Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/11794/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10th September 2014	**On 7th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MISS MAHIDIEH ESMAEELIKIA
(Anonymity Direction Not Made)

Appellant

and

ENTRY CLEARANCE OFFICER,

Respondent

Representation:

For the Appellant: None.
For the Respondent: Mr R Hopkin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iran born on 30th August 1986 and she appeals against the decision dated 22nd May 2013 by the respondent to refuse her a visit visa further to paragraph 41(i) and 41(ii) of the Immigration Rules.

2. First-tier Tribunal Judge Callow heard the appeal on 30th January 2014 and promulgated a decision on 8th April 2014 dismissing the appeal. The appellant had appealed with her aunt and uncle whose appeals were allowed. The appellant in this instance wished to visit her cousin but her right of appeal was restricted, as recorded by the judge, to human rights grounds under Section 84(1) (c) of the Nationality Immigration and Asylum Act 2002.

3. An application for permission to appeal was lodged by the appellant stating that the judgment contained an error of law. It was asserted that the judge had failed to consider evidence and give adequate reasons, that the judge needed to make a finding as to whether or not the relationship was 'more like brother and sister' as asserted between the appellant and the sponsor (they were in fact cousins), there was a failure to distinguish case law. The Tribunal cited case law in which applicants wished to settle in the UK rather than visit for a short time and previously this case would have had a full right of appeal. Article 8 rights can be established even where the relationship is not set out in 'paragraph 12'. In addition there was procedural unfairness because of the delay between the appeal hearing and the decision making.

Grant of Permission to Appeal

4. The application for permission to appeal was initially refused by First-tier Tribunal Judge Reed but the application for permission to appeal was renewed by the appellant and granted by Upper Tribunal Judge Reed.

The Hearing

5. At the hearing Mr Hopkin submitted that there was no right of appeal and the Tribunal had no jurisdiction.

Conclusions

6. The appellant stated in her grounds of appeal that she wished to visit her cousin the sponsor, Mr Mehdi Falaboland, a British citizen, for two weeks.

7. Section 88A of the Nationality Immigration and Asylum Act 2002 restricts the right of appeal according to the nature of the relationship with the person being visited. As recorded in the determination [11] and [14] the Immigration Appeal (Family Visitor) Regulations 2012, (which restricts the members of family who can appeal), apply. Further to Section 88A (3) a person may appeal under Section 82(1) on the grounds of Section 84(1) (b) and (c) on race relations and human rights grounds respectively. In this instance there is no full right of appeal for the appellant because she only the cousin of the sponsor.

8. Further to Rule 9(1)A(b) of the Asylum Immigration Tribunal Procedure Rules 2005 the Tribunal may *not* accept a notice of appeal where the notice of appeal concerns the refusal of an application for entry clearance which was *not* made for a purpose falling within Section 88A(1)(a) or (b) of 2202 Act and the notice of appeal does not

rely on either of the grounds specified in Section 88A(3)(a) of the 2002. As stated the application was not made for a purpose falling within Section 88(1)(a) or (b)

9. The Form IAFT 2 (notice of appeal received by the Tribunal on 17th June 2013 made no reference to human rights grounds. With reference to the appellant it stated

'the third appellant has completed 123 units of the 137 she required for her degree. She has considerable reason to return.

The 3rd Appellant works and earns around 0.5 million tomen a month and her work related bank account does show a balance of 4 million tomen (04/April) however she has in the region of 10 million tomen (£5,000) (30/April) on her deposit account representing monies from her father which he earns from rent and other sources. The sums available are sufficient for a visit)'.

10. An appellant may, however, amend the *grounds* of appeal further to Rule 14 of the Asylum and Immigration Tribunal Procedure Rules 2005 (the FTT rules) with permission of the Tribunal. There was no indication prior to the application for permission to appeal that there had been any application to vary the grounds of appeal submitted. However I accept that the appeal was canvassed before the First Tier Tribunal on human rights grounds and I find this gives, by considering the matter within the determination, implicit permission to the appellant to raise this ground and have it determined. The Home Office was present at the hearing and indeed argued the case. The appeal was indeed accepted by the Tribunal and set down for hearing.

