



IAC-AH-PC-V1

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

Appeal Number: VA/01543/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3rd November 2015**

**Decision & Reasons Promulgated
On 23rd November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MS UZMA HANIF CHAUDHRY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - ABU DHABI

Respondent

Representation:

For the Appellant: Mr A. de Ruano, representative

For the Respondent: Ms E. Savage, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 29th July 1967. She appeals against a decision of Judge of the First-tier Tribunal Fox sitting at Birmingham Sheldon Court on 18th November 2014 in which he dismissed the Appellant's appeal against a decision of the Respondent dated 25th February 2014. That decision was to refuse entry clearance to the Appellant as a visitor under paragraph 41 of the Immigration

Rules. There being no separate right of appeal under paragraph 41 itself, the Appellant's argument was that the decision of the Respondent breached her rights under Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The Appellant wished to visit her brother who would accommodate her during the visit.

The Refusal

2. The Respondent rejected the application under the requirements of paragraph 41 considering that the Appellant's brother did not have the means to fund the Appellant's stay. It was not clear what level of responsibility he had in meeting his own financial responsibilities and obligations. The Appellant's visit would add additional stress to the Sponsor's finances. The Respondent was not satisfied that the Appellant would leave the United Kingdom upon completion of the visit. The Appellant had claimed to have done voluntary work at her church. Her bank account showed approximately £575 but as she did not receive a monthly income from her voluntary work doubt was raised as to the origin of that money. The balance on the account had been inflated by deposits totalling £545 made over the course of three months prior to submitting the visa application. The Appellant had acknowledged in her application form that she did not receive an income from any other source.
3. The claimed cost of the trip would be £1,000 and the Respondent was not satisfied that it was reasonable for the Appellant to incur that expense given her circumstances. The Appellant was unmarried and had no-one dependent upon her. She had not declared any assets, savings or property and the Respondent was not satisfied that the Appellant had shown sufficiently strong ties to Pakistan. There was little to encourage her to leave the United Kingdom upon completion of the visit. She had never travelled outside Pakistan before and had therefore not demonstrated compliance with any restrictions imposed upon her stay in another country.

The Decision at First Instance

4. The Appellant appealed against that decision arguing that her evidence was credible but had been ignored by the Respondent. Although this was not a spouse case the logic of cases such as **MM** was that financial issues should be considered under human rights grounds.
5. The Judge rejected the argument and at paragraph [17] considered the Article 8 factors in the case when assessing the proportionality exercise. The Judge wrote:

"I have taken into account all relevant factors including but not limited to those referred to above and below. The robust good health of the Appellant and the Sponsor. The fact that they each have chosen to live their lives in different countries. That the Sponsor and Appellant continue to remain in contact with one another and have done so over the years without any difficulty. The Sponsor claims that it is difficult for him to travel but he gives me no detail on that. As a consequence upon the lack of evidence I have no hesitation in finding that he and the Appellant can meet in Pakistan because he is able to travel."

6. The Judge found at paragraph 11 that the Appellant could meet the maintenance and accommodation requirements of paragraph 41 because the Sponsor was able to afford to maintain and accommodate the Appellant if she were to arrive. However at paragraph 12 the Judge doubted the evidence he had received regarding the Appellant's own finances. He dismissed the appeal.

The Onward Appeal

7. The Appellant appealed arguing that the Judge had overlooked a witness statement from the Sponsor which had responded in detail to the grounds of the refusal both in terms of the Appellant's circumstances in Pakistan as well as the Sponsor's circumstances in the United Kingdom. The Sponsor had not attended to give oral evidence but the Judge should have considered the Sponsor's statement. The Immigration Rules still needed to be considered in human rights appeals. The question was whether the interference with the Appellant's private and/or family life was in accordance with the law. If it was not then the case did not reach as far as the proportionality exercise.
8. The application for permission to appeal came on the papers before First-tier Tribunal Judge White on 11th February 2015. In refusing permission to appeal he stated he was not satisfied that Judge Fox had made an error of law. The Judge had made no specific reference to the Sponsor's statement but the Appellant had requested an oral hearing and yet the Sponsor failed to attend that hearing. In such circumstances it was highly questionable whether any significant weight could be attached to the statement. The proposed visit was one of four weeks. Given the circumstances of the party and the ability of the Appellant to make a fresh application it was open to the Judge to find that interference with private and family life was proportionate. He refused permission to appeal.
9. The Appellant renewed her application for permission to appeal to the Upper Tribunal in broadly similar terms. The application came before Upper Tribunal Judge Grubb on 6th July 2015. In granting permission to appeal he wrote:
- "Whether the Appellant met the requirements of the Immigration Rules is relevant to the proportionality exercise but the grounds are unarguable to the extent that they assert that a decision would be 'not in accordance with the law' under Article 8.2 if the Appellant met the requirements of paragraph 41. Nevertheless if the point in (2) [in the grounds of onward appeal] is established this may well affect the sustainability of any decision under Article 8."
10. Paragraph 2 of the grounds had summarised the decision of **R (Iran) [2005] EWCA Civ 982** on the circumstances when an error of law could arise. This could include making perverse or irrational findings on a material matter, failing to give adequate reasons for such findings, failing to take into account and resolve conflicts of fact or opinion, giving weight to immaterial matters or making a material misdirection of law on any material matter, committing a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings and/or making a mistake as to a material fact which could be established by

