Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/02682/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 January 2016	**On 11 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

VISA OFFICER, NEW DELHI

Appellant

and

SUMIT SHARMA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Mr J Plowright, Counsel, instructed by Charles Simmons Solicitors

DECISION AND REASONS

Introduction

1. For ease of reference, I shall refer to the parties as they were before the First-tier Tribunal. Thus the Visa Officer is once again the Respondent and the Appellant is Mr Sharma.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Miles (Judge Miles), promulgated on 19 February 2015, in which he allowed the Appellant's appeal on Article 8 grounds. That appeal

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was against the Respondent's refusal of entry clearance as a family visitor, dated 29 April 2014.

3. The Appellant is an Indian national, born on 18 July 1981. His visa application was based on a desire to visit his brother in the United Kingdom (the sponsor). They had not seen each other for some years and the sponsor found travel to India difficult because of his self-employment. It was said that the sponsor financially supported the Appellant, and had been doing so for many years.

4. The Respondent's refusal was based squarely on matters arsing from paragraph 41 of the Immigration Rules (the Rules). In particular, it was said that the Appellant did not genuinely intend a short visit and that he would not return home at the duration of the proposed trip. Nothing was said about Article 8.

The hearing before Judge Miles

5. The judge correctly recognised that the appeal before him was limited to human rights grounds only (discrimination not having been relied upon). He proceeded to consider the Respondent's reasons for refusing the application and made findings on the matters under paragraph 41 of the Rules which were favourable to the Appellant. Judge Miles specifically states that if he had had jurisdiction to allow the appeal under the Rules, he would have done so (paragraph 14).

6. Turning to Article 8, the judge, having taken account of the unchallenged fact of lengthy financial dependency of the Appellant upon the sponsor and daily telephone contact between them, proceeded to find that family life existed (paragraph 16). An interference with (or lack of respect for) that family life was also found. In assessing proportionality, Judge Miles referred to the Appellant's ability to meet paragraph 41 of the Rules and the genuine problems faced by the sponsor in terms of visiting India (paragraph 17). Ultimately, the judge was, on the facts of the case before him, "just" persuaded to conclude that the Respondent's decision was disproportionate (paragraph 18). The appeal was duly allowed on Article 8 grounds only.

The grounds of appeal and grant of permission

7. Having cited several cases relating to Article 8, including Kugathas [2003] EWCA Civ 31, paragraph 6 of the grounds states:

> "It is submitted that the findings on financial dependency and telephone contact do not establish that Article 8 is engaged in light of the fact that the Appellant and Sponsor have not seen each other for eight years."

8. Paragraph 7 describes the proportionality assessment as "inadequate" on the basis that it did not explain why a decision denying only temporary contact could be disproportionate. Paragraph 8 assets that the judge used Article as a "general dispensing power."

9. Permission to appeal was granted by First-tier Tribunal Judge Lever on 7 May 2015.

The hearing before me

10. Mr Kotas relied on the grounds. He focused on the lack of face-to-face contact between the Appellant and sponsor. He referred me to paragraph 27 of Kaur (visit appeals; Article 8) [2015] UKUT 00487 (IAC)[1] and SS (Congo) [2015] EWCA Civ 387.

11. Mr Plowright submitted that the findings and conclusions of Judge Miles were open to him. There had been a proper direction to the test required under Kugathas. In respect of the proportionality issue, the judge had been entitled to take the satisfaction of the paragraph 41 requirements into account. I was referred to paragraphs 22 and 39 of Kaur.

12. In reply, Mr Kotas suggested that the Appellant could make a fresh visa application.

Decision on error of law

13. Having considered this matter with care, I conclude that there are no material errors of law in the decision of Judge Miles.

14. Dealing first with ground 1. It is readily apparent to me that this aspect of the challenge is in effect one of perversity. It is clear that the judge directed himself correctly to the Kugathas test (albeit that the judgment itself is not cited). Further, the judge's findings of fact have not been challenged. In light of this and given the wording in paragraph 6 of the grounds, the Respondent is asserting that the judge simply could not rationally have reached the conclusion he did.

15. I reject this challenge. In a case such as this where an elevated threshold applies because of the nature of the challenge, the question is whether Judge Miles' conclusion on family life was "open to him" (see paragraphs 17 and 22-23 of Dasgupta (error of law – proportionality – correct approach) [2016] UKUT 00028 (IAC) and paragraph 16 of Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC)). Given that the resolution of issues concerning the existence of family life are "intensely factual" (see paragraph 24 of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC), the party alleging perversity is likely to face particular difficulties.

16. In the present case the judge found that the financial dependency had been long-standing and that there was daily telephone contact. Whilst the judge's finding on family life as between the Appellant and sponsor might have been generous, I am unaware of any binding authority to the effect

[1] The decisions in Kaur (visit appeals; Article 8) [2015] UKUT 00487 (IAC), Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) and Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC) all post-date Judge Miles' decision.

that these factors are simply incapable, on any rational view, of showing ties beyond the norm such as to constitute family life for the purposes of Article 8(1). The Respondent has provided nothing in support of her argument. On the contrary, a fair reading of paragraph 39 of Kaur discloses a suggestion that financial dependency *might* be sufficient to engage Article 8(1). So too in paragraph 41 of ZB (Pakistan) [2009] EWCA Civ 834.

