



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

Appeal Number: VA/17524/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14 August 2014**

**Determination  
Promulgated  
On 19<sup>th</sup> Aug 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE APLEYARD**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS KHIN PHONE SWE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr. E. Tufan, Home Office Presenting Officer.  
For the Respondent: No appearance.

**DETERMINATION AND REASONS**

1. This is a respondent appeal but I shall henceforth refer to the parties in the original terms detailed in the determination of Judge of the First-tier Tribunal Gillespie following consideration of this appeal on papers resulting in a determination promulgated on 28 May 2014.

2. The appellant is a citizen of Burma/Myanmar who made application to visit her brother-in-law and sponsor Mr Hla Pe, her daughter Mrs Nilar Khin Bo, her daughter's husband and other family members.
3. The Entry Clearance Officer refused the appellant's application in a decision dated 11 September 2013. He did so relying on paragraphs 41(i) and (ii) of the Immigration Rules HC 395 (as amended).
4. The appellant appealed that decision. It was considered by the judge who found, in allowing the appeal, at paragraph 19 of his determination, that in all the circumstances it was more probable than not that the appellant intended to make a genuine family visit and will return to her home country thereafter.
5. The respondent sought permission to appeal relying on Section 52 of the Crime and Courts Act 2013 which abolished the full right of appeal in family visitor visa cases. Applications submitted on or after 25 June 2013 are affected and so far as they are concerned a full right of appeal against entry clearance as a family visitor has been removed. Entry clearance refusal decisions attract residual rights of appeal on race discrimination and human rights grounds.
6. Although there was no appearance on behalf of the appellant at today's hearing I took account of a letter sent in by the appellant's solicitors Messrs Cahill De Fonseca dated 15 July 2014. It requests the appeal to be considered once more on papers and that the decision of the Immigration Judge to allow the appeal under the Immigration Rules be set aside, but that the findings of fact be preserved and the appeal allowed on Article 8 grounds.
7. Mr Tufan relied on the grounds put forward in seeking permission to appeal and contended that the judge failed to make any findings in relation to either race discrimination or human rights grounds. Beyond that the judge materially erred by allowing the appeal under the Immigration Rules and in so doing had gone outwith his jurisdiction.
8. I find that to be the position and conclude that the judge made a material misdirection of law in purporting to deal with this appeal under the Immigration Rules and in particular under paragraph 41.
9. Race relations is not an issue in this appeal.
10. However, I note that in her original grounds of appeal the appellant asserted that the decision of the Entry Clearance Officer to refuse her application as a family visitor constituted a disproportionate interference with the appellant's right to family life.
11. In their letter of 14 July 2014 her solicitors rely on the authority of **Razgar, R (on the Application of) v SSHD [2004] 2 AC 368** and argue that in circumstances where the appellant's daughter is married to a recognised refugee the refusal constitutes an interference with both her and her

family's right to a family life. It is not possible for the appellant's daughter, son-in-law and granddaughter to visit her in Burma although it is acknowledged that it is possible for them to meet up in a nearby country. Article 8 is engaged and in all the circumstances the Entry Clearance Officer's decision is a disproportionate response.

12. Article 8 of the European Convention on Human Rights states:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

13. In looking at Article 8 I have considered the decision of the House of Lords in **Huang v SSHD [2007] UKHL 11**. The House of Lords gave guidance that in assessing proportionality there was no legal test of truly exceptional circumstances, reaffirmed the analysis they had given in **Razgar, R (on the Application of) v SSHD [2004] UKHL 27** and also reaffirmed the importance of continuing reliance on established Strasbourg jurisprudence relating to Article 8. Lord Bingham's step by step approach in **Razgar** continues to apply in all expulsion cases. Firstly, it is necessary to establish whether there is a private or family life with which removal would interfere and then Lord Bingham's five questions, the step by step approach, should thereafter serve as a framework for deciding such cases.

14. I remind myself that the mere existence of a family relationship or a private life is not sufficient for the applicability of Article 8(2). Much more is needed. At paragraph 20 of Lord Bingham's judgment in the case of **Huang** he said this:

“In an Article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.”

15. I must consider Lord Bingham's step by step approach and in so doing I recognise that at all stages of the Article 8 assessment when deciding whether there is a family or private life, when deciding whether any existing family or private life is the subject of an interference having grave consequences and when deciding whether any such interference is proportionate to the legitimate public end sought to be achieved, the approach is to take into account a wide range of circumstances including the appellant's previous family and personal circumstances and the likely developments in the future.
16. In **Razgar** Lord Bingham gave the following guidance:
- “In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on Article 8, these questions are likely to be:
- (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
  - (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
  - (3) If so, is such interference in accordance with the law?
  - (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
  - (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?”
17. I have had regard to all the written evidence and submissions but do not find that I can allow this appeal under Article 8 of the ECHR. It is understandable that the appellant may wish to visit family members in the United Kingdom. However, I find that the relationship the appellant has with her family members in the United Kingdom does not constitute family life as envisaged by Article 8. As I say the mere existence of a family relationship is not sufficient for the applicability of Article 8(2). There is no evidence that the family life there is cannot carry on as it has before and the appellant's own solicitors acknowledge the family has the prospect of meeting up in other nearby countries to Burma/Myanmar. Whilst the decision may be an interference with the exercise of the appellant's right

to family life it does not have consequences of such gravity as potentially to engage the operation of Article 8. Having concluded that the answer here to the second of Lord Bingham's questions is a negative one there is no need for me to proceed further.

18. I do not find that it has been established on the evidence that the decision of the Entry Clearance Officer is unlawful under Section 6 of the Human Rights Act 1998 and accordingly I will dismiss the appeal on human rights grounds.

### **Summary**

19. For the reasons detailed above the judge erred in allowing this appeal under the Immigration Rules.
20. I set aside the First-tier Tribunal's decision.
21. I remake the decision in the appeal by dismissing it on human rights grounds.
22. No anonymity direction is made.

Signed

Date 19 August 2014.

Deputy Upper Tribunal Judge Appleyard

### **TO THE RESPONDENT FEE AWARD**

As I have dismissed the appellant's appeal I do not consider it appropriate to make a fee award in this appeal.

Signed

Date 19 August 2014.

Deputy Upper Tribunal Judge Appleyard