



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: VA/18086/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 2 December 2014**

**Determination
Promulgated
On 16 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS JAFRI ALIA

Claimant

Representation:

For the Appellant: Mr L Tarlow (Senior Home Office Presenting Officer)
For the Claimant: Mr E Waheed (Counsel instructed by SAJ Law Chambers)

DECISION AND REASONS

1. This is an appeal against a determination of the First-tier Tribunal (Judge Shamash) promulgated on 2 September 2014 in which she allowed the Claimant's appeal against a decision made by the Entry Clearance Officer (ECO) in Abu Dhabi refusing entry clearance as a family visitor.
2. The Claimant's date of birth is 17 November 1951 and she is a citizen of Pakistan.

Background

3. The Claimant is a 62 year old widow living with her youngest son, his wife and their child in Karachi. She applied for a visit visa under paragraph 41 of the Immigration Rules to visit her son in the United Kingdom. The Entry Clearance Officer refused the application on the grounds that the Claimant had not established sufficient ties in Pakistan. It was accepted that there was evidence of sufficient income and maintenance in the United Kingdom. However, the Secretary of State was not satisfied that the Claimant intended to leave the UK at the end of the visit because the ECO was unclear of the Claimant's domestic and family circumstances.
4. The Tribunal determined the appeal on the papers. There was a limited right of appeal under Section 84 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The Tribunal made clear that the documentary evidence produced by the Claimant met the requirements of the rules under paragraph 41 of HC 395; there was sufficient evidence of ties in Pakistan and of the Claimant's independence to discharge the burden of proof. In particular the Tribunal found that the Claimant lived in Karachi all of her life where she has significant assets and has a son and grandchild for whom she cares. [14].
5. In considering Article 8 ECHR the Tribunal found that the Claimant was an elderly woman who wished to visit her son and that there was little more that she could have provided in order to show that she had assets and ties in Pakistan [17]. The Tribunal considered Article 8 in the context of the rights for family members to visit and to maintain such relationships, and the obligation on the State to facilitate such rights. The Tribunal found that there was an interference with the Claimant's family life because she was prevented from visiting members of her family in the UK. There was evidence that the sponsor had visited the Claimant in Pakistan and could continue to do so.

Grounds of Application

6. The Secretary of State argued that the Tribunal erred by failing to make a finding that the Claimant has family life in the UK, which should be the starting point for any consideration (**S v United Kingdom [1984] 40 DR 196**). There was no evidence or finding of any further elements of dependency such as to engage Article 8 (**Kugathas v SSHD [2003] EWCA Civ 31**).
7. Furthermore, the Tribunal failed to identify compelling circumstances not recognised by the Rules following **Gulshan**

[2013] UKUT 00640 (IAC) and **Nagre [2013] EWHC 720 (Admin)** on the meaning of exceptional circumstances, namely, that the refusal would lead to an unjustifiably harsh outcome. The Claimant would have been able to reapply for entry clearance given that the judge found she met the Immigration Rules. The Tribunal should have found that the decision to refuse was proportionate had it taken into account such matters.

Permission

8. Permission to appeal was granted by First-tier Tribunal Judge Simpson on 28 October 2014. The grounds and determination disclosed an arguable material error of law.

The Hearing

Submissions

9. Mr Tarlow relied on the comprehensive grounds in support of the application. The Tribunal had given no consideration to the first stage in **Nagre** and **Gulshan** as regards compelling circumstances.
10. Mr Waseem submitted that the overall approach demonstrated by the Tribunal was correct and that any apparent errors related to the style and structure of the decision. He submitted that there were sufficient findings of fact at [15] to show that the Article 8 assessment was correctly made. He further submitted that the Tribunal correctly identified the unique feature of this case, namely, that the Entry Clearance Manager's review was insufficient by failing to attach weight to the fact that the claimant lived with her son and the information contained in the Form B.
11. Mr Waseem submitted that **Kugathas** was not relevant in this case and placed reliance **Ghising (Family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)**. There can be family life absent any elements of dependency and it was clear that there was family life between a son and his elderly mother. The five stages of **Razgar** were discernable in the decision of the Tribunal.

Discussion and Decision

12. This matter comes before me for consideration as to whether or not there were material errors disclosed in the Tribunal's decision. Essentially the grounds complain that the Tribunal failed to set out and consider the necessary steps to justify consideration of Article 8 outside of the Rules and thereafter in the Article 8 assessment did not make a finding of family life and did not consider proportionality.

13. First of all, the Tribunal considered the evidence submitted under the Immigration Rule HC 395 at paragraph 41 and found that the Claimant met the requirements of the Rules.
14. Thereafter the Tribunal went on to consider the Article 8. There was no consideration of the “Gulshan/Nagre test“. However, I find no material error in the Tribunal’s approach having regard to **R (on the application of Esther Ebum Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC)** in which the headnote states: *There is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.*
15. The Tribunal considered Article 8 but failed to follow the five stages set out by Lord Bingham in the judgment of **Razgar**. The Tribunal made no clear findings of fact that addressed any of the five questions posed including whether or not there was family life and the question of proportionality.
16. Accordingly, I am satisfied that the decision discloses an error of law in its dealing with the second stage assessment.
17. However, I do not find a material error in light of the facts and evidence that were before the Tribunal. I am satisfied that in the context of family visits there is a family life between the Claimant and her son that engages Article 8 without the need for establishing dependency over and above normal ties for adults. The Claimant is the mother of the sponsor and she is in receipt of income from him and is therefore partially dependant on him. The consequences of the refusal are of sufficient gravity to engage Article 8. The decision amounts to an interference with the family life because the Claimant is not able to see her son and his family in their home in the UK. In considering proportionality I take into account that the Tribunal found that the requirements under the Rules were met having regard to evidence of social, economic and family ties in Pakistan. The Claimant has the funds available and

there is suitable accommodation and maintenance from the sponsor. The sponsor has in the past visited his mother and there is no reason why he cannot continue to do so, however this has financial implications for the family. Furthermore family life is not limited to physically being able to see a family member but encompasses being able to spend time in the family home, experiencing their life style and developing emotional bonds in particular with her young grandchildren. The Secretary of State has not raised any factors to indicate that the visit is not in the public interest. On the facts as established I am satisfied that the decision was not proportionate.

18. There was no material error law in the determination.
19. The appeal is allowed under Article 8 ECHR.

No anonymity order made

Signed

Date 15.12.2014

Deputy Upper Tribunal Judge G A Black

No fee award made.

Signed

Date 15.12.2014

Deputy Upper Tribunal Judge G A Black