



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/21041/2013

THE IMMIGRATION ACTS

Heard at Birmingham
On 15th March 2016

Decision & Reasons Promulgated
On 13th April 2016

Before

Deputy Upper Tribunal Judge Pickup
Between

Manju Bhimabhai Modhavdia
[No anonymity direction made]

Appellant

and

The Entry Clearance Officer Bombay

Respondent

Representation:

For the appellant: Not represented

For the respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's against the decision of First-tier Tribunal Judge Colyer promulgated 28.1.15, dismissing her appeal against the decision of the Entry Clearance Officer, dated 29.10.13, to refuse entry clearance to the United Kingdom as an adult dependant relative of a person settled in the UK. The Judge heard the appeal on 21.8.14 and 23.12.14.

2. First-tier Tribunal Judge Lewis refused permission to appeal on 8.4.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Grubb granted permission to appeal on 23.6.15.
3. Thus the matter came before me on 15.3.16 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below I find no error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Colyer to be set aside.
5. The appellant was not represented at the error of law appeal hearing. By letter dated 14.3.16 the appellant's representatives explained that they were not in funds to represent the appellant orally at the appeal, but sought to rely on grounds submitted to the First-tier Tribunal and additional grounds for the Upper Tribunal hearing.
6. I confirm that I have carefully considered the submissions in the grounds, together with those advanced by Mr Parkinson, before reaching my decision.
7. This is not the first application by the appellant. Earlier applications were refused in 2009, 2010, and 2011, under paragraph 317 of the Immigration Rules.
8. The application which is the subject of this appeal was considered under section EC-DR of Appendix FM, which provides the requirements for entry clearance as an adult dependent relative.
9. At the date of refusal the appellant was 23 years of age. Her parents reside in the UK and she lives independently in India. She claimed that as a young female it was not acceptable for her to live alone. Although she has a brother in India, she claims to have no contact with him. The application was for settlement to live with her father. She claimed to be financially dependent on her father, but the only independent evidence of that was a single Western Union receipt confirming transfer of £150 in July 2013.
10. The application was refused because the Entry Clearance Officer was not satisfied that the appellant required, due to age, illness, or disability long-term personal care to perform everyday tasks, as set out in EC-DR.
11. Between the application and the hearing of the appeal in the First-tier Tribunal, the appellant's father passed away. She sought instead to rely on dependency of her mother and brother, who by then were in the UK. However, her mother's appeal against refusal of leave to remain as a spouse was dismissed.
12. Judge Colyer relied on a previous appeal decision in 2011, in which this appellant, her mother, and two siblings were the appellants. In that earlier decision the previous judge found that they had not seen the sponsor since he left India in September 2007. That judge dismissed the appeals on both immigration and human rights grounds. Judge Colyer dealt with a further appeal by the appellant's mother,

which was dismissed in 2014 and although she became appeal rights exhausted, she did not leave the UK and had not yet been removed.

13. Judge Colyer was informed that the appellant's father, a British citizen, passed away in February 2014. As this is an out of country appeal, it is important to note that this was after the decision of the Entry Clearance Officer in October 2013. The First-tier Tribunal should have restricted consideration of the appellant's circumstances to those prevailing at the date of the refusal decision.
14. Judge Colyer found that the appellant did not meet the requirements of Appendix FM for entry clearance. The judge then went on to consider her circumstances outside the Rules under article 8 ECHR. The judge noted that the appellant and the sponsor had not lived together for many years and that as he had passed away any family life with him had ended.
15. Judge Colyer found that on the facts of the case the decision of the Entry Clearance Officer did not amount to an interference with family life. However, the judge also considered, in the alternative, the proportionality of the decision, pursuant to the stepped approach in Razgar. The judge found that the appellant had live all her life in India and had never resided in the UK. She was mature enough, the judge considered, to continue her independent life in India. The judge found the decision of the Entry Clearance Officer was not disproportionate.
16. The grounds of application for permission to appeal challenge only the article 8 decision.
17. In granting permission to appeal, Judge Grubb noted that the First-tier Tribunal Judge had taken into account the death of the appellant's father and the change in the mother's immigration status, and an appeal, all matters taking place after the date of decision. Judge Grubb considered there to be an arguable error of law given that s85(5) and s85A(2) limits consideration to "the circumstances appertaining at the time of the decision." However, Judge Grubb added, "The materiality of any error will, of course, have to be established. Certainly the Judge goes on to determine proportionality even if he were wrong that Art 8.1 is not engaged. However, it is not clear whether he made that assessment on the basis of the current circumstances or those appertaining at the date of decision. At this stage, I cannot be satisfied it is not material and so I grant permission on the s85 ground. That error, if established, may well infect the proportionality assessment."
18. The judge having found that the appellant did not meet the requirements of the Immigration Rules, I am not satisfied that there was any need or justification for the judge to go on to consider the appellant's circumstances outside the Rules under article 8 ECHR at all.
19. In SS (Congo) and Others [2015] EWCA Civ 387 the Court of Appeal held that even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be

