



**Upper Tribunal
(Immigration and Asylum Chamber)
VA/06970/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke-on-Trent
On 29th January 2016**

**Determination Promulgated
On 30th March 2016**

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MARTIN**

Between

ENTRY CLEARANCE OFFICER - ABU DHABI

Appellant

and

**MR HASEEB AKRAM KHAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr A McVeety (Senior Home Office Presenting Officer)
For the Respondent: Mr Tsalikis (First Law Solicitors)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Entry Clearance Officer, with permission, against the Decision and Reasons of First-tier Tribunal Judge Mitchell promulgated on 20th May 2015 in which he allowed the Appellant's appeal, on Human Rights grounds, against the Entry Clearance Officer's decision to refuse to issue him with entry clearance as a visitor.

2. For the sake of continuity we shall continue to refer to Mr Khan as the Appellant and the Entry Clearance Officer as the Respondent in this decision.
3. The Appellant, born in September 1988, is a citizen of Pakistan. He applied, along with his mother, to enter the United Kingdom to visit his brother. On 29th September 2014 the Entry Clearance Officer refused his application. The Appellant's mother's application was granted.
4. The Appellant appealed to the First-tier Tribunal and his appeal was dealt with by Judge Mitchell on the papers on 12th May 2015. The Appellant had opted for a paper consideration of his appeal.
5. In his decision the Judge set out the Entry Clearance Officer's reasons for refusal. These were that the Appellant appeared to have regular monthly payments from his salary but also large payments in September 2014 some 4.7 times his claimed income. The origin of those funds was unclear and as they were inconsistent with the account history the Entry Clearance Officer was not satisfied that they reflected the Appellant's income or financial circumstances. On that basis the Entry Clearance Officer was not satisfied that the employment or financial circumstances of the Appellant were as claimed. This led him to doubt the credibility of the Appellant's claim to be seeking entry as a visitor for a limited period.
6. The Judge noted that in his appeal the Appellant claimed to meet the requirements of the Immigration Rules and that the decision of the Entry Clearance Officer was wrong. The appellant had, the Judge said, clearly and concisely outlined where the funds originated, explaining that he had sold gold jewellery inherited from his father and that the proceeds were paid in instalments which he then paid into his bank. An affidavit was provided by the buyer of the gold which was duly translated and included in the papers.
7. In addition to his claim that he met the requirements of the Immigration Rules the Appellant also claimed that the decision breached his "*basic human rights to visit his family members who are legally resident in the United Kingdom.*" He and his mother had wanted to enter the United Kingdom to welcome his brother and sister-in-law's new baby girl. It was said that his mother, who had been granted entry clearance, had cancelled her visit as she was unable to travel on her own.
8. In his findings the Judge set out the case of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) and quoted the head note thereof. He then started his consideration with the Appellant's claim to meet the requirements of the Immigration Rules and at paragraph 16 stated:-

"The Appellant at question 75 of his application form explains exactly why he wishes to travel to the United Kingdom and that he is taking his mother with him and she is quite old and unable to travel alone. This does raise an obvious article 8 ECHR issue in that the decision is interference with the Appellant's family and private life."

9. He then goes on in the following paragraphs 17 - 19 to state:-

"I do consider that the Appellant has discharged the burden of proof and showing that he is a genuine visitor who would leave United Kingdom at the end of the proposed visit. I am unable to allow the appeal under the immigration rules. It has been submitted that the Appellant's rights and his family's rights under article 8 ECHR were breached by the refusal decision.

There clearly would be family life between the Appellant and his mother and his brother.

The decision to refuse entry clearance was not in accordance with the law and the Appellant can meet the requirements of the Immigration Rules."

10. The judge then goes on to consider paragraph 117 of the Nationality, Immigration and Asylum Act 2002 and Article 8 in accordance with Razgar [2004] UKHL 27. He concludes at paragraph 24:-

"The Appellant in this case however would appear to be able to meet the immigration rules. I have taken the decision of Mostafa into account. I do consider the fact that the Appellant can meet the immigration rules is a weighty but not determinative factor in my decision. I do consider the fact that the Appellant will be travelling with his mother to the United Kingdom to visit his brother and niece and that his mother is unable to travel without him at this time is both a compassionate and compelling factor. The decision would not appear to be in accordance with the law as the Appellant can meet the requirements of the immigration rules. The decision would not appear to be proportionate to the legitimate public aim of maintaining effective immigration control. There do not appear to be any other legitimate aims in the decision of the Entry Clearance Officer. I therefore consider that the appeal should be allowed under article 8 ECHR."

