Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/02091/2014

THE IMMIGRATION ACTS

Heard at Newport
On 14 July 2015

Decision & Reasons Promulgated
On 22 July 2015

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

AHMED MAHMUD AL NOZIR

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr F Junior of Hamlet Solicitors LLP

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer against the decision of the First-tier Tribunal (Judge Afako) allowing the respondent's appeal against a decision taken on 17 March 2014 refusing his application for entry clearance to visit the sponsor (his brother) in the United Kingdom under para 41 of the Immigration Rules (HC 395 as amended).

Introduction

2. It was accepted before the judge, correctly, that the respondent's appeal was limited to Art 8 by virtue of s.88A of the Nationality, Immigration and Asylum Act 2002 as amended with effect from 25 June 2013 by s.52 of the Crime and Courts Acts 2013.

3. Initially, the respondent had applied for entry clearance along with his parents to visit the sponsor. Although the ECO refused all three applications, on review the Entry Clearance Manager reversed the decisions in respect of the respondent's parents and so granted them entry clearance. Consequently, the judge was only concerned with the appeal of the respondent.

4. In his determination, Judge Afako accepted that the respondent could, contrary to the ECO's decision, meet the requirements of para 41 of the Rules as a visitor. However, he recognised that that was not a proper basis for allowing the appeal given that the only proper ground of appeal was on human rights, namely under Art 8 of the ECHR.

5. The judge went on to apply the five stage approach in Razgar [2004] UKHL 27. First, he accepted that the respondent enjoyed family and private life with his brother's family and that the ECO's decision interfered with that family and private life. Secondly, he accepted that the decision was in accordance with the law. Thirdly, however, he found that the decision was disproportionate in all the circumstances taking into account that the respondent was a genuine visitor wishing to visit his brother and his nephew who suffered from autism and was unable to travel to Bangladesh.

The Appeal to the Upper Tribunal

6. The ECO sought permission to appeal on essentially three grounds. First, the judge had been wrong in law to find that Art 8 was engaged on the basis that there was "family life" between the respondent and his brother and family in the UK. Secondly, the judge had erred in law in that his proportionality assessment was inadequate and the judge had failed to take into account the public interest consideration set out in Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002").

7. On 21 April 2015 the First-tier Tribunal (Judge N J Osborne) granted the ECO permission to appeal. Thus, the appeal came before me.

Discussion

8. Mr Richards, who represented the ECO focused on the ground that the judge had been wrong in law to find that there was "family life" between the respondent and his family in the UK given that his brother was an adult and there was no evidence before the judge of any particular bond or close connection between the respondent and his brother or his nephew. Mr Richards relied upon the decision in Kugathas v

SSHD [2003] EWCA Civ 31 that more than "normal emotional ties" were required to establish "family life".

9. Mr Junior, who represented the respondent submitted that the judge had given adequate reasons for his finding and that there was no error of law in concluding that "family life" existed.

10. In this appeal, I am not concerned with a relationship between the respondent and a member of his family which gives rise to a presumption that family life exists as would be the case with a parent and minor child or between spouses. In this appeal, family life must factually be found to exist in all the circumstances of the case.

11. In Kugathas the Court of Appeal considered the issue of when "family life" existed for the purposes of Art 8. Sedley LJ in his judgment at [14] approved the approach of the European Commission for Human Rights in S v UK (1984) 40 DR 196 at p.198 where the Commission said this:

> "Generally, the protection of family life under Art 8 involves cohabiting dependants, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Art 8 of the Convention without evidence of further elements of dependency, involving more than normal emotional ties."

12. At [17], Sedley LJ said:

> "17. Mr Gill QC [Counsel for the appellant] says that none of this amounts to an absolute requirement of dependency. That is clearly right in the economic sense. But if dependency is read down as meaning 'support', in the personal sense, and if one adds, equine the Strasbourg jurisprudence, 'real' or 'committed' or 'effective' to the word 'support', then it represents in my view the irreducible minimum of what family life implies …".

