Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
VA/00115/2015
VA/00118/2015

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On: 25th May 2016	**On: 7th June 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Jeena Mohammed Hussein Al Musawi
Murtadha Ameen Abdulhussein
(anonymity direction not made)

Appellants

and

Entry Clearance Officer - Amman

Respondent

For the Appellant:	**Mr Brown, Counsel instructed by TM Fortis Sols**
For the Respondent:	**Mr Harrison, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellants are both nationals of Iraq. They are respectively a mother and son, and they want to come to the United Kingdom in order to visit a Mr Mohammad Hossein Ali Mohammad. Mr Mohammad ('the Sponsor') is the

father of the First Appellant, and therefore the grandfather of the Second Appellant.

2. Mr Mohammad has been living in the United Kingdom since the early 1990s when he came to Britain as a refugee. He has never returned to Iraq. He is now aged 99 and is unable to travel due to various age-related ailments. This was the background to why his daughter and grandson applied for visitor visas.

3. Their applications were refused on the grounds that the Entry Clearance Officer (ECO) did not accept that they were genuine visitors who intended to leave the United Kingdom at the end of their trip. The information supplied did not demonstrate that there was sufficient incentive for them to return to Iraq, given the worsening security situation there. Particular mention is made of the fact that the Second Appellant is a "repeater", i.e. a student who is resitting some exams.

4. The Appellants appealed to the First-tier Tribunal and it is common ground then when they did so, the appeals were limited in scope to deciding whether the decisions of the ECO breached their human rights, specifically their Article 8 ECHR right to a family life.

5. The matter came before Designated Judge of the First-tier Tribunal Baird. In a determination promulgated on the 10th September 2015 the appeals were dismissed, on the ground that the Appellants had not got past the first *Razgar* hurdle[1] of establishing that there is here a family life such that Article 8 is engaged. The Tribunal noted that the Sponsor had not seen his daughter for over 25 years. He had never met his grandson. It directed itself to the guidance in Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) and Adjei (visit visas – Article 8) [2015] UKUT 261 (IAC). The sum of that guidance was that an ability to meet the requirements of the Rules cannot be determinative in human rights appeals. Applicants must show that Article 8 is engaged, and 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 a 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."

The Tribunal accepted that the emotional ties between the Sponsor, his daughter and grandson may have been enhanced by his age, but found there to

[1] Per Lord Bingham in R (on the application of Razgar) v SSHD [2004] UKHL 27

be no evidence of *Kugathas* dependency[2]. As to whether the Appellants actually met the requirements of the Immigration Rules, this was not a matter that required the Tribunal to make a finding; the determination does however note that it is unsatisfactory for ECO's to simply point to the security situation in Iraq to refuse individual cases.

Error of Law

6. The Appellants now appeal[3] on the following composite grounds:

   i) The Tribunal erred in omitting to consider whether the Appellants in fact met the requirements of paragraph 41;

   ii) There were in this appeal the "very unusual circumstances" of a credible sponsor whose dying wish it was to be able to see his family. The Tribunal accepted that his physical and moral integrity was likely affected by the decision and in these circumstances Article 8 was plainly engaged;

   iii) The Tribunal erred in failing to have regard to the guidance in Kaur (visit appeals – Article 8) [2015] UKUT 487.

7. In his oral submissions Mr Brown expanded on his grounds. The headnote in Kaur reads as follows:

   1. *In visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. Whilst judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the Human Rights Act 1998 (or shows unlawful discrimination) (see Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) and Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC)), the starting-point for deciding that must be the state of the evidence about the appellant's ability to meet the requirements of paragraph 41 of the immigration rules.*

   2. *The restriction in visitor cases of grounds of appeal to human rights does not mean that judges are relieved of their ordinary duties of fact-finding or that they must approach these in a qualitatively different way. Where relevant to the Article 8 assessment, disputes as to the facts must be resolved by taking into account the evidence on both sides: see Adjei at [10] bearing in mind that the burden of proof rests on the appellant.*

   3. *Unless an appellant can show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may exist to justify the grant of LTE [Leave to Enter] outside the rules": (see SS (Congo) [2015] EWCA Civ 387 at [40] and [56]) he or she is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals.*

[2] Kugathas v SSHD [2003] EWCA Civ 31
[3] Permission granted on the 7th December 2015 by Designated Judge of the First-tier Tribunal McCarthy

8. Mr Brown submitted that the First-tier Tribunal had in these cases attempted to resolve the Article 8 question in a vacuum. Although the Tribunal had deprecated the ECO's reasoning it had not gone on to make clear findings on paragraph 41 and that rendered the Article 8 assessment incomplete. It was not necessary to find a *Kugathas* style dependency. These were unusual circumstances factually distinct from those cases where individuals seek to resist removal, and gain permanent leave, on the basis of relationships with other adults. The case of a very elderly refugee wishing to have a short period of time with his daughter and grandson was a paradigm example of what might constitute "very unusual circumstances".

9. For the Respondent Mr Harrison conceded that the Tribunal had not followed the approach advocated in Kaur but relied on the Rule 24 response to point out that the Tribunal had not found Article 8 to be engaged at all.

Error of Law

10. The First-tier Tribunal heard this appeal on the 20th August 2015; Kaur was promulgated six days later. It is therefore unsurprising that the determination did not cite that decision or follow its guidance. That chronology notwithstanding the Respondent does however agree that if the Appellants establish a failure to apply the law as it is stated in Kaur, that will be a demonstrable error of law.

11. At paragraph 14 of the determination the First-tier Tribunal records "I have no jurisdiction to deal with the refusal under the Immigration Rules". The Tribunal therefore declines to make any findings on the requirements set out in paragraph 41, although it does point out the deficiencies in the reasoning behind the refusal.

12. In Kaur the Upper Tribunal found there to be two reasons why decision-makers should consider the terms of paragraph 41 in the context of a human rights appeal against refusal to issue a visit visa. One would be the identification of the public interest, the requirements of the Rule reflecting where the balance should be struck. If an appellant can show that he meets the requirements that will plainly be pertinent, if not necessarily determinative, of the question of proportionality. In this Kaur is consistent with Mostafa and Adjei. The Tribunal in Kaur went on however to find the Rules to be important for a further reason. It found that there was a significant degree of overlap between paragraph 41 and those matters under consideration in a *Razgar* Article 8 assessment:

> Whilst such requirements are clearly not Article 8 considerations there is at least one obvious overlap in subject-matter when the applicant seeks to visit family members, namely that the genuineness of the intentions behind the visit (a

> requirement set out in paragraph 41(i)) **may be highly material to the issue of whether there is family life within the meaning of Article 8(1)** and/ or the issue of whether there are strong family life reasons for the visit that are to be weighed in the balance under Article 8(2). In this context an inability to maintain and accommodate without recourse to public funds or employment may also be material to any Article 8 proportionality exercise. [at 13]
>
> [emphasis added]

13. In these cases the only question raised by the refusal was whether the Appellants were genuine visitors who intended to leave the UK at the end of their trip. Mr Brown submits that this question could not sensibly be divorced from the nature of the relationship that they shared with Mr Muhammad. Applying the reasoning in Kaur, I would have to agree. The degree of overlap is illustrated by the closing remarks of the determination: "I do accept it to be likely that the Sponsor's physical and psychological integrity have been affected by the decision to refuse entry clearance but I cannot take the view that this is disproportionate to the need for effective immigration control in the UK". Without a finding on whether the requirements of paragraph 41 were met, it was not possible for the Tribunal to have conducted a rounded assessment of whether Article 8 was engaged at all.

14. I am therefore satisfied that the determination does contain an error of law and the decision is set aside.

15. The second ground of appeal was whether the Tribunal had properly addressed the question of whether this was one of those "very unusual" cases discussed in Mostafa, where persons other that close relatives (i.e. spouses or minor children) can bring themselves within the ambit of Article 8. The determination considers the nature of the relationships at paragraph 19. It is noted that it has been many years since the Sponsor has seen his daughter, and he has never met his grandson at all. On these facts a *Kugathas* dependency is not established and so the Tribunal found there to be no Article 8 family life in play. For the Respondent Mr Harrison agreed that the Tribunal had here applied an impermissibly narrow definition of 'family life'. In the context of an application for entry clearance as a visitor there was rarely if ever going to be a *Kugathas* dependency between the parties. The question was whether there were individual interests at stake of a particularly pressing nature: SS Congo v SSHD [2015] EWCA Civ 387.

The Re-Made Decisions

16. The First-tier Tribunal found Mr Muhammad to be a credible witness. Mr Harrison did not seek to go behind that finding and I did not therefore consider it necessary to hear any live evidence from him. He has set out his position in a witness statement dated 14th August 2015. Mr Muhammad explains that he

was granted refugee status in the early 1990s and that he has never returned to Iraq. His daughter the First Appellant has remained there. She is married to a financial statistician and has a very comfortable life by Iraqi standards. He has not seen her for over 25 years and has missed her dearly. He speaks with her regularly by telephone but this cannot compensate for not seeing her in person. Although he has not met his grandson he is "extremely proud" of him and would like to be able to meet him, spend quality time with him and "show him off" to friends and family. The Second Appellant has told his grandfather that he wants to become an architect and is hoping to go to university to study civil engineering. Mr Muhammad has been kept abreast of his educational achievements and states that he knows his grandson has worked very hard. He has a goal of entry to a good university and it is for this reason that he has chosen to re-sit some of his exams to that he can achieve the highest grades possible. Mr Muhammad recognises that his daughter and grandson will not be able to spend very long with him because they need to return to Iraq in order to get on with their lives but it would mean a lot to him:

> "I can assure the Respondent that for what little time we are together I will be eternally grateful. I just want to be reunited with my daughter and be afforded an opportunity to meet with my grandson whom I have never met before it is too late for me".

17. The Appellant's bundle contains a letter from a Dr S Rizvi of the David Medical Centre in Chorlton, Manchester. Dr Rizvi is Mr Muhammad's doctor. He writes to confirm that Mr Muhammad is unable to fly due to various ailments that have affected his mobility. Mr Harrison took no issue with this evidence and accepted that Mr Muhammad would be unable to visit his family in Iraq, or indeed any other third country. He was aged 98 at the date of decision (he is now approaching his 100th birthday) and attended court in a wheelchair with the assistance of his daughter.

18. As to the position of the Appellants the evidence was as follows. Their applications were accompanied by a covering letter dated 2nd October 2014 in which they state that the family comprise the mother, father, a daughter aged 20 and the Second Appellant. They all live together in a comfortable district of Baghdad. The First Appellant does not work because she does not need to. Her husband has earned a good salary as a financial statistician and this has enabled her to stay at home and bring up their children. Before she had children she was employed by the Iraqi Government. The Second Appellant is in the middle of his studies and is aiming to attend university in Baghdad. The family live on the income derived from the First Appellant's husband's employment with the Qualios Company for General Communication for which he earns $3500 per month. They have savings of in excess of £50,000, demonstrated by the production of 'fixed deposit cheques'. At the date of application the First Appellant held in excess of £13,500 in a separate savings account. The documents supplied with the application included:

- Birth certificates, marriage certificates, passports of all family members (including those not travelling)
- A letter dated 9th July 2014 from Ayad Mohammad, executive director of Qualios Company for General Communication confirming that the First Appellant's husband earns $3500 per month
- A fixed deposit cheque issued by Rafidain Bank in the name of the First Appellant's husband showing that between April 2014 and April 2015 he held a fixed deposit of fifty million dinars (this is accompanied by a OANDA currency conversion showing that to be equivalent of £25, 842)
- A fixed deposit cheque issued by Rafidain Bank in the name of the First Appellant showing that between March 2014 and March 2015 she held a fixed deposit of fifty million dinars (this is accompanied by a OANDA currency conversion showing that to be equivalent of £25, 842)
- A Rafidian Bank savings book in the name of the First Appellant's husband showing savings of 3,000,000 Iraqi dinars (this is accompanied by a OANDA currency conversion showing that to be equivalent of £1,550)
- A Rafidian Bank savings book in the name of the First Appellant showing savings of 26,382,727 Iraqi dinars (this is accompanied by a OANDA currency conversion showing that to be equivalent of £13,635)

19. The evidence supplied on application was supported on appeal by that of Mr Muhammad, who sets out his own understanding of their financial situation in his witness statement. Whilst acknowledging that this was not first hand information Mr Brown reminded me that Mr Muhammad has gleaned his knowledge through years of regular contact with his daughter and her family (ie he has not simply written down what he was told for the purpose of these appeals) and he has of course been found to be a wholly credible witness. The Appellants' bundle further contains a signed statement by Ms Azhar Hussain, who is the First Appellant's sister. Again, Ms Azhar Hussain reports that through her own regular contact with her sister she knows that her sister has a happy family unit in Iraq and that she is very settled there. Ms Hussain explains that her sister has not previously applied for a visa to come and visit her father because she has had her own caring responsibilities towards her mother-in-law, who was elderly and unwell and only passed away in March 2014. Both family members in the UK stress that the Appellants have their whole life to return to in Iraq, including the First Appellant's husband (the Second Appellant's father) and daughter (the Second Appellant's sister).

20. I have considered all of this evidence in the round and reminded myself that at all times the burden of proof in respect of establishing the facts lies on the Appellants. The standard of proof is a balance of probabilities.

21. I share the view expressed by the First-tier Tribunal at paragraph 14 that the ECO (and upon review ECM) cannot simply point to the "worsening security situation" in Iraq to submit that these Appellants are not genuine visitors. That is particularly so where it remains the position of the Secretary of State that central Baghdad, where the family live, is perfectly safe: this is a view endorsed in large measure by the latest country guidance AA (Article 15(c)) Iraq [2015] UKUT 544 (IAC). Whilst the general country background situation may be relevant, it cannot be determinative. It is a matter that I have attached some weight to.

22. I am satisfied that the family situation in Iraq is as claimed. I note that the First Appellant has been able to leave Iraq on numerous occasions, entering Jordan several times in recent years. She has always returned to Baghdad. She has family members in the UK, the USA and New Zealand yet has never sought to visit any of them before. This would tend to indicate that she has no pressing desire to leave her home.

23. The Appellants would be travelling without the other two members of their nuclear family, who would be remaining in Baghdad. This would tend to indicate that they would be likely to return there.

24. The Appellants have demonstrated that they are financially secure in Iraq. Although the First Appellant did not provide payslips for her husband's employment I accept that these are not necessarily documents which would be available. As it is put in the evidence, "things are different in Iraq". The financial documents supplied went unchallenged by Mr Harrison and I accept that these demonstrate that the family has a good deal of financial security in the form of savings. I accept that they have been able to accrue these savings because of the salary of the First Appellant's husband.

25. I accept that the Second Appellant has an incentive to return to Baghdad. He has a home, father, sister, school and no doubt friends there. The fact that he has decided to re-sit some exams does not in itself provide an incentive to leave the country.

26. I accept, having had regard to all of the evidence before me, that the Appellants do have a genuine reason to want to visit the United Kingdom. The First Appellant has not seen her father for many years and I accept that it is wholly natural for a daughter to wish to see her father again before he dies, and vice versa. Although they have kept in touch by telephone I accept that physically

seeing each other would be a significant event and that it means a great deal to Mr Muhammad in particular.

27. Overall I am satisfied that the Appellants are genuine visitors and that they do intend to return to their home in Baghdad once their trip to the UK is over.

28. The First-tier Tribunal accepted that the decision to refuse entry clearance has affected the physical and psychological integrity of Mr Muhammad and I agree with that assessment. Mr Muhammad left Iraq during the height of Saddam Hussain's repression and was recognised as a refugee. I accept that this dislocation from his homeland and family must have been very difficult for him and that as he reaches the end of his life it has become increasingly important to him to see his family members. I accept that fulfilling his wish is also a matter of great significance to the Appellants, who of course would also desire to see him and spend time with him. Whilst ties between a parent and adult child or between a grandparent and adult grandchild will not normally constitute family life for the purpose of Article 8(1) I accept that in these particular circumstances the Article is engaged. The "pressing need" test set out in SS Congo is amply met. The background to the family's dislocation, the fact that the Sponsor is unable to travel himself and the fact that this will, in all likelihood, be the last opportunity that the Appellants have to spend time with Mr Muhammad cumulatively amount to the "very unusual circumstances" mentioned in Mostafa. If this is the last opportunity that these three people have to enjoy a family life together in the normal way this has served to intensify the emotional desire that the parties have to be reunited. I accept that there are compelling emotional bonds between the Sponsor, his daughter and grandson and that in the particular circumstances Article 8 is engaged.

29. Mr Harrison conceded that the decision does represent an interference, since Mr Muhammad is unable to travel. Reminding myself that the need to maintain immigration control is a legitimate aim under Article 8(2) I consider proportionality in light of the facts and the guidance of the Upper Tribunal that I have mentioned above. I accept and find as fact that the Appellants are genuine visitors who intend to leave the United Kingdom at the end of their trip and that they meet all of the requirements of paragraph 41 of the Rules. I accept that the personal emotional loss to them of being refused entry on this occasion is likely to be profound and irrevocable. The impact on the Sponsor is no less significant and cumulatively there are strong and compelling reasons to grant entry clearance. For those reasons I find that the decisions to refuse entry are not proportionate and allow the appeals.

Decisions

30. The determination of the First-tier Tribunal contains an error of law and it is set aside.

31. I remake the decisions in the appeals by allowing the appeals on human rights grounds. Given the age of the Sponsor the Respondent will no doubt wish to act upon this decision as soon as practicably possible and issue the relevant visas.

32. I was not asked to make a direction for anonymity and in the circumstances I see no reason to do so.

Upper Tribunal Judge Bruce
25th May 2016