



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: VA/14044/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 21 November 2014**

**Decision and Reasons
Promulgated
On 21 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

THE ENTRY CLEARANCE OFFICER, NEW DELHI

Appellant

and

**GURDEEP KAUR
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: None

DECISION AND REASONS

1. The appellant in this case is the Entry Clearance Officer, who appeals with the permission of the First-tier Tribunal against the decision of Judge of the First-tier Tribunal Griffith to allow the appeal of Ms Gurdeep Kaur, an Indian national born on 8 December 1993, against a decision dated 2 July 2013 refusing Ms Kaur entry clearance in order to attend her cousin's wedding in the UK. She applied jointly with her mother, Ms Inderjit Kaur

Saini. She would have stayed with her mother's sister, Ms Ravinder Kaur Gahunia ("the sponsor"), in Hounslow for three weeks before returning to India to resume her BSc in nursing course. The appellant's appeal was allowed by Judge Griffith who found the requirements of paragraph 41 of the Immigration Rules, HC395 were met. Her mother's appeal was also allowed.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. From now on I shall refer to Ms Kaur as "the appellant" and to the Entry Clearance Officer as "the respondent".
3. I was not asked and saw no reason to make an anonymity direction.
4. The sponsor did not attend the hearing to give evidence. I checked the notice of hearing was sent to the correct address and that she had had sufficient notice of the hearing. There has been no contact from her or the appellant. I therefore proceeded in her absence. Mr Jarvis made brief submissions, which I have recorded and taken into account.

Error of law

5. The respondent sought and was granted permission to appeal against Judge Griffith's decision in respect of the appellant on the ground that she failed to recognise that the grounds of appeal were restricted to human rights and race discrimination. It is fair to point out that there is no reference in either decision or the entry clearance manager's review to the restricted scope of the right of appeal and therefore neither the appellant nor Judge Griffith were alerted to this.
6. Reference was made in the grounds to the limitations on the definition of "family visitor" imposed by the Immigration Appeals (Family Visitor) Regulations 2012, which came into force on 9 July 2012. Under those Regulations, a niece visiting her aunt and cousins would not have fallen within the class of persons who would have had an unrestricted right of appeal under the Nationality, Immigration and Asylum Act 2002. On the other hand, Ms Inderjit Kaur Saini, who was visiting her sister in the UK, would have had an unrestricted right of appeal, which is presumably why the respondent did not appeal against Judge Griffith's decision allowing her appeal under the rules.
7. It is plain that Judge Griffith did not direct herself correctly and she failed to recognise that she had no jurisdiction to allow the appellant's appeal under the rules. She made no reference at all to human rights or, for that matter, race discrimination. I therefore set aside her decision.
8. I re-make the decision as follows.

Decision substituted

9. The grounds of appeal were prepared by the sponsor in person and are headed "URGENT REVIEW". They speak of the upset caused by the

refusal and emphasise the importance of the appellant's attendance at her daughter's wedding. By granting the visa the "cultural family ties" would be preserved. The grounds stress that the appellant is a genuine visitor who would return to India after three weeks to resume her nursing degree course. There is no issue of race discrimination raised in this case. In view of the family relationships, there is potentially an issue arising under article 8 of the Human Rights Convention, which protects the right to family life.

