



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

Appeal Number: VA/14549/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision and
Promulgated**

Reasons

**On 2 December 2014
Extempore**

On 8 December 2014

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

ENTRY CLEARANCE OFFICER - ABU DHABI

Appellant

and

MRS NASEEM AKHTAR

Respondent

Representation:

For the Appellant: Mr Melvin, Home Office Presenting Officer

For the Respondent: No appearance

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the determination of First-tier Tribunal Judge Wellesley-Cole promulgated on 9 September 2014 whereby she allowed the appeal of Mrs Naseem Akhtar against the decision of the respondent made on 4 July 2013. Mrs Akhtar did not appear before me nor did any representative attend on her behalf. I am satisfied that she had instructed solicitors in the United Kingdom in the past. I am satisfied also, having regard to the court file, that due notice of

the time, date and venue of the hearing had been served and in the absence of any explanation I am not satisfied there is any good reason why I should not proceed to determine this matter so I am satisfied it is in the interests of justice to do so, having had due regard to the overriding objective.

2. Mrs Akhtar whom I shall refer to as the claimant sought permission to enter the United Kingdom as a visitor to stay with a cousin and the application was made on the basis that she met the requirements of paragraph 41 of the Immigration Rules.
3. The respondent refused to grant entry clearance for reasons set out in a notice which was served on the claimant. The reasons for that are summarised by Judge Wellesley-Cole in her determination and are not in dispute. Judge Wellesley-Cole considered the application and having heard evidence from the sponsor concluded that the applicant met the requirements of paragraph 41 of the Immigration Rules.
4. The respondent sought permission to appeal on the grounds that Judge Wellesley-Cole had erred in law as the claimant's right of appeal is limited given that the application was made after 9 July 2012 the date on which the Immigration Appeals (Family Visitor) Regulations 2012 came into force. As she was seeking to visit a cousin, a relationship which falls out with the classes of persons entitled to a right of appeal under the immigration rules, the only grounds of appeal permissible were that the decision is unlawful pursuant to the Race Relations Act or unlawful pursuant to Section 6 of the Human Rights Act 1998.
5. On 21 October 2014 First-tier Tribunal Judge Nicholson granted permission stating that the grounds are clearly arguable. There is no response pursuant to Rule 24 from the respondent in this case.
6. When the matter came before me as noted above there was no appearance from the claimant. Mr Melvin submitted that Judge Wellesley-Cole had made a clear error of law in proceeding pursuant to consideration of the Immigration Rules and failing to have regard to the only permissible grounds of appeal that is race relations and human rights.
7. I am satisfied that Judge Wellesley-Cole did err materially in failing to consider first whether, given the provisions of the Immigration Appeals (Family Visitor) Regulations 2012, she had jurisdiction to consider the appeal on the ground that the decision was contrary to the Immigration Rules. It is clear that, on the facts of this case given that the claimant was seeking only to visit a cousin that she did not have the right of appeal except on limited grounds. That is because "cousin" does not fall within the list of persons set out in regulation 2, and it is only those people who have a right of appeal on immigration rules grounds. Judge Wellesley-Cole therefore had no jurisdiction to consider that issue. Further, she failed to make any findings with respect to the limited grounds permissible, in this case with respect to Human Rights, and accordingly I am satisfied this

error is material. I therefore I set Judge Wellesley-Cole's decision aside. I therefore proceed to re-make the decision.

8. As Mr Melvin submitted it is difficult to discern from the grounds of appeal that human rights is raised except obliquely. The only mention of family life is that which the appellant has in her home country. Further, I am not satisfied in this case that there is on the evidence before me even arguably a family life between the claimant and either her cousin in the issue of whether the Upper Tribunal has jurisdiction pursuant to the Human Rights Act to consider the appeal. That is because the scope of the European Convention on Human Rights is essentially territorial and it is only exceptionally that rights can be asserted outside the jurisdiction or territory of the member state.
9. As was stated in **Sun Myung Moon (Human rights, entry clearance, proportionality) USA [2005] UKIAT 00112** at [68]:

“The essence of family life, which makes it possible that the ECHR extends to some non-nationals outside of the territorial jurisdiction who seek respect for their family life with someone settled here, is the need for physical proximity between those persons. This would cover the normal relationships between husband and wife, parent and child and closely allied relationships. We did not conclude that Article 8 in this extended form covered all aspects of personal and private life, or necessarily all those relationships which could come within the notion of family life within the Convention. It covers the basic components of family life, personal relationships which require physical proximity in order for them to be enjoyed in any real sense. We emphasise that in this extended form, we were examining the issue from the standpoint of the non-national out of country, rather than from the standpoint of the family member settled here. Our comments do not bear upon the position of the latter were they to assert rights as in **Abdulaziz.**”
10. Whilst the issue of the extra-territoriality of the European Convention has been considered more recently in **Al-Skeini** [2006] UKHL 26 and by the Court of Appeal in **R v Naik** [2011] EWCA Civ 1546, I do not consider this alters the position that the Human Rights Convention is simply not engaged when what is asserted is a family life which exists outwith the United Kingdom and none of those between whom it exists are present here, and where, unlike in **Naik** other articles of the Human Rights Convention might be engaged.
11. This is not a case where she was held in the custody of British authorities nor can it properly be argued that the actions in the facts of this case of the consular authorities could be construed as such that the claimant was within their “jurisdiction”; they had no control over her. Further, having had regard to the decision of the Court of Appeal in **Naik** I consider that this is not a case to which Article 10 applies or that that could by analogy be applied to the facts of this case and accordingly I am not satisfied that the Tribunal has jurisdiction to entertain the case.

12. Further, even if I am wrong on the issue of jurisdiction, I am not satisfied that the appellant has established a family life with anybody in the United Kingdom and accordingly the appeal would fall to be dismissed in any event there being in reality little or no evidence of how any family life or private life within the jurisdiction was the subject of interference or a failure to promote.
13. For these reasons, I remake the decision by dismissing the appeal on all grounds. I would, however, ask the respondent to take careful note of the findings of fact made by Judge Wellesley-Cole in considering any further application by the claimant.

SUMMARY OF CONCLUSIONS

- 1 The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.
- 2 I remake the decision by dismissing the appeal on all permissible grounds.

Signed

Date: 3 December 2014

Upper Tribunal Judge Rintoul