13. At [19], Sedley LJ added:

> "19. … neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, 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 these grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Art 8."

14. Arden LJ added this at [25]:

> "25. 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* (Application Nos 9214/80, 9473/81, 9474/81) (1985) 7 EHRR 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. The Secretary of State accepts that that possibility may exist, although in my judgment it will probably be exceptional. Accordingly there is no absolute rule that there must be family life in the UK, as the Tribunal held."

15. That approach has been endorsed in subsequent case law, for example, JB (India) & Others v ECO [2009] EWCA Civ 234 and Etti-Adegbola v SSHD [2009] EWCA Civ 1319. In doing so, the case law recognises that "family life" between a child and parent does not necessarily terminate at the stroke of midnight when the child turns 18 years of age.

16. Most recently in Singh and Singh v SSHD [2015] EWCA Civ 630, the Court of Appeal approved Kugathas. In his judgment Sir Stanley Burnton (with whom Richards and Christopher Clarke LJJ agreed) said at [24]:

> "I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purspoes of Article 8."

17. On the facts, the Court of Appeal concluded that the judge had been correct to find that the respondent had no family life with his family in this country as they were "independent and working" and, as regards his younger siblings in India, there was "no evidence of anything beyond the normal bonds of affection, apart possibly from some financial support of the family in India". But as regards the latter Sir Stanley Burnton concluded:

> "that support cannot lead to a finding of a family life in this country, which was the only family life for which the appellants contended."

18. In this appeal, Judge Afako made the following finding in relation to the respondent's family life with his brother's family at para 10 of his determination:

> "There is no question that the decision prevents the appellant from enjoying a family and private life with his brother's family. Given the circumstances of his brother's family (as I discuss below) the relationship is of some importance and amounts to family life and an important aspect of private life."

19. Mr Junior accepted in his submissions that there was no specific evidence before the judge in respect of the respondent's relationship with his brother or with his nephew.

20. The judge had a written statement from the respondent dated 29 January 2015 (at pages 1-3 of the respondent's bundle); a written statement from the sponsor dated 29 January 2015 (at pages 4 and 5 of the respondent's bundle) and the sponsor gave oral evidence.

21. It is clear that the thrust of this evidence was to establish the genuineness of the respondent as a family visitor based upon his financial circumstances and that of the sponsor. The evidence did demonstrate that the respondent's nephew suffered from autism and a number of health problems which made it difficult if not impossible for him to visit Bangladesh. However, nowhere in the those statements nor, having consulted the Record of Proceedings, did the respondent or sponsor give any evidence of anything other than "normal" ties that would exist between adult siblings or between an uncle and nephew who lived in different countries. There was no evidence of any bond, dependency or tie which could conceivably amount to family life between the respondent and his family in the UK.

22. For these reasons, the judge erred in law in allowing the respondent's appeal under Art 8 on the basis that the refusal of entry clearance breached his right to respect for family life in the UK.

23. That then leaves the judge's finding that the respondent enjoys "private life" with his brother's family in the UK. It is well-recognised that Art 8 is not engaged unless an individual can establish "existing" family life. That must equally be true of "private life". Article 8 is not concerned with a situation where an individual seeks to forge either family or private life which does not already exist. Providing, however, either does exist then Art 8 also protects an individual's right to "respect" for in the sense of permitting its development or flourishing.

24. In this appeal, it is difficult on the limited evidence submitted to the judge (and no further evidence was submitted to me) to see what "private life" existed and which the decision of the ECO prevented being developed or allowed to flourish. The only candidate is the respondent's relationships with his family members in the UK. However, the evidence of that was very limited, going, in effect, no further than the existence of those relationships, in particular with the sponsor and the respondent's nephew. Indeed, in relation to the respondent's nephew, there was no evidence of any relationship apart from the one arising by virtue of kinship raised in either witness statement or in the sponsor's oral evidence.

