Upper Tribunal
Immigration and Asylum Chamber **Appeal Number:**
VA/16574/2013

VA/16579/2013

THE IMMIGRATION ACTS

Heard at Field House **Promulgated on:**
On 22 October 2014 **12 December 2014**
and 10 December 2014

Before

Upper Tribunal Judge Kekić

Between

Noor Ahmad Khan
Zahida Nasreen

Appellant

and

Entry Clearance Officer, Abu Dhabi

Respondent

Representation
For the Appellant: Mr S Mahmud and Mr L Loughlan, Counsel
For the Respondent: Ms A Holmes and Mr I Jarvis, Senior Home Office Presenting Officers

Determination and Reasons

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission to the respondent on 11 September 2014 by First-tier Tribunal Judge Hollingworth in respect of the determination of First-tier Tribunal Judge Carroll who allowed the joint appeals following a hearing at Taylor House by way of a determination promulgated on 7 July 2014. For convenience I continue to refer to the Entry Clearance Officer as the respondent and to Mr Khan and Mrs Nasreen as appellants.

2. The appellants are Pakistani nationals born on 26 November 1951 and 3 February 1952 respectively. Their applications for visas to visit Aftab Ahmad Khan, their son and sponsor, for a period of one month were refused on 14 July 2013. They were given a right of appeal limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002 as the ECO maintained they had applied on or after 25 June 2013.

3. When the appeals came before the First-tier Tribunal, the respondent was unrepresented and the judge proceeded to hear oral evidence from the sponsor and allowed the appeal under paragraph 41.

4. In her challenge to the decision, the respondent argues that the judge had no jurisdiction to hear the substantive merits of the appeal. It is argued that where one of the limited grounds of appeal, namely human rights or race relations are raised, the Tribunal only had the right to consider those grounds. The respondent points to the notice of decision which makes this clear and maintains that the judge therefore erred in allowing the appeal under paragraph 41. It is also pointed out that the judge made no findings on human rights grounds as required.

Appeal hearing on 22 October 2014

5. The appeal initially came before me on 22 October 2014. The appellant was represented by a new firm of solicitors and his sponsor attended with Counsel. Ms Holmes relied on the respondent's grounds and argued that the judge had failed to consider human rights at all. The determination was therefore flawed.

6. Mr Mahmud replied. He maintained that the judge had jurisdiction to consider the substantive merits because the appellants had made their applications before 24 June 2013. In any event they

had raised human rights in the grounds of appeal and the sponsor's witness statement. The issue of a limited appeal was not raised before the judge or in the notice of decision. It was a breach of Article 8 that the ECO found that the appellants were not settled in Pakistan. They had family life with their son in the UK and it was their right to visit him and his right to have them visit.

7. In response Ms Holmes pointed to the application forms which were signed on 25 June 2013. She also pointed out that the issue of the limited appeal *had* been raised in the decision notices.

8. Further examination of the bundle revealed some inconsistencies over whether the application was made on 24 June or 25 June or indeed 27 June as maintained in the respondent's grounds. Mr Mahmud requested an adjournment so that this matter could be clarified. In all fairness to the appellants, I therefore agreed to the request and the matter was listed for hearing on 10 December with the agreement of the parties.

Appeal Hearing on 10 December 2014

9. No further evidence relating to the date of the application was presented when the matter resumed. On this occasion Mr Jarvis appeared for the respondent and Mr Loughlan for the appellants. A bundle of documentary evidence was adduced for the appellants but it largely reproduced the evidence already on the court file and Mr Loughlan did not seek to refer to it during the course of the hearing.

10. Mr Jarvis sought a short break to check the entry clearance database and returned after some 10-15 minutes to say that the application was submitted online on 24 June 2013 and biometric information was taken on 25 June at 06.35 and received in the UK at 10.40. There was no confirmation of the date that the fees were paid. However, Mr Jarvis stated that the process was still ongoing on 25 June. The completion date of 27 June was taken from the ECO's system. He argued that the appellants were therefore caught out by the new rules. They had limited appeal rights and had not sought to challenge that claim in the grounds of appeal. Only human rights grounds could be relied on. The judge had not addressed this issue. That was an error of law.

11. Mr Loughlan did not accept that the respondent had established that the applications had been made on 27 June 2013. He argued that biometrics are done after the fee is paid and the on line date should be taken as the date the application is made. It followed that the appellants had full appeal rights. In any event, they had

raised human rights grounds in the grounds of appeal and it was speculative to say that the judge had not considered them. They would have been in his mind. However, if he was satisfied that the requirements of the rules had been met, there was no obligation for him to consider human rights.

12. Mr Jarvis responded. He submitted that the respondent's case had always been that the applications were made after the change of jurisdiction. If the appellants asserted that was not so, it was for them to produce evidence to explain why they made that claim. The applications were signed on 25 June 2013. The onus was not on the entry clearance officer to show that the applications were made thereafter. The appellant had not argued human rights before the judge. Although they had referred to human rights in their grounds of appeal, this had not been pursued and in order for the issue to be determined, it had to be argued.

13. That completed the submissions on the issue of the error of law. I reserved my decision on that issue but proceeded, nevertheless, to hear oral evidence from the sponsor on Article 8 in the event that an error was found.

14. The sponsor gave his name as Aftab Ahmed Khan and he relied on his witness statements dated 4 July and 15 November 2014. He stated he had a large family in Pakistan consisting of his parents, three sisters (the youngest of whom was 14), a brother, uncles and aunts. His younger sister lived with their parents. He said that if his parents did not leave the UK after their visit, she would have no place to live. He stated that he was due to be married in January 2015. He was remarrying his wife whom he had previously divorced. His parents had helped them to reconcile. The marriage was not taking place in Pakistan because this would be embarrassing and, in any event, relatives there were not aware of the divorce. He had not disclosed this information previously because he did not want strangers to know. He stated that it was never his intention that his parents would come and remain here. The main reason for the application was to attend his wedding and to meet his daughter whom they had never met. She was aged four. He stated that the data of his January remarriage had been arranged in December 2013. He confirmed this was after his parents had made their application.

15. In cross-examination the sponsor stated that the application was made to come and attend his wedding. It was put to him that he had given evidence that the marriage had been arranged in December 2013, after the making of the applications. He said that was when he had initially planned to have the wedding; the

arrangements and planning had begun in early 2013. The marriage would be a civil ceremony. He had no evidence regarding the booking of the date of December 2013. He was asked whether there was anything which would prevent him from visiting Pakistan to see his parents and he replied in the negative.

16. There was no re-examination.

17. In response to questions I asked for clarification, the sponsor stated that he had been living in the UK for nine and a half years. He had been back to Pakistan on seven or eight occasions and his parents had been here twice. They were retired. His mother was a pensioner and he sent them money every month. They also received rental income from property. They lived with his sister and brother. Neither was married. When asked to explain why he had earlier said his sister would be homeless if his parents left, the sponsor stated his brother would be moving to Karachi for work in February. The family currently lived in Peshawar. They owned the house. One sister lived in Peshawar and the rest of his family were in Karachi and Lahore. Neither Mr Jarvis nor Mr Loughlan had any questions arising from mine and that completed the oral evidence.

18. I then heard submissions from the parties. Mr Jarvis relied on his earlier submissions and argued that this was a restricted right of appeal. With regard to Article 8, this was a qualified right and, whilst it was not impossible to show family life in these circumstances which met the legal authorities, the thrust of all those judgements related to the separation of families on removal. The extra-territorial cases centred round positive family reunion issues. It would defeat the purpose of the jurisdictional changes if judges could bypass the rules and allow appeals under Article 8. The intention of Parliament in approving the change was to get people to remake their applications rather than pursue appeals. This was a case of adult parents and an adult child. Even if they had lived in the same city, they would struggle to show family life beyond the normal emotional ties. In terms of this case, the family ties did not amount to anything beyond normal. Human rights had to be decided as at the date of the decision. Rather than waiting to argue their case, the appellants could have remade their applications. There was nothing to prevent the sponsor from travelling to Pakistan to see his parents and for them to meet his child. Even if a family life were to be found there was no sufficient interference with it. The appellants were still living with their daughter and looking after her. There were no serious consequences which would engage Article 8.

19. Mr Loughlan relied on his earlier submissions on the timing of the application. He acknowledged that human rights had not been a live issue before the first-tier judge but pointed out that they had been raised in support of that appeal. He submitted that the family had close relationships through their visits and therefore it must be the case that they had family and private life. This was a case of parents wanting to come to the UK to see their son get married. The sponsor had a life here and was entitled to remain here. The appellant had been here before, complied with the rules and had returned. It was absurd to argue that they had no settled life in Pakistan. They had a 14-year-old child, property and savings. All their children except the sponsor live there. There was no case for effective immigration control. The refusals were an attempt to meet government targets and nothing else. The appellants were not elderly or asking to come here to be supported by the sponsor. They had a strong Article 8 claim and it was wrong for the government to say that they could never come to visit the sponsor. The appeal should be allowed.

20. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Reasons

Error of law:

21. The issue of a limited right of appeal was plainly raised in the notices of decision for both appellants and in the review by the EC Manager where it was flagged as a preliminary issue. There was no challenge to this by the appellants until the first hearing before me. Even then, whilst objections were raised, no clear evidence to support the contention of an earlier application date was adduced. It was for that reason that I granted an adjournment; the sponsor being confident that he would be able to obtain evidence of when the fee payment was made. Lengthy arguments are now made in Mr Loughlan's skeleton argument about the timing of the application but it is of note that no issue was taken by the appellants before the First-tier Tribunal in respect of the restricted right of appeal and no Rule 24 response was prepared in respect of the Secretary of State's grounds for permission to appeal and the grant of permission, both of which emphasise the limited appeal rights.

22. The restricted right of appeal was clearly identified both by the ECO and the ECM. I am bound to say that the judge's failure to deal with this matter or indeed to even acknowledge it is an error of law and regrettably shows a lack of care in preparation by the

judge. The judge was obliged to consider the human rights claim raised, albeit briefly, in the appellants' grounds of appeal and to have made findings on whether the refusal breached their Article 8 rights as claimed. He did not do so. Mr Loughlan's submission that the absence of any reference to human rights did not mean that the judge did not consider them is rather strange. There is no reference to anything in the Record of Proceedings which would suggest that these were argued and I can see nothing to support the submission that the judge had Article 8 in mind.

23. Whether the judge's error is material depends on when the applications were made. If made on 25 June 2013 or thereafter, then the judge had no jurisdiction to determine the substantive merits of the appeals under paragraph 41 as he has done. If they were made before 25 June, then he did. The first issue I must therefore consider is when the applications were made.

24. The appellants were given an adjournment to provide further evidence pertaining to the making of the application, such as evidence from the ban regarding the payment of the fee but nothing has been forthcoming. The fresh bundle does not assist with the date of the applications.

25. I have regard to all the documents that are contained in the respondent's bundle in respect to both appellants. There is, however, some confusion over the making of the applications. I accept Mr Loughlan's point in the skeleton argument as to the correct time and date for the implementation of the removal of the right of appeal, this being an overseas case. I accept that the correct time must be the equivalent of 00.00 GMT on 25 June 2013, i.e. 05.00 in Pakistan. According to Mr Loughlan's argument, the on line application for the first appellant was made at "12.09 a.m." on 25 June (paragraph 5 skeleton argument) and at 11.56 on 24 June for the second appellant. These timings are taken from the bottom of the application forms. He argues that accordingly, both are "in time". The difficulty with this argument is that it does not take account of the fact that whilst the forms do indeed bear those endorsements at the bottom right, and also show an application date of 24 June 2013, they are both signed and dated the 25 June 2013. That would suggest to me that whilst the on line application may well have commenced on 24 June, the forms were not fully completed until 25 June.

26. I also take account of the information provided regarding the receipt of biometric information. This is contained on the application forms adduced by Mr Jarvis at the hearing and show that these details were received in the UK at 10.40 on 25 June

2013. That would have been 15.40 in Pakistan and would accord with the signatures of the same date. Mr Loughlan argues that he was not aware of any rule that required biometric date to be completed before an application was valid. I would refer him to A34(iii)(b) and 34A(iii) and (iv) which clearly state that biometrics must be received where they form part of the information required for an application. The latter paragraph also requires a signature to be given. Given that the unchallenged evidence shows that the biometrics were not given/received until 25 June at a time when the new legislation had been implemented in the UK, the appellants' claim to have completed a valid application prior to the change of the rules is untenable. For the sake of completion, I note that the information from Mr Jarvis provides details as to the process undertaken and confirms the final results were received at 18.43 on 25 June 2013 (whether in the UK or in Pakistan is immaterial).

27. For these reasons I find that it is more probable than not that the applications were completed on 25 June 2013 following the implementation of the new rules removing full rights of appeal for family visitors. There is no basis for Mr Loughlan's submission that the refusals were a means of meeting government targets. That is pure speculation and wholly unjustified given the unarguable facts as set out above.

28. It follows that the judge's error is material and that the determination cannot stand. I set it aside in its entirety as the judge had no jurisdiction to make findings on the substantive merits under paragraph 41. As he failed to address the only issue he did have jurisdiction to consider, namely the Article 8 grounds of appeal, I now turn to that.

Article 8:

29. It has been argued for the appellants that they have a strong Article 8 claim in that they have a family life with their son, the sponsor, and that their rights are breached by the refusal to allow them to visit him and attend his wedding. It must be said that at times Mr Loughlan's submissions appeared to veer to the substantive merits of the case and the intentions of the parties. He addressed me with regard to the appellants' circumstances and their incentive to return to Pakistan after their visit rather than focusing on what it is that makes their relationship with the sponsor fall into the category of family life deserving of protection under Article 8. I was told that the appellants lived with their youngest unmarried daughter aged 14. This is not however borne out by the evidence. The ECO noted in his refusal that their only dependent child was

an adult and it may be seen from the VAF (Part 4, 45-52) that there is reference to one dependent child living with them. This child is named as Umair Ahmad Khan born on 20 April 1991. Plainly he is not a 14 year old female. Further, given the sponsor's evidence that his brother was shortly moving to Karachi for work, it would appear that the appellants would be left alone following his departure.

30. I was told that the appellants had made their applications to attend the wedding of the sponsor and that to stop them from being allowed to do so was a breach of their human rights. However, the sponsor's evidence about his re-marriage was inconsistent. He initially stated that his wedding date was set for January 2015 and that this date had been arranged in December 2013 which was some six months after his parents had made their applications. This was then changed in cross examination and the sponsor said that he meant that the initial wedding date was to have been in December 2013. However, I note that the appellants sought to travel in July 2013 and declared they would stay a month. The sponsor's evidence that the application was primarily so that his parents could attend his wedding is clearly not supported by the evidence as they would have been long gone before the set date. There is no suggestion that any earlier date was planned and cancelled. In any event, the prospect of a wedding was never mentioned until the sponsor's November 2014 witness statement. His explanation that he did not want "strangers" to know about this is bizarre. Had this been the primary reason for the intended visit, one would have expected him to disclose the information much earlier.

31. It is not clear on what basis the sponsor came to live here but he chose to move away from his parents and to make a separate life for himself in the UK. He has a daughter and he intends to re-marry her mother. His family life is with them. Whilst he still of course has a relationship with his parents and they with him, I have not seen or heard anything to indicate that the relationship is anything over and beyond what one would expect between adult children and their parents. The sponsor visits them quite regularly. He can continue to do so and he can take his daughter to Pakistan to meet them and the rest of the family. The appellants can of course make a fresh application for entry clearance. Their applications were refused because of a lack of adequate documentary evidence and question marks over substantial deposits not in accordance with the declared income. These are matters which are easily resolvable with the right evidence. Their past two visits would be matters in their favour and there is nothing to suggest that all future applications would be refused as

the sponsor maintains. Plainly matters have to be assessed as at the date of the decision. The previous visits had been made several years earlier and it would be ridiculous to suggest that the situation could not have changed since.

32. In conclusion, therefore, and applying the lower standard, I find that the appellants have failed to show that they have established family or private life with the sponsor that is deserving of protection under the ECHR. Whilst he helps them with money, they have an income of their own and have a large family in Pakistan. They have their own property and it is not suggested that they depend on the sponsor in any particular way. The sponsor's claim to provide "moral support" to his parents is unparticularised and takes matters no further. There being no family/private life, it follows that there can be no interference with it which would breach the appellants' human rights. The refusal essential maintains the status quo. The appellants can continue to see the sponsor when he visits them and they have the option of making fresh applications to visit him with the appropriate evidence.

Decision

33. The First-tier Tribunal made errors of law and the determination is set aside. I remake the decision and dismiss the appeals on human rights grounds. There is no jurisdiction for the Tribunal to determine the appeals under paragraph 41.

Anonymity

34. I see no basis for making an anonymity order.

Signed:

Upper Tribunal Judge Kekić
11 December 2014