



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: VA/02668/2015
VA/02669/2015

THE IMMIGRATION ACTS

Heard at Field House
On 22nd June 2016

Decision & Reasons Promulgated
On 1 July 2016

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

ENTRY CLEARANCE OFFICER

Appellant

and

SAMINA MASOOD
MASOOD AHMAD ABBASSI
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondents: No appearance

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State on behalf of the Entry Clearance Officer, I shall refer to the parties as in the First-tier Tribunal. The Appellants are husband and wife and are citizens of Pakistan. Their appeals against the refusal of entry clearance as visitors was allowed by First-tier Tribunal Judge Lagunju in a decision promulgated on 19th February 2016.

2. The First-tier Tribunal Judge found, on the basis of the evidence at the time of the decision, that the Appellants were genuine visitors who intended to return to Pakistan at the end of their stay. Contrary to the decision of the Respondent, the Appellants satisfied the Immigration Rules.
3. However, the Appellants' appeals were limited to Article 8 grounds under Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002. The judge quite rightly made findings in respect of the Immigration Rules since this was relevant to proportionality. Having concluded that the Rules were satisfied, the judge went on to assess the Article 8 claim and made the following findings.

"I am satisfied on the strength of the documentary evidence provided, coupled with the explanation provided in the ground of appeal that the Appellants have shown that they have very strong and significant ties to Pakistan including property, finances, young children and employment. According to the Sponsor in his letter the Appellants are relatively wealthy and have a good quality of life in Pakistan. I am satisfied that the Appellants have shown that they are genuine visitors who will return at the end of their visit. I am also satisfied that the Respondent's decision to refuse entry clearance amounts to a disproportionate interference in the enjoyment of their private lives, which in this instance includes a short visit to see ailing family members."

4. The Respondent applied for permission to appeal on the ground that the judge erred in law in failing to consider whether Article 8 was engaged and had he done so he would have concluded that it was not. The Appellants had failed to establish family life because their relationship with their grandparents was not one where there was dependency more than normal emotional ties. The Respondent argues that the judge failed to have regard to Adeji (visit visas – Article 8) [2015] UKUT 0261 (IAC) which states at paragraph 13:

"A person who satisfied the Tribunal that he does meet the requirements of para 41 of HC 395 does not succeed on that account. He still has to demonstrate that refusal represents an unlawful infringement of rights protected by Article 8 of the ECHR."

5. The Respondent submits that the judge failed to make a reasoned finding that the decision interfered with the current status quo of the Appellants' relationship with their grandparents and furthermore, the proportionality assessment was inadequate. The Appellants had not demonstrated that the interference with their right to family and/or private life resulting from the refusal, had given rise to such grave consequences such as to engage Article 8.

6. Permission to appeal was granted by First-tier Tribunal Judge E B Grant on the ground that the judge had arguably misdirected himself in law because Article 8 was not engaged on the facts of the appeal. There was no family life between the adult Appellants and their grandparents and the private life limb of Article 8 cannot found a right of entry following SS (Malaysia) [2004] UKAIT 00091.
7. First-tier Tribunal Judge Grant stated: “The grounds and the decision of the First-tier Tribunal seem to overlook a decision of the Tribunal in Abbasi & Another (visit - bereavement - Article 8) [2015] UKUT 463 where the Tribunal found that the refusal of a visa to foreign national seeking to enter the United Kingdom for a finite purpose of mourning with family members the recent death of a close relative and visiting the grave of the deceased is capable of constituting a disproportionate interference with the rights of the persons concerned under [Article] 8. It is difficult to see a distinction between visits for bereavement reasons and finite visits to the seriously ill who might soon be deceased though there may well be a valid distinction between the two scenarios. Given that in Abbasi the Tribunal found that [Article] 8 can be engaged on private life grounds, it was incumbent on the First-tier Tribunal Judge to make a finding whether the entry visa for the limited purpose of a hospital visit was protected by [Article] 8.
The First-tier Tribunal did arguably err in law in failing to make any specific finding on the private life of the appellants and how it was engaged by the refusal in the appeal and failed to go on and conduct a structured proportionality balancing exercise taking into account the public interest considerations and the facts as found by the judge. Permission to appeal is granted on all grounds, including the impact, if any, Abbasi may have on the outcome of the appeals.”
8. Mr Duffy submitted that whether someone satisfied the Immigration Rules was relevant to proportionality and he accepted that there was no challenge to the judge’s finding that the Appellants could satisfy the Immigration Rules. The Appellants had made an application to visit ill family members in hospital. They had not shown that they had family life. Paragraph 24 of Mostafa was particularly relevant because the family members here were not close family members as envisaged by the Tribunal in Mostafa, therefore in that respect the Appellants had failed to show that there was family life and therefore Article 8 was engaged.
9. Following Abbasi it was possible to assess whether there were grave consequences as a result of the refusal of entry clearance. Even if there was family life, the issue would be whether the consequences were of such gravity to engage Article 8. He submitted that the Tribunal in Mostafa said that it was unlikely to be the case unless there was a really close relationship. It would appear that the Appellants’ grandmother had died pending the hearing of this appeal and therefore it was clear she was gravely ill. Any future application could probably succeed following Abbasi given that there was no challenge to the findings that the Appellants were genuine visitors.

