Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: VA/01560/2015 & VA/01561/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2nd May 2017	**On 5th May 2017**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WAHBI MOHAMMED RASHID (1)
PAKIZA MUSTAFA TOFIQ (2)
(ANONYMITY ORDER NOT MADE)

Respondents

Representation:

For the Appellant: Mr K Norton, Senior Home Office Presenting Officer
For the Respondent: Mr S Zulal, Sponsor

DECISION AND REASONS

Introduction

1. The claimants are citizens of Iraq. The first claimant was born on 1st July 1939 and the second claimant on 1st July 1957. They are husband and wife. They wish to come to the UK to visit their family in the UK including the sponsor their son, Mr Shwan Zulal, who is a British citizen residing in the UK. Their application was

refused under paragraph 41 of the Immigration Rules on 27th January 2015. Their appeal against the decisions was allowed by First-tier Tribunal Judge Seifert in a determination promulgated on the 10th October 2016 on human rights grounds.

2. Permission to appeal was granted by Upper Tribunal Judge Kebede on 16th March 2017 on the basis that it was arguable that the First-tier judge had erred in law in failing to give any reasons why the relationship between the claimants and the sponsor went beyond normal emotional ties and thus that there was an Article 8 ECHR family life relationship. It was also arguable that the proportionality assessment was inadequate.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The grounds of appeal contend in summary as follows.

5. Firstly, that according to the relevant case law that family life will only exist between adults when there is a dependency which amounts to more than normal emotional ties, and that findings on this basis must be reasoned and supported with appropriate evidence. In this case the First-tier Tribunal has failed to refer to relevant evidence in support of the contended close relationship, and there was no evidence the sponsor had paid for the claimants' trip or made substantial deposits in their banks account.

6. It was also not properly found that the refusal amounted to an interference with any family life relationship as the sponsor and claimants could meet in a third country, and in any case the sponsor had gone to northern Iraq in March 2015.

7. Further the decision on proportionality is also not lawful as there is no consideration of whether due to the worsening of the security situation the claimants might not return to Iraq despite their having gone back in 2013, and given that a visit only allows a temporary period in which the claimants and sponsor can be together. There was also a failure to have a proper consideration of the factors in s.117B of the Nationality, Immigration and Asylum Act 2002.

8. Mr Zulal, sponsor for the claimants, argued that the decision of the First-tier Tribunal was just and correct given the claimants', and their UK relatives', commitment to retaining close bonds and the unrealistic nature of meeting elsewhere.

9. I informed the parties that I was satisfied that the First-tier Tribunal had erred in law for the reasons set out below and would therefore set aside the decision of the First-tier Tribunal. We then proceeded to the remaking hearing.

Conclusions – Error of Law

10. I find that the First-tier Tribunal has erred in law for failing to provide a sufficiency of reasoning on all points of the relevant Article 8 ECHR definition in the decision: namely whether sufficiently strong family/private life ties exist between the claimants and UK relatives to engage Article 8 ECHR; whether refusal of entry clearance amounts to an interference with those Article 8 ECHR rights; and particularly whether any interference was proportionate. In relation to the final matter at paragraph 35 of the decision no reasoning is provided at all as to why the claimants could meet the requirements of the Immigration Rules at paragraph 41 or to any other relevant matters going to proportionality, and there is no analysis relevant to matters under s.117B of the Nationality, Immigration and Asylum Act 2002.

Evidence and Submissions – Remaking

11. The sponsor, Mr Shwan Zulal, is a British citizen born in Sulaimani on 27th June 1976. He gave, in summary, the following evidence in written submissions and oral evidence to the Upper Tribunal.

12. He is a management consultant working in the oil industry, and has a company called Carduchi. He has a UK law degree, and he and his wife own their own home in Twickenham as well as two other properties which they rent. Mr Zulal lives in the UK with his British citizen wife, Ms Gemma Anthony, and their two British citizen children, Daniel Anthony Zulal (who is 8 years old) and Georgia Antonia Anthony (who is 6 years old). He is the son of the claimants.

13. The claimants also have other family in the UK namely another son, Mr Kawan Wahbi who is also a British citizen, and who is married with one child born in 2015. Mr Wahbi works in the city of London for Cisco. Also in the UK are the first claimant's two sisters.

