



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: VA/17582/2013

THE IMMIGRATION ACTS

Heard at Manchester  
On May 13, 2015

Decision and Reasons Promulgated  
On May 19, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE ENTRY CLEARANCE OFFICER

and

MR MOHAMMAD ABDUL AWAL  
(NO ANONYMITY DIRECTION MADE)

Appellant

Respondent

Representation:

For the Appellant: Mr Harrison (Home Office Presenting Officer)

For the Respondent: Miss Hashmi (Legal Representative)

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The Appellant is a citizen of Bangladesh. He made an application for entry clearance as a family visitor to visit his brother on June 25, 2013. His application was refused on July 27, 2013 and his right of appeal was restricted to the grounds set out in Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002.

3. The appellant appealed that decision on September 5, 2013 under section 82(1) of the Nationality, Immigration and Asylum Act 2002 arguing that refusing his application was a breach of article 8 ECHR.
4. The appeal came before Judge of the First-tier Tribunal Birrell (hereinafter referred to as the "FtTJ") on May 16, 2014, and in a decision promulgated on May 28, 2015 she allowed his appeal on the basis a refusal would breach the brothers' right to family life.
5. The respondent lodged grounds of appeal on January 21, 2015 submitting the FtTJ had erred. The decision had only been received on January 9, 2015 as it was sent to the wrong address by the Court, in error. Permission to appeal (including a direction the appeal was in time) was granted by Judge of the First-tier Tribunal Parkes on the basis the FtTJ erred in her approach to family life between siblings.
6. The matter came before me on the above date and the parties were represented as set out above. The sponsor was in attendance.
7. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order

#### **SUBMISSIONS ON ERROR IN LAW**

8. Mr Harrison relied on the grounds of appeal and simply argued that the FtTJ had materially erred by finding family life existed between mature siblings who had not seen each other since 2012.
9. Miss Hashmi submitted the decision taken by the FtTJ was open to her. The FtTJ was fully aware of the appellant's brother's medical condition and the papers also revealed that there was some financial dependency between the appellant and sponsor as evidenced in the sponsor's answers to questions put to him by the respondent in a telephone interview. The appellant's brother had regularly visited his family, including the appellant, for a number of years and it was only his recent renal problems that prevented him travelling. The decision should be upheld.

#### **CONSIDERATION AND FINDING ON MATERIAL ERROR OF LAW**

10. The appellant, aged 39, wanted to visit his elder brother, aged 69 years of age. The respondent found he did not meet the Immigration Rules refusing it for not satisfying paragraph 41(i), (ii) and (vii). The appellant appealed this decision but due to the restrictive nature of the right of appeal his appeal rights were limited to article 8 ECHR.
11. The FtTJ considered the evidence as she had to because any decision under article 8 includes a consideration of whether the Immigration rules were satisfied. In unchallenged findings she found it was a genuine visit, he had a wife and children remaining in Bangladesh and the sponsor would bear the cost of some of his travel expenses. I am satisfied that if she had been able to allow this appeal under the rules she would have done so.

12. However, in order for the appellant to succeed he had to demonstrate that family or private life between him and his brother existed in a article 8 sense. The mere fact they were related was not sufficient and the FtTJ found the appellant's brother's medical condition was sufficient to bring article 8 into play.
13. Mr Harrison's submission is simple namely the FtTJ because she failed to consider the first question that is set out in Razgar [2004] UKHL 00027. Lord Bingham stated that the first test the appellant must satisfy in any article 8 claim is whether there is family or private life.
14. The FtTJ considered his article 8 claim in paragraph [17] of her determination. I do not recite her paragraph verbatim but I have set out below the essential parts of that paragraph-

"In relation to the ... appellant he wishes to see his brother... In this case I accept that he enjoys and is entitled to respect for family life in the form of visits with his brother. I accept that ... is in very poor health... I accept that he is unable to travel and therefore the refusal of entry clearance would interfere with his right to see his brother. ..."
15. In granting permission to appeal the judge referred to the decisions of Kugathas v SSHD (2003) INLR 170 and Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC). I have also had regard to the decision of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC).
16. In Kugathas the Court of Appeal stated that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough.
17. In Ghising the Tribunal said that a review of the jurisprudence discloses that there is no general proposition that Article 8 can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1).
18. In Mostafa the President of the Tribunal stated in article 8 claims the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.
19. The fact the appellant would have met the Rules is an important factor when considering proportionality but before proportionality is considered there are a number of other questions that have to be satisfied and the most important one in this appeal was the actual issue of family/private life itself.
20. The Tribunal made clear in Ghising that each case has to be considered on its merits but the Court of Appeal in Kugathas emphasised that the parties have to show some dependency that goes beyond the normal emotional ties of siblings.

21. This appeal concerned siblings who had lived apart for many years. Miss Hashmi argued there was evidence of dependency but that possibly between the appellant and the sponsor. The FtTJ did not find any dependency between them so I find that no merit in that part of her submission. She further argued that the appellant's brother had visited him in Bangladesh but this contact does not demonstrate dependency especially when the appellant's case is that he has his own family in Bangladesh and he intends to return.
22. This FtTJ found the appeal should be allowed because the brother would be unable to travel but this does not demonstrate a dependency. It is evidence of interference but under Razgar the issue of interference is only considered once family/private life has been established.
23. Whilst the appellant, his brother and the sponsor are clearly family I am satisfied the FtTJ erred in finding their circumstances amounted to family life. The appellant's brother's condition does not make him dependent on the appellant because the housing report provided confirms that he lives with his wife, the sponsor and his wife. There is no financial support forthcoming from the appellant as evidenced by the fact the sponsor helps the appellant.
24. The FtTJ has considered the questions in Razgar but overlooked the first question and for that reason she erred in law.
25. I indicated to the parties that if there was a material error then the only proper decision I could reach would be to dismiss the appellant's appeal on human rights grounds.

#### **DECISION**

26. There was a material error. I allow the appeal and I remake the decision and dismiss the appellant's appeal.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

#### **TO THE RESPONDENT FEE AWARD**

I reverse the fee award made as the respondent's appeal has succeeded.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis