Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/00943/2015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 6 July 2017	**On 14 July 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER

Appellant

and

TRONG SAN VU

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr J Edwards instructed by Morgan Hall Solicitors

DECISION AND REASONS

Introduction

1. The respondent (whom I will refer to as the "claimant") is a citizen of Vietnam who was born on 8 September 1954.

2. On 29 December 2014, he applied for entry clearance in order to visit his daughter, son-in-law and grandchildren in the UK under para 41 of the

Immigration Rules (HC 395 as amended). On 5 January 2015, the Entry Clearance Officer refused the claimant's application on the basis that he was not satisfied that the claimant was a genuine visitor who intended to leave the UK on completion of his visit (para 41(i) and (ii)). On 11 September 2015, the Entry Clearance Manager confirmed the ECO's decision, determining also that the decision did not breach the ECHR.

The Appeal to the First-tier Tribunal

3. The claimant appealed to the First-tier Tribunal. As a result of the amendment to s.88A of the NIA Act 2002 by s.52 of the Crime and Courts Act 2013, the claimant's appeal was limited to human rights grounds, namely Art 8 of the ECHR.

4. Judge Paul allowed the claimant's appeal under Art 8. He accepted that the claimant was a genuine visitor and that the refusal of entry clearance was a disproportionate interference with his family life. Accordingly, the judge allowed the appeal under Art 8.

5. The Entry Clearance Officer sought permission to appeal on the basis that the judge had erred in law in accepting that there was family life between the claimant and his family in the UK and also on the basis that the proportionality assessment was inadequate.

6. On 30 March 2017, the First-tier Tribunal (Judge Saffer) granted the Entry Clearance Officer permission to appeal.

The Submissions

7. Mr Mills, who represented the ECO, submitted that the judge had failed properly to consider the issue of "family life" in accordance with the case law of Kugathas v SSHD [2003] EWCA Civ 31 and Ghising (Family Life – Adults – Gurkha Policy) [2012] UKUT 00160 (IAC). It was, Mr Mills submitted inadequate for the judge simply to say in para 17 that "there are close family ties here". That, he submitted, failed to engage with the issue of whether there were more than "normal emotional ties" between the claimant and his adult daughter. He accepted that, as Ghising identified, family life could exist between an adult child and a parent (as in Ghising where the child continued to live at home) but there was nothing of that sort on the facts of this case. Mr Mills relied upon the Upper Tribunal's decision in Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) at [24] where the Tribunal emphasised that it would be only 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 Article 8(1)."

8. Further, as regards any relationship between the claimant and his two grandchildren in the UK, Mr Mills acknowledged that the family had visited the claimant in Vietnam in 2015 but there was no presumption of family life between a grandparent and a grandchild and there was limited

evidence of the relationships in the witness statements of the claimant and his daughter. There was, Mr Mills submitted, insufficient evidence to find that family life existed between the claimant and his grandchildren.

9. Secondly, Mr Mills submitted that even if family life did exist between the claimant and his UK family, the judge had erred in law in finding that any interference was disproportionate.

10. Mr Mills invited me to both set aside the judge's decision and to remake it dismissing the claimant's appeal under Art 8.

11. Mr Edwards submitted that the judge's decision should stand. He submitted that the judge should be given credit for knowing his job and, in particular, the underlying law in cases such as Kugathas which led him to find in para 17 that there were "close family ties here". Mr Edwards submitted that the claimant's family had visited Vietnam and that there was family life between both the claimant and his adult daughter and between the claimant and his grandchildren who were, at the date of the judge's decision, aged around 2 and 4 years of age. He pointed out that the family visits to Vietnam were more expensive because of the number who had to travel and, he submitted, short-term visits to visit family should be seen as a facet of "family life". Mr Edwards submitted that the judge had not erred in law in allowing the claimant's appeal under Art 8.

12. In order to succeed under Art 8, the claimant relied, and continues to rely, upon "family life" with his adult daughter in the UK and his two grandchildren in the UK. There is no presumption of family life between an adult child and parent. There must be a sufficiently close relationship in order to establish "family life" and so engage Art 8 of the ECHR. Although a presumption may arise between a grandparent and grandchild, that may be rebutted on the evidence in a particular case.

13. I was referred to the Court of Appeal's decision in Kugathas and the Upper Tribunal's decision in Ghising. Those cases, together with the subsequent decisions of the Court of Appeal in R(Gurung and others) v SSHD [2013 EWCA Civ 8 and Singh v SSHD [2015] EWCA Civ 630, were helpfully set out, and approved, by the Court of Appeal in Rai v Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320 at [17]-[20] where Lindblom LJ (with whom Beatson and Henderson LJJ agreed) said this:

> "17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents … the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors … include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that

"there is no presumption of family life". Thus "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". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not … essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".

