Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: VA/18360/2013
VA/18361/2013

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Determination Promulgated**
On 26th March 2015	**On 7th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ACTING FOR ENTRY CLEARANCE OFFICER, ABU DHABI)

Appellant

and

MUHAMMAD AMAN
BALAN BIBI
(NO ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant Secretary of State: Mr N Smart, Senior Home Office Presenting Officer
For the Respondents: Mr T Muman instructed by Messrs Sehgal Solicitors

DECISION AND REASONS

1. This decision is to be read in conjunction with my decision in these appeals promulgated on 4th February 2015 in which I set aside the decision of Judge of the First-tier Tribunal Thomas and gave directions for the future conduct of the appeals. As in that earlier decision I will continue to refer to Muhammad Aman and his wife Balan Bibi as the Appellants, the title by which they were known before the First-tier Tribunal and I will refer to the Secretary of State as the Respondent. I stated in directions annexed to that earlier decision that the issues to be decided at the resumed hearing were whether Article 8 was engaged and if so whether the Appellants should succeed in their appeals against the original decisions. The significance of the "barrus" ceremony would be considered in that context.

2. The resumed hearing was listed before me. The document produced consisted of the Appellants' original bundle extending to 74 pages and a further bundle comprising 21 pages. For the Respondent I had the core bundle and an extract from Wikipedia concerning religious ceremonies. Mr Muman for the Appellants said that there were elements under Article 8, 9 ECHR relating to the ceremony referred to and he asked me to reopen the question of the relevance of Article 9 to these appeals. I declined for the reasons explained in my earlier decision and said that all matters would be considered in the context of Article 8. I was aware of the recent reported decision of the Upper Tribunal in **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)** and the judgment of the Court of Appeal in **SM and Others (Somalia) v ECO Addis Ababa [2015] EWCA Civ 223** to which I said I would refer if I thought these cases relevant. I heard oral evidence from the Sponsor Mohammed Rafiq, son-in-law of the Appellants, upon which he was cross-examined. Following that oral evidence I heard submissions from both representatives and at the end of the hearing I reserved my decision.

3. In his statement for the initial hearing the Sponsor had set out that it was becoming increasingly difficult for the family as a whole to visit Pakistan. There were many family members in this country. He then stated (paragraph 10)

> "Furthermore, my father-in-law's sister – Barish Jan is buried in the UK. She was very close to my father-in-law. She passed away in 2012 and wishes to visit the grave. There is an annual ceremony where we pay our respects to her. This is known as barrus and is a fundamental part of the religion. During this ceremony we all get together and pay our respects. Prayers are said at the graveside. My father-in-law has been denied the opportunity to be part of this ceremony and wishes to attend to be part of this occasion."

At the hearing before me on 26th March 2015 the Sponsor adopted his later statement signed on 19th March 2015. In that he said that he had attempted to contact local mosques to provide documentary evidence to explain how important the ceremony was to their religion, culture and traditions. He first attended Mr Muhammad Sajjad the imam at Paigham-E-Islam mosque and it was there that he was advised that the

death anniversary was known as a barsi ceremony and not barrus as he had previously stated. It appeared that where he came from in Pakistan the common term was barrus. The barsi ceremony took place on the anniversary of a person's death. During the ceremony the whole family gathered together to attend the grave of the loved one. Prayers were recited, food was prepared so that the family could eat together. If the person had passed away in Pakistan food was also donated to the poor. In the UK they simply made a donation to the local mosque or charity of choice. The Appellants had been denied the opportunity to attend such a fundamental ceremony despite the judge in the previous hearing being satisfied that they would return upon completion of the visit. That was notwithstanding the fact that it was the first Appellant's sister Barish Jan who passed away and as such she was a very close family member. Furthermore it was known to the family that this was one of her last wishes. Her husband had since died also.

4. He continued in his oral evidence stating that the Appellants had five children in this country and twelve grandchildren of whom eleven were under the age of 18. At the barsi ceremony it was important for the deceased that the Appellants should attend. It was an opportunity for closure for her brother the first Appellant. It was affecting him that he could not see the burial place and pay his respects. Relatives were going to Pakistan and paying respects to him and mentioning the death of his sister. They had been very close and without him coming to the grave the witness said there would be no closure. It was an important matter being able to come to pay last respects, lay flowers, recite the Holy Book and have an imam present together with close family. In the UK donations were also given to charity. The ceremony could not be done in Pakistan because the burial site was in the United Kingdom.

5. He was asked in cross-examination when the Appellants had wished to visit the United Kingdom and he said it was about July of 2013. It was pointed out to him that the application form appeared to have been signed on 31st July 2013 and if the anniversary of the death was 21st July 2013 and if the visit was not going to take place until August then that was after the anniversary had occurred. He responded that it was not necessary for the ceremony to take place an exact year after the death but it could be approximately, within two months either way.

6. The witness was then asked whether the Appellants had tried to attend the funeral itself in 2012. The witness replied that the first Appellant was very distraught at that time but he had not made an application. The witness could not say why that was the case. The first Appellant had missed out in 1981 when another sister had died in this country.

7. It was put to him that the information from the Wikipedia site seemed to show different ceremonies in different countries. The witness said that he was not familiar with the practice in other countries. It was put to him that the letters from imams referred to the ceremony taking place on the anniversary of the death and there was no mention of it being

approximately the anniversary date. He replied that the ceremony would take place annually but in their village in the Atok region they were flexible concerning the timing. They call the ceremony barrus.

8. The deceased had lived in the United Kingdom since about 1964. The first Appellant he thought had visited in 1980 for a short period when he had stayed with the deceased and close family. He said that she had visited him in Pakistan, the last occasion being in 1992.

9. In submissions Mr Smart asked me to dismiss the appeal, he said the issue of whether or not Article 8 was engaged depended on relationship. It was clear from **Kugathas v SSHD [2003] EWCA Civ 31** that a sufficient relationship between adults could only exist in particular circumstances in order to gain the protection of Article 8. He referred to paragraph 21 in **Mostafa**. There had to be relevant family life. In practical terms the necessary relationship was likely to be between a husband and wife or parents and a minor child. He submitted that the appeals failed the first question posed by Lord Bingham in **Razgar [2004] UKHL 27**. The relationship aspects failed to meet the test for Article 8. Specific customs relating to barsi/barrus had to be seen in the factual circumstances. With regard to the ceremony the evidence indicated that it was tied to the death anniversary. The applications made by the Appellants would not have permitted them to be present at the anniversary but significantly after the anniversary of the deceased's death. They intended to visit for four months, not simply to attend the ceremony.

10. He accepted that the findings of Judge Thomas as to the Appellants' circumstances and intentions were preserved which would mean that they were in a position to make a fresh application to the ECO on the basis of those findings. If the barrus ceremony was, as claimed, an annual event they could apply to come on another occasion.

11. In response Mr Muman said it was a curious case and did not concern the usual Article 8 circumstances. It included the Article 8 rights of a deceased in connection with funeral arrangements. He submitted that involved the family and private life of the deceased. During visits she had said that she wanted her brother to be present and there was a relationship between him and the deceased. **Mostafa** did not deal with those circumstances and there seemed to be no relevant case law as yet.

12. In the context of Article 8 he asked me to filter in Article 9. There was objective evidence with regard to the barsi ceremony. The Appellants' beliefs were serious and genuine and met the test set out in **R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15**. The applications had not been based on a whim and there was real significance in the trip which could not be undertaken by anyone else. The deceased's last wish had been for her brother to attend the barrus/barsi ceremony. The documents were supportive of there being religious implications of not carrying out those wishes. They related to a "good death". He submitted that the first of the **Razgar** questions was

satisfactorily met. There was also the issue of the relationship grandparents and minor grandchildren, most of whom were under the age of 18. Once the first question of **Razgar** was passed the fact that the Appellants met the requirements of the Immigration Rules meant that the decisions under appeal were not in accordance with the law. He relied upon **Mostafa** which referred to the promotion of family life. Article 8 did not specifically define the type of relationship required and there might be unusual circumstances such as the time spent on the barsi ceremony. However the principal point was the observance of the last rites of the deceased for religious and cultural reasons. The Article he said was engaged.

13. In considering the merits of this appeal I bear in mind that the burden of proof in establishing that Article 8 is engaged is upon the Appellants and that the relevant date for considering the merits of the appeal is the date of decision. I accept the Sponsor's evidence that the Appellants live in Pakistan and have not visited this country since 1982 and that a substantial section of their family lives in the United Kingdom, including five children and twelve grandchildren, eleven of whom are under the age of 18 years. I also accept that the first Appellant was the brother of the late Barish Jan, who died in Birmingham on 21st July 2012, she having lived in this country since about 1964 and having last visited the Appellants in Pakistan in 1991. The Appellants have a natural desire to see members of their family but I accept that another reason for wishing to come to this country was to visit the grave of the late Barish Jan with the intention of gathering at the graveside on or about an anniversary of the death for the barrus or barsi ceremony.

14. I pointed out in directions that I would need to consider the significance of the barrus ceremony. The Sponsor described the ceremony as fundamental to the family's religious and cultural beliefs. There were in the Appellants' second bundle statements from two ministers of religion Muhammad Sajjad and Mohammed Iqbal. Both are in precisely the same form. They recite that it was the last wish of the deceased to see her brother and for him to be present at her funeral and that he wished to fulfil his sister's wishes by being present at the annual death anniversary or barsi. They stated: "This is a fundamental part of our culture, tradition and religious beliefs." A further letter from the secretary of Kings Heath mosque Mr Suleman Isakji refers to attendance at the anniversary ceremony being a means of consoling and respecting the sister's wishes and easing emotional pain as a result of the death. The reference in the letters to the wishes of the deceased and of the first Appellant appears to be hearsay. No source is given for the writers having such knowledge from any direct means.

