Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/04153/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 20 May 2015	**On 28 May 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Entry Clearance Officer – Abu Dhabi

Appellant

and

Chaudhry Tahir Mahmood
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr NH Asghar, sponsor
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Entry Clearance Officer against the decision of First-tier Tribunal Judge Kempton promulgated 16.1.15, allowing the claimant's appeal against the decision of the Entry Clearance Officer, dated 30.6.14, to refuse him entry clearance to the United Kingdom as a family visitor pursuant to paragraph 41 of the Immigration Rules. The Judge heard the appeal on 13.1.15.

2. First-tier Tribunal Judge Hodgkinson granted permission to appeal on 24.2.15.

3. Thus the matter came before me on 20.5.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out herein, I found that there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Kempton should be set aside and remade. Following further submissions of the sponsor and Mr McVeety I dismissed the appeal, for the reasons set out below.

5. The refusal of entry clearance attracts only a limited right of appeal, on Race Relations and Human Rights grounds. In the circumstances, the approach of the judge in §9 through §16, assessing the merits of the immigration application or decision, was flawed and the conclusions of the judge in respect of the same irrelevant. The statement that, "Ultimately, the issue is one of whether the appeal should be refused for the appellant to make a fresh application with more evidence or whether it should be allowed," is entirely misconceived.

6. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) it was held that:

> "In the case of appeals brought against refusal of entry clearance under Article 8 ECHR, the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control."

7. And as recently held in Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC):

> "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… As compliance with para 41 of HC 395 is not a ground of appeal to be decided by the Tribunal, any findings concerning that will carry little weight, especially if based upon arguments advanced only by the appellant."

8. The first task of the judge should have been to consider whether Article 8 is engaged at all. The decision contains no assessment of Article 8 at all, other than the entirely unreasoned and evidentially unsupported statement that "I find that in order to maintain family life between the appellant and sponsor, the appeal should be allowed." The decision contains not a single consideration as to why the refusal decision amounted to a breach of Article 8 and no reference to proportionality. The judge had to demonstrate how the refusal of a temporary visit of the claimant amounted to such a grave interference with family life protected by Article 8 so as to engage ECHR at all. It is clear that the judge failed to follow the Razgar stepped approach. The judge also ignored section 117B of the 2002 Act to the effect that immigration control is in the public interest.

9. On the facts of this case that the claimant has a sister in the UK whom he has not seen for 8-9 years, and intended to visit the sponsor, his cousin, and other wider family members in the UK. Whilst these may be family members and there may be a relationship between them, it is one maintained at a distance. Without more, these are not the sort of close family bonds, more than the normal emotional ties between close relatives, that Article 8 is intended to protect. In essence, impermissibly, the judge found that the Rules were met and proceeded to use Article 8 as a general dispensing power.

10. I therefore find that the making of the decision of the First-tier Tribunal involved the making of an error on a point of law such that the decision should be set aside.

11. For the same reasons, I find that the decision of the Entry Clearance Officer was not in breach of the appellant's Article 8 ECHR rights to respect for family life. Article 8 is not engaged in this case. There is nothing to demonstrate that the facts of this case the decision of the Entry Clearance Officer constitutes such grave interference with family life so as to even begin to engage Article 8 at all. Further, it is open to the sponsor or other family members to visit the appellant in Pakistan or elsewhere outside the UK. That it is open to the appellant to make a further application, taking care to address the reasons for refusal, also demonstrates that the decision is not disproportionate.

I set aside set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **4 August 2015**

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **4 August 2015**