Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/23630/2016
HU/23631/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 November 2017	**On 27 February 2018**

Before

THE HONOURABLE LORD MATTHEWS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WASEED SAJID
NADIA TABBASUM
(anonymity direction not made)

Respondents

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondents: The respondents did not appear and were not represented

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondents, hereinafter "the claimants", against a decision of the Secretary of State by an Entry Clearance Officer refusing them leave to

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enter the United Kingdom as a visitor. The First-tier Tribunal allowed the appeals "on Article 8 grounds".

2. The claimants did not appear before us. That is unsurprising. The case in the First-tier Tribunal was decided "on the papers" and the claimants sent nothing to indicate any intention to appear or arrange representation in the Upper Tribunal. There is a printed copy of an email printout on the file showing that the first claimant contacted the Tribunal by email on 24 October 2017 asking about his appeal and there was a reply dated the next day, 27 October 2017 saying in terms that the "case has been set for 21 November, 2017,". Notice of the hearing was sent by airmail on 25 October 2017. Clearly this would not have been in the first claimant's possession when he made enquiries but given the email correspondence this is not important.

3. The claimants are married to each other. We are satisfied that on this occasion it can be assumed that the husband was acting for his wife as well as on his own behalf. Theirs is essentially a joint application and decision.

4. In the circumstances we were satisfied that there was effective notice and we continued in the absence of the claimants.

5. Mr Bramble based his case closely on the grounds on which permission was given. Essentially it was his case that this was not a human rights appeal and the Tribunal had no jurisdiction to hear it.

6. It was his first submission that there was no human rights application in this case. We disagree.

7. He explained, correctly, that applications such as this one made after 6 April 2016 could only be challenged before the Tribunal when there had been a decision to refuse a protection claim (or to revoke a person's protection status) or to refuse a human rights claim. Mr Bramble, again correctly, drew attention to Section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 which provides for a right of appeal where the Secretary of State has decided to "refuse a human rights claim". His point was that for there to be a right of appeal against the decision complained of the claim that was refused had to be a human rights claim. There is no question of relying on a ground of appeal alleging breach of human rights if the claim itself did not assert a human right.

8. It was his contention that there was no such claim in this case.

9. Unlike the phrase "protection claim" the phrase "human rights claim" is not defined in the 2002 Act. In the case of the first

claimant, in answer to the question "Is there any other information you wish to be considered as part of your application?" he stated on his application form:

> "My wife brother passed away and buried in UK in an accident as his death certificate is attached inside. My grandmother is also gravely ill in UK and admitted to hospital as a hospital letter is also attached inside. Kindly grant us entry clearance on humanitarian basis."

10. In the case of the second claimant essentially the same answer was given, altered appropriately to reflect that it is her brother who had died and her husband's grandmother who was gravely ill.

11. The reference to a request for entry clearance "on humanitarian basis" in this context is enough, we find, to alert a reasonably attentive decision-maker to the fact that the claimants *said* that they had a particular compelling reason to visit the United Kingdom and we are satisfied that this was enough to require the Secretary of State to consider the possibility that the claimants might have been entitled to enter the United Kingdom as a human right subject to qualification. We are satisfied that it did not need to be particularised in more detail to be a human rights claim. It was recognisable as a human rights claim and should have been treated as such.

12. The Secretary of State was aware of this possibility and reached the conclusion that the application was not a "human rights claim" and decided that there was no right of appeal against that decision.

13. Such a ruling is, obviously, amenable to judicial review but is also, we find, a matter that should be determined by the First-tier Tribunal. It is for the Tribunal, not the parties, to decide if it has jurisdiction.

14. The second ground of appeal is entitled "Misinterpretation of Private Life". That may not be entirely apt but it is an introduction to criticism of the decision of this Tribunal in **Abassi (visits – bereavement) [2015] UKUT 463 (IAC)**. According to the Secretary of State this decision "found an interference in the private life of those concerned and then said that the Secretary of State does not accept that "private life is capable of engaging Article 8 in the context of a family visit." The argument for this is that the proposed visitor is outside the United Kingdom but the scope of the United Kingdom's obligations under the European Convention on Human Rights is limited to those within its jurisdiction.

15. It is helpful to consider exactly what the Tribunal decided in **Abassi**.

16. We respectfully agree with, and emphatically endorse, the reminder given in **Abassi** that a person's right under Article 8 of the European Convention on Human Rights cannot always be dealt with by the convenient simplification of considering "family life" or, as if it was an alternative, "private life". Such an approach does not give effect to the plain meaning of the Convention which protects a person's "private and family life, home, and correspondence". The word "and" between "private" and "family" is clearly conjunctive. The Article is not about people visiting their relatives but about the state not interfering unnecessarily with people going about their intended business. It used to be said that it protected "physical and moral integrity".

17. The point that impressed the Tribunal in **Abassi** is that it was the appellants' case that they had wished to visit their grandfather at the last stages of his life and, as that was no longer possible because he had died, they wished to visit his grave and mourn with family members. Clearly they could only mourn at the graveside if they were in the United Kingdom. For reasons that are not explained in any great detail the Tribunal was satisfied that such a strong deep human desire *could* be within the scope of a person's private and family life that the Article was intended to protect and, on the evidence in that case, *was* within it. The decision in **Abassi** establishes that making family visits after bereavement might be a qualified human right. It does not mean that all such visits necessarily involve a human right.

18. The first twelve paragraphs or so in the decision of the Upper Tribunal in **Abassi** are concerned with the proper operation and understanding of Article 8. At paragraph 6 the Tribunal said:

> "The decisions summarised above illustrate the versatility of Article 8 ECHR, together with the difficulty of drawing a clear boundary between its private and family life dimensions in certain factual contexts. While each belongs to its discrete factual context, these decisions nonetheless illustrate that the matters relating to death, burial, mourning and associated rights have been held to fall within the ambit of Article 8. Three further decisions of the ECHR have a factual matrix closely comparable to that in the present appeals."

19. The point being made there, plainly, is that Article 8 is misunderstood if it is confined only to "private life" or "family life".

20. Although the appellants in **Abassi** were outside the United Kingdom the jurisprudence relied upon by the Tribunal in determining the case of **Abassi**, as far as we can see, concerned

people who were within their country that had adopted the European Convention on Human Rights when they complained that their human rights were being breached. Beyond being an example of an application of an out of country application that came within the scope of the Convention it did not help us very much when we had to decide if the relationships and wishes relied upon here came within the scope of Article 8(1).

21. At paragraph 13 of the decision in **Abassi** the Tribunal decided to remake the decision complained of and said that "the factual matrix is uncontentious". There is very little detail about the nature and extent of the factual matrix. All we are told is the appellants wished to visit their grandfather's grave and mourn with family members. We cannot ascertain from first principles or from a careful reading of the decision in **Abassi** why it should be said that visiting the grave of a grandfather, or, in this case a brother, is a human right. It may be that in some circumstances, where there is a full explanation of a cultural tradition or the nature of a relationship, it would become clear that such a right existed but it is not clear to us from **Abassi**, and we do not see that **Abassi** requires us to find, that on facts such as this the desire to visit a grave and mourn with family members is a human right that the convention facilitates. The First-tier Tribunal has not wrestled with this but has purported to follow **Abassi** just by identifying analogous facts, which we find, indicates that it has misunderstood the reasons for the decision.

22. We are not persuaded that there is any general right to visit a grave and mourn with family members or that there are any particular facts, such as strong personal relationships and/or powerful cultural norms, that create the right in this case. If there are they were not supported by the evidence presented to the Secretary of State in support of the application or the Tribunal in support of the appeal.

23. Once this possible route under the versatility of Article 8 is discarded we have to consider if a more traditional exploration of "private and family life" could produce a similar result. We are quite satisfied that where the element relied on really is reduced to mere "private life", or, as we would prefer to put it, at the "private life" end of the "private and family life" spectrum, then it is not something that is relevant in an out of country application.

24. This approach was confirmed by the Court of Appeal in the case of **Secretary of State for the Home Department v Abbas [2017] EWCA Civ 1393** (not to be confused with **Abassi**). It is now quite clear that relying on Article 8 in an entry clearance case purely for elements of private life is not permissible. In the decision of **SSHD v Onuorah [2017] EWCA Civ 1757** the Court

of Appeal emphasised the importance of the approach approved in **Kugathas v SSHD [2003] EWCA Civ 31** which required there to be "something more" than mere emotional ties to establish family life between adults and other siblings. Without being in any way dismissive of the relationship between the second appellant and her grandmother this is not such a case and there is nothing in **Kugathas** that *necessarily* extends the protection of the Convention to the desire to be with relatives for the purposes of mourning.

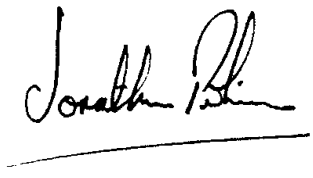
25. We have to conclude that the First-tier Tribunal did not understand the decision in **Abassi** and applied it wrongly. If it had applied it rightly it would have found that the evidence relied upon here did not support a finding that the desire to mourn at a graveside was a right, albeit a qualified right, within the protection of article 8. If there are circumstances here that establish a human right to enter the United Kingdom they have not been identified and proved by evidence.

26. It follows that the appeal cannot succeed on human rights grounds.

27. We have reminded ourselves that the Judge's finding that the claimants did in fact satisfy the requirements of the rules has not been challenged. This is something that will need to be considered if the claimants do make a further application for entry clearance but it will not determine any future application.

28. The claimants asserted that they had made a human rights claim but failed to make good that assertion and the First-tier Tribunal was wrong to find otherwise.

29. The First-tier Tribunal erred in law. We set aside its decision and substitute a decision that the claimants have not established that the interference relied on comes within the scope of Article 8 and therefore has not established a human rights claim and the claimant's appeal against the Secretary of State's decision is dismissed.



Signed

Jonathan Perkins, Upper Tribunal Judge Dated: 23 February 2018