



IAC-AH-DP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: VA/13752/2013

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

**On 17th September, 2014
Signed 17th November, 2014**

On 18th November, 2014

Before

Upper Tribunal Judge Chalkley

Between

MR IMTIAZ AKRAM CHEEMA

Appellant

and

ENTRY CLEARANCE OFFICER - ABU DHABI

Respondent

Representation:

For the Appellant: Ms D Qureshi, Counsel

For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 17th March, 1987 and who made application for entry clearance to visit family in the United Kingdom for one month under paragraph 41 of Statement of Changes in Immigration Rules HC 395, as amended (“the Immigration Rules”). His application was refused by the Entry Clearance Officer on 18th June, 2013 and the appellant appealed to the First-tier Tribunal. His appeal was heard by First-tier Tribunal Judge Mitchell at Taylor House on

31st March, 2014. In a determination promulgated on 15th April, 2014, the judge noted that the appellant was not a qualifying family member in accordance with the Immigration Appeals (Family Visitor) Regulations 2012. The grounds of appeal merely asserted that the appellant's rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms were breached by the decision of the Entry Clearance Officer.

2. The judge noted that the appellant had previously travelled to the United Kingdom indicating that he intended to stay for one month, but actually stayed for just under six months. He noted that the appellant is single with no dependants and claims that he is a landlord with a total monthly income of 46,000 Pakistani rupees. Evidence submitted on the appellant's behalf did not indicate that he received any income from property he owned. The Immigration Judge heard evidence from the sponsor, a British citizen who confirmed that he was now ill. The Sponsor requires the removal of a tumour, but has delayed his operation pending the arrival of the appellant.
3. The judge noted that the sponsor,

“came across as being slightly cantankerous and unwilling to listen and able to ignore or just not take notice of anything which did not please him. He almost certainly would be a difficult patient.”.

At paragraph 22 the judge noted:-

“This viewpoint is reinforced by the fact that he said in his oral evidence that he does not wish to have care from any female person and insists on a male carer. The hospital also has had difficulty in communicating with him on occasions and has apologised for not being successful in doing so.”

4. A letter sent by the sponsor's general medical practitioner confirms that the sponsor has indicated that he has no-one else to care for him in the United Kingdom except his nephew who has agreed to be with him during his medical treatment. The judge noted that in a statement appearing in the appellant's bundle he claims to be a farmer owning agricultural land and a basement shop and he claims that he has a property business which generates 85,000 Pakistani rupees per month. He estimates his income to be in the region of 45,600 rupees per month because that is his disposable income after tax and expenditure. He claims also to receive approximately 1,000,000 rupees per year from his agricultural crops. At paragraph 38 the judge said:-

“For the purpose of this appeal I conclude that there is a family or private life relationship between the appellant and the sponsor. This is supported by the fact that the appellant is willing and able to travel many thousands of miles across the world to care for the sponsor. He would also be put to the inconvenience of having to arrange for other people to look after his business interests in Pakistan. This is likely to cost him a significant amount of money which he would not otherwise not have to spend (sic).”

5. The judge noted a bank statement in the appellant's bundle which shows that the account fluctuates considerably and on occasions the balance falls to below 800 rupees. The account is clearly a business account, but he notes that there are no documents relating to produce from the land the appellant owns and that there was no evidence before the judge relating to the appellant's property business. The judge quoted paragraph 17 of *Razgar v Secretary of State for the Home Department* [2004] UKHL 27 and noted that the appellant could not meet the requirements of the Immigration Rules. He appeared to think that the appellant failed to meet the requirements of the Immigration Rules, because he had failed to demonstrate his personal circumstances and income in Pakistan. In actual fact it was of course because he was not related to the sponsor in a manner required by the Immigration Appeals (Family Visitor) Regulations 2012.

6. The judge set out paragraph 17 of *Razgar* in full, but failed to attempt to answer any of the questions save for the first one, the third one and the last one. At paragraphs 47 and 48 the judge said this:-

"The decision if it did breach the appellant's and sponsor's rights under Article 8 of the ECHR would be in accordance with the law. The appellant has failed to meet the other requirements of the Immigration Rules for the reasons set out above.

48. The Immigration Rules do have the legitimate aim of maintaining effective immigration control and the rights and freedoms of others and implicitly the economic wellbeing of the United Kingdom. Having considered the evidence and the representations that have been made I consider that such interference is clearly proportionate to the legitimate public end sought to be achieved. I therefore dismiss the appellant's appeal under Article 8 ECHR."

7. The judge went on to dismiss the appeal under the Immigration Rules, appearing not to recognise the fact that there was no appeal before him. Permission to appeal was granted by First-tier Tribunal Judge VA Osborne, who noted at paragraph 38 of the determination the judge said that "for the purposes of this appeal I conclude that there is a family or private life relationship between the appellant and the sponsor". Judge Osborne went on to say:-

"5. This finding is against an unusual background which has compassionate aspects to it. The appeal cannot succeed under the Family Visitor Regulations because the relationship between himself and the sponsor is that of uncle and nephew. However, the appellant maintains that the nature of the relationship between himself and his uncle is such that his uncle regards him as a son and further it is only the appellant who could look after the [sponsor] in the circumstances that he has found himself in and the uncle has in fact refused to have surgery which is required as a matter of urgent necessity because he wants to wait until his 'son' can be there to assist him.

6. Having found that there is 'family or private life' between the appellant and his uncle I am satisfied that the central issue of the determination would

then turn to the question of proportionality. It is not argued that the appellant could meet the requirements of either paragraph FM or paragraph 276ADE of the Immigration Rules. The issue of proportionality must be determined following a balancing exercise and whilst within the determination of the First-tier Tribunal Judge has set out matters which are both in favour of the appellant's claim and against it his conclusion was that the appeal could not succeed. But it is not clear that the First-tier Tribunal Judge has made a specific finding on the issue of proportionality and in doing so I am satisfied that he may have made an arguable error of law in the unusual circumstances of this appeal. On that basis I am satisfied that permission to appeal should be allowed."

8. At the hearing before me the appellant was represented by Ms Qureshi of Counsel and the respondent by Mr P Deller a Senior Home Office Presenting Officer. Counsel drew my attention to the fact that at paragraph 44 the judge had referred to paragraph 7 of *Razgar v Secretary of State for the Home Department* [2004] UKHL 27, but then went on to decide the appeal without properly assessing proportionality, despite having found at paragraph 38 that there is "family or private life relationship between the appellant and the sponsor". She reminded me that the appellant came to the United Kingdom in 2010 and returned after his post graduation diploma in 2012. He returned again in May, 2012, for just under six months to visit the sponsor. The sponsor himself was divorced in 1983 and since then his children have not had any contact with him. The appellant is now 27 years of age and, she submitted, there clearly is a family life between the appellant and sponsor. At paragraph 46 of the determination the Immigration Judge failed to take into account the emotional dependency of the sponsor on the appellant and the fact that the sponsor cannot travel. For the respondent, Mr Deller suggested that it was difficult to understand quite how the judge had concluded that Article 8 was indeed engaged. At paragraph 38 the judge said:-

"For the purposes of this appeal I conclude that there is a family or private life relationship between the appellant and the sponsor. This is supported by the fact that the appellant is willing and able to travel many thousands of miles across the world to care for the sponsor. He will be put to the inconvenience of having to arrange for other people to look after his business interests in Pakistan. This is likely to cost him a significant amount of money which he would not otherwise not had to spend (sic)."

Mr Deller suggested the case falls apart when one comes to consider the second question posed by Lord Bingham at paragraph 17 of *Razgar* namely will such interference have consequences of such gravity as potentially to engage the operation of Article 8. The sponsor has chosen not to have any surgery until the appellant is here. That is a matter for him. There is adequate provision made under the Rules and the application fails to identify any sufficiently compelling factors which would entitle a judge to allow the appeal outside the Immigration Rules.

9. I reserved my determination.

10. This is a confused determination. The judge appears to be completely unaware that the reason he has an Article 8 appeal before him is that the appellant does not have a decision which is appealable under the Immigration Rules because of the relationship of the appellant to the sponsor and the operation of the Immigration Appeals (Family Visitor) Regulations. The judge did not consider whether the appellant met the requirements of paragraph 276ADE but it does not appear to have been urged before him and it was certainly not urged before me that the appellant could meet the requirements of paragraph 276ADE.
11. Unfortunately, Counsel could not explain what the judge meant when he concluded that there, "is a family or private life relationship between the appellant and the sponsor". Even if one were to assume that the judge was satisfied that there was a family life between the adult appellant and his uncle with whom he has never actually permanently lived, it was incumbent upon the judge to proceed to answer the questions posed by Lord Bingham in paragraph 17 of *Razgar*. It cannot properly be said that the interference will have consequence of such gravity as to potentially engage the operation of Article 8. In any event Counsel is quite wrong when she suggests that the Immigration Judge failed to take into account the circumstances of both the appellant and the sponsor in deciding proportionality. At paragraph 46 the judge said:-

"The sponsor in the United Kingdom can receive appropriate medical treatment and care without the appellant, coming to the United Kingdom. He may receive more extensive care and be happier in himself were his nephew to come to the United Kingdom. Overall however I do not consider the decision to refuse entry clearance amounts to a breach of either the appellant's or the sponsor's rights under Article 8 of the ECHR. Although there has been care given by the appellant in the past to the sponsor the decision was made that the appellant should return to his home country where he immediately re-established his private and family life. He only wishes to come to the United Kingdom for a relatively short period of time, six months, in order to provide interim care to the sponsor. I have been informed that the sponsor cannot travel to Pakistan although there is no direct medical evidence to support this."
12. There was no evidence before the judge that the appellant has any particular nursing or medical qualifications which would enable him to deliver the standard of care which the sponsor may need following his operation. The fact that the sponsor cannot travel was noted by the judge. The judge was wrong in paragraph 46 to note that the appellant wanted to come to the United Kingdom for six months, because he had only applied for a family visit visa for one month. However, even if it were to be shown that the interference did have consequence of such gravity as potentially to engage the operation of Article 8, it cannot be said that the judge did not perform a proportionality exercise.
13. Whilst the determination is worrying in that it does disclose several errors, I do not believe any of them to be material or capable of affecting the outcome of the appeal. The judge was entitled to find that

the interference was proportionate to the legitimate public end sought to be achieved and there was nothing in the circumstances of the appellant or his appeal which could properly be said to have enabled the judge to allow the Article 8 appeal outside the Immigration Rules.

14. I uphold the decision of the First-tier Tribunal.

Richard Chalkley

Upper Tribunal Judge Chalkley
17th November, 2014