10. Mr Duffy submitted that I must consider the circumstances existing at the time of the decision in deciding whether the refusal of entry clearance engaged Article 8 and, if so, whether it was in fact proportionate in the circumstances.

Discussion and conclusion

11. The judge quite properly assessed whether the Appellants were genuine visitors and there is no dispute in relation to his findings of fact in that regard. The Appellants satisfied the Immigration Rules. The issue is whether the judge in effect allowed the appeal on that basis rather than carrying out a proper consideration of Article 8.
12. The judge concluded that the Appellants satisfied the Immigration Rules and that there was a disproportionate interference with the enjoyment of their private life. He found that private life in this instance included a short visit to see ailing family members. Whilst this conclusion is brief, it is a conclusion which was open to him on the evidence. I find that any error in failing to demonstrate a structured approach to Article 8 is not material for the following reasons.
13. The judge quite clearly finds that a short visit to see ailing family members can amount to family and/or private life for the purposes of Article 8. The judge only uses the word private life, but the Appellants clearly have a family relationship with their grandparents.
14. In Mostafa, the Tribunal concluded 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 it was likely to be limited to cases where the relationship is that of husband, wife or other close life partner or a parent and a minor child.
15. However, in looking at the family and private life of these Appellants, the judge has quite clearly recognised that they do have a relationship with their grandparents and that for the purposes of the visit the relationship is limited to seeing their grandparents, who are gravely ill and hospitalised, and probably likely to die. The judge therefore considers the visit on the basis that this is the only opportunity the Appellants will have to see their grandparents before they die.
16. The refusal of entry clearance in a case like this does have consequences of such gravity because the Appellants will be prevented from having one last visit and prevented from saying goodbye to their grandparents if entry clearance is denied. The circumstances of this case are exceptional in that respect. No more exceptional than those recognised in Abbasi where a short visit to attend the funeral and visit the grave of a deceased relative was considered to be sufficient to engage Article 8.

17. Accordingly, I am of the view that there was no error of law in the judge's conclusion that their private life in this instance was a short visit to see ailing family members and therefore Article 8(1) was engaged. There was no public interest element to the balancing exercise of proportionality because the Appellants satisfied the Immigration Rules. Given the medical evidence that the Appellants' grandparents were suffering from serious illnesses, the judge's conclusion, that the refusal of entry clearance was disproportionate on the particular facts of this case, was one which was open to him on the evidence. I find that there was no error of law in the judge's decision to allow the appeal on human rights grounds.
18. Alternatively, if the judge has made an error of law in failing to set out the five stage approach of Razgar and specifically dealing and spelling out what those grave consequences were, although it is obvious on reading the decision what they were, then the error is not material because the appeal was properly allowed on Article 8 grounds.
19. I can see no difference between the case of Abbasi and this one. It seems disproportionate to enable Appellants to visit deceased relatives, but not those who are seriously ill and about to die. It is clear from the evidence that has been submitted post decision that was in fact the case because the Appellants' grandmother died on 6th June 2016. It is of no comfort that any subsequent application to visit would probably be allowed following the case of Abbasi.
20. However, for the purposes of determining this appeal, I cannot take into account the death of the Appellants' grandmother. The judge recognised the seriousness of the situation and took into account that the grandparents were suffering from illnesses which required their hospitalisation and this was likely to be the last time that the Appellants would be able to see them. It is on that basis that the judge found that Article 8 was engaged and that the refusal of entry clearance was disproportionate because the Appellants could satisfy the Immigration Rules.
21. In summary, I conclude that there was no error of law in the judge's decision to allow the appeal on Article 8 grounds. Any error in reasoning or structure was not material to the decision to allow the appeal. Accordingly, I dismiss the Respondent's appeal to the Upper Tribunal and the decision of First-tier Tribunal Judge Lagunju shall stand.

Notice of Decision

The Respondent's appeal is dismissed.

No anonymity direction is made.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 30th June 2016

TO THE RESPONDENT
FEE AWARD

The file indicates that a fee is payable but no fee was in fact paid. It is unclear whether the Appellants have in fact paid the £80 requested. If they have paid that fee I make a fee award of that amount. If, as indicated on the file that the payment was not taken because it was declined, then of course the Appellants are not entitled to recover that amount.

J Frances

Signed

Date: 30th June 2016

Upper Tribunal Judge Frances