



IAC-TH-LW-V1

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

Appeal Number: VA/01943/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1 February 2016**

**Decision & Reasons Promulgated
On 9 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

**MR ABDUL GUDUS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Sellwood, Counsel instructed by Rashid & Rashid Solicitors

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The Appellant, a citizen of Pakistan, applied in 2008 and again twice in 2013 for a visa to visit his family in the UK. These three applications were refused. His fourth, made in January 2014, was refused in March 2014, and the decision upheld in June 2014. His ensuing appeal was heard by Judge Gandhi sitting at Richmond on 12 May 2015. Both parties were represented. The Sponsor, who is the Appellant's brother, gave evidence.

In a decision promulgated on 3 July 2015 the appeal was allowed on human rights grounds.

2. The Respondent sought permission to appeal. This was refused by Judge Osborne on 30 September 2015 in the following terms:

- “1. The grounds seek permission to appeal a Decision and Reasons of First-tier Tribunal Judge Gandhi who in a Decision and Reasons promulgated 3 July 2015 dismissed the Appellant’s appeal against the Respondent’s refusal of entry clearance as a family visitor under the Immigration Rules but allowed it under Article 8 ECHR.
2. The grounds assert that the Judge made a material error of law. The Judge found that the Appellant and Sponsor have no relationship beyond the normal emotional ties and that contact between the Appellant and Sponsor can be maintained as it is now via Skype and phone. The Respondent submits that as the Judge found no family life, the Judge erred in proceeding to make a proportionality assessment. Second, the Judge failed to give adequate reasons for findings on a material matter. The Judge found that the Appellant’s private life had been long established. The Judge found that the Appellant’s private life had been long established. The Judge failed to give adequate reasons as to how the Appellant’s private life can be said to be long established. The Appellant lives in Pakistan and there are no reasons given as to how he has established a private life in the UK. The Appellant has not been in the UK with a precarious immigration status or unlawfully because he has not been in the UK at all. The Judge erred in considering that to be relevant.
3. Contrary to what is stated in the grounds, in a careful and well-reasoned determination the Judge set out the pertinent issues, law, and even evidence relating to the facts of the appeal. In appeals of this nature it is the task of the Judge to make findings of fact on the basis of the evidence and to provide adequately clear reasons for those findings. That is precisely what the Judge did. The findings made by the Judge were properly open to him on the basis of the evidence before him. Additionally, the Judge manifestly demonstrated that he had in mind the correct approach to Article 8. The Judge wholly appropriately adopted the step by step approach which was approved in the well established case of **Razgar [2004] UKHL 27** and demonstrated that he had all appropriate Article 8 issues in mind. The Judge explained clearly in [27] and [28] precisely why the Judge concluded that the Appellant’s private life under Article 8 on the carefully balanced specific facts of this particular appeal led to the appeal being allowed.
4. Neither the grounds nor the Decision and Reasons disclose any arguable error of law.”

3. I observe what appears to me to be a contradiction within the reasons of Judge Osborne. At paragraph 2 he stated that the judge erred whilst in paragraph 4 that there was no arguable error of law.

4. On second application permission to appeal was granted on 23 October 2015 by Judge Alis in the following terms:

- “1. The Respondent sought permission to appeal the decision of First-tier Judge Ghandi (sic) allowing the Appellant’s appeal against the Respondent’s decision to refuse to allow the Appellant to visit the United Kingdom as a family visitor on human rights grounds.
 2. Permission to appeal was initially sought from First-tier Judge Osborne, which was refused. The Respondent now seeks to renew her application for permission to appeal to the Upper Tribunal.
 3. The First-tier Tribunal correctly identified that the Appellant’s appeal was limited to article 8 grounds and at paragraph [26] found that ‘family life’ for article 8 purposes did not exist because the appellant had failed show (sic) continuing ties of emotional or other dependency over and above the ordinary ties of affection that might be expected in such a relationship. However the appeal was allowed on private life grounds with the First-tier tribunal finding at paragraph [27] that private life existed and a refusal, in the circumstances of this case, was disproportionate. Full reasons for that finding were given.
 4. First-tier Tribunal Judge Osborne found no error in law and the renewed grounds take issue with the First-tier Tribunal’s approach.
 5. The first ground refers to the First-tier Tribunal’s approach to a family life but as the Tribunal found there was no family life for article 8 purposes I find no evidence to support this ground.
 6. The second ground tackled the approach to the appellant’s private life with his father and vice versa. In this regard I find there is an arguable error in law. In allowing the appeal on private life grounds it is arguable the First-tier Tribunal having concluded the rules were met simply allowed the appeal on article 8 grounds finding the refusal disproportionate when in fact the first task was to consider whether private life was actually engaged. In any event, the parties are referred to Moon (Human Rights, Entry Clearance, Proportionality) [2005] UKIAT 112 and in particular paragraph [68] which appears to limit article 8 appeals in entry clearance appeals to family life claims.
 7. Permission to appeal is therefore granted.”
5. I have reproduced both of these decisions in full because they circumscribe the areas of debate.
 6. The Appellant submitted a Rule 24 response of 31 January 2016, which is effectively a skeleton argument.
 7. The Sponsor and three members of his family attended the error of law hearing on 1 February 2016. As Mr Sellwood submitted, it was not entirely clear whether permission to appeal had been granted upon both grounds. Since they were interdependent, I directed that both should be eligible for argument. The hearing took the form of submissions, which I have taken into account, together with the Appellant’s Rule 24 response. I reserved my decision.

Determination

8. The genesis of the challenge to the decision of Judge Gandhi lies in paragraphs 26 and 27. At 26 she found that the ties between the Appellant and his father and brother, all adults, were not sufficient to engage Article 8 family life. At 27, “Nevertheless I find there is a private life between the appellant and his father/brother.” Devoid of authority, I might conclude that private life cannot exist “between” an appellant and family members without being a synonym for family life, and might have found this to be an error of law upon which the subsequent proportionality assessment could not be founded. However, the authorities which I discuss preclude the matter being so disposed of.
9. At paragraphs 15 and 16 Judge Gandhi recorded that the Appellant wanted to visit his father, who was aged 85, had significant health problems, had had a heart operation and could not travel, and that he also wished to visit the grave of his mother, whom he had not been able to visit because his previous applications had been refused.
10. The essence of the challenge to the decision of Judge Gandhi is the extent to which Article 8 of the 1950 Convention is applicable to visit visa applications, either in relation to private life, because the private life of an appellant will exist outside the UK, or at all.
11. I consider the authorities cited in argument.
12. **Sun Myung Moon (Human rights, entry clearance, proportionality) USA** [2005] UKIAT 00112 discussed at paragraph 68 the extent to which human rights could be invoked by non-nationals living abroad. It is discursive rather than directory, does not clearly distinguish between family and private life and is arguably obiter dicta. Dating back to the comparative pre-history of 2005, the issues which it raises have been addressed in a quartet of cases in 2015.
13. **Mostafa (Article 8 in entry clearance)** [2015] UKUT 00112 (IAC) does not draw a clear distinction between private and family life: paragraphs 9, 16, 17. Only in very unusual circumstances, likely to be limited to relationships of husband and wife, other close life partners or parent and minor child, will a person other than a close relative be able to engage Article 8(1) in an entry clearance case, and even then this will not necessarily be extended to cases of, for example, a proposed visit based on a whim or not involving the people spending significant time together. **Adjei (visit visas - Article 8)** [2015] UKUT 00261 (IAC), held that the first question in visit visa appeals based upon human rights is whether Article 8 is engaged at all, and not infrequently it will not be. **Abbasi and another (visits - bereavement - Article 8)** [2015] UKUT 00463 (IAC) held that the refusal of a visa to foreign nationals seeking to enter the UK for a finite period for the purpose of mourning with family members the recent death of a close relative and visiting the grave of a deceased person is capable of constituting a disproportionate interference with the

rights of the persons concerned under Article 8, and that the question is fact-sensitive. **Kaur (visit appeals; Article 8)** [2015] UKUT 00487 (IAC) held that in visit visa appeals based upon human rights the starting point is the ability of the appellant to comply with the visit visa requirements of paragraph 41 of the Immigration Rules and that the restriction of the grounds of appeal in visitor cases to human rights still requires judges to find facts and resolve resultant disputes. In her decision Judge Gandhi discussed **Mostafa, Adjei** and **Kaur**.

14. The consensus of authority is that, the more so with visit visa appeals now confined to human rights grounds, Article 8 has a role, even if in limited or even very unusual circumstances, in visit visa appeals, and that there is not a clear distinction between private and family life. Such circumstances can include family mourning and visiting family graves.
15. Visiting his mother's grave was one of the reasons for the Appellant's application. Visiting his very sick father, for what he had to assume would be the last time, was another. These are, I find, very unusual circumstances, far removed from a visit on a whim.
16. I accordingly find that, in finding Article 8 to be applicable, the judge did not err in law. Her proportionality assessment followed the **Razgar** paradigm, was structured and reasoned and reached a conclusion which was reasonably open to her from the evidence. It too does not disclose any error of law.
17. The determination is accordingly upheld.

Decision

18. The original decision does not contain an error of law and is upheld.
19. No anonymity direction is made.

Signed

Dated: 3 February 2016

Deputy Upper Tribunal Judge J M Lewis