st

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/02071/2014

THE IMMIGRATION ACTS

At Field House
on 17th April 2015

Determination Promulgated
on 29th May 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MR NAJIBZAFAR KHAN
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Ball, Counsel, instructed by J McCarthy, Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. I refer to the parties as they were in the First tier Tribunal though it is the respondent who is appealing in the present proceedings.

2. The appellant is a national of Pakistan, born on 18 August 1953.

3. He applied for a family visit visa. This was refused on 24 March 2014. The entry clearance officer was not satisfied he was a genuine visitor intending

to leave. He did not satisfy paragraph 41(i) and (ii) of the immigration rules. This required an applicant to satisfy the entry clearance officer as to the period and purpose of the visit. The entry clearance officer questioned why, on the figures given, he was willing to spend the equivalent of four months disposable income or 70% of the funds held in his business account.

4. An additional reason for refusal was paragraph 320(2)(b). The heading is: `Grounds on which entry clearance or leave to enter the United Kingdom is to be refused' and states :

> (2) the fact that the person seeking entry to the United Kingdom:
>
> > (b) has been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years
>
> Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors.

In 1981 he was sentenced to 6 years imprisonment for the importation of class A drugs.

5. On 25 June 2013 section 52 of the Crime and Courts Act restricted appeal rights for visitors to the grounds contained in section 84 (1)(b) and(c) of the 2002 Nationality, Immigration and Asylum Act 2002. In the appellant's case this meant his appeal was restricted to human rights.

6. In the Notice of Appeal it was stated he had been granted entry clearance in June 2011 and 2012 and had complied with the terms of entry. The entry clearance manager on review pointed out that paragraph 320 changed in December 2012 whereby a mandatory refusal applied. It was also pointed out that the appellant's relatives could visit him in Pakistan or a third country.

The First tier Tribunal

7. His appeal was heard by First-tier Judge Hunter on 5 November 2014. The decision allowing his appeal on the basis of family life and Article 8 was promulgated on 5 January 2015.

8. The judge found the appellant did not meet the requirements of the immigration rules in relation to visit visas and referred to section 117B of the Nationality, Immigration and Asylum Act 2002. This states that the maintenance of effective immigration controls is in the public interest. It also provides that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom that persons who seek to enter the United Kingdom are able to speak English and are financially independent.

9. The appellant's wife and his two adult children had been living in the United Kingdom since 2010. His son and daughter said that they were fearful of travelling to Pakistan because on previous visits they had been subjected to threats and robbery. Judge Hunter concluded that family life existed between the appellant and his wife and adult children and concluded and that refusal of entry clearance was a disproportionate interference.

The Upper Tribunal.

10. The respondent sought permission to appeal on the basis there was a material misdirection of law by the judge in concluding that family life within the meaning of Article 8 existed. Given the temporary nature of a visit visa it was also submitted that the judge failed to explain why a refusal was a disproportionate interference with Article 8 rights. The judge acknowledged contact continuing through other means and had not dealt with the possibility of visits in a third country. The respondent also submitted that the generalised fear of the crime level in Pakistan was not an insurmountable obstacle and there were risks of crime in the United Kingdom. It was also submitted that the judge made a material error of law in dealing with paragraph 320 (2)(b) by considering it only as part of the proportionality exercise. Permission to appeal was granted.

11. At hearing reference was made to the decision of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC). Ms Everett argued that the relationships did not engage family life within the meaning of Article 8. Mr Ball argued Article 8 was engaged particularly in relation to the appellant's wife and that the respondent was seeking to reopen the merits of the decision. He referred me to paragraph 65 of the determination and the judge’s conclusion that family life exists between them. Paragraph 66 deals with the appellant’s relationships with his children and again the conclusion was that family life exists.Mr Ball submitted the appellant's presence would not be a burden upon the State. He had complied with the terms of entry before and has also been granted a Schengen Visa. He pointed out that the appellant and his wife are not divorced and it would have been open to him to apply for settlement if he wanted to remain permanently in the United Kingdom.

Consideration

12. At the end of the hearing I asked the appellant’s representative his views on whether, in the event of an error of law being found I could proceed to deal with the matter in accordance with the Directions. He took instructions and indicated the family preferred that the appeal be reheard in the First-tier Tribunal.

13. It is my conclusion that the determination of Judge Hunter does contain material errors of law and cannot stand. It is clear from the determination that Judge Hunter carefully considered all the evidence. He has closely engaged with the factual background. However, there are two issues on which there were material errors of law. The first relates to the

engagement of Article 8.The respondent's decision only related to a temporary status, namely a short visit with the option of visits either in Pakistan or third countries. Much emphasis was placed upon the importance of the visit to the appellant's children. Undoubtedly they welcome seeing their father. However, not only had the nature of a visit visa to be considered but also the fact that they are adults, leading independent lives. In relation to the appellant's wife the temporary nature of the visit had to be considered as well as the fact she and the appellant had voluntarily separated. The second issue relates to the appellant's criminal conviction and the effect of paragraph 320 (2) (b).

Family life

14. Regarding the adult children at paragraph 66 the Determination reads:

> "… they both told me they have remained in contact with their father and communicate with him on a regular basis. While there is not a financial dependency I accept that there is a close emotional relationship between the appellant and Ms Khan and Mr Zafar."

15. The judge refers to the low threshold required to establish family life and concluded family life did exist. Kugathas v SSHD [2003] EWCA Civ 31 concerned an adult's relationship with his mother and adult siblings. The Court of Appeal felt that the following passage in S v United Kingdom [1984] 40 DR 196 was still relevant:

> "… generally, the protection of family life under Article 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 … would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

16. The reference to a further element of dependency did not mean it had to be economic. It is however necessary to show that ties of support, either emotional or economic are in existence and go beyond the ordinary and natural ties of affection that would accompany a relationship of that kind. The appellant bears the burden of proof of establishing that Article 8 is engaged. Whilst the threshold is low it nevertheless exists and must depend on the context under consideration. In the present case the judge's findings are limited to the ordinary and natural ties of affection and there are no other circumstances justifying the conclusion that this situation engages Article 8. Consequently I find this amount to a material error of law.

Paragraph 320 (2)(b)

17. The other issue is paragraph 320(2)(b). The judge is clearly influenced by the fact the appellant had been successful in an earlier appