



IAC-FH-NL-V1

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

Appeal Numbers: VA/04994/2014
VA/04996/2014
VA/04999/2014
VA/05001/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 13 January 2016**

**Decision & Reasons Promulgated
On 28 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ENTRY CLEARANCE OFFICER - BEIJING

Appellant

and

**MINGBU WANG
HUIFANG WANG
CHANGJUH WANG
YINQING WANG**

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr. D. Mills, Home Office Presenting Officer

For the Respondents: Mr. S. Vokes of Counsel, instructed by Lin & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against the decision of First-tier

Tribunal Judge Somal promulgated on 16 January 2015 in which she allowed the appeals against the decisions to refuse to grant entry clearance as visitors.

2. For the purposes of this decision I refer to the Entry Clearance Officer as the Respondent and to Mingbu Wang, Huifang Wang, Changjuh Wang and Yinqing Wang as the Appellants, reflecting their positions as they were before the First-tier Tribunal.
3. Permission to appeal was granted as follows:

“The decision of the Judge and the reasons for that decision at [15] are compassionate. However, the decision to some extent flies in the face of the Judge’s findings set out at [11]. Furthermore, all the appellants are adults. In that context, there is no assessment of what “family life” meant in the context of each of the members of this family. Consequently, it is at least arguable that the judge conducted an inadequate assessment of proportionality which amounts to an arguable error of law.”
4. At the hearing I heard submissions from both representatives, following which I reserved my decision.

Submissions

5. Mr. Mills submitted that the hearing had taken place in January 2015 on the papers. At the time, the First-tier Tribunal was to an extent “in the dark” regarding how to deal with visit visa appeals under Article 8 ECHR. There had since been caselaw which outlined the approach. I was referred to the cases of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC), Abbasi and another (visits - bereavement - Article 8) [2015] UKUT 00463 (IAC), Kaur (visit appeals: Article 8) [2015] UKUT 487 (IAC) and Adjei (visit visas - Article 8) [2015] UKUT 361.
6. He submitted that on the facts of the case it was difficult to see how Article 8 was engaged. They were adult relatives who had not seen each other for some time and the visit was for the purposes of the funeral. Following the case of Abbasi which held that a visit for a funeral could engage Article 8, he submitted that while he could not pursue the ground that Article 8 could not be engaged, the reasoning in the decision for finding that Article 8 was engaged was sparse. Article 8 would not be engaged absent compelling circumstances.
7. In paragraph [11] the judge made express findings that the Appellants did not meet the requirements of the immigration rules. They had not provided evidence of employment or study. Whether or not an Appellant meets the rules is a significant factor in relation to Article 8. He submitted that the consideration of proportionality was inadequate and there had been no proper balance of the public interest versus the compelling circumstances.

8. Mr. Vokes submitted that the proportionality exercise carried out by the judge was on all fours with that in Abbasi. The judge dealt with the immigration rules then went on in paragraph [12] to address the five questions under Razgar.
9. In paragraph [13] she found that there was a close relationship between the Appellants and the relative whose funeral they wished to attend. The threshold for finding an interference in family life was not high. In paragraph [14] the judge addressed the third and fourth Razgar questions. The proportionality assessment in paragraph [15] mirrored that in paragraph [15] of Abbasi. There were compassionate circumstances which meant that entry clearance was reasonable and appropriate.
10. It could not be said that the judge had forgotten the findings in paragraph [11] when considering Article 8 outside the immigration rules. She found that there were compassionate circumstances such that entry clearance should be granted for a short period of time. He submitted that the Appellants would probably have been granted temporary admission had they just turned up without visas. He submitted that there were compelling reasons.
11. Regarding the finding that there was family life, it was an oxymoron that there would not be family life, given that the Appellants were the children and the siblings of the man whose funeral they wished to attend. The burden was on the Respondent to show that there was not family life. There had been a temporary loss of contact between the Appellants and their dead relative. The judge proceeded on the basis that they had enjoyed family life prior to coming to the United Kingdom. There was sufficient reasoning, although he accepted that it was a "sparse decision".
12. In response Mr. Mills submitted that the consideration of whether Article 8 was engaged was inadequate. It was surprising that no evidence had been produced to indicate how long ago the relative had come to the United Kingdom, and for how long he had lived with the Appellants in China. He had come as an asylum seeker, but it was not clear when he had come to the United Kingdom. He submitted that the losing party in an appeal had the right to know why they had lost, and was not possible to know this from the decision.
13. To state that Article 8 could be presumed to be engaged when children and parents were involved was far from absolute. When a father had left the family to claim asylum, it could be that there was no relationship with the family. In the balancing exercise, the Respondent's reasons for refusing entry clearance had to be considered but these had been left to one side. The findings in paragraph [11] were not considered as part of the balancing exercise and it could not be assumed that the judge had considered them. In the period of time after this decision was made, the law on how to approach Article 8 in visit visa appeals had been clarified. The decision contained a clear error of law.

Error of law

14. In paragraph [11] of the decision the judge finds that the Appellants have failed to address the Respondent's concerns in relation to the immigration rules. She gives reasons for this which include the fact that she cannot be satisfied that the first Appellant is employed as claimed as no evidence has been provided. Further, no evidence has been provided to show that the second and third Appellants are students. The judge doubted whether the money in their accounts was genuinely available for the purpose of the visit. The fourth Appellant had stated she was self-employed but had produced nothing to confirm it. Further she had concerns about the sponsor and the lack of evidence he had provided. At the end of the paragraph she states: "I find the refusal was correctly made under paragraph 41 given the paucity of information about the ties to China and the financial and economical position of each Appellant and the sponsor in the UK."
15. In paragraph [12] the judge turns to Article 8 outside of the immigration rules following the five steps set out in Razgar.
16. The headnote to Adjei states as follows:

"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. Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) is not authority for any contrary proposition."
17. Paragraph [13] states:

"I accept that the Appellants as the children and siblings have enjoyed a family life with their family member before he came to the UK. Given the threshold is not especially high I find that there is an interference with their family life if they are not granted entry clearance, in accordance with the case of AG Eritrea v SSHD [2007] EWCA Civ 801."
18. The judge finds that they enjoyed family life and that Article 8 is engaged but, given that the Appellants are all adults, even if the second and third Appellants are the children of the relative whose funeral they wished to attend, in order to ascertain whether family life existed between them for the purposes of Article 8, they would need to show that the ties between them went above and beyond the normal emotional ties to be found between adult relatives. There is no assessment of their circumstances here, but only simple statement that the Appellants enjoyed family life with their relative before he came to the United Kingdom. There is no finding that the bonds which they had with their father and brother went above and beyond the normal emotional ties.

19. There is no indication in paragraph [13] as to when the Appellants' relative came to the United Kingdom. There is no indication as to whom he had been living with prior to coming to the United Kingdom. There is no indication that he was living with either his children or his siblings prior to coming to the United Kingdom. It is not enough to assume that the Appellants had family life with their father just because he was their father, without knowing the family circumstances.
20. The Appellants' relative died in January 2014. In paragraph [15] the judge finds that the family learnt of his death in June 2014, some five months later. She states that they did not know how sick he was. Given this, it is not clear that the Appellants were in touch with their relative for some period of time.
21. The judge states that she has considered the documents submitted by the Appellants in connection with the appeal [2]. I have considered the witness statements. There is no information in these about when their relative came to the United Kingdom. There is no information about his life in China prior to arriving in the United Kingdom, for example, with whom he was living. In the statement of Huifang Wang, which was also adopted by her brother Changjun Wang, it states that she loved her father very much and "we all looked forward to reuniting one day. He was a good man and a good father. He always had good advice and although he was living in the UK he looked after us" [6]. She gives no further information, for example of how long they have been living apart, or how he looked after them in China. There is no explanation as to why she did not know that he was so ill, and why they did not discover that he had died until some five months after his death.
22. I find that the evidence before the First-tier Tribunal did not address the existence of family life between the Appellants and their dead relative. There was no evidence of their life together in China prior to his coming to the United Kingdom.
23. The headnote to Abbasi states as follows:
 - "1. The refusal of a visa to foreign nationals seeking to enter the United Kingdom for a finite period for the purpose of mourning with family members the recent death of a close relative and visiting the grave of the deceased is capable of constituting a disproportionate interference with the rights of the persons concerned under Article 8 ECHR.
 2. The question of whether Article 8 applies and, if so, is breached will depend upon the fact sensitive context of the particular case.
 3. The Tribunal should adopt a structured and sequential approach to the Article 8 issues."
24. While therefore it is clear that the refusal of a visa to the Appellants is capable of constituting a disproportionate interference with their Article 8 rights, Abbasi also makes clear that the question of whether Article 8 applies is fact sensitive. It is necessary to establish first that Article 8 applies. I find that the judge has failed to

give reasons for why Article 8 applies given the lack of evidence about the family circumstances of the Appellants and their relative.

25. Further, in relation to the proportionality exercise, Mostafa 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.”

26. The judge found in paragraph [11] that the Appellants failed to address the Respondent's concerns in relation to the refusal under the immigration rules, but there is no mention of this failure to meet the immigration rules in the proportionality assessment. The judge is clear that the Appellants had failed to provide any evidence of their circumstances in China. The findings in paragraph [11] are not mentioned at all in paragraph [15] which contains the entire proportionality balancing exercise. I find that this is an inadequate proportionality assessment.

Notice of decision

The decision involves the making of an error on a point of law and I set it aside.

The appeal is remitted to the First-tier Tribunal.

Signed

Date 27 January 2016

Deputy Upper Tribunal Judge Chamberlain