defective as it fails to explain why the refusal of entry clearance is of sufficient consequence in the context of these family visits to the claimant. It was insufficient and unlawful for the appeal to be allowed simply because the First-tier Tribunal found the claimant to meet the Immigration Rules.
6. Ms Azhar submitted that the findings made by the First-tier Tribunal were ones open to the judge, but accepted that she could not point to any findings that family life existed between the claimant and sponsors in the UK, or that refusal of entry clearance interfered with that family life.

Conclusions – Error of Law

7. The Home Office Presenting Officer before the First-tier Tribunal reminded the Tribunal that the only relevant ground of appeal in this matter was under s.84(1) (c) of the Nationality, Immigration and Asylum Act 2002, as is recorded at paragraph 5 of the decision. The representative for the claimant also submitted that it would be a breach of the claimant's Article 8 ECHR rights in submissions, as is recorded at paragraph 12 of the decision.
8. However in paragraphs 13 to 15 of the decision, in which the First-tier Tribunal makes the findings on the evidence and submissions, there is no reference to this

correctly identified legal basis for determining the appeal. The decision simply makes (validly reasoned) findings that the sponsors were credible witnesses and then concludes that the claimant met the requirements of paragraph 41 of the Immigration Rules. This was not a lawful basis on which to determine the appeal as since 25th June 2013 s.52 of the Crime and Courts Act has restricted the appeal rights of those refused entry clearance as visitors only to arguments that the decision was a breach of the claimant's human rights.

9. The approach the First-tier Tribunal ought to have adopted is set out in Adjei (Visit visas – Article 8) [2015] UKUT 261:

“The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether article 8 of the ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the rules and should not do so. If article 8 is engaged, the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow.¹ Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) is not authority for any contrary proposition”

10. As the Secretary of State has argued to establish whether family life exists the First-tier Tribunal ought to have considered the principles in the cases relating to Article 8 ECHR family life between adult children and their parents. The key issue would have been to identify whether there were more than normal emotional ties resulting in dependency for mutual support. This was not done by the First-tier Tribunal. Further there was no consideration of whether the decision to refuse entry clearance interferes with any family life relationship, or whether if there is an interference this is proportionate to the legitimate aim. The finding that at the date of decision the claimant met the Immigration Rules is only a factor relevant to the proportionality of the refusal if there is a family life relationship which is interfered with so as to engage Article 8 ECHR at all.
11. I therefore find that the First-tier Tribunal erred in law in adopting an approach to the determination of this appeal which did not accord to the only legally valid ground of appeal available to the Tribunal. I therefore set aside the decision of the First-tier Tribunal.

Evidence and Submissions - Remaking

12. Mr Saeed Anwar Suleman attended the Tribunal and gave oral evidence. He confirmed his statement is true and correct. In short summary in this statement and in oral evidence he says as follows. He is a British citizen who works for the Royal Mail. The claimant is his father-in-law. The claimant had previously held a five year visit visa and come between 5 to 10 times on visits to the UK in the past 17 years, and stayed on average for 3 months on each occasion. He was certain his father-in-law would return to Pakistan if allowed to visit again. He had property, friends and family in Pakistan. He just wants to visit the UK for a short time and go back there. He is a financially self-sufficient man. It was not satisfactory if he and other family members travelled to Pakistan as they could not all gather

¹ Now see *SS (Congo) v Secretary of State for the Home Department* [2015] EWCA Civ 387.

together (the 20-30 family members) as they could not all travel at the same time due to work (as all of the children of the claimant worked) and school obligations (of the grandchildren) in this country. Family gatherings required all of the family members to be present. This was only possible if the claimant to come here. His wife had visited the claimant recently as the claimant had been unwell and because the claimant's wife had passed away a year ago. He speaks with the claimant about twice a week on the telephone.

13. Dr Muhammad Ali Khan attended the Tribunal and gave oral evidence. He confirmed his statements is true and correct. In short summary in this statement and in oral evidence he says the following.
14. He is a medical doctor currently working in Whipps Cross Hospital, a British citizen and son of the claimant. The claimant had visited between 4 and 5 times during the currency of his previous 5 year visa, for between one and five months on each visit. He stayed longer when there was a family occasion such as a wedding. The claimant is a very law abiding man who has never overstayed his visa in the past and would not do so in the future. When he worked he had been based in Saudi Arabia and could have moved to the UK at that time, but he preferred to return to Pakistan where he has status and position in society. There were property and land deeds that the entry clearance officer had not properly considered showing his ties to Pakistan. The claimant owns his own residential and commercial property in the centre of the town of Jhelum, and also manages property for his nieces and nephews as their father (his younger brother) has passed away. He supports himself financially from these assets.
15. The claimant has a close relationship with his UK based family as all of his six children and eight grandchildren live here. He is a physically fit and mentally well 80 year old gentleman, but emotionally it is important that he is allowed to have free access and contact with his UK family especially after his having suffered the loss of his wife, and to be in the UK for celebrations with the full family group. He had been very unwell with stomach problems in 2013 but had come through these problems due to keeping fit, a good diet and a positive mental attitude. The family here do also try to provide him with extras such as fans and a bottled water dispenser to make his life easier. It was very important to the claimant and his daughter (the claimant's granddaughter) that he be able to come to the UK and do face to face things like collect his three year old granddaughter from school. It was important to all the family and to the children to see how family ties really work by having periods of living together, and these visits provide the claimant and the UK based family with great joy. The claimant loves to travel and to have a break with his UK based family. Whilst they try to call him three or four times a week it is not always possible to make contact that way as the claimant is often out of his home, and this is not a sufficient way to conduct their family relationships.
16. Mr Walker relied upon the entry clearance refusal notice, although it was noted that this did not provide any reasons why the claimant was not entitled to entry clearance in accordance with Article 8 ECHR. Mr Walker conceded that the