17. Judge Miles' conclusion must also be seen in the context of his finding that the requirements of paragraph 41(i) and (ii) were met. This is relevant to the sustainability of the judge's acceptance of family life, albeit that he has not specifically stated as much (see paragraph 13 of Kaur). A final matter to note is that the existence of family life was not expressly disputed in either the Respondent's original refusal notice or the Entry Clearance Manager's review. Nor, as far as I can tell from the Record of Proceedings on file, did the Presenting Officer take this issue against the Appellant.

18. In respect of the substantial period since the last direct contact between the Appellant and sponsor, the judge was clearly well aware of this fact.

19. To the extent that ground 1 may encapsulate a challenge to the judge's conclusion that the refusal constituted an interference (or, more accurately a lack of respect for) the family life, I find that given what he says in paragraphs 16 and 17, it was open to Judge Miles to have answered the second Razgar question in the affirmative.

20. I turn now to ground 2. The wording here is somewhat confused, as whereas proportionality is mentioned at the outset, reference is made thereafter to the interference/lack of respect issue, which in fact comes first in the Razgar methodology. In any event, in terms of this issue, I refer back to the preceding paragraph.

21. As with ground 1, the Respondent's challenge to proportionality is in reality an assertion that Judge Miles' conclusion was not open to him. Once again, I disagree.

22. The judge quite rightly acknowledges in paragraph 15 that satisfaction of paragraph 41 of the Rules does not necessarily lead to success under Article 8. Having said that, we now know from Mostafa, Kaur and Adjei that the ability or otherwise to meet the requirements of the Rules is certainly relevant when assessing both the existence of family life and proportionality. In the present case the ability to satisfy paragraph 41 of the Rules is relevant in three ways.

23. First, the judge was fully entitled to take account of the fact that the Appellant would be a genuine visitor, with an understandable desire to see his brother after a long period apart. This was a factor to which the judge was entitled to weigh in the Appellant's favour.

24. Second, the public interest in maintaining effective immigration control is, as I read Kaur, effectively covered by the provisions of paragraph 41 of the Rules (see paragraphs 22-23 of that decision). Thus, the failure of Judge Miles to expressly refer to "the public interest" does not undermine his overall conclusion.

25. Third, an applicant who fails to meet the visitor Rules will almost invariably fail in their Article 8 claim, as there is no discernable gap between paragraph 41 and what Article 8 requires. That scenario did not apply to the Appellant. Having considered the concluding observations in paragraph 27 of Kaur and SS (Congo) more generally, what is being said is that the need to show "compelling circumstances" in the form of a particularly strong claim arises where the requirements of the Rules are not met. In visit visa cases there is of course no jurisdiction to allow an appeal under the Rules, but there can be findings that the Rules are in fact met by the individual concerned. Therefore, the Rules may be satisfied, but the appeal cannot be allowed on that basis (as a result of the statutory limitations imposed by sections 88A and 84 of the Nationality, Immigration and Asylum Act 2002, as amended). It is somewhat difficult to see why an appellant who can show that Article 8(1) is engaged, has met the relevant Rule, and does not bear the baggage of any misconduct, must in addition present further exceptional circumstances. I do not read Kaur (to the extent that it relies on SS (Congo)) as saying that an appellant does bear such a burden in cases where the Rules are met. I respectfully refer to the concluding comments of the Upper Tribunal at paragraph 24 of Mostafa, where it said that in the context of a case in which Article 8(1) is engaged:

> "If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8."

26. Returning to the present appeal, whether or not what I have said above is correct, Judge Miles did not simply state that satisfaction of the Rules automatically led to success under Article 8. He specifically takes into account the fact (unchallenged by the Respondent) that the sponsor was effectively precluded from visiting India because of his self-employment. This, together with the satisfaction of paragraph 41 of the Rules, entitled the judge to arrive at the rational conclusion that the refusal of entry clearance was disproportionate.

27. As I have stated previously, it is clear that the judge had in mind throughout his assessment of this case that the Appellant had not seen the sponsor for some years. This factor did not preclude the judge (as a matter of rationality) from finding that the Respondent's decision was disproportionate.

28. The judge's failure to refer to section 117B of the 2002 Act has never been relied upon by the Respondent. In any event, it is immaterial, given in particular the co-extensive relationship between paragraph 41 of the Rules and the public interest.

29. Finally, paragraph 8 of the grounds is misconceived. The judge was not using Article 8 as a "general dispensing power": this is not a case in which the Appellant failed to meet the Rules. The effect of the Respondent's contention is that an Article 8 claim can never succeed in a visit visa appeal, and that is plainly wrong.

30. As with the conclusion on family life, Judge Miles may have been generous to the Appellant, but his conclusion was open to him.

31. The Respondent's appeal to the Upper Tribunal fails.

Anonymity

32. I make no direction. None has been sought and none is appropriate.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

Signed Date: 4 February 2016

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. This is because the Appellant's claim under Article 8 involved additional evidence and adjudication thereon by the First-tier Tribunal.

Signed Date: 4 February 2016

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal