Upper Tribunal
(Immigration and Asylum Chamber) **Appeal VA/00506/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 1 March 2016	**On 5 April 2016**

Before

THE HONOURABLE LORD BURNS

UPPER TRIBUNAL JUDGE WARR

Between

SHAHNAZ JAVED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

Entry Clearance Officer (Abu Dhabi)

Respondent

Representation:

For the Appellant: Mr I Panaawala (solicitor)
For the Respondent: Mr S Whitwell (Home Office Presenting Officer)

DETERMINATION AND REASONS

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1. The appellant is a citizen of Pakistan born on 8 September, 1962. She applied for entry clearance as a family visitor to visit her son, the sponsor, but this application was refused on 8 December, 2013. While the respondent recognised the importance of family visits it was considered that the appellant had relied on a false property evaluation report and in the light of this the respondent refused the appellant's application under paragraph 320 (7A) of HC 395. In the premises the respondent was not satisfied that the appellant was a genuine visitor or that she would leave the UK at the end of her visit and referred to paragraph 41 of the rules. The respondent added this:

> "You should note that because this application for entry clearance has been refused under paragraph 320 (7A) of the immigration rules, any future applications may [original emphasis] also be refused under paragraph 320 (7B) of the immigration rules (subject to the requirements set out in paragraph 320 (7C))."

2. The appeal was allowed under the immigration rules by a First-tier Judge on 19 November, 2014 but the respondent successfully challenged the decision and on 6 March 2015 the Upper Tribunal remitted the matter back to the First-tier Tribunal for a fresh hearing, with none of the factual findings being preserved, as the judge had not considered the appeal on human rights or race relations grounds and had no jurisdiction to deal with the matter under the immigration rules.

3. The appeal came before First-tier Judge Cockrill on 13 August 2015.

4. He heard oral evidence from the sponsor. Having heard submissions he reminded himself that there was only a limited right of appeal and the appeal was not under the immigration rules and could only be brought in the circumstances of the case before him on human rights grounds. He considered whether article 8 was engaged following the guidance in Adjei (visit visas – Article 8) 2015 UKUT 261 (IAC).

5. The judge addressed this question by first considering the facts in paragraphs 15 of the determination stating that:

> “What we have here is a mother, born in 1962, who wishes to see, in effect, her son and inevitably her daughter and grandchild. It is important, I think, to look at the family situation overall in making that initial assessment. It does seem to me that the nature of those relationships, both parental and grandparental, are such that it can sensibly and properly be said that article 8 (1) is engaged. There is, in other words, family life in existence between the appellant and her adult children and also with the grandchild."

6. In paragraph 16 he referred to the five stage test in Razgar v Secretary of State [2004] UKHL 27 and in paragraph 17, noting that the threshold was not particularly high, concluded that Article 8 was engaged.

7. He then turned to the issue of proportionality, dealing with the allegation of deception first. He resolved this issue in favour of the appellant for reasons given in paragraph 18 of the determination. He found that the appellant had not put forward a false document in support of her application for a visit visa. However he stressed that this finding was only of relevance to his consideration of proportionality.

8. In paragraph 19 he stated as follows:

> "The point that I want to stress in this case, and I am dealing now with proportionality, is that this particular sponsor from whom I heard can, as I see it, go out to Pakistan to visit the appellant. He has done so in the past and he confirms that the last time he visited was in 2012. He is entitled to some seven weeks holiday every year but he can only take a maximum of two weeks at a time. It is my assessment that his reluctance to go to Pakistan really stems from economic reasons and nothing really more than that. He could maintain perfectly properly his relationship with his mother by going out to Pakistan on an annual basis and in that way, coupled with the fact that he is regularly speaking to his mother by telephone, he maintains his relationship. I accept as a fact that he telephones her three or four times a week, and he is in communication with her using Skype. In that manner there is a family relationship maintained between this sponsor and his appellant mother. It seems to me, therefore, with that factual backdrop, that the decision of the respondent to refuse this particular application is indeed a proportionate decision. I am mindful that in the decision in Mostafa (Article 8 in entry clearance) 2015 UKUT 112 (IAC) compliance with the rules is capable of being a weighty, although not determinative factor in the decision on proportionality. That seems to me to be applicable to the circumstances of this case. What I need to look at and focus upon is proportionality, that is the crux of the case. It seems to me for all the reasons that I have expressed that the decision of the respondent is a proportionate one. The relationship between this adult child and his mother is being maintained at the moment by telephone and Skype and can be perfectly well maintained by regular visits by the sponsor to the appellant in Pakistan. In effect the same argument can be presented for his sister who, I am told, has also visited their mother and she did so in 2013. The same point can be made for other relatives."

9. The judge went on to dismiss the appeal on human rights grounds.

10. The appellant applied for permission to appeal to the First-tier Tribunal which was refused. Upper Tribunal Judge King, however, granted permission to appeal on 20 January 2016 expressing concern that a refusal under paragraph 320(7A) could be maintained. He added: "however the grounds of appeal are limited to human rights and the issue may be one only resolved by judicial review." It might be that unfairness was something affecting proportionality in a human rights claim.

11. At the hearing before us Mr Panaawala relied on his skeleton argument and the grounds and the positive findings of fact that had been

made in both the first and the second determination. Both judges had found there had been no deception and a direction should have been issued to that effect. The decision was unfair. The decision had been based on deception and the judges had found that there had been no deception and should have so declared. The appellant needed to clear his name. He would need to bring judicial review proceedings and a fresh application would be unsuccessful.

12. Mr Whitwell acknowledged that the judge had found that there was no deception and that there had been no cross-appeal by the Entry Clearance Officer but as stated in the rule 24 response the applicant could make a fresh application or apply for judicial review. The first Tribunal's decision had been set aside. Any fresh application would be judged on its merits. He referred to the cases of Kaur (Visit appeals; Article 8) [2015] UKUT 487 (IAC) and Kugathas [2003] EWCA Civ 31. While the judge had erred in the light of Kugathas in finding that there was family life between the appellant and his mother he was correct to dismiss the appeal. He referred to Mostafa and what was said in paragraph 24 of that case:

> "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."

13. At the conclusion of the submissions we reserved our decision. It does seem clear to us that the judge's jurisdiction was limited as is said in the cases of Mostafa and Adjei. While on the authorities it may be that the judge was generous in finding that Article 8 was engaged we cannot agree that he materially erred in law in dismissing the appeal for the reasons he gave in paragraph 19 when considering proportionality which we have set out above.

14. The problem for the appellant in this case is that as Mr Whitwell put it the issue under paragraph 320 (7B) has been "left in the air". Mr

Panaawala suggested some declaration should be made by the Tribunal to the effect that the deception allegation had been dealt with.

15. We cannot see what that would achieve. Clear findings have been made by the judge in favour of the appellant on the deception issue. As is acknowledged by Mr Whitwell there has been no cross-appeal. Mr Panaawala was concerned that a fresh aplication for an entry clearance would inevitably face refusal. We find that concern to be unfounded for three reasons. Firstly that was not how the Entry Clearance Officer put the matter when refusing the application – see the extract from the decision we have set out above at paragraph 2. The words “may also be refused” were used rather than “will also be refused” and the word “may” was emphasised. Secondly the rule 24 response makes it clear the findings could be relied upon “in any further application” and thirdly Mr Whitwell confirmed that any further application would be decided on its merits. We have no doubt that the Entry Clearance Officer will respect the findings made by the First-tier Judge in this case on the deception issue.

The appeal is accordingly dismissed.

Signed
G Warr (Judge of the Upper Tribunal)

2 March 2016

Fee Award

The First-tier Judge made no fee award and we make none

Anonymity Order

No anonymity order was made and none was applied for