claimant has a family life relationship with his UK based family due to the extent of emotional ties between this elderly widowed gentleman and his children (all of whom lived in the UK with their spouses and children) and the extensive history of visits between the claimant and the sponsors in addition to the telephone contact ; and that in light of the cultural need for family gatherings in the UK with all family members present which could not be arranged in Pakistan for practical reasons it was accepted that the refusal interfered with the claimant's family life. Mr Walker accepted that there was evidence before the Tribunal which indicated that the claimant would return to Pakistan in the form of his ownership of property and management of property for his late brother's children, and that he did have family in Pakistan including nephews, nieces and a sister. He also accepted that the claimant had a history of only staying in the UK for short visits complying with the Immigration Rules before returning to Pakistan.

17. Ms Azhar relied upon the case of Kaur (visit appeals; Article 8) [2015] UKUT 00487. She submitted that as Mr Walker had accepted that there was family life between the claimant and his UK sponsors and that the refusal interfered with that family life, that her submissions only needed to focus on whether the decision was disproportionate. She said it was disproportionate as the claimant clearly would leave at the end of his visit. He had done so after short visits on many occasions in the past and had not previously tried to settle, even though in the past, in accordance with previous version of the Immigration Rules, he would have been able to do so. It could therefore properly be argued that there were compelling circumstances which required a grant of leave to enter given the need for meaningful family gatherings with all family members present.
18. At the end of the hearing I reserved my determination.

Conclusions – Remaking

19. I am guided by Adjei and Kaur in the approach to the re-making of this appeal.
20. I find that the sponsoring witnesses before me were both credible. They gave their evidence in a straightforward and heartfelt way; it was obviously that Dr Khan was deeply attached to his father and heartbroken that his father had not been able to have the contact he would have wished with his child, but none the less I do not find he exaggerated his evidence. The oral evidence given by both witnesses was consistent with their written statements, and with the other documents in the case.
21. It is conceded by Mr Walker, acting for the Secretary of State, that there is a family life relationship between the claimant and his children and grandchildren in the UK. I accept that there are unusual circumstances in this case with the claimant being a very elderly widower with all of his children and grandchildren in the UK, and being in very regular contact with those children in this country on the telephone several times a week and via regular visits which have historically involved his traveling to the UK and the UK based family travelling to Pakistan. Whilst the claimant is a physically capable gentleman and there is no evidence he has is not mentally sharp, he is elderly, without a day to day companion and

emotionally needs to be part of his UK family in a way which exceeds normal emotional ties. This emotional closeness is clearly reciprocated by the UK based family.

22. It is also conceded by Mr Walker for the Secretary of State that the refusal of entry clearance interferes with that family life. I too accept that this is the case for two reasons. Firstly culturally the family have a need to be all together for family and religious/cultural occasions such as Eid and this is not possible to arrange in Pakistan with all the adult children working and their children having school commitments in the UK. Secondly the family life relationship between the claimant and his young grandchildren, such as the child of Dr Khan who is aged just 3 years, cannot take place in a full sense via Skype or telephone: they need physical contact and presence, and seeing the child's UK home and school is an important part of this family relationship.
23. When considering proportionality it is necessary to consider whether the visit Immigration Rules at paragraph 41 were in fact met at the time of decision. The notice of refusal raises issue only with paragraphs 41(1) and (ii), and thus bases the refusal on the fact that the Secretary of State was not satisfied that the claimant would leave the UK at the end of his short visit and that he was a genuine visitor. This was contended to be the case because the claimant could not show he was in receipt of his claimed level of income or that he had significant ties to Pakistan. It was accepted that all other aspects of the Immigration Rules, most significantly that there would be adequate accommodation and support in the UK were met.
24. The claimant has produced evidence that he owns, and owned at the time of decision, property in Jhelum and has a power of attorney to manage other property (previously owned by his deceased brother) in Jhelum. I accept this evidence combined with the witness evidence demonstrates that the claimant owns property and has a more than adequate income from this property in Pakistan, and is involved with the management of his late brother's properties for his nieces and nephews, and that this was the case at the time of decision. I also accept the evidence of the witnesses that the claimant has a sister in Pakistan, as well as these nieces and nephews and so lives (and lived at the time of decision) in an area with extended family member nearby. I find that the claimant had demonstrated, through his history of a number of previous visits to the UK, that he has not wished historically to remain in the UK longer than for the period of a short visit within the Immigration Rules. I am satisfied, given this evidence, on the balance of probabilities that the claimant was, at the time of decision, a genuine visitor who had sufficient ties and assets in Pakistan to mean that he would abide by the terms of his entry clearance and return at the end of his visit which would not extend beyond six months, and that this remains the case today.
25. I find that there are compelling circumstances in this case relating to the need for a close family to be able to meet together to celebrate social and religious occasions inclusive of the oldest and youngest members of the family, which for practical reasons of work and schooling must be in the UK given the family make-up of employed and school age British citizens with the exception of the claimant.

I conclude that given the claimant's ability to meet the Immigration Rules, whilst giving proper weight to the public interest in maintaining immigration control, that it would be a disproportionate interference with the claimant's right to respect for family life to refuse to grant him entry clearance for a visit of a period of up to 6 months.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. I re-make the decision in the appeal by allowing it on human rights grounds.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 19th July 2016