objective and uncontentious evidence where the appellant and/or his advisors were not responsible for the mistake and where unfairness resulted from the fact that a mistake was made.

11. The Respondent replied to the grant of permission by a letter dated 20th August 2015 stating that the First-tier Tribunal Judge had directed himself appropriately. The Respondent pointed out that the grounds of onward appeal had not specified what the contents of the Sponsor's witness statement were or how they went to establish family life between the siblings. It was highly unlikely that the parties could demonstrate family life in the first place something which had to be established before even considering whether the Rules were met as part of the proportionality exercise. The grounds cited the Upper Tribunal decision in **Mostafa [2015] UKUT 112:**

“We are however prepared to say that it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together”.

The Hearing before Me

12. In consequence of the grant of permission the matter came before me to determine in the first place whether there was an error of law in the determination at first instance such that it fell to be set aside and the matter reheard. If there was not then the decision of the First-tier would stand. In submissions for the Appellant Mr Ruano (who had drafted the grounds of onward appeal) relied on his grounds (which I have summarised above). The main issue was that the Judge had not considered the Sponsor's witness statement and that was a clear error of law. The question was the materiality of that error and whether it was significant enough to merit a reconsideration. The Judge was not bound to accept the statement but he did have to deal with it. If the Upper Tribunal agreed with that submission the case should be remitted back to the First-tier Tribunal to be decided afresh.
13. The Respondent had raised the case of **Mostafa** in her reply to the grant suggesting that the family relationship between brother and sister was not one which was close enough to engage Article 8 for these purposes. However **Mostafa** had said that such cases were fact-sensitive and one had to look at the individual merits of the case. The next closest to a husband and wife or parent and child was a relationship of adult siblings. That was close enough of a relationship for the error made by the Judge (not considering the evidence in the Sponsor's statement) to be material.
14. In response the Presenting Officer relied on the Rule 24 reply. Even if the Judge had made an explicit reference to the Sponsor's statement it would have not made any difference to the outcome of this appeal. In fact when one looked at paragraph 4 of the Sponsor's witness statement which stated that she received 10,000 rupees per

month from rent from her property that did not address the concerns of the Respondent because the increase in the Appellant's bank statement had been of the order of 100,000 Pakistan rupees in less than three months. The statement had not addressed the concern of the ECO why such a significant increase in the Appellant's bank statement had occurred. The Appellant had stated in her application form at question 57 that she had no savings but that was inconsistent with the explanation of the Sponsor.

15. The Sponsor failed to provide an accurate or detailed account of his outgoings in his statement. Reliance on the statement would have made no difference to the outcome of the appeal. In any event the Appellant had to demonstrate the existence of family life between adult relatives which amounted to more than normal emotional ties and there was no evidence of such ties. Mostafa was authority for the proposition that refusal would come within the scope of Article 8 but this case was far removed from Mostafa which was a husband and wife case. There was no error of law in the determination.
16. In conclusion the Appellant's representative argued that the test in Kugathas of a family relationship between adults involving more than normal emotional ties was relevant to cases involving settlement as opposed to this case which was about a visit for which there was only a limited amount of time. It was not necessary for the Appellant to demonstrate more than emotional ties.

Findings

17. There is no right of appeal as such against a decision to refuse entry clearance as a visitor under paragraph 41 of the Immigration Rules. What the Appellant has to show is that the refusal of entry clearance breaches this country's obligations under Article 8 of the European Convention. The alternative ground that the Race Relations Act has been breached is not relevant to this case.
18. What is relevant to consider is whether the Appellant can meet the requirements of paragraph 41. If she cannot that of itself must be taken into account should the case reach as far as the proportionality exercise under Article 8. The Judge found as a fact that the Appellant could not meet the requirements of paragraph 41 although it is fair to say that his treatment of that issue was brief. The Judge upheld the Respondent's concern as to the origin of the funds in the Appellant's bank account stating that the Appellant had not properly explained the origin of those funds.
19. Whilst it is correct that the Judge does not in terms refer to the Sponsor's statement, as was submitted to me in argument the Sponsor's statement does not address that concern raised by the Respondent in the notice of refusal. Thus even if the Judge was arguably wrong in law to fail to refer to the Sponsor's statement, that failure made no difference to the outcome of the case since there was no evidence before the Judge which met the objection raised by the Respondent that the Appellant's account had unexplained finances. The rental of 10,000 Pakistan rupees per month referred to by the Sponsor was evidently considered inadequate to explain the very large amounts paid into the Appellant's account shortly before she made her application for entry

clearance. This had prompted the Respondent to doubt whether the Appellant had the intention to return to Pakistan at the end of the visit. A failure to demonstrate that intention would lead to a failure to satisfy the requirements of paragraph 41 of the Rules.