25. Consequently, there was no evidential basis for the judge to conclude that the ECO's decision breached the respondent's "private life".

26. For those reasons, the judge erred in law in allowing the appeal under Art 8 which was not engaged on the basis of the evidence before the judge and the appeal should have been dismissed.

27. In any event, even if private life did exist, I am satisfied that the judge's conclusion that the ECO's decision was disproportionate is, in itself, flawed and the only proper finding is that the ECO's decision was proportionate. I reach that view on the

premise that the only conceivable basis upon which Art 8 could be engaged is the respondent's private life.

28. First, the judge accepted, and so do I, that the respondent's nephew suffered from autism and had "complex medical needs" such that he was unable to travel to Bangladesh. Secondly, the judge accepted that the respondent met the substance of the Immigration Rules, namely para 41. Thirdly, however, the judge failed to take into account that the respondent could reapply for entry clearance and it had not been shown that such an application was likely to fail. In fact, in the light of the judge's findings on the Rules the respondent has demonstrated, at least at the date of the ECO's current decision, that he is a genuine visitor who meets the requirements of those Rules. Fourthly the judge's decision was made on the basis of there being "family life" for the purposes of Art 8. For the reasons I have given above that was in error. Although I accept that, to an extent, the distinction between "family" and "private" life may not affect the outcome of an appeal (see Singh and Singh at [25]), the weight to be given to "family life", given the need to establish and exist the "close ties" following Kugathas, means that the weight to be given to family life is likely to be greater because the effect or impact upon the individual if that family life cannot be continued is likely to be greater. That was, no doubt, Judge Afako's approach but it was based upon an erroneous finding that family life existed.

29. For these reasons, his finding in relation to proportionality also cannot stand.

30. In relation to proportionality, if private life existed (contrary to my conclusion above), I would find as follows.

31. In carrying out the balancing exercise in respect of proportionality, the fact that the respondent met the requirements of para 41 is a weighty but not determinative factor in determining proportionality (see Mostafa (Art 8 in entry clearance) [2015] UKUT 112 (IAC)).

32. I "have regard to" the relevant factors in s.117B of the NIA 2002.

33. First, the maintenance of effective immigration control is in the public interest (s.117B(1)).

34. Secondly, it is in the public interest that those who seek to enter the UK speak English (s.117B(2)). I was not addressed on this point. However, given the terms of the respondent's witness statement, and that it is not suggested he required an interpreter to certify it as true, I accept for these purposes he can speak English.

35. Thirdly, I accept that the sponsor will pay for the respondent's visit and so he will not be a burden on the taxpayer (s.117B(3)).

36. However, there is no family life established on the evidence between them or any other member of the respondent's family in the UK. The evidence of existing "private life" is limited to that arising from kinship. I bear in mind that the respondent's nephew cannot travel to Bangladesh to see the respondent. There is

also the prospect that the respondent may again apply for entry clearance and, no doubt, the findings of Judge Afako under para 41 will be readily apparent to the ECO though not binding him as to the respondent's future position under the Rules. That, in my judgment, is an important factor in determining whether this decision was or was not proportionate.

37. In Mostafa, the Upper Tribunal at [24] stated that:

> "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 Art 8(1). In practical terms it 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."

38. I agree. At best the respondent can rely on his private life alone in this appeal.

39. Taking all these factors into account, I am not satisfied that the ECO's decision results in a sufficiently serious breach of the respondent's protected rights under Art 8 so as to be disproportionate.

Decision

40. For these reasons, the decision of the First-tier Tribunal to allow the respondent's appeal under Art 8 involved the making of an error of law. That decision cannot stand and is set aside.

41. I substitute a decision dismissing the appeal under Art 8.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee award is payable because the appeal has been dismissed.

Signed

A Grubb
Judge of the Upper Tribunal