10. The burden of proof is on the appellant and the standard of proof is the ordinary civil standard of a balance of probabilities. Section 85(5) of the 2002 Act provides that I may consider only the circumstances appertaining at the time of the decision to refuse. In *AS (Somalia)* UKHL 32, the House of Lords held that section 85(5) applied to human rights grounds of appeal.
11. Article 8 states as follows,
 - "1. Everyone has the right to respect for his private and family life, his home his and correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
12. There is no provision within Appendix FM of the rules, which is expressly concerned with the application of article 8 to immigration decisions, to visitors. Appendix FM is concerned with family unity where the respective family members wish to live together permanently. It is sometimes said that it is only necessary to look outside the rules and to refer to domestic and European case law if there are arguably good grounds for granting leave to remain outside the rules because the outcome would have unjustifiably harsh consequences. That does not appear to be the case here but I shall nevertheless do on to do so in case that is an incorrect analysis.
13. It is for the appellant to show there would be an interference with her right to family life, although in entry clearance cases the correct approach to this issue may be to assess whether the decision amounts to an unjustified lack of respect for family life, focusing on the UK's positive obligations to facilitate family reunion (*Shamim Box* [2002] UKIAT 02212). Article 8 is a qualified right expressed in such a way as to allow for exceptions and it is for the respondent to show that the lack of respect is lawful and in pursuit of a legitimate aim. I then have to assess whether the decision is disproportionate to that aim.
14. I reminded myself of the five questions to be answered in determining an article 8 ground of appeal, as set out in paragraph 17 of *Razgar*

[2004] UKHL 27, an approach confirmed in paragraph 7 of *EB (Kosovo)* [2008] UKHL 41. I also reminded myself that I am not solely concerned with the rights of the appellant but I must also consider the direct impact of the refusal on her family members (*Beoku-Betts* [2008] UKHL 39).

15. There is scant evidence regarding the factual background but it is possible to glean the following from the papers. The appellant is a young woman, aged 20, who is unmarried and lives with her parents, who support her, in Hoshiarpur. She is in the second year of her studies at the Shri Guru Ram Das Institute of Nursing in Amritsar. She has not travelled to the UK or outside India in the last ten years. The sponsor appears to have travelled to India and met the appellant there, as is to be expected.
16. The first question is whether there is family life for the purposes of article 8 between the appellant and the sponsor. The question of whether family life exists between adult family members was considered in detail in paragraphs 50 to 62 of *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 00160 (IAC). The guidance given by the Upper Tribunal in that case was subsequently approved by the Court of Appeal in paragraph 46 of *Gurung & Others* [2013] EWCA Civ 8. Most of the case law has been concerned with adult children living with their parents. The thrust of the guidance is that each case depends on its own facts.
17. The available evidence falls considerably short of showing there is family life between the parties in this case. There is no evidence of dependency between the parties, emotional or financial. In essence, the appellant lives with her parents in India and her family life, as properly understood, is centred on them. The sponsor lives in the UK and has her own family life here. An aunt and her niece will naturally be fond of each other but, in the circumstances that they have never live together apart from during short visits, it would be wrong to regard family life as having arisen. The appeal must be dismissed on this simple basis as article 8 is not engaged by the decision.
18. If I were wrong about that, moving to the issue of proportionality, I would have found the decision justified by the need to maintain immigration controls. Section 117C(1) of the 2002 Act now informs us that the maintenance of effective immigration controls is in the public interest, although I suspect that was widely understood in any case. The point here is that the family life which might exist in this case is of a kind which can be adequately safeguarded by means of visits and contact by telephone and other electronic media. There is no evidence the appellant and her aunt have ever lived in the same household as part of a single family unit. The appellant has been denied the opportunity to attend her cousin's wedding and to make a three-week visit to the UK. That will have been hugely disappointing for her. However, it does not amount to a breach of a fundamental right. In light of the reversal of the decision taken in respect of her mother, she can also re-apply for entry clearance and, if she does so reasonably soon, she can apply in the expectation

that the concerns of the Entry Clearance Officer which led to the refusal in her case will be regarded as having been satisfactorily answered.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made an error of law and I re-make the decision in the following terms:

The appeal is dismissed on human rights grounds.

No anonymity direction.

**Signed
2014**

Date 21 November

**Judge Froom, sitting as a Deputy Judge of
the Upper Tribunal**

**TO THE RESPONDENT
FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

**Signed
2014**

Date 21 November

**Judge Froom, sitting as a Deputy Judge of
the Upper Tribunal**