"18. In *Ghising (family life – adults – Gurkha policy)* the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in *Kugathas* had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):

> "61. Recently, the [European Court of Human Rights] has reviewed the case law, in *[AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. …".

The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life – adults – Gurkha policy)*, including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

20. To similar effect were these observations of Sir Stanley Burnton in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

> "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 purposes of Article 8"."

14. The case law identifies that the issue of whether "family life" is established is "highly fact-sensitive" and requires a careful consideration of all the relevant facts. Further, the search is for real and effective support which may involve emotional or financial support and ties. The ordinary relationship between an adult child and parent (at least where that child has not struck out for an independent life, including forming his or her own family) will not usually amount to "family life".

15. In the context of an Art 8 claim where entry clearance as a visitor has been refused, the Upper Tribunal in Mostafa pointed up the likely scope of any such claim (at [24):

> "It is the very essence of Article 8 that it lays down fundamental values that have to be considered in all relevant cases. It would therefore be extremely foolish to attempt to be prescriptive, given the intensely factual and contextual sensitivity of every case. Thus we refrain from suggesting that, in this type of case, any particular kind of relationship would always attract the protection of Article 8(1) or that other kinds of relationship would never come within its scope. 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 Article 8(1). In practical terms this 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."

16. Mr Edwards' referred me to this passage in para 6 of his skeleton argument. The facts of this case do not fall within the examples given by the Upper Tribunal. But, of course, they were no more than that – examples.

17. In this case, the evidence before the judge was that the claimant's daughter lived in the UK and is a British citizen. She is married and she and her husband have two young children. The claimant lives in Vietnam with his wife. At the date of decision, he was 60 years of age. Although the evidence was that his family in the UK would pay for and

accommodate him when he visited them, he was not financially supported by his daughter in the UK when he is living in Vietnam. The evidence before the judge, which it would appear he accepted, was that the claimant had worked for many years in a transport company and was presently in receipt of rental income from land every month. There was no evidence that the claimant was other than healthy. The evidence before the judge was that the claimant's daughter had been in the UK for ten years and that during that time she had returned to Vietnam with her husband and children on more than one occasion. The most recent visit was in February 2015. The claimant had one other daughter living in Vietnam. The claimant had never been to the UK but they kept regular contact using Viper Social Media.

18. The judge's reasoning leading him to allow the appeal under Art 8 is at paras 14-19 of his determination as follows:

> "14. The burden is on the appellant to show that his application engages his human rights, and then for the Secretary of State to show that any interference is proportionate.
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> 15. In this case, it appears that there has been at least one previous application that has been refused – although the details for that were not put in front of me. The Entry Clearance Manager said that this case fell to be considered on separate criteria.
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> 16. The forensic exercise involved determining whether or not, in truth, this was some attempt at disguised immigration because, of course, that is at the heart of the decision to refuse entry.
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> 17. Family ties are clearly important, and the appellant's sponsor amply demonstrated that there are close family ties here. The question is whether or not this decision interferes with family life to such an extent that it is disproportionate. I take into account that it is much cheaper for the appellant to fly to the UK than it is for the sponsor, her husband and two children to make the trip the other way. I also take into account that the father clearly has a wish to see how his daughter is fairing and what is clearly a very different culture and environment from that which exists in Vietnam.
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> 18. It seems to me that the balancing exercise here involves determining whether or not the Immigration Provisions, designed to prevent people from migrating here, properly bite in this case. It is noteworthy that the application was dated in December 2014, and there was a photograph of the appellant and his wife taken in early 2015. It seems to me pretty clear, therefore, that the appellant has an established family life back in Vietnam, and indeed spent all his years there, and is truly a Vietnamese citizen.
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> 19. It seems to me that, set against that backdrop, that to interfere with his right – and perhaps more importantly, his family's rights – to visit the UK is a significant one, and there must be good grounds for showing that such interference is proportionate. On the facts of this case, finding (as I do) that the appellant and sponsor are genuine people, I am satisfied that this is a genuine visit visa application, and I am satisfied that the proposed refusal is a disproportionate one with the exercise of family life."

19. It is not difficult to see why the judge decided that the claimant was a genuine visitor. However, even though he acknowledges that it is for the appellant to show that his human rights are engaged (see para 14), his finding that Art 8 is engaged on the basis of "family life" is in my judgment unsustainable in law.

20. First, the judge failed to direct himself in accordance with the case law summarised in [17]-[20] of Rai. Secondly, and more significantly, the evidence simply did not bear out that the required relationship existed between the claimant and his adult daughter. There were no elements of financial or emotional dependency. The judge was, no doubt, entitled to find that it was a close family. The visits to Vietnam and the continued contact via the internet paid witness to that. However, that was no more than an ordinary relationship between a family split geographically across the world. The claimant's daughter had an independent life with her own husband and children. She had lived separately from her father and mother in Vietnam for ten years. In my judgment, the judge could not rationally conclude on the evidence that the relationship between the claimant and his adult daughter amounted to "family life" within Art 8 of the ECHR.

21. Further, the evidence of the claimant's relationship with his grandchildren was extremely sparse and limited. There was no evidence of the closeness of relationship identified in the case law. In and of themselves, visits and, if it involved the grandchildren, contact via the internet might suffice if the evidence spoke sufficiently to the content of the relationship. Here, in my judgment it did not. Mr Edwards was unable to draw my attention to any specific evidence relating to the relationship between the claimant and his grandchildren. It is wholly unclear from the judge's reasons whether, before the judge, any reliance was directly placed upon those relationships at all. What is clear is that the evidence did not seek to address those relationships in any substantial way. To the extent any presumption arose, the total lack of evidence as to the content of the relationships told heavily against there being 'family life' in fact. Consequently, in my judgment, it was also irrational (to the extent that the judge did find this) for the judge to conclude that the relationship between the claimant and his grandchildren engaged Art 8 of the ECHR.

22. As Mr Mills submitted, if that was the position, Art 8 was not engaged and the First-tier Tribunal's decision must be set aside and a decision to dismiss the claimant's appeal under Art 8 substituted.

23. In any event, even if to some limited extent the evidence did establish a relationship between the claimant and, perhaps more likely, his grandchildren engaging Art 8, there is no rational basis upon which the judge could have found that the interference was disproportionate.

24. In reaching that conclusion I bear in mind the point raised, albeit very cursorily in Mr Edwards' skeleton argument (at para 13) and not at all in

his oral submissions, that the relationships may amount to 'private life' under Art 8 (see Singh at [25]).

25. First, the judge was, of course, required to give weight to his finding that the claimant had established that he was a genuine visitor and therefore met the requirements of para 41. That, in itself, would not make any decision disproportionate but would point in that direction (see Mostafa at [23]). As in any assessment of proportionality under Art 8.2, a 'fair balance' between the individuals' rights and the public interest must be stuck (see e.g. R(Agyarko and another) v SSHD [2017] UKSC 11 at [47]).

26. Secondly, I accept that it is in the best interests of the claimant's grandchildren to see, to the extent geographical separation permits, their grandfather and that is a primary consideration (see, e.g. ZH (Tanzania) v SSHD [2011] UKSC 4 and Zoumbas v SSHD [2013] UKSC 74).

27. Thirdly, however, as the history of this family demonstrates, the claimant's UK family is able to visit Vietnam where the claimant lives. The evidence was they had done so on more than one occasion and most recently in February 2015. The decision does not, therefore, prevent short family visits and therefore, face-to-face contact, between the claimant and his family in the UK. The fact that it is more expensive to visit Vietnam, because of the numbers travelling, whilst a factor does not provide substantial support for a conclusion that the refusal of entry clearance is disproportionate.

28. It is well recognised that, even in the case of spouses, Art 8 does not provide a right to choose where family life should be enjoyed: *a fortiori* where an individual seeks to make a short family visit to the UK where the UK family can feasibly and reasonably visit that individual in their own country.

29. In my judgment, therefore, the judge could not rationally conclude that if Art 8.1 was engaged (and on my findings it was not in respect of 'family life') any interference by refusing the claimant entry clearance is not disproportionate. In my judgment, any interference is plainly and clearly proportionate.

30. I should add that, of course, in any future entry clearance application, the claimant has the benefit of the judge's factual finding that he was a genuine visitor.

Decision

31. For the above reasons, the decision of the First-tier Tribunal to allow the claimant's appeal under Art 8 involved the making of an error of law. That decision is set aside.

32. I remake the decision dismissing the claimant's appeal under Art 8.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 14 July 2017

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed, no fee award is payable.

Signed

A Grubb
Judge of the Upper Tribunal

Date 14 July 2017