Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: VA/02577/2015
VA/02579/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 July 2017	**On 10 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ENTRY CLEARANCE OFFICER, RIYADH

Appellant

and

DR SANJEEDA KHATOON
DR MOHAMMAD EJAZ AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr P Armstrong, Home Office Presenting Officer
For the Respondents: Mr M Hashim of Counsel instructed by Immigration Chambers (Ilford)

DECISION AND REASONS

1. These are linked appeals against the decision of First-tier Tribunal Judge Lingam promulgated on 24 November 2016 in which she allowed the appeals of Dr Sanjeeda Khatoon and Dr Mohammad Ejaz Ahmed against refusals of entry clearance as family visitors dated 2 February 2015.

2. Although before me the Entry Clearance Officer is the appellant and Drs Khatoon and Ahmed are the respondents, for the sake of consistency with

the decision of the First-tier Tribunal I shall refer to Drs Khatoon and Ahmed as the Appellants and the Entry Clearance Officer as the Respondent.

3. The Appellants are wife and husband with respective dates of birth of 30 January 1951 and 6 June 1946. They are both nationals of India who reside in the Kingdom of Saudi Arabia. The Appellants applied for entry clearance as family visitors proposing a two week holiday in the United Kingdom. They were sponsored in their application by their son, Dr Arif Ahmed, a British citizen, born on 16 April 1975 ('the sponsor'). The Respondent refused the applications for reasons set out in respective Notices of Immigration Decision dated 2 February 2015 with particular reference to paragraphs 41(i) and (ii) of the Immigration Rules. Concerns were expressed in the decisions in respect of the financial circumstances of the Appellants and also in particular with regard to their status in Saudi Arabia. In this latter regard doubt was expressed as to their compliance with the labour laws of Saudi Arabia and in the circumstances the Entry Clearance Officer was not satisfied that they would be readmitted to Saudi Arabia and consequently, in turn, determined that he was not satisfied that the Appellants genuinely intended only a visit to the United Kingdom and would not seek to remain.

4. The Appellants appealed to the Immigration and Asylum Chamber. Their appeal rights were limited to the grounds in section 84(1)(b) and (c) of the Nationality, Immigration and Asylum Act 2002 by virtue of amendments introduced by section 52 of the Crime and Courts Act 2013. In essence they could only bring their appeal on human rights grounds. The appeal was heard on 4 November 2016 by Judge Lingam who on that occasion heard evidence from the sponsor. The appeals were allowed for the reasons set out in the Decision of the First-tier Tribunal Judge.

5. The Respondent has sought and been granted permission to appeal against the decision of Judge Lingam. Permission to appeal was granted on 11 May 2017 by First-tier Tribunal Judge Mark Davies who in material respects observed as follows:

> "*The Judge's decision is flawed because although he finds 'it is without doubt that the appellants enjoy an established family life with their son and his family in the UK' he has not indicated what evidence leads him to make that finding. There appears to be no evidence of dependency which would enable the Judge to conclude that a family life existed and thus Article 8 was engaged*."

6. Although that grant of leave is expressed in absolute terms – "*[the] decision is flawed*" - of course what Judge Davies really meant was that it

was arguable that that was the case. The decision as to whether or not the First-tier Tribunal Judge had fallen into error of law is a decision for this Tribunal at substantive hearing and not a decision to be made at the permission stage. Be that as it may, for present purposes, this makes no material difference to the issues before me.

7. It is very clear from the decision of the First-tier Tribunal that the Judge was impressed with the sponsor as a witness, and also impressed with the supporting evidence provided in respect of the Appellants' circumstances, their professional standing and also their immigration status in Saudi Arabia: see in particular paragraphs 18 and 43-45 of the First-tier Tribunal Judge's decision. It is similarly clear that the First-tier Tribunal Judge considered that the Appellants had adequately addressed the concerns expressed by the Respondent in respect of paragraphs 41(i) and (ii) of the Immigration Rules. However, as the First-tier Tribunal Judge recognised, this was an appeal limited to human rights grounds which in practical terms on the facts of this case meant limited to Article 8 grounds, and was not an appeal under the Immigration Rules. Accordingly, an ability to meet the requirements of the Immigration Rules was not inevitably determinative of the outcome in the appeal. It was a matter that might sound in the proportionality assessment, that is to say the evaluation pursuant to the fifth of the **Razgar** questions, but it was not in itself determinative of the existence of family life which was the starting point for any appeal brought under the limited grounds.

