Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/00714/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 June 2016	**On 4 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS MUSSARAT JABEEN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell - Home office presenting officer
For the Respondent: No legal representative

DECISION AND REASONS

1. The Secretary of State in this matter is the appellant and I shall refer to the parties as "the Secretary of State" and to the appellant from the First-tier Tribunal proceedings as the "Claimant". At the hearing before me the sponsor, Mr Khawaja Mushtaq appeared on behalf of the appellant who is

his mother. He produced a skeleton argument, an article and an unreported Tribunal decision.

2. The Secretary of State appeals the decision and reasons of the First-tier Tribunal (Judge Widdup) (FtT) who allowed the claimant's appeal on human rights grounds against a decision to refuse her visit visa under the Immigration Rules at paragraph 41 of HC 395 (as amended).

3. The claimant is a citizen of Pakistan and had made regular family visits to the UK in 2005, 2008 and 2011.

4. The grounds of appeal were restricted under Section 84(1)(b) and (c) of the Nationality, Immigration and Asylum Act 2002. The FtT took as its starting point the issue as to whether or not the claimant met the requirements of paragraph 41. The FtT followed the approach in **Mostafa (Article 8) [2015] UKUT 00112 (IAC)**. At [23] to [34] the FtT found that the claimant met the requirements under paragraph 41.

5. At [35] the FtT considered Article 8 and correctly cited the five-stage process in **Razgar** to be followed. At [37] the FtT cited **Singh & anor v SSHD [2015] EWCA Civ 630** in concluding that it was not necessary to consider whether the claimant had a degree of family life with her family in the UK or whether the relationship formed part of her private life. The FtT further acknowledged that the claimant lived apart from the UK and has her own family life in Pakistan with her husband.

6. In considering the second question in **Razgar** the FtT found that there was an interference of sufficient gravity because the claimant had a history of past visits and a commitment to maintaining a close relationship with her son, daughter-in-law and grandchildren. It then found that the decision was lawful.

7. At [40] the FtT considered proportionality and had in mind that the claimant would be able to make a fresh visit visa application on its merits and that the FtT's findings of fact in relation to meeting the requirements under paragraph 41 could be taken into account in any future application in the event that family circumstances remained much as they were. The FtT considered timing was relevant as in allowing the appeal the visit would take place sooner than if a fresh application were made and further costs would be avoided. The FtT found at [42] that the decision did not interfere with the claimant's family or private life save that it prevented a family visit. It found that in other respects the appellant's relationship with her UK family would continue. The FtT went on to consider financial factors and accepted that the cost of a visit by the UK family to Pakistan would be expensive and difficult rather than if the claimant visited the family in the UK where it would be cheaper and less disruptive.

8. The FtT disregarded the refusal letter with reference to the lack of insurmountable obstacles to visits in Pakistan on the basis that this was

not the correct approach and that it was "setting the bar too high". The FtT posed the question "whether, given that the appellant/claimant intends a genuine visit to her UK family, is it proportionate to prevent her doing so ?" On the facts as found the FtT concluded that the interference was disproportionate and allowed the appeal.

Grounds of Application for Permission

9. Family life must exist in order for Article 8 to be engaged. The FtT erred in finding family life at [26] and failing to have regard to **Kugathas v SSHD [2013] EWCA Civ 31** and **MS (Article 8 – family life dependency – proportionality) Uganda [2004] UKIAT 0064** and **Ghising and Others [2013] UKUT 00567 (IAC)**.

10. The FtT erred at [42] by concluding that there was no interference with the claimant's family and private life save for the fact that she could not visit.

11. The proportionality assessment was inadequate as it failed to explain why the refusal of a visa was a disproportionate interference with Article 8 rights. The sponsor and his family could visit the claimant in Pakistan. Reliance was placed on paragraph [42] of **Kaur (Visit appeals; Article 8) [2015] UKUT 00487 (IAC)** which states that "in order to succeed in a claim outside the Rules, a claimant must show a particularly pressing need so as to give rise to compelling circumstances justifying a departure from the Rules". The FtT failed to follow such an approach and erred in law.

