IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/00673/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 January 2015	**On 27 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER – ISTANBUL

Appellant

And

MR OZGUR SOBE
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant: Ms Geraldine Peterson, Counsel instructed by Gulsen & Co Solicitors
For the Respondent: Ms S Vidyadharan, Specialist Appeals Team

DECISION AND REASONS

1. The Specialist Appeals Team appeal on behalf of the appellant to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by an Entry Clearance Officer to refuse him entry clearance as a family visitor. The First-tier Tribunal did not make an anonymity direction, and I do not consider that an anonymity direction is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a national of Turkey, whose date of birth is 10 December 1993. He applied for entry clearance to visit his family in the UK for ten days. His application was refused by an Entry Clearance Officer in Istanbul on 7 January 2014. The reasoning of the ECO was that his father had gone to the UK in 2009 as a visitor, but had remained under the provisions of the ECAA Rules where he had continuing leave under that category. His mother and brother had leave as his dependants. The claimant had previously applied to join his father in 2011 and 2013, but both applications were refused. The claimant was a student at Izmir University studying physiotherapy and rehabilitation. He registered in September 2012, and was currently in the second year of his four year degree. At the time of his previous application submitted in July 2013 (his application for settlement), his circumstances were the same as now, in that he was also enrolled on a four year university course. Nonetheless he had stated in his application for settlement that his intention was to settle in the UK with his father. So he had not given a reason why six months later his intention was no longer to settle with his father, but merely to visit him. It was his responsibility to satisfy the ECO that his circumstances in Turkey were such that if given leave to enter he complied with all the conditions attached to such leave, and that he intended to leave the UK at the end of his visit. But the claimant had not done this. So he refused the application by reference to subparagraphs (i) and (ii) of paragraph 41 of the Rules. It was pointed out that his right of appeal was limited to the grounds referred to in Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002.

The Hearing Before, and the Decision of, the First-tier Tribunal

3. The claimant's appeal came before Judge Buchanan sitting at Hatton Cross in the First-tier Tribunal on 25 September 2014. Ms Peterson of Counsel appeared on behalf of the claimant, and a Presenting Officer appeared on behalf of the ECO. The judge received oral evidence from the claimant's mother and father, and also considered a witness statement from the claimant.

4. In his subsequent determination, Judge Buchanan allowed the appeal for the reasons given by him in paragraphs 4.1 to 4.7. Paragraphs 4.1 to 4.5 related entirely to the merits of the appeal against the decision under paragraph 41. The judge concluded at paragraph 4.5 that the claimant had ties both economic and personal to Turkey from which he concluded that his stated intention of only visiting the UK during breaks and study was a genuinely stated intention.

5. At paragraph 4.6 the judge addressed the question of family life. He found that the claimant enjoyed family life with his family in the UK. He was part of the family group, the remainder of whom had settled in the UK. He considered it was relevant that the claimant would fall within the category of children who might be admitted to the UK as being unmarried and fully dependent under the age of 21 (under the Ankara Agreement). The judge continued:

> In my judgment, where a decision by the respondent to refuse a visit visa application may impact on future applications to visit the UK; and where the remainder of the family are settled in the UK then there will be interference in family life. I do not consider that that interference is proportionate notwithstanding the accepted position that the [claimant] would be entitled to make further application to settle in the UK until aged 21. In reaching that conclusion I have regard also to Section 117B of the 2002 Act.

6. The judge concluded in paragraph 4.7 that the claimant had satisfied him on balance that he intended to leave the UK at the end of any visit, and he went on to allow the appeal in respect of the immigration decision made by the ECO, without specifying that he was allowing the appeal on Article 8 grounds.

The Application for Permission to Appeal

7. A member of the Specialist Appeals Team settled extensive grounds of appeal to the Upper Tribunal, arguing that in order for the claimant to be successful on Article 8 grounds, the Tribunal in line with **Gulshan [2013] UKUT 00640 (IAC)** would have to identify whether there were compelling circumstances not sufficiently recognised by the Rules.

8. It was also submitted that relationships between adult siblings or adult children and their parents would not normally constitute family life unless there were special elements of dependency, beyond normal emotional ties, citing the following passage in **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**:

> The family life is not established between an adult child and a surviving parent or other siblings unless something more exists than normal emotional ties. … Such ties might exist if the appellant were dependent on his family or vice versa.

They also pointed out that:

> Neither blood ties nor the concern and affection that ordinarily go with them are … enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit … from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8.

The Grant of Permission to Appeal

9. On 25 November 2014 First-tier Tribunal Judge P J G White granted permission to appeal for the following reasons. It was unclear on what basis the judge had allowed the appeal. If it had been allowed under the Rules, that was arguably an error of law. If the appeal had been allowed on human rights grounds, it was arguable that the judge had not followed the approach indicated in **Gulshan**/**Nagre** (as modified by **MM**) in regard to compelling circumstances. The judge had also arguably failed to give proper regard to the fact that the claimant was an adult (**Kugathas**).

The Hearing in the Upper Tribunal

10. At the hearing before me, Ms Peterson relied on an extensive written Rule 24 response in defence of the judge's determination. After hearing

submissions from both parties, I ruled that an error of law was made out such the decision should be set aside and remade. I gave my reasons for so finding in short form, and my extended reasons are set out below. I then received submissions from both parties as to how the decision should be remade. On that question, I reserved my decision.

Reasons for Finding an Error of Law

11. In paragraph [21] of **Muse & Ors v Entry Clearance Officer [2012] EWCA Civ 10** Lord Justice Toulson acknowledged that the case law at Strasbourg and in the UK placed a high value on the ability of families to live together: and it was well established that in this regard there is both a positive and a negative obligation under Article 8.

12. At paragraph [22] he said that the principle enunciated by Lord Bingham in paragraph 20 of **Huang [2007] UKHL 11** drew no distinction between refusal of leave to enter and refusal of leave to remain. However, that was not to say that, in the application of the principle, the question of proportionality between proper immigration control and proper respect for family life need be answered in the same way:

    (a) in a case of refusal of entry which is sought for the purpose of family reunion; and

    (b) in a case of removal which would break up a family.

    Each case has to be considered on its own facts.

13. At paragraph [23], he observed that the trauma of breaking up a family and thereby rupturing family ties may be significantly greater than the effect of not facilitating the reunion of a family whose members have become accustomed to living apart following a decision by part of the family to live elsewhere.

14. At paragraph [24] he held that where entry is sought for the purpose of family reunion, the Immigration Rules, laid before Parliament, represent an attempt by the government to strike a fair balance between respect for family life and immigration control, which includes economic considerations. It is within the state's margin of appreciation to set those Rules and as a matter of generalities the requirements are proportionate. But the Rules are the beginning and not the end of the matter. The authorities provide examples of cases which fall outside the Rules where the positive obligation of the state under Article 8 requires the giving of leave to enter. Such cases are often difficult and require close analysis of the facts.

15. While the judge gave adequate reasons for allowing the appeal under paragraph 41, the claimant had no right of appeal on the merits. This appeal could only succeed on Article 8 grounds, and the judge's approach to resolving the Article 8 appeal was inadequate, both with regard to crucial findings of fact and also in assessing proportionality.

16. There is a substantial body of jurisprudence confirming the principle that family life is not established for the purposes of Article 8(1) unless there is a relationship of dependency and, where adults are concerned, that the ties between them go beyond normal emotional ties. Where an applicant asserts a financial, emotional or physical dependency on the UK sponsor, this is likely to make it more difficult for the applicant to demonstrate that he or she satisfies the requirements of sub-paragraphs (i) and (ii) of paragraph 41. However, the Rules do not in terms debar applicants who are dependants on a UK sponsor, and so the **Kugathas** dependency criteria are not directly antithetical to the requirements of paragraph 41. It is however true that imposing a requirement of dependency in a family visit appeal is likely to be an insurmountable obstacle in the vast majority of cases, thus rendering the Article 8 right a nugatory one for meritorious claimants save insofar as they can rely on favourable findings of fact in the Article 8 appeal to buttress a fresh application under the Rules.

17. While it was asserted in the grounds of appeal that the claimant had an emotional, as well as financial, dependency on his father, the judge made no finding to this effect.

18. In her Rule 24 response Ms Peterson does not rely on the proposition that **Kugathas** dependency was or is demonstrated. Instead, she relies now, as she did before the First-tier Tribunal, on the alternative proposition that family life for the purposes of Article 8 was established by reference to the relevant provisions of the 1973 Immigration Rules which fall to be applied under the Ankara Agreement. The Rule in question is referred to by the judge. It is contained in paragraph 42 of HC 509, which states as follows:

> Generally, children aged 18 or over must qualify for admission in their own right; but subject to the requirements of paragraphs 37 and 38, an unmarried and fully dependent son under 21 or an unmarried daughter under 21 who form part of the family unit overseas may be admitted if the whole family are settled in the United Kingdom or are being admitted for settlement.

19. On the basis of this Rule, Ms Peterson submits the judge was right to treat the claimant as still being part of the family unit, and that therefore Article 8(1) was engaged, notwithstanding the fact that the **Kugathas** criteria were not met.

20. But the critical distinction is that the claimant was not applying for settlement under the Ankara Agreement and hence under the Immigration Rules as they stood in 1973, but was applying for a visit visa under the Rules as they stood in 2010. In determining whether there was family life for the purposes of Article 8(1) the judge had to direct himself by reference to the relevant human rights jurisprudence, and not base his finding on a Rule which did not apply to the application. Moreover, as was affirmed by the Supreme Court in **Patel**, the Article 8 assessment does not change according to the precise ambit or wording of the applicable Immigration Rule that the applicant either fails to meet or cannot successfully invoke. In short, the fact that under the Ankara Agreement the claimant can claim a right of settlement as a financially dependent son under the age of 21 in circumstances where the remainder of his

immediate family are settled in the UK, does not mean that he has continuing family life with his family in the UK for the purposes of Article 8(1).

The Remaking of the Decision

21. For the purposes of remaking the decision, I have taken into account the contents of the claimant's bundle before the First-tier Tribunal. I see no reason to depart from the favourable findings of fact made by the FTT judge on the claimant's compliance with sub-paragraphs (i) and (ii) of paragraph 41 of the Rules, and those findings of fact remain undisturbed.

22. With regard to the Article 8 claim, I refer to the five-point **Razgar** test. Having carefully considered the evidence and Ms Peterson's submissions in her skeleton argument before the First-tier Tribunal and in her Rule 24 response, I find that the Article 8 claim falls at the first hurdle. The claimant has not shown that the interference consequential upon the refusal decision is of sufficient gravity such that questions one and two of the **Razgar** test should be answered in the his favour. Not only does he not assert that he is emotionally dependent on his parents in the UK, but he also gives evidence that he is in a long-term relationship with a student who attends the same university, and that they are cohabiting. In an undated letter which was translated on 11 October 2014 his girlfriend says that they have been living together at the same address for around a year, which means that they were living together at the date of the refusal decision. So although the claimant remained financially dependent on his father at the date of decision, he was otherwise leading an independent life and had formed a family unit with his girlfriend.

23. By the date of the hearing in the First-tier Tribunal, there was a practical impediment to family members in the UK returning to Turkey for a family visit. This was because they had submitted their passports to the Home Office for the purposes of an application for ILR. But this practical impediment did not exist at the date of the refusal decision, so the effect of the refusal was not to prevent the claimant seeing his parents and younger brother in Turkey.

24. Since I answer questions one and two of the **Razgar** test against the claimant, it is not necessary for me to consider the remaining questions. But, for the avoidance of doubt, I answer questions three and four of the **Razgar** test in the ECO's favour. Although the claimant successfully established in his appeal to the First-tier Tribunal that he was a genuine visitor, I am not persuaded that the concerns raised by the Entry Clearance Officer at the date of decision were unreasonable on the evidence that was made available to him. By the same token, I find that the refusal decision was proportionate, having regard to Section 117B of the 2002 Act. It was also proportionate for another reason, which was that the interference was temporary. It was and remains open to the claimant to make a fresh application for a visit visa, relying on additional evidence and/or favourable judicial findings to show that the requirements of sub-paragraphs (i) and (ii) of paragraph 41 are met.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

This appeal on Article 8 grounds against the refusal of entry clearance as a visitor is dismissed.

No anonymity direction is made.

Signed Date **27 January 2015**

Deputy Upper Tribunal Judge Monson