11. However, the judge did not err in applying only case law for those seeking to settle permanently in the UK. The restrictions and the extent of Article 8 are highlighted in the judge's determination through reference to European jurisprudence and domestic case law. **Kugathas v SSHD** [2003] EWCA Civ 31 accepted the approach set out in **S v UK** (1984) 40 DR 196 to the effect that generally the protection of family life under Article 8 involved cohabiting dependents and whether it extended to other relationship depended on the circumstances of the particular case. Relationships between adults require evidence of further elements of dependency. It was accepted in **Kugathas** that this was not 'black letter law but this did set out the proper approach'.

12. Indeed I cannot see how it can be wrong to consider the facts of each specific case which is what the judge did in this case. He recorded that the appellant was a student living with her own parents and economically dependent upon them in Iran.

13. The question arose in the application for permission to appeal as to why cases in relation to settlement applied, implying that there should be some 'lesser' protected right which should be afforded consideration when only a short visit was intended. **Kugathas** referred to **ECO v Shamim Box** [2002] UKIAT 02212 and noted that it identified the approach to an Article 8 case in removal is different from that in an entry clearance case but added that 'Strasbourg has never seen this to entail a

significant difference in underlying criteria' but as the court in **Kugathas** stated '*in other words family life must mean the same thing whatever the issue*'.

14. Clearly the state has a duty to respect family life but the question is whether family life is established and this entails a consideration of elements of dependency which were 'real' or 'committed' in terms of support in order to be able to establish family life albeit that support does not necessarily have to be economic. As indicated in **Marckx** (1979) 2 EHRR the mere existence of family relationship is not sufficient to found a family life, there must be some other element and the existence of family life is a question of fact.

15. The judge stated at [21] that the existence of family life had not been established. There was no evidence that the appellant and sponsor had lived together and latterly they had lived in different countries. The judge made findings on the evidence at 3(c) to the effect that the appellant lived with her parents and two of her siblings. She had a part time job and a bank account with a credit balance of IRR41M. There was no indication of any form of financial dependency. Indeed the determination recorded that she was to be funded for the two week trip by her father. The judge noted that the visit was only temporary and addressed the issue of whether a sufficient link existed between the appellant and the sponsor. He recorded that the relationship was between the cousins was that they had lived apart.

16. The judge found [21] that it had not been shown that there existed ties of support either emotional or economic which went beyond the ordinary and natural ties of affection that would accompany a relationship between cousins. In reference to ground 1 of the challenge the judge did effectively weigh the strength of the relationship. He recorded that the sponsor was married. Even in the challenge the evidence is that the sponsor saw the appellant two years ago.

17. It is correct that the judge did not refer to the sponsor's oral evidence and this may have been an error but in the circumstances of this particular case I cannot see that a direct reference to his evidence would alter this decision for these reasons. In his witness statement he stated that he and his cousin, the second appellant, were 'very close' and more like 'brother and sister' and they 'grew up living next door to each other, we regularly stayed at each other's homes and were always in each other's lives. We are in regular contact and I visit her every time I go back. I saw her about two years ago and again four months ago'. He confirmed that the appellant had lots of family she would not wish to leave Iran and that her father earned a significant rental income which was paid directly into her account. Clearly there was no financial dependency.

18. First this statement does not indicate any 'close ties' of dependency above normal emotional ties in a family. Secondly the sponsor confirmed that he was still able to visit the appellant in Iran. He has been a British citizen since at least 2006, the date of his passport and has seen her twice in this time.

19. I do not accept that the judge in the specific facts of this case was in error to find that family life did not exist. The sponsor is married and financially independent and the appellant is a student, lives with her parents and is financially dependent on her father. They have lived apart for many years and indeed there was no record that they had lived for any significant period of time together.

20. The last ground of challenge relates to the length of time taken between the hearing and the promulgation of the determination. Paragraph 17 of the application is not clear as it states 'it appears the judge could recall the hearing and did not consider the evidence in full'. This is recorded as 69 days. The evidence is recorded in the record of proceedings to which the judge had access. That a full note of the hearing does not appear in the determination does not mean that the judge failed to consider the sponsor's evidence and a short reference is included by the judge at paragraphs 3 (d) and 9. In reading the determination as a whole prejudice to the appellant is not evident.

21. I consider therefore that the Tribunal had jurisdiction to hear this appeal and the determination of Judge Calllow contained no error of law which would make a material difference and the determination should stand.

Signed Date 6th October 2014

Deputy Upper Tribunal Judge Rimington