8. The Judge directed herself in considering Article 8 to the case of **Shamin Box [2002] UKIAT 02212**, and also in particular the case of **Mostafa (Article 8 in entry clearance) [2015] UKUT 112**. Reference was also made to the case of **Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC)**. The Judge also identified the public interest considerations pursuant to section 117A of the 2002 Act, although these matters again primarily relate to the issue of proportionality rather than the question of the existence or otherwise of family life.

9. The key finding in respect of family life is set out at paragraph 30 of the Judge's decision. It is in these terms:

> "*There is no dispute regarding the appellants' claim of relationship with the sponsor. Indeed, the appellants have made several trips to visit their son and his family living in the UK. There is therefore a long established family life in the UK. The appellants are frequent visitors at all their children's homes. The sponsor stated that he wishes for his children (sons born in 2009 and 2012), who see their grandparents each year, to continue enjoying their relationship with their grandparents. I am satisfied that as the appellants have been*

> *seeing the sponsor's children since birth that there would be a strong bond between the appellants and their grandchildren in the UK*."

I pause to note that the reference there to "*frequent visits at all their children's homes*" is a reference to the fact that the Appellants as well as having the sponsor in the UK have adult children variously in India, Saudi Arabia and the United States of America.

10. The Judge does not advance any further analysis or consideration of the facts of family life and does not identify any further reasons for her conclusion as to the existence of family life. The conclusion reached at paragraph 30 is, however, taken forward at paragraph 38 when the Judge turns to a consideration of the **Razgar** questions. At paragraph 38 the finding at paragraph 30 is in essence restated - "*It is without doubt that the appellants enjoy an established family life with their son and family living in the UK*" - with the Judge adding that she was satisfied that the decision would interfere with the exercise of the Appellants' family life with their son and his family. Thereafter the Judge's Decision considers the issue of proportionality.

11. It is to be noted in this context that in addressing the concerns in respect of the Notices of Immigration Decision and paragraph 41 of the Immigration Rules the Judge records submissions advanced on behalf of the Appellants to the effect that they would not be in a position to vary their leave once in the UK because they were not dependants of their son. We see this at the concluding sentence of paragraph 43: "*Even if so, as submitted by [their representative], such an application if one were submitted would fail for lack of dependency on their son*". This is echoed again at paragraph 45 in these terms: "*As indicated above, I take on board that any concern the appellants might remain with the son can be dispelled by the admission that the appellants are both financially and emotionally independent of the sponsor*".

12. The Respondent challenges the Judge's conclusion in respect of 'family life' and argues in the Grounds of Appeal that the conclusion is unsustainable by reference to the applicable principles to be gleaned from case law and bearing in mind the facts of these particular Appellants. In this regard particular reliance is placed in the first instance on the case of **Kugathas [2003] EWCA Civ 31**. This is a well-known case in this jurisdiction but nonetheless it is worth restating the contents of paragraph 19 and in part paragraph 25. Paragraph 19 is in these terms:

> "*Returning to the present case, neither blood ties nor the concern and affection that ordinarily go with them are by themselves altogether in my judgment enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we*

> *visit, or who visit us, from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8."* (per Lord Justice Sedley).

At paragraph 25 the following is stated, in part:

> "*Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties: see S v United Kingdom [1984] 40 DR 196 and Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7EHRR 471. Such ties might exist if the appellant were dependent on his family or vice versa. It is not, however, essential that the members of the family should be in the same country.*"

13. The guidance set out therein is essentially echoed in a further case that the Respondent places reliance upon, **MS (Article 8 – family life – dependency – proportionality) Uganda [2004] UKIAT 00064**. Paragraph 8 of that decision states in part:

> *"It is accepted law that in circumstances where family life is put forward as existing between an adult child and his parents or an adult sibling and his other siblings there needs to be further elements of dependency involving more than normal emotional ties. This was reaffirmed by the Tribunal recently in the decision in Salad [2002] UKIAT 06698 relying on the earlier case of Advic v United Kingdom, a Strasbourg case decided in September 1995*."

14. The Respondent makes further reference in the Grounds to the cases of **ZB (Pakistan) [2009] EWCA Civ 834** and **Ghising and Others [2013] UKUT 00567 (IAC)**, but it seems to me that in substance those cases add or detract nothing further from the principles I have indicated above - although perhaps provide something by way of illustration of the application of those principles to the facts of particular cases.

15. Bearing these matters in mind it is appropriate that I also refer to the case of **Mostafa** to which the Judge directed herself: see First-tier Tribunal Judge's decision at paragraph 35. Paragraph 24 of **Mostafa** is in part in the following terms:

> "*It is the very essence of Article 8 that it lays down fundamental values that have to be considered in all relevant cases. It would therefore be extremely foolish to attempt to be prescriptive, given the intensely factual and contextual sensitivity of every case. Thus we refrain from suggesting that, in this type of case, any particular kind*

of relationship would always attract the protection of Article 8(1) or that other kinds of relationship would never come within its scope. We are, however, prepared to say 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 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."

16. I emphasise that the Tribunal in **Mostafa** emphasised that it was not attempting to be in any way prescriptive. However, the Tribunal identified that it will only be in 'unusual circumstances' that a relationship outside the type of relationship identified in the passage quoted above would engage Article 8. This inevitably throws one back on the jurisprudence as to the existence or otherwise of family life between, for example an adult child and his/her parent/s. Accordingly it seems to me that there is nothing in the case of **Mostafa** that detracts from the previous jurisprudence, and indeed the reference to it only being in unusual circumstances - indeed "*very unusual circumstances*" - that Article 8 might be engaged inevitably indicates that a decision-maker must be clear in their reasoning as to what particularly was unusual to justify a finding of 'family life'.

17. In my judgment the making of visits over recent years, and seemingly annual visits through the lifetime of the very young grandchildren, does not inevitably establish family life. It is not manifestly a very unusual circumstance. In my judgment the Judge fails to explain how, on the facts of this particular case, it does indeed constitute 'family life' – or indeed more particularly as she puts it at paragraph 30, "*family life in the UK*". The Judge fails to engage with the passage cited at paragraph 36 in her decision from **Mostafa**, and in substance does not explain what distinguishes the circumstances of the Appellants' case that justifies a finding that runs contrary to the guidance in the jurisprudence explored above. More particularly the Judge singularly fails to reconcile her conclusion as to family life with her findings that there was no financial or emotional dependency as between the Appellants and the sponsor. Indeed it seems to me that the notion of a **Kugathas** dependency is confounded by the Judge's own findings at paragraphs 43 and 45 as quoted above.

18. It is clear from paragraph 43 of the Decision that, like many families, the children of the Appellants upon reaching adulthood have gone their own ways, and the parents have in turn pursued their own careers quite

independently. The adult children and their respective spouses and own children are spread geographically and live lives independent of the Appellants. The Appellants in turn live their lives independently of their children. Whilst in one sense they are still indeed 'parents and children' and still a 'family' in the broad sense of that word, it is not the case that family life subsists within the meaning of Article 8. For that reason it seems to me the Judge has erred both in law and fact in respect of her conclusions.

19. Even if it were otherwise and the first **Razgar** question could be answered in the favour of the Appellants, there is no exploration of how ties could be maintained by visits by the sponsor and his family to Saudi Arable, or indeed to a third country such as India or the USA where there are other family members.

20. In all of the circumstances I find that there was a material error of law on the part of the First-tier Tribunal Judge which necessitates that the decision of the First-tier Tribunal Judge must be set aside.
21. It also follows from what I have said and for the reasons set out above that I find that the Appellants cannot succeed under Article 8 because family life does not exist as between them and the sponsor and his family in the UK. Accordingly, I remake the decision in the appeals, and dismiss the appeals.

22. I should add that nothing I have said in the foregoing undermines the Judge's clear and careful findings as to the *bona fides* of the Appellants with regard to their intentions in respect of the visit to the United Kingdom. It may well be that an Entry Clearance Officer in considering a new application will wish to have very particular and careful consideration to those favourable findings as to the essential *bona fides* of the Appellants and indeed their sponsoring son in the UK. However that is a matter for another time and is not an issue directly before me today.

Notice of Decisions

23. The decisions of the First-tier Tribunal contained a material error of law and are set aside.

24. I remake the decisions in the appeals. The appeals are dismissed.

25. No anonymity directions are sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **7 July 2017**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeals and therefore there can be no fee awards.

Signed: Date: **7 July 2017**

Deputy Upper Tribunal Judge I A Lewis (in his capacity as a First-tier Tribunal Judge)