11. The Entry Clearance Officer sought and was granted permission to appeal by a Judge of the First-tier Tribunal on the basis that the finding of family life between the Appellant and the sponsor, his brother, was in conflict with settled law as to the need for something more than normal emotional ties in order to establish family life between adults. It was also said to be arguable that there was an absence of reasoning at paragraph 18 as to the existence of family life between "the Appellant and his mother and his brother"

12. Thus the matter came before us. Our first task is to decide whether the First-tier Tribunal made an error of law in its decision and reasons and if so whether and to what extent the decision should be set aside.

13. Mr McVeety relied on the grounds save to point out that the quote from Mostafa at paragraph 12 of the decision and reasons is only a partial quote and missed out the second and crucial part which indicated that success is likely to be limited to cases where the relationship is close such as between husband and wife or parent and minor child. He argued that the Appellant in this case was visiting an adult sibling with his mother and Mostafa was incorrectly applied by the Judge.

14. On the Appellant's behalf it was argued that the Judge directed himself correctly and that his findings did not conflict with existing case law. It was argued that the relationship between the two brothers was indeed beyond that between normal adult siblings as the brother in the UK had, since the death of their father, taken on the role of parent to his brother.
15. In our view the First-tier Tribunal did err in its decision and did indeed misapply the wisdom of Mostafa.
16. The case of Mostafa, relied upon by both sides in this case, states in its head note:-

"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".

17. However, at paragraph 24 the Tribunal said this:-

"It is the very essence of Article 8 that it lays down fundamental values that have to be considered in all relevant cases. It would therefore be extremely foolish to attempt to be prescriptive, given the intensely factual and contextual sensitivity of every case. Thus we refrain from suggesting that, in this type of case, any particular kind of relationship would always attract the protection of Article 8(1) or that other kinds of relationship would never come within its scope. **We are, however, prepared to say that it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together.** In the limited class of cases where Article 8 (1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate. If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8".

18. We have highlighted the relevant part. The judge in this case appears to have ignored completely the body of the decision, relying purely on the head note finding baldly that the relationships engaged Article 8.
19. The Judge also erred in starting his deliberations with whether or not the Appellant met the requirements of the Immigration Rules as this will only ever be relevant if it is found that Article 8 is engaged. Whether or not the Appellant meets the requirements of the Rules will then be a factor to be taken into account when assessing proportionality. In this case the Judge

started with his decision as to whether the Appellant met the requirements of the Immigration Rules before considering whether Article 8 was engaged.

20. On the basis that he approached the appeal incorrectly and on the basis that his finding that Article 8 was engaged was entirely unreasoned (paragraph 19) we find that he made an error of law. As his conclusion in relation to Article 8 was determinative of the appeal we set the decision aside. With the agreement of the parties we proceeded to redecide the appeal.
21. We are entirely unpersuaded by the argument that the sibling in the United Kingdom has taken over the role of father to the Appellant. The Appellant is aged 25 years. The sponsor has been in United Kingdom for a considerable period of time where he has settled and is raising his family. The Appellant is employed in Pakistan and has a close relationship with his mother. Even if the UK Sponsor has assumed the role of head of the family, that does not render his relationship with his adult brother one of dependence over and above what is to be expected between adult siblings, or indeed an adult and parent (Kugathas [2003] EWCA Civ 31). We are entirely unpersuaded that Article 8 is engaged as between the Appellant and his brother in the United Kingdom. This family has chosen to enjoy its family life across continents over a number of years and thus the decision of the Entry Clearance Officer represents no interference in the exercise of that family life. There is nothing to prevent the Sponsor from visiting the appellant in Pakistan or indeed the family meeting for a holiday in a third country.
22. Similarly, we are entirely unpersuaded that the relationship between the Appellant and his mother would be interfered with by the refusal of entry clearance. We are entirely unpersuaded that the mother's ability to travel is entirely dependent upon the Appellant accompanying her. Even if she were unable to travel alone, she could travel with someone other than the Appellant. Airlines deal on a daily basis with elderly and infirm passengers who require support at the airport and on to and off the plane. We do not accept therefore that the Appellant's mother cannot travel without him accompanying her. She could either be accompanied by another member of the family or use the good offices of the airline to assist her if she is taken to and collected from the relevant airports by family members.
23. Furthermore, even if there were family life between the Appellant and his mother in Pakistan, which we did not find that there is, that family life would not be interfered with by mother travelling to the United Kingdom for a holiday.
24. For all of the above reasons we find the First-tier Tribunal made an error of law. Having set the decision aside we remake it and dismiss the Appellant's appeal against the Entry Clearance Officer's decision. Accordingly, the Entry Clearance Officer's appeal to the Upper Tribunal is allowed.

25. We would simply add that the Judge's finding that the Appellant met the requirements of the Immigration Rules has not been challenged. That does not entitle him to succeed in his appeal but is a finding that we preserve.

Signed

Dated 11th March 2016

Upper Tribunal Judge Martin