Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/05352/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th February 2016	**On 7th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

ENTRY CLEARANCE OFFICER
(PAKISTAN)

Appellant

and

MISS SYEDA MARIAM ZAHRA
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr D Jones, instructed by M. K. Suri & Co
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Amin promulgated on 13th August 2015 in which she allowed an

appeal against a decision made by the Entry Clearance Officer on 21st July 2014 refusing the application made by Syeda Mariam Zahra for entry clearance as a family visitor.

2. The appellant before me is the Entry Clearance Officer. However, for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall, in this decision, refer to Miss Zahra as the appellant and the Entry Clearance Officer as the respondent.

3. The appellant is a national of Pakistan, born on 13th February 1998. She is the daughter of Mr Ijaz Hussain and Mrs Syeda Ijaz, both of whom are Pakistani nationals who visited the UK in 2013 and have remained in the UK since. During their visit, Mr Ijaz Hussain suffered a heart attack and was admitted to hospital for an emergency Angioplasty.

4. On 30th June 2014 the appellant applied for entry clearance to travel to the UK for a period of 8 weeks to see her father. The appellant had previously been refused entry clearance on 15th January 2013. Having considered her application the respondent was not satisfied that the appellant is seeking entry to the UK as a visitor and that she intended to leave the UK at the end of the proposed visit. The application was refused and it was that refusal that gave rise to the appeal before the First-tier Tribunal on the limited ground that the decision was unlawful under s6 Human Rights Act 1998.

5. The First-tier Tribunal Judge heard evidence from the appellant's sister and brother-in-law. That evidence is recorded at paragraphs [6] to [19] of the decision. The Judge's findings and conclusions are to be found at paragraphs [21] to [43] of the decision. I do not set them out in full in this decision, but I have had careful regard to them. Suffice it to say that the Judge found both the appellant's sister and brother-in-law to be credible witnesses: [22]. The Judge found, at paragraph [23] that Article 8 is engaged and that there is a close relationship between the

appellant and her father that constitutes family life. The Judge found, at paragraph [38] that any interference will have consequences of such gravity as potentially to engage the operation of Article 8 and that the interference is in accordance with the law.

6. The focus of the Judge's conclusions was essentially stages iv) and v) of the five stage test set out in **Razgar (2004) UKHL 27**, that is referred to by the Judge at paragraph [25] of her decision. To that end, the Judge states:

> *"38. The interference is in accordance with the law but I am not satisfied that it is necessary on any of the grounds cited in question four above.*
>
> *39. I have taken into consideration at this second stage the fact that the Appellant has met the Immigration Rules and she has not undermined the dignity of the UK's immigration system. The only issue in the refusal was that her visit was not considered to be genuine. I have taken account of the family's impeccable immigration history from past visits apart from her father and mother who have had to remain in the UK due to the father's unexpected and sudden illness. The Appellant herself also previously came to the UK and returned home with her parents. Her aunt and uncle have also visited and returned after their visit.*
>
> *40. The ability to meet the immigration rules is a weighty issue but I am aware that it is not a determinative factor when deciding whether the refusal is proportionate. I also find it is not proportionate to the legitimate public aim.*
>
> *41. My reasons for this are that the Appellant is in a close relationship with her father. She was 15 years old when she last saw her father. She is now 17 years old.*
>
> *42. In the two years that have passed her father's health has deteriorated and her health as a result has also deteriorated. The Appellant has strong ties in Pakistan, not least her continuing education and her family (uncle and brother).*

43. In all the circumstances, I conclude that the interference with the Appellant's family life (Article 8) by the refusal of temporary entry is disproportionate in the circumstances."

The grounds of appeal

7. In the grounds of appeal the respondent contends that the Judge erroneously failed to take into account the evidence before her, that the appellant's parents are both living with the sponsor in the UK without any valid leave, when stating as she does at paragraph [32] that "..I also recognise with some force the impeccable immigration history of the sponsor and family who has visited the UK. All of them have returned back after their visit.". Furthermore, the Judge erred in her assessment of proportionality because refusal is justified in the interests of effective immigration control. Finally, it is said that the Judge erred in finding at paragraph [34] of her decision that Skype and telephone calls are not sufficient to 'maintain the family life that the appellant clearly enjoys with her father.' It is said that on the evidence, it is far from clear that the appellant enjoys family life with her father, or that his medical condition is such to preclude communication via telephone or Skype.

8. Permission to appeal was granted by Upper Tribunal Judge Martin on 11th December 2015. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge Amin involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

9. Before me, Mr Kotas conceded, rightly in my view, that the first and second grounds of appeal that I have identified above, amount to nothing more than a disagreement with findings that were open to the Judge. He also accepts, again rightly in my view, that at the time of the respondent's decision to refuse the appellant Entry Clearance (*21st July 2014)* the appellant's parents were not in the UK unlawfully. They had

in fact applied on 20th June 2013 for leave to remain in the UK on discretionary grounds following the heart attack suffered by the appellant's father in May 2013. A decision to refuse the applications was made on 14th October 2014 and the appeals were not determined until the decision of First-tier Tribunal Judge Eban promulgated on 9th October 2014. Until that time, they had the benefit of leave in accordance with s3C Immigration Act 1971.

10. Mr Kotas submits that the appellant's parents have no desire at all to return to Pakistan and it is plain that they wish to remain in the UK. He refers me to paragraphs [22] and [23] of the decision of First-tier Tribunal Judge Eban in the appellant's parents' appeal, in which it is recorded that the appellant's parents want to make their life in the UK. The appellant's father is said to be *"...a 63 year old man who now wants to stay in the UK so that he can be looked after by his daughter and benefit from medical treatment here. He has serious health problems and takes medication."*.

11. On behalf of the appellant Mr Jones submits that the submissions relied upon by Mr Kotas before me, do not arise from the grounds of appeal advanced by the respondent in writing. He submits that whilst the extracts from the decision of First-tier Tribunal Judge Eban might suggest that the appellant's parents' want to remain in the UK, that desire only arises because of the unfortunate turn in the health of the appellant's father. He submits that it is plain that the decision of First-tier Tribunal Judge Amin that is the subject of the appeal before me, proceeded with the Judge knowing that it was the health of the appellant's father, that prevents her parents from returning to Pakistan. Mr Jones submits that all of the grounds of appeal advanced on behalf of the respondent amount to nothing more than a disagreement with findings that were properly open to the Judge. He submits that the decision of the First-tier Tribunal Judge is factually accurate, and discloses no material error of law.

12. The issue for me to decide is whether or not the Judge was entitled to conclude, as she did, that the interference with the appellant's family life(Article 8) by the refusal of temporary entry is disproportionate, in the circumstances.

13. In that respect I follow the guidance of the Court of Appeal in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**. The Court of Appeal held that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. A finding that is "perverse" embraces findings that are irrational or unreasonable in the Wednesbury sense, and findings of fact that are wholly unsupported by the evidence. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really could not understand the original judge's thought process when he was making material findings. I apply that guidance to my consideration of the decision in this appeal.

14. Having carefully read the decision of the First-tier Tribunal Judge and her reasons for allowing the appeal, I reject the submission that the decision discloses a material error of law as claimed by the respondent. In my judgement, it was open to the Judge on the unusual and particular facts of this appeal, to conclude that the interference with the appellant's family life is disproportionate in the circumstances. Another Judge might not have reached that same conclusion but that is not to say that the finding made by the Judge was irrational or unreasonable in the *Wednesbury* sense, or wholly unsupported by the evidence. The Judge reached her findings having had careful regard to the evidence before her of the relationship between the appellant and her father and the evidence before the Tribunal as to the health of the appellant's father and his inability to travel to Pakistan.

15. It follows that in my judgment the decision of the First-tier Tribunal Judge does not disclose a material error of law and the appeal is dismissed.

Notice of Decision

16. The appeal is dismissed and the decision of the First-tier Tribunal Judge stands.

17. No anonymity direction is applied for and none is made.

18. At the end of the hearing before me, Mr Jones submitted that in the event that the appeal is dismissed, the appellant would wish to make representations as to costs. It is of course open to the appellant to make an application for costs under Rule 10(5) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the 2008 Rules"), but the Tribunal may not make an order in respect of costs or expenses except if the Tribunal considers that a party, the respondent here, has acted unreasonably in bringing the appeal or conducting the proceedings. I do not pre-empt any decision that I may in due course need to make, but I do remind the appellant that although the appeal has ultimately failed, permission to appeal was granted by a Judge of the Upper Tribunal, who observed that it is arguable that the Judge erred in her approach to Article 8. If any application for costs is made, I direct that the respondent shall serve any submissions in reply, within 14 days, and the application shall then be determined by me, on the papers.

Signed Date: 7th July 2016

Deputy Upper Tribunal Judge Mandalia