20. The Judge had stated at paragraph 11 of his determination that he could not accept the financial documents before him from the Appellant as they had failed to satisfy him that they were a true and accurate reflection of her financial circumstances. The essential point in this case was that the Appellant could not demonstrate any significant ties to Pakistan that would act as any form of incentive upon her to return to Pakistan at the end of the visit. By rejecting the Appellant's financial circumstances the Judge impliedly accepted that objection of the Respondent. He was entitled therefore to come to the conclusion that the Appellant could not satisfy paragraph 41. The Judge was satisfied that the Sponsor could adequately maintain and accommodate having perused the Sponsor's bank statements but was not satisfied as he needed to be that the Appellant was giving him an accurate account of her own situation.
21. There is no appeal as such from a refusal under paragraph 41, the appeal must be on the basis that the decision breaches Article 8. Thus it is not of itself fatal to an appeal that the Appellant cannot meet paragraph 41 but that failure has to be taken into account if and when the case reaches the proportionality stage. The Respondent's argument is that it is not necessary to get as far as the proportionality stage since there is no family life which is being interfered with by the Respondent's decision. What there is is the relationship of adult siblings, a brother and sister. The Judge did not find that there was a family life capable of being interfered with in such a way as to give rise to a potential breach of Article 8, see paragraph 15 of the determination where the Judge states: "I am not satisfied that there is an arguable case to be made for consideration outside of the Rules".
22. Nevertheless the Judge went on to consider the case on an even if basis. Even if the Appellant could show there was family life that was interfered with by the Respondent's decision, that decision was in accordance with the legitimate aim of immigration control and was proportionate to that aim for the reasons he gave and which I have summarised above. The Appellant's counter argument in the case is that the proportionality exercise is not reached because the legitimate aim is not made out although it has to be said that this argument made in the grounds of onward appeal is somewhat short of reasoning.
23. Even if the Appellant could demonstrate that the relationship of an adult brother and sister came within Article 8(1), there could be no doubt that refusal of entry clearance in circumstances where the Appellant cannot meet the requirements of the Immigration Rules must by definition be in accordance with the legitimate aim of immigration control.
24. Even if the Appellant's argument that it is not necessary for the Appellant and Sponsor to show more than normal emotional ties is correct (and I have grave doubts

on that score) one still has to consider the issue of proportionality. The Judge found that the Appellant could not meet the Immigration Rules. There was thus considerable weight to be placed on the Respondent’s side of the scales. The Judge found as a fact that it was possible for the Sponsor to travel to Pakistan to meet the Appellant and that as the rupture in the family had been caused by the decision of the Appellant and Sponsor to live in two separate countries, any interference was proportionate. The Sponsor’s argument in his statement that it would be difficult for him in the United Kingdom to travel to Pakistan with all his family does not raise any arguable issue as to why in reality the Sponsor cannot travel to Pakistan to meet the Appellant if they so wish. Whether the Sponsor chooses to take other family members with him or not is a matter for him.

25. The Judge was quite right in his conclusion that there would be no breach of Article 8 because the Respondent’s decision was entirely proportionate to the legitimate aim being pursued. As I have indicated I do not consider that the case reaches the proportionality stage because I find that the Judge was right when he said that the Appellant and Sponsor cannot demonstrate a family life that is being interfered with by the decision. They are adult siblings and there is no suggestion that their relationship is more than normal emotional ties. I reject the argument that it is not necessary to show more than emotional ties on a visit appeal as opposed to a settlement appeal. Both a visit appeal and a settlement appeal when raising Article 8 must satisfy the same criteria. It is not difficult to show the existence of family life, the courts have said that is not a particularly high threshold to cross, but what must be shown before an interference can be demonstrated is that that family life consists of more than normal emotional ties and this the Appellant cannot show. Thus the appeal fails not only because of the **Kugathas** point but also because the weight to be attached to the Respondent’s decision significantly outweighs any interference there might be with the Appellant and Sponsor’s family life and/or the Appellant’s private life. The Judge did not make an error of law and gave adequate reasons for his conclusions. I uphold his decision to dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I dismiss the Appellant’s appeal against the First-tier Tribunal decision.

Appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 19th day of November 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 19th day of November 2015

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Deputy Upper Tribunal Judge Woodcraft