15. A further document in the Appellants' second bundle is headed "Transferring Rewards to the Dead (Esaal-E-Sawab)". That refers to various ceremonies including barsi. It describes a gathering of the family on the third, tenth and 40th day after the death or the death anniversary of a family relative as being a common practice in many Muslim communities

especially in Pakistan and India and refers to these ceremonies as being innovative practices and Muslims being required to refrain from them. There therefore appear to be differing opinions as to the significance of ceremonies including barsi. It is noted that the first Appellant did not attempt to come to the United Kingdom for the funeral itself and no reason was given for this. On the evidence before me I find on the balance of probabilities that there is a traditional ceremony called barsi (or sometimes barrus) and I accept that it was the wish of the first Appellant to go to the grave of his sister with other family members for the purpose of this ceremony. There appear to be no religious consequences of failing to attend or carry out the ceremony and it is more in the nature of a tradition than a religious obligation. Neither of the ministers who referred to the practice as being "fundamental" explained in what way it was described as such. The other document produced clearly indicated that it was not fundamental but merely a folk tradition. I was told that it was the dying wish of the deceased that her brother should attend the funeral or ceremony but there was no direct evidence of this from anybody who was present at the death and the point is not established. I do not in any event accept that Article 8 rights of the deceased can be in issue for the reasons I touched on in the earlier decision. There is a very substantial difference between the desire of a British resident for a particular form of cremation to enable the soul or spirit to be set free (as referred to in the cremation case of **R(Ghai) v Newcastle City Council and the SSHD [2009] EWHC 978 (Admin)) and** a desire for an overseas resident to attend a graveside ceremony without any specified consequences if the ceremony is not performed with all parties present.

16. On the evidence I do accept that members of the family in the United Kingdom would like the Appellants to attend a barsi ceremony and during the course of a four month visit it was intended that they should together go to the barsi ceremony for the deceased. That is the factual context in which I consider whether Article 8 is engaged so far as private life is concerned. The family are separated because members have emigrated to the United Kingdom. There will be no change to the current exercise of private life by the Appellants or by the family in the United Kingdom as a result of the decisions under appeal. The Appellants are seeking to take a further step or to develop their private life by coming to the United Kingdom and, amongst other things, attending the barsi ceremony.

17. I do not regard that proposed step as being of sufficient significance to engage Article 8. Lord Carnwath emphasised in **Patel and Others v SSHD [2013] UKSC 72** (at paragraph 57) that it was important to remember that Article 8 was not a general dispensing power. He said that Article 8 was concerned with private or family life not education as such. "The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a protected right under Article 8." The desire of a student to develop private life through education was not protected. Similarly in my view the wish of the Appellants to attend the barsi ceremony, together with the wish of the family in the United Kingdom for them to do so, is simply not sufficient to

engage Article 8. In **Nasim and Others (Article 8) [2014] UKUT 00025 (IAC)** the Tribunal stated that the judgment of the Supreme Court in **Patel** served to refocus attention on the nature and purpose of Article 8 and in particular to recognise that Article's limited utility in private life cases that were far removed from the protection of an individual's moral and physical integrity. There is some support for this view also at paragraph 24 of **Mostafa** where it is stated

> "… 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 …"

I accordingly find that as regards private life the appeals do not meet the test for the first of Lord Bingham's criteria in **Razgar**.

18. So far as family life is concerned I find that it has not been established that family life for the purposes of Article 8 has been established to exist between the Appellants and the United Kingdom family. I explained in my earlier decision that I found that the guidance in **Kugathas v SSHD [2003] EWCA Civ 31** was binding upon me. There was no evidence before me of any especial level of dependence between the Appellants and the UK members of the family. There was no evidence of support going beyond the normal affection of adult family members. So far as the minor grandchildren are concerned whilst family life could exist if the family were living together in a household and there were elements of dependency that is not the case here. The Appellants and their grandchildren live far apart. The Appellants are not quasi parents. This view is consistent with the guidance given in **Mostafa**. That is not to say that there is not great affection between members of the family. It is very important to bear in mind that family life for the purposes of Article 8 is quite distinct from family life in the popular usage of that term.

19. I have already dealt with the other points relied upon in my earlier decision. For these reasons the appeals are dismissed. I made clear in my earlier decision that the factual findings of Judge Thomas set out at paragraphs 10 to 12 inclusive of her decision had not been set aside although the decision she reached had. The Appellants are of course free to make a further application if advised citing in support the relevant parts of that decision. That is a matter for them.

20. There was no request for an anonymity order. As the appeals have now been dismissed the fee awards made must also fall.

Notice of Decisions

For the reasons referred to above the decisions of the First-tier Tribunal contain material errors on points of law and have been set aside. I have remade the decisions and for the reasons set out above these appeals are dismissed under the Immigration Rules and under the Human Rights Convention. No anonymity order is made.

Signed Date 13 April 2015

Deputy Upper Tribunal Judge French