Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/06993/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 February 2016	**On 26 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

ENTRY CLEARANCE OFFICER-NEW DELHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

BABUL AHMED

Respondent

Representation:
For the Appellant: Ms S Sreeraman (Senior Home Office Presenting Officer)
For the Respondent: Mr G Davison (Counsel)

DECISION ON ERROR OF LAW AND REASONS

1. In this matter the Appellant is the Entry Clearance Officer and the Respondent is Mr Ahmed. For convenience and for ease in following this decision I shall continue to refer to Mr Ahmed as the Appellant and the Entry Clearance Officer as the Respondent.

2. This appeal relates to application for entry clearance made by Mr Ahmed to enter the United Kingdom as a visitor. The Entry Clearance Officer [ECO] had refused that application by way of a decision dated 9 October 2014. The Appellant had appealed against the ECO's decision and his appeal was heard thereafter at Taylor House by First-tier Tribunal Judge Moore. The

Judge had allowed the Appellant's appeal. The ECO had sought permission to appeal and that was granted by First-tier Tribunal Judge Page Nicholson stating:

> "2. ... for all applications submitted from 25 June 2013, a person refused entry clearance to visit relatives in the UK will be unable to appeal against that immigration decision except on (i) human rights and (ii) race relations grounds by virtue of s.52 of the Crime and Courts Act 2013-the commencement date and transitional provisions being set out in the Crime and Courts Act 2013 (Commencement No.1 and Transitional and Saving Provision) Order (SI 2013/1042). 3 The Judge did not consider the appeal on human rights and made no finding as to whether there was a family life that could engage Article 8 ..."

3. I heard submissions from both parties today. I had reserved my decision but had indicated to the parties that if I was minded to find that there was an error of law then this was a case in which it was important for the findings of fact to be preserved if possible. On that basis both parties submitted that it would be appropriate for there to be a remittal of the matter to the same Judge at the First-tier Tribunal to consider the appeal further.

4. Having reflected on the decision of the First Tier Tribunal Judge and having now read the decision of the Upper Tribunal in **Kaur (visit appeals: Article 8)** [2015] which neither party had cited, I come to the clear view that there is a material error of law in the decision of the Judge.

5. The Judge materially erred in law because he allowed the appeal based on the Immigration Rules but there was no such appeal before him and no basis upon which an appeal could be allowed based on the Immigration Rules. The only basis of the appeal was in respect of Article of the European Convention on Human Rights as Race Relations did not feature as part of the grounds.

6. I note the reference to the public interest and section 117B Nationality Immigration and Asylum Act 2002 in the Judge's decision, but that does not get close to a proper consideration of the matters required in an Article 8 assessment.

7. As was made clear by the Upper Tribunal in **Kaur**, there needs to be a clear and proper assessment of Article 8:

> "39. We bear in mind that ties between a parent and adult children or between a grandparent and children will not as a rule constitute family life for Article 8(1) purposes unless there is dependency over and above normal emotional ties: see Kugathas [2003] EWCA Civ 31 and Singh and Another [2015] EWCA Civ 74. In light of these authorities we are prepared to accept that even though not financially dependent on her sponsor son, the claimant enjoyed ties with him and has family that went beyond the normal emotional ties between an elderly mother/grandmother and her sponsor son/grandchildren and fall within the scope of Article 8(1). Although we have set aside the decision of the First-tier Tribunal Judge, we consider that in relation to the issue of whether Article 8(1) was engaged he was entitled to

> attach particular weight to the evidence that the claimant had played a central role in bringing up the two grandchildren (the judge heard evidence about this from one of them). There may have been a two and a half year gap, but it was known she had tried unsuccessfully before to get a visa.
>
> 40. Whilst in entry clearance cases it is not to be assumed that there will always be an interference with family life (see e.g. SM and Others (Somalia) [2015] EWCA Civ 233; see also more generally VW (Uganda) (2009) EWCA Civ 5), we are prepared to accept that the decision in this case did interfere in the claimant's right to respect for family life (or, as the Strasbourg Court prefers to describe it in entry clearance cases, did amount to a lack of respect for family life).
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> 41. Regrettably we are wholly unpersuaded, however, that the decision lacked proportionality. Like the ECO, we consider the claimant had not shown she met the requirements of paragraph 41 to show that she intended only a genuine visit. The First-tier Tribunal Judge would appear to have concluded otherwise but gave no or no adequate reasons for adopting that view. In re-making the decision we must now, of course, have regard, inter alia, to the claimant's letter of January 2015. This letter certainly assists us in providing some further details of her family circumstances in India, but it does not persuade us that her family ties in India were as meaningful to her as those with her third son and his children whom she had brought up. (In this regard we would observe that we do not accept Mr Bramble's contention that this further letter casts doubt on whether she had in fact brought up these children, as the reference she makes to having "hardly resided with him" was a reference to the sponsor, who had gone to the UK leaving his children behind; it was not a reference to these two grandchildren.)"

8. In this case the Judge did decide that Paragraph 41 of the Immigration Rules was met and therefore the Upper Tribunal's reference to **Mostafa** and **Adjei** at paragraph 28 needs to be considered against that background.

9. Therefore with the relatively unusual circumstances of this case in which there have been favourable findings of fact in respect of Paragraph 41 of the Immigration Rules but no assessment of Article 8, in my judgment it would not be appropriate to deprive the Appellant of the relatively advantageous position through no fault of his. The Respondent was not represented at the hearing. Instead therefore, in accordance with the submissions of the parties, I do consider that it is appropriate for there to be a remittal of this case to the same Judge at the First-tier Tribunal.

10. The Judge will be able to consider the submissions/evidence of the parties at a further hearing which will focus on Article 8. The findings of fact which have been made shall remain in place and are preserved. It will be open to the Judge to make further findings and to make his assessment in respect of Article 8 guided by the case law particularly that referred to above.

Notice of Decision

11. The decision of the First-tier Tribunal Judge contains a material error of law is set aside to the extent referred to above.

12. The decision in respect of Article 8 ECHR shall be re-made by First-tier Tribunal Moore at Taylor House. If Judge Moore is not available then the Resident Judge at the First-tier Tribunal shall allocate this case for hearing before a suitable First-tier Tribunal Judge.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Mahmood