identified to support a claim for grant of leave outside the new Rules in Appendix FM.

20. On the facts of this case no such compelling circumstances were identified. The appellant's father left India in 1997 and thus even at the date of decision, the appellant had not lived with him for some years. It would appear she lived with her mother and other family members in India, until her mother also came to the UK. It is not clear to me whether at the time of the decision the appellant's mother was still in India, but it is certainly the case that even if she had by then come to the UK, she had no right to remain here, as the subsequent appeal decision held.
21. Even if the judge was justified in going on to consider the appellant's circumstances outside the Rules, pursuant to article 8 ECHR, it is clear that on any basis the article 8 claim was doomed to failure.
22. First, the judge was not satisfied that there was any family life between the appellant and her father for there to be any interference by the refusal to grant entry clearance, and that there was no such interference in any event. In the previous appeal decision, relied on by Judge Colyer, the Tribunal also found that there had been no interference with family life with the father except by his decision to come to the UK and by the mother's subsequent decision to come to the UK with the appellant's siblings.
23. As the Rule 24 response, dated 20.8.15, points out, at §57 the judge would not have found in the appellant's favour regardless of the subsequent death of her father, thus the error in failing to assess the circumstances prevailing at the date of the refusal decision is not material. At §57 the judge went on to rely on additional matters including the death of the father, but it is clear from the first half of the paragraph that the judge concluded the refusal decision caused no significant interference with the relationship between the appellant and her father.
24. In essence, the appellant seeks to take advantage of the failure of the judge to consider the circumstances at the date of decision and before the death of her father removed the entire basis of the application, as pointed out in the Rule 24 response. As Mr Parkinson explained in his submissions, even if the judge had allowed the appeal, the Entry Clearance Officer would have refused entry clearance because of those change of circumstances. It is submitted that in that case whether the judge considered the circumstances prevailing at the date of decision or the date of hearing, the outcome of the appeal was academic.
25. There is no merit in this ground of appeal, as the judge went on in any event to conduct a proportionality assessment on the basis of a potential relationship between the appellant and her family members in the UK. In effect, given the history, this was potentially a stronger family life claim that she had in relation to her claim of family life with her father. However, even on that stronger basis it is clear from §62 onwards that the judge considered the decision was not disproportionate. Even if the judge had restricted consideration to the circumstances at the date of refusal decision in

2013, when the father was still alive, there was no basis for a finding that the decision was disproportionate, especially when the fact that the appellant could not meet the requirements of the Immigration Rules which cater for the admission of adult dependent relatives.

26. In all the circumstances, the dismissal of the appeal was inevitable, given the failure of the appellant to meet the requirements of the Rules and the rather tenuous family life link claimed between the appellant and her father who left India in 1997. The admission or consideration of post-decision evidence could have made no difference to the outcome. It follows that no material error of law is disclosed in the decision of the First-tier Tribunal.

Conclusions:

27. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

21 March 2017

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: the appeal has been dismissed.

A handwritten signature in black ink, appearing to read "James". The signature is written in a cursive style with a large initial 'J' and a long horizontal stroke.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

21 March 2017