14. The claimants have visited the UK for the following visits: October – December 2013 (just second claimant), December 2012 to March 2013, December 2010 to March 2011, June 2006 to November 2006 and April 2003 to July 2003. Mr Zulal gave evidence that they would have visited every year if they had been able to obtain the relevant visas. They had missed the births and birthdays of grandchildren and this pains the claimants greatly as they would wish to be present for such occasions and in any case on a regular basis. The first claimant could not attend his son (Mr Wahbi's) wedding due to denial of a visa. It costs them about £3000 to obtain visas for every visit because they have to travel to obtain visas to Jordon or Lebanon on two occasions per visa, and spend money not just on flights but also on accommodation and local agents. That they are prepared to spend this type of money shows the level of the family bond. The claimants and UK family are very committed in maintaining close bonds between them. These ties are not based on financial dependency as the claimants are wealthy people (see below), and are not based on ill-health as all family members are healthy. They are simply about emotional ties and a commitment to

maintaining a close extended family, which is seen amongst other things as in the best interests of the children.

15. Apart from visits Mr Zulal and his family have three times weekly Skype sessions with the claimants. For Mr Zulal the commitment to maintaining a close extended family is all the more important as his wife's father is dead and his mother-in-law has severe dementia, lives in a care home and cannot therefore have an active grandparental role for his children. He finds it tragic when his children ask him why they cannot see the claimants, their grandparents, and he can provide no good reason.

16. Mr Zulal explained that it is not possible for the claimants and his UK based family (his brother and his family and the two paternal aunts) to meet in another country because they cannot take the children to Iraqi Kurdistan due to security problems as it is not safe enough given the threat of ISIS terrorism, and the fact that flights are often cancelled meaning it is not possible to be sure to be back in the UK for school term time and other commitments. The Foreign Office warn against all but essential travel to Iraqi Kurdistan. He and his wife are also not happy to take the children to other countries with security problems but more favourable visa systems to Iraqis such as the claimants, such as Lebanon. He and his wife also do not want to take the family to Turkey (a country to which the claimants have travelled before) because of the anti-Kurdish position of present government and Kurdish and ISIS related terror incidents in that country. It would be very difficult for the claimants to get visas to Schengen countries now: the claimants were able to travel to Germany in the past as part of a trade delegation but have never been issued with ordinary tourist visas. Mr Zulal did not think the claimants would succeed in getting Schengen visas in the future. In any case, it made no sense for the nine UK relatives to go to some other country where they had no ties for a family visit when the two claimants had time and money to travel to the UK and enjoy a visit and share their homes in this country.

17. Mr Zulal explained that the claimant's shop in Sulaimani is just an asset and not currently a functioning business. The joint income of the claimants is around £2956 per month, which is clearly a substantial amount even in the UK, and contrasts with £300 a month for a teacher in Iraqi Kurdistan. This money comes from rent and his father's pension. The claimants had provided documentary evidence of their property ownership (valued in the region of £1,000,000) and the rents charged and of his father's pension. It was correct that the money in the bank (some £24,000) was put in to that account for the sole purpose of showing the existence of these funds. This was due to the insecurity of banks in Iraq and the risk of money being stolen whilst in banks, which meant that funds were not kept in them. He said that the claimants were wealthy people in their home country, and it was also significant to the fact that they would have incentive to return that they could not liquidate their property assets as due to the security threat of ISIS and low current oil prices it was not at all easy to currently sell property in Iraqi Kurdistan.

18. Mr Zulal said that aside from money and property in Sulaimani his parents had a number of other very good reasons why they would return there. The security issues aside it is a good place to live. They have a nice place to live on a small farm outside of the city where they grow their own fruit and vegetables. They have help from a refugee family from Mosul whom they provide with a small house and some money for work on the land and to provide any other necessary help. They have friends and relatives in Sulaimani which include the first claimant's brothers and the second claimants brother and sisters, with a total of six siblings for both who live nearby. The claimants also belong to social clubs. The first claimant is also very determined that he wants to die where he was born, in Sulaimani. The claimants could have decided to come and live in the UK twenty years ago but that is simply not what they want to do. It was accepted that the claimants were genuine visitors who would return and had sufficient funds for their visit by the First-tier Tribunal in 2010, and there were no significant changes in circumstances which made that conclusion incorrect today.

19. In relation to English language ability the first claimant speaks reasonable English as he taught English in primary school, and the second claimant has just a little English. His children do not speak Kurdish so this is the claimants' language of communication with their grandchildren.

20. Mr Zulal said that he would be providing the claimants with accommodation and food whilst they were in the UK but that they would pay all of their other expenses from their own recourses.

21. Mr Norton relied upon the refusal notices, and said that the appeal should be dismissed. These notices state that there is no evidence that the electrical shop is currently a going concern; that the claimants only have a joint income from rents of properties and pension of £2965; that the bank statement evidence is deficient as there was no translation and it does not show the origins of the funds. The entry clearance officer therefore concluded that the claimants had not demonstrated their economic circumstances sufficiently and so the Secretary of State could not be satisfied that they were genuine visitors seeking entry to the UK for a period up to six months and that they could accommodate and support themselves adequately without recourse to public funds. The applications were therefore refused under paragraph 41(i), (ii), (vi) and (vii) of the Immigration Rules. The entry clearance manager's review adds that there was no evidence of a breach of any family life relationship in the refusal of the application, and in particular argues that in any case the claimants and sponsoring family could meet via a visit in a third country or by the sponsor and family going to Iraq.

