IAC-FH-AR-V4

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: VA/03081/2014
VA/03084/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 September 2015	**On 6 November 2015**

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

SAMIR KARAMAT SHEIKH
NADIMA SAMIR
ANONYMITY DIRECTION NOT MADE

Appellants

and

ENTRY CLEARANCE OFFICER – ABU DHABI

Respondent

Representation:
For the Appellant: Mr C Yeo, instructed by Kadmos Consultants
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. Following a hearing on 9 July 2015 in which we found an error of law in the decision of the First-tier Judge who had heard the appellants' appeals in December 2014, this is the remaking of the decision on the appeal.

2. The appellants, who are husband and wife, had applied for entry clearance to enable them to visit their daughter and son-in-law in the United

Kingdom. The Entry Clearance Officer accepted that the daughter and son-in-law would pay for their maintenance and accommodation while in the United Kingdom but had concerns about the appellants' financial circumstances and as a consequence as to their intentions. The date of refusal is 13 May 2014.

3. The judge noted that the appeal could only be on race relations and human rights grounds in light of changes to the Rules, but nevertheless concluded that it was important to establish whether the appellants met the requirements of the Rules as this would be relevant to consideration of their appeal under Article 8 of the ECHR. It was also the case that by the time of the hearing before the judge the appellants' daughter was pregnant and a further reason for the visit was to see their new grandchild. The judge found that the appellants satisfied the requirements of the Rules and that the appeal succeeded under Article 8.

4. In our decision which we took at the hearing on 9 July 2015 we concluded that the judge's determination was flawed by error of law in that he had not made a finding as to whether there was family life in this case. This was in essence the only matter that required to be determined at the fresh hearing.

5. Mr Yeo adopted and developed points set out in his skeleton argument. He argued that not a lot had to be done to engage Article 8 in such a case and an artificial distinction had been made between private and family life as was done by the Home Office in the Immigration Rules. There was a reminder of that in the decision in Singh [2015] EWCA Civ 630. Even if family life were not engaged, often private life would be. The Court of Appeal had said at paragraph 25 that the factors to be examined in order to assess proportionality were the same regardless of whether family or private life was engaged.

6. In effect the same was said in Khoroshenko v Russia (Application number 41418/04). This involved a number of members of the extended family of a serving prisoner which was found to engage private life and family life. Private life was very broad, as was illustrated by the authorities set out in the skeleton including Razgar [2004] 2AC 368 and X v Iceland (Application number 6825/74). This was of especial relevance where there was no breach of the Immigration Rules as was the case here. Article 8 was very broad and was capable of protecting all expressions of family life including an adopted child as in Marckx v Belgium (Application number 6833/74).

7. With regard to the recent decisions of the Tribunal concerning family visits and Article 8, it was argued that Mostafa [2015] UKUT 00122 (IAC) contained the right approach except that it did not address private life but the Tribunal had not been asked to do so. It was argued that if a person met the requirements of the Immigration Rules and the human right was engaged and there was some kind of interference then it could not be proportionate to exclude the person. It was said in Mostafa that there could be exceptions to that principle, but the normal rule was that if

Article 8 was engaged and there was an interference and the requirements of the Rules were met then the appellant would succeed.

8. It was argued that the decision in Adeji [2015] UKUT 216 (IAC) was wrong. There was no consideration of the private life dimension or a holistic taking of private and family life together. Account of a number of other matters had been taken which were more relevant to proportionality. It was also wrong in seeming to encourage judges not to assess compliance with the Rules in such a case. It was clearly important to do so as the Rules normally determine proportionality. The decision in Kaur [2015] UKUT 487 (IAC) also assisted the appellants' argument. In that case the appellant had not met the terms of the Rules, but it was accepted that family life was established where the proposed visit was by an 83 year old woman to her son and his family. Contact between families was important, as had been said in Kaur.

9. In Abbasi [2015] UKUT 463 (IAC) compliance with the Rules had not been considered at all but it should be a key issue in these cases. That decision was helpful on the issue of private life, noting that it was quite a broad concept.

10. Mr Yeo argued that the appropriate approach was to follow what had been said in Mostafa but to accept that private life was just as valid as family life and should be assessed and if the person met the Rules they would succeed. It was an important issue, as all appeals lodged since April 2015 and some before that could be on human rights grounds only. The Home Office position was that human rights would be engaged in a lot of Appendix FM applications even if not referred to, for example, cases involving spouses, and compliance with the Immigration Rules would be very important to human rights, so compliance with the Rules, although not on the face of the statute, was nevertheless a key issue with regard to human rights. The fact that the children could visit the parents in Pakistan was irrelevant to whether family life was engaged and even if the approach in Kugathas [2003] EWCA Civ 31 was employed, private life was engaged as families wanted to be together and maintain contact and visit and attend festivals together. The child, who, was now 6 months old, had not been conceived at the date of application but the fact of its birth was important with regard to ties.

11. It was not appropriate to begin with the restrictive approach. The right of appeal had not been removed and as there were human rights grounds there was no reason to interpret it restrictively or limit the number of appeals. Historically many appeals had succeeded, and the Home Office recognised the importance of maintaining family contact, with the regular reference to "modern means of communication" but that was not the same as actual contact. Restrictive cases such as Kugathas and Singh arose in the context of settlement applications. Article 8 was flexible and there was no need to follow the restrictive approach. It was a question of respect for family life. There was also a question not only of the

appellant's rights but also those of their daughter to see her parents and the matter should be considered holistically.

12. In his submissions Mr Tufan referred to and relied on his skeleton argument. As to whether family or private life was engaged, it was necessary for there to be more than emotional ties for there to be family life and there was no evidence of dependency. It was not sufficiently serious for private life to be engaged. All the private life was in Pakistan. The application therefore failed.

13. If the Tribunal disagreed and found it was engaged, the facts were curious. There was the appellant's statement, but there was no record of the child on the Home Office system and there had never been any evidence of the child's birth. The judge had been wrong to take into account the family's hope to have the parents in the United Kingdom to celebrate the child's birth as the decision was in May 2014, which was eleven months before the birth of the child. It was a question of Article 8 as at the date of decision.

14. Mr Tufan also argued in line with his skeleton that there was no interference. There was the option to visit which was always open, and it was delayed by the child's birth, but there had been previous visits. Also the sponsor only had leave for a few more months at the date of hearing although it had now been extended but it was a precarious status.

15. As regards the case law, it was the case that permission to appeal to the Court of Appeal had been granted in Mostafa. Mr Tufan relied mainly on what was said in Adjei. It was a reported and persuasive decision. Kaur and Abbasi really took matters no further.

16. We reserved our determination.

17. In its recent judgment in Singh, the Court of Appeal set out in some detail the relevant authorities leading to the conclusion at paragraph 24 that in the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. The court went on to say that 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 court went on to say at paragraph 25 that the debate as to whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic, and as had been said by the Court of Human Rights in AA [2012] INLR 1, the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged.

18. In Razgar, it was said with regard to the scope and extent of the private life dimension of Article 8 that:

> "Elusive although the concept is, I think one must understand 'private life' Article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person."

19. Mr Yeo has also drawn our attention to X v Iceland where it was said that "the right to respect for private life ... comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality."

20. Clearly the central point in this case is whether or not there is family or private life. Whereas there is clearly, as we have set out above, a legal context to this, it is in our view essentially a question of mixed fact and law. With regard to the family life element, we note what was said by the Court of Appeal in Singh, itself borrowing from other authorities in particular Kugathas, where it was said by Arden LJ at paragraph 25, that: "In my judgement, a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties ...". She went on to say "Such ties might exist if the appellant were dependent on his family or vice versa. It is not, however, essential that the members of the family should be in the same country ... it will probably be exceptional."

21. On the facts in Kaur, family life was found to exist between the 83 year old appellant and her son and his wife and children. It was accepted that she enjoyed ties and had family going beyond the normal emotional ties between an elderly mother/ grandmother and her sponsor son/grandchildren; it was also accepted that the First-tier Tribunal Judge was entitled to attach particular weight to the evidence that the claimant had played a central role in bringing up the two grandchildren.

22. In the instant case, the appellants have not visited the United Kingdom since their daughter came here in December 2011. In her statement and oral evidence before the First-tier Tribunal Judge the appellants' daughter said that she misses her parents terribly and maintains regular contact by modern means but it is not the same as being with each other until she came to the United Kingdom they had lived together. She had visited them in August – September 2012.

23. In our view this does not amount to family life, bearing in mind the guidance in Singh, Kugathas and the other authorities. It is the normal relationship between parents and an adult child and her husband and one which does not engage Article 8 family life.

24. As regards private life, we have set out above the general guidance as to what private life entails. It is relevant also to note what was said in AA v United Kingdom (Application no. 800/08: [2012] INLR 1: "... it is not necessary to decide the question [of whether there was family life between the proposed deportee, aged 24, and his mother] given that, as Article 8 also protects the right to establish and develop relationships with

other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes an interference with his right to respect for private life" (paragraph 49). It is of course relevant to bear in mind the context of a settled migrant's situation in that case, but we agree with Mr Yeo that private life as much as family life can engage Article 8(1) in an entry clearance case.

25. However that cannot entail an advantage for private life cases over family life cases. Just as the "something more than normal emotional ties" element is necessary to establish family life between an adult child and her parent, the same must be so for private life, and the absence of that extra quality to the relationship between the appellants and their daughter and her family must be of equal relevance to the argument that they have a protected private life.

26. Accordingly this appeal fails *in limine* on the issue of whether or not Article 8 is engaged. If we are wrong in this respect, we consider that the appeal could not succeed on the basis that there is no interference. Private/family life can be maintained, as it has been already, by the sponsor visiting her parents in Pakistan.

27. We should say that otherwise we agree that had it come to the question of proportionality, the fact that the appellants satisfy the requirements of the Immigration Rules would mean that if they had established private or family life and an interference the refusal to grant leave would be disproportionate. There may be exceptional cases, as alluded to in Mostafa, where that might not be the case, but we have been unable to think of any although we accept that that caution must remain.

28. However, for the reasons set out above, these appeals are dismissed.

Signed Date

Upper Tribunal Judge Allen

No anonymity direction is made.

No fee award is made.

Signed Date

Upper Tribunal Judge Allen