Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: VA/17306/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons promulgated**
On 2 December 2014	**On 5 December 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Entry Clearance Officer, Beijing

Appellant

and

Zeshan Daoud
(No anonymity order made)

Respondent

Representation

For the Appellant: Mr. I. Jarvis, Home Office Presenting Officer.
For the Respondent: Ms. A. Akhtar of Sony Sadaf Haroon Solicitors.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Andonian promulgated on 5 September 2014 allowing Mr Daoud's appeal against the decision of the Entry Clearance Officer ('ECO') dated 6 August 2013 to refuse to grant entry clearance as a family visitor.

2. Although before me the ECO is the appellant and Mr Daoud the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Daoud as the Appellant and the ECO as the Respondent.

Background

3. The Appellant is a national of Pakistan born on 22 April 1993. On 25 June 2013 the Appellant completed a visa application by payment of the due fee, seeking entry clearance to visit, primarily, his brother Mr Adeel Ahmed ('the sponsor'). The Appellant was, and still is, a student of medicine at the University of Shihezi in China, and so the application was made to the entry clearance service in Beijing. The application was refused for reasons set out in a Notice of Immigration Decision dated 6 August 2013 with particular reference to paragraphs 41(i) and (ii) of the Immigration Rules. Essentially, the Respondent was not satisfied in respect of the financial support the Appellant claimed he was receiving to enable him to continue his studies in China, and in consequence was not satisfied that the Appellant was genuinely seeking entry as a visitor for a limited period and intended to leave the UK at the end of the proposed visit.

4. The Notice of Immigration Decision specified that the Appellant's right of appeal was limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002.

5. The Appellant appealed to the IAC. The Grounds of Appeal challenged the basis of the refusal under the Rules, but did not raise human rights grounds. Indeed Ms Akhtar candidly acknowledged before me that when the grounds were drafted the Appellant and his representatives were not alert to the limitation in his right of appeal, and that the Grounds did not address the limited scope of the right of appeal. Ms Akhtar also acknowledged that the evidence presented to the First-tier Tribunal, by way of the witness statement of the sponsor and supporting documents also focused upon the decision under the Rules and did not seek to address any Article 8 issues.

6. The First-tier Tribunal Judge, having heard evidence from the sponsor, allowed the Appellant's appeal on Article 8 grounds for reasons set out in his determination. (See further below.)

7. The Respondent sought permission to appeal which was granted (along with an extension of time) by First-tier Tribunal Judge Grant-Hutchison on 17 August 2014 on the basis that "*it is arguable that the Judge made a material misdirection of the law in its [sic.] approach to Article 8 by failing to identify why the Appellant's circumstances amounted to exceptional circumstances that warrant a grant of leave outside the Immigration Rules when he only seeks to visit his family for a few weeks before he returns to his studies*".

Consideration: Error of Law

8. The First-tier Tribunal Judge recognised the limited nature of the right of appeal (determination at paragraphs 2-3) and commented "*notwithstanding that the appellant had not made a reference to section 84(1)(c) of the rules, nevertheless I dealt with the issue before me under article 8*". Moreover, at paragraph 10 and under the heading 'Decision', it is clear that the Judge purported to allow the appeal under Article 8.

9. However, otherwise the Judge's focus was upon the basis of refusal under the Rules. The Judge identifies "*the only point of the refusal*" at paragraph 5. He thereafter evaluates the evidence demonstrating, to his satisfaction, that the sponsor was adequately supporting the Appellant in his studies in China; and further concludes that in circumstances where the Appellant was at an advanced stage of studying medicine it would be "*absurd*" that he should have any intention of overstaying in the UK – "*It simply makes no sense why an up and coming doctor would want to overstay in the UK on a visit visa. All he wants to do is visit his family here... It is far more beneficial for him it is reasonable to conclude to complete his studies, and to become a Doctor rather than remain in the UK as an overstayer*" (paragraph 8).

10. Although, at paragraph 9, the Judge makes reference to the sponsor's difficulties in visiting the Appellant because he is busy at work, he does not set this aspect of the evidence, or any other aspect of the evidence in the framework of human rights. Nor does the Judge make any express findings as to the nature and quality of private/family life that may exist between the Appellant and the sponsor, or give any consideration to the extent of interference with any such private/family life in consequence of the Respondent's decision. There is no attempt in the determination to analyse the circumstances of the case by reference to the established jurisprudence on Article 8.

11. Indeed Ms Akhtar, realistically and frankly, acknowledged that the determination essentially read as if it were an assessment of the

Appellant's case within the parameters of the Rules, and conceded that the Judge "did go wrong".

12. In such circumstances I find that the First-tier Tribunal Judge materially erred, and that the decision of the First-tier Tribunal must be set aside.

Remaking the Decision

13. Both representatives acknowledged that the appeal was suitable for consideration by the Upper Tribunal. Ms Akhtar, with the assistance of the sponsor – and with no objection from Mr Jarvis - clarified certain matters by way of background. The sponsor had been in the UK since 2007, and had not seen the Appellant since that time. The Appellant had left Pakistan to commence his studies in China in 2008, and had not returned to Pakistan until a visit in July 2014. The Appellant's and sponsor's parents and siblings remain in Pakistan. The sponsor had commenced working for his current employer in January 2013, and had been promoted to the more demanding role of area manager in May 2013. The sponsor and his wife are expecting a baby in April 2015: however, it was acknowledged that conception post-dated the Respondent's decision by approximately 12 months and therefore this was not a relevant consideration as it was not a matter pertaining at the date of the Respondent's decision. The representatives then made submissions.

14. Although the Respondent's decision was based on the Appellant not meeting the requirements of the Immigration Rules, and although I am not embarked upon a consideration of an appeal where the ground pursuant to section 84(1)(a) is available to the Appellant, it is nonetheless the fact that the First-tier Tribunal Judge made findings of fact - not themselves expressly challenged and eminently sustainable - to the effect that the Appellant did meet the requirements of the Immigration Rules at the date of the Respondent's decision.

15. Mr Jarvis accepted if the decision to refuse the Appellant entry clearance ran contrary to the requirements of the Rules, notwithstanding the limited scope of the right of appeal this was nonetheless relevant in any appeal founded on Article 8 grounds to the third, fourth and fifth **Razgar** questions. Where an appellant met the requirements of the Rules it could not be maintained that the decision was in accordance with the law; further, it could not readily be argued that any consequent interference with private/family life was necessary in circumstances where it was not justified under the Rules; yet further, the imperative of maintaining

effective immigration control could not readily be relied upon as a justification for interference in circumstances where an appellant met the requirements imposed by the Rules as a mechanism of such control.

16. However, it was the Respondent's case that either or both the first two **Razgar** questions should not be answered affirmatively in the Appellant's favour.

17. I have noted what has been said by Ms Akhtar on the Appellant's behalf with regard to the commendable level of brotherly responsibility shown by the sponsor in financially supporting the Appellant through his studies. To that extent it is to be acknowledged that the Appellant is not financially independent. However, in my judgement, both he and the sponsor are otherwise leading lives where on a day-to-day basis they are independent both of each other and indeed of the family members based in Pakistan. Their respective private lives have been led apart since 2007 and it seems to me that there is no particular interference with the private lives of either in consequence of the Respondent's refusal. Each will continue to enjoy his respective life as before and the frustration of not being able to see each other for a few weeks in the UK will of no very great moment.

18. Whilst it may be said that there is some element of mutual family life by reason of the brotherly relationship – underscored by the financial support provided by the sponsor – I am not satisfied that this equates to the sort of 'more than the normal emotional ties' contemplated in **Kugathas [2003] EWCA Civ 31** as a requisite to the protection of Article 8 in cases involving adult offspring or adult siblings – particularly in circumstances where on the instant facts there has been such a lengthy geographical separation.

19. Further, I have considered the effect of the refusal of entry clearance denying the Appellant the opportunity of seeing his brother in the UK in the wider context of it being said that the sponsor has difficulties in making arrangements to see the Appellant either in China or Pakistan. Practical problems such as are mentioned with regard to work commitments are a commonplace fact of modern life; however no compelling reason has been advanced to lead me to conclude that such practicalities are not readily surmountable with due planning and coordination. Similarly, no particular evidence has been put to me to indicate that the expense of arrangements to meet in some country outside the UK would be prohibitive or otherwise unreasonable.

20. Having regard to the matters set out above, I am not satisfied that either of the first and second **Razgar** questions are to be answered in favour of the Appellant.

21. Accordingly, I find that the Respondent's decision was not in breach of the Appellant's or anybody else's Article 8 rights.

22. For the avoidance of any doubt I have had regard to the public interest considerations incorporated at sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 (pursuant to amendments introduced by the Immigration Act 2014). However, because the Appellant's appeal fails by reference to the first two **Razgar** questions, the 'public interest question' does under 'proportionality' does not arise.

Notice of Decision

23. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

24. I re-make the decision. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 3 December 2014