Conclusions – Remaking

22. I first make it plain that I found Mr Zulal an impressive witness who I unhesitatingly find told the truth. He answered all questions put to him directly, carefully and fully, and supported his answers with documentary evidence. His evidence was clearly heart felt, and his motivation for pursuing this matter the

best interests of his young children and love for his wider family. It was also the view of Judge of the First-tier Tribunal K.F. Walters who heard the previous visit visa appeal in relation to the claimants in 2010 that Mr Zulal was an "impressive and credible" witness.

23. The relationships between the claimants and their UK family (primarily their two sons, their wives and their three young grandchildren) must be the first focus of this decision. Unless Article 8 ECHR is engaged at all then there can be no appeal as there is only jurisdiction for the Tribunal to hear an appeal on human rights grounds, as is very clearly stated in Adjei (visit visas – Article 8) [2015] UKUT 261. As cited in that case it is anticipated that relatively few claimants will be able to show an engagement of Article 8 ECHR in the context of a visit application to UK based relatives, and the indication is that only in cases where a family life relationship meeting the Kugathas v IAT [2003] EWCA Civ 31 test of showing "more than the normal emotional ties" is it likely that Article 8 ECHR is engaged at all.

24. It is however clear from the subsequent case decided by a panel which included the President of the Tribunal, Mr Justice McCloskey, Abbasi and another (visits – bereavement – Article 8) [2015] UKUT 463, that it is not just in scenarios where such a family life relationship is shown that Article 8 ECHR may be engaged in a visit appeal. In the case of Abbasi the right to respect under Article 8 ECHR for a short visit to the UK for collective family mourning of a relative who was buried in this country was recognised by the Upper Tribunal, and the examination of the preceding European Court of Human Rights Article 8 case law on the issue shows that this right was not defined as specifically part of the claimants' family or private life.

25. In this case it is clear that the claimants are not financially or physically dependent on their UK relatives. They are wealthy elderly people with no serious health problems who continue to lead a fulfilled and active life with siblings, friends, clubs and purpose in their home country. The question of whether there are more than "normal" emotional ties between the claimants and their UK based sons and their families so as to make a finding of family life in the European Court of Human Rights sense is difficult to answer as it is hard to know what should be the measure of normal in this factual scenario. The emotional ties are, I find, on the evidence before me of Mr Zulal, very close. They speak and see each other on Skype three times a week. The claimants and their sponsors want to be physically together regularly, and not just for family events such as marriages, births, and children's birthdays. They have shown that they are prepared to invest significant funds, time and effort into achieving this as Mr Zulal's evidence about the processes for obtaining visas sets out. Mr Zulal clearly is committed to the idea of his children having involved grandparents in their lives; he clearly believes this to be in their best interests; and is pained by his inability to arrange the claimants' visit which is particularly vital to his children given the sad health situation his mother-in-law finds herself in. There is a commitment to close extended family ties within this family which is not perhaps shared by the majority in an age more

comfortable with such strong bonds being limited to the nuclear family, but which is not entirely unusual either.

26. Ultimately I do not find that it matters whether the relationship I find to exist between the claimants and their UK sponsors is characterised as a family life one or simply an intensive, significant and central part of the claimants and their sponsors' private lives, as ultimately I find it is of very great significant to all of their identities as human beings, and thus must be accorded respect under Article 8 ECHR. I draw some support for this approach by what is said by the Court of Appeal in Singh & Anor v SSHD [2015] EWCA Civ 630 at paragraph 25 : "However, the debate as to whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case, in agreement with Sullivan LJ's comment when refusing permission to appeal, the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in *AA*, in a judgment which I have found most helpful, the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged."

27. As I have identified that there are very significant Article 8 ECHR relationships engaged on the facts of this case I must move on to consider whether there is an interference with those relationships or whether it would be reasonably possible for the face to face meetings aspect of these relationships in this extended family to take place elsewhere.

28. I conclude on the facts of this case that this would not be possible. It would be possible for Mr Zulal, if he were a single man, to have his face to face contact with the claimants by travelling to Iraqi Kurdistan as he has done in the past, and thus if this were the factual matrix there would be no interference with the Article 8 ECHR rights set out. However, this is not the factual matrix: there is not just Mr Zulal but also his British born wife and their two young British citizen children, and his British citizen brother, his British citizen wife and their young British citizen child. The Foreign and Commonwealth Travel Advice remains that all but essential travel is advised against to Sulaimani and Iraqi Kurdistan in general. It is noted that there is a high risk of terrorism including kidnapping across Iraq, medical facilities are limited, that flight disruption may occur, and that there is only limited consular assistance available. It is not reasonably possible in these circumstances for these two young families to travel to stay with the claimants in their home in Sulaimani. I agree with Mr Zulal that the other countries to which the claimants would be able to obtain visas present with similar security problems as set out in his evidence; and that places without such prevalent security issues are highly probably to be equally unwilling to issue visas to the claimants to enter their borders as the British authorities have been.

29. The final question that I must answer is whether the interference with Article 8 ECHR rights by refusal of visit visas to the claimants is proportionate to the legitimate aim. In answering this question I must consider whether the claimants are able to meet the requirements of the Immigration Rules. The Secretary of State

has contended that they cannot do so. There is some agreement on the facts as regards the claimants' financial situation however: the entry clearance officer accepts that the claimants have a joint income of £2956 a month and they appear to accept that this is supported by rental agreements and a pension document from the Ministry of Finance and Economy for the first claimant sourcing this income.

30. The claimants accept that their money cannot be traced in its origins by payment via banks as contended by the entry clearance officer, but point to evidence (in the form of a Reuters article entitled "Banks say current accounts have ben inaccessible since 2014" dated 4th December 2015) of the problems which mean Iraqi Kurds do not use banks. The article recounts the fact that since 2014 the Iraqi Kurdistan government has seized billions of dollars in deposits at two branches of Iraq's central bank. The claimants have now provided translations of the bank statements from Ashty Bank for both claimants showing a total of £24,000. The claimants accept that the electrical shop is currently dormant and not of central relevance, beyond being an asset, to the claimants, although both claimants remained members of the Chamber of Commerce and Industry at the point of decision.

31. Having examined all the documentation provided by the claimants pertaining to the date of decision, and heard from the sponsor Mr Zulal, I am satisfied on the balance of probabilities that the claimants joint monthly income at that time was in the region of £2900 and that this income was derived from rental income and a pension; that they had access to cash in the region of £24,000 in a bank account; and that they owned property worth in the region of 950,000 (as supported by the property documents and translations in the claimant's bundle). I am satisfied that this level of wealth means that the claimants were more than able to pay for their travel to and from the UK and support themselves for the period of their visit at the time of decision. I am satisfied that they would have been provided with adequate accommodation by Mr Zulal and his wife, and that they are owners of the property in Twickenham as a property deed regarding this has been provided.

32. I am also satisfied that the claimants would have returned to Iraqi Kurdistan at the end of their proposed three month visit and were genuine visitors. At the time of decisions the claimants had the very considerable financial and property assets set out above, but in addition they also had family, friends, a settled life with their own source of fruit and vegetables and paid help as needed in their homestead, social club membership and a strong desire to live and die in their home country. I also note that they had both returned from visits to the UK on four previous occasions, and in the case of the second claimant on a further occasions when she visited the UK alone. I am satisfied that they would therefore have returned home at the end of their visit and abided by the conditions of their leave to enter during their visit.

33. I note also that my conclusion on this issue is the same as that reached by Judge of the First-tier Tribunal K F Walters in March 2010, although clearly my

assessment is based on the facts and evidence before me, and these have altered over the four plus years between this decision of the First-tier Tribunal and the decisions to refuse the claimants entry clearance which are the subject of this appeal.

34. I now consider issues arising under s.117B of the Nationality, Immigration and Asylum Act 2002 in the context of my decision on proportionality. I find that in accordance with s.117B(1) the public interest in maintaining immigration control does not weigh strongly against the claimants as despite the refusal under the Immigration Rules they were in fact able to meet the requirements of the relevant Immigration Rules at paragraph 41 at the time of the decisions to refuse entry clearance. I have considered that the claimants have more than adequate funds and accommodation for their visit, and find that in accordance with s.117B(3) that the public interest in their being financially independent and not being a burden on taxpayers is met. They also have sufficient English for their visit. Given the central and highly significant Article 8 ECHR rights that this visit concerns, which might be summarised as to be able to maintain established strong face to face extended intergeneration family links which I find to be in the best interest of the children involved, and the lack of any other reasonably possible location for having such family meetings I find that the decisions to refuse entry clearance are a disproportionate interference with the Article 8 ECHR rights of the claimants and their UK family and sponsors.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I re-make the decision in the appeal by allowing it on Article 8 ECHR grounds.

Signed: *Fiona Lindsley* Date: 3rd May 2017
Upper Tribunal Judge Lindsley