Permission to Appeal

12. Permission was granted by First-tier Tribunal Judge Lambert on 17 May 2016 in the following terms:

> "The appellant wished to visit her adult son and grandchildren in the UK. The grounds argue a failure to engage with established law as to family life between adults. They are, in view of the absence of any discussion of this in the decision, arguable. The judge appears to refer at paragraph 37 to **Singh [2015] EWCA Civ 630** as authority for the proposition that 'I do not need to consider whether the appellant has some degree of family life with her family in the UK', although the CA in that case said only there was no legal or factual presumption as to the existence or absence of family life under Article 8 in the case of adult children.
>
> There is therefore an arguable error of law disclosed by the application."

Error of Law Hearing and Submissions

13. Mr Whitwell read the skeleton argument produced by the sponsor together with an article from the Tribune dated 17 June 2016. He submitted that the FtT could not rely on an unreported judgment that had been provided by the sponsor unless the Presidential guidance was met.

14. In essence Mr Whitwell submitted that the FtT erred by dispensing with making any findings re family life as between the claimant and her family in the UK and by relying on **Singh** which was not authority for the proposition that such findings could be dispensed with.

15. Secondly, the grounds challenged the proportionality assessment which centred on the timing and cost of the visit which arguably were insufficient to render a decision disproportionate.

16. Mr Mushtaq relied on his skeleton argument. He produced the birth certificates for his two children. There was no challenge as to the family members in the UK and to the fact that the visits included to the grandchildren.

17. The sponsor submitted that the claimant had been a frequent visitor to the UK and that the children had been denied a continuation of their relationship with their grandmother. This was her fourth application. Family life was not in issue because there was a relationship as between the claimant and the sponsor as mother and son and as between the grandchildren and the claimant. The FtT dealt with all of the issues under Article 8 and further found that she met with the requirements of paragraph 41.

18. Mr Mushtaq submitted that whilst it was possible to take the family to another country for a visit and have a holiday, what they wished for was to have the claimant sharing family life with them in the UK for the period of her visit. It would be inconvenient and costly for visits to take place elsewhere or in Pakistan. Further the claimant had recently remarried and it would be difficult for the family to stay with her new husband. The cases were fact-sensitive and he relied on the fact that his children were young and had been caused considerable emotional upset by not being able to see their grandmother. The sponsor was the only son in the family and had a close relationship with his mother. The sponsor further raised the issue of medical difficulties suffered by one of his children who had a muscular condition which made it difficult for him to travel.

19. At the end of the hearing I reserved my decision, which I now give with my reasons.

Discussion and Decision

20. The challenge to the First-tier Tribunal decision focuses on two issues in relation to the engagement of Article 8. The first being whether or not

family/private right was engaged under Article 8 and the second whether the assessment made by the FtT as to proportionality was correct.

21. **Mostafa** found 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 a minor child ...".

The Upper Tribunal further held that in appeals against refusal of entry clearance under Article 8, 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 a determinative factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. The Tribunal took the view that if the claimant has shown that in refusing entry clearance there is an interference with family life then it will be necessary to assess the evidence to see if the claimant meets the substance of the Rules. This is because the ability to satisfy the Rules will illuminate the proportionality of the decision to refuse entry clearance. The approach therefore proposed by **Mostafa** was for the Tribunal to first consider whether or not Article 8(1) was engaged and in the event that it is, thereafter to consider the requirements of the Rules in the proportionality assessment. This approach was followed in **Adjei (Visit visas - Article 8) [2015] UKUT 0261 (IAC)**. The Tribunal there stated that the first question to be addressed was whether or not Article 8 was engaged at all. "If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark on an assessment of the decision of the ECO under the Rules and should not do so". **Abbasi and Another (Visits – bereavement - Article 8) [2015] UKUT 00463 (IAC)** held that the refusal of a visa preventing family members attending for the purposes of mourning of a close relative was capable of constituting a disproportionate interference with the right of persons concerned under Article 8. It further found that the question of whether Article 8 applied and was breached depended on a fact-sensitive context of the particular case and a Tribunal should adopt a structured and sequential approach to the Article 8 issues.

22. More recently **Kaur (Visit appeals; Article 8) [2015] UKUT 00487** held that in visit appeals the Article 8 decision cannot be made in a vacuum and that the starting point must be the state of the evidence as to the claimant's ability to meet the requirements of paragraph 41 of the Immigration Rules. This is not inconsistent with the approach in **Mostafa** or **Adjei** as the Tribunal emphasised that unless an appellant/claimant can show that there 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 leave to enter

outside of the Rules" then she/he is exceedingly unlikely to succeed. Reliance was placed on **SS (Congo) [2015] EWCA Civ 387**.

23. In this appeal there is no challenge to the fact that the FtT found that the claimant met the requirements of the visit visa Rules under paragraph 41. Such matters were correctly taken into account by the FtT in its proportionality assessment.

24. Where the FtT erred is with regard to the failure to make any finding of fact with respect to the first question in the **Razgar** stages, namely is there an interference with the right to respect for the private and/or family life of the appellant under Article 8(1) ? At [37] the Tribunal cited **Singh** and took the view that there was no necessity to consider whether the claimant had a degree of family or private life and further went on to acknowledge that the claimant lived apart from her UK family and had her own family life in Pakistan with her husband. I am satisfied that this approach amounts to a material error of law. The FtT failed to consider the nature and extent of the family life and/or private life as between the claimant and her UK family. It is not simply a question of their being a familial relationship in existence. In dealing with adults there must be other factors to show a dependency above and beyond the normal family ties. There was no evidence before the FtT to indicate that there was a dependence beyond the normal ties as between the claimant and her only son the sponsor and with her young grandchildren. Further it was acknowledged by the FtT that the claimant indeed had her own family life in Pakistan with her husband. All of the cases referred to above make it clear that in appeals concerning visit visas the first question will be whether or not Article 8(1) is engaged. As stated in **Adjei** it is envisaged that it is necessary to show 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 leave outside of the Rules.

25. Accordingly I find that the Tribunal materially erred in law.

26. Furthermore I find that there was a misdirection of law by the FtT. In **Singh and Another** [24] it was held as follows:

> "I do not think that the judgements to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration controls, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. ... it all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of family life. There has to be something more."

The reference to **Singh** by the First-tier Tribunal [37] was taken out of context. In **AA v UK [2012] INLR** it was stated that in the assessment of

proportionality it mattered not whether there was private or family life engaged. On the facts of this case, which are not disputed, I find no evidence to establish that family life is engaged as between the claimant and her adult son and/or the grandchildren. The FtT failed to make findings as to family and/or private life at all. Accordingly it was wrong to continue with the **Razgar** stages.

27. Equally, I am satisfied that the ground in connection with the assessment of proportionality is also made out. Whilst cost, timing and convenience are all factors that in practice impact on the ability of family members to maintain visits and strengthen family ties, on the facts of this case visits could be made to the claimant in Pakistan, there were other means of maintaining links as between family members and further the claimant could make a fresh application. Following **SS (Congo)** where consideration is made outside of the Rules this must be justified by the existence of compelling and compassionate circumstances which illuminate the proportionality assessment. Whilst in no way seeking to diminish the importance of maintaining family ties and visits as between adult children and grandchildren, and the frustration experienced by persons making applications for visit visas that are dealt with inconsistently, in this instance the FtT erred in law as there were no circumstances capable of meeting **SS(Congo).**

28. As indicated in the FtT decision and reasons the claimant may make a fresh application for her visit visa and with that application submit a copy of the First-tier Tribunal decision setting out its findings and decision that the requirements under paragraph 41 were met. Arguably the decision should be taken into account in any future application in the event that the family's circumstances remain static.

29. The only remaining matter is the issue of the sponsor's son's medical condition. As explained to the sponsor at the hearing this was not a matter that was put in evidence before the FtT and/or supported by any medical evidence and it cannot therefore be a matter of relevance to this appeal.

Decision

30. I find a material error of law in the First-tier Tribunal decision and that decision is set aside.

31. I now go on to remake the decision of the First-tier Tribunal by substituting a decision to dismiss the appeal on human rights grounds. There is no evidence before the Tribunal to show that Article 8(1) is engaged. I base my decision on the facts as found by the First-tier Tribunal which were not disputed and I had in mind the submissions made in the skeleton argument produced by the sponsor and his representations at the hearing.

32. The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed Date 1.7.2016

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 1.7.2016

GA Black
Deputy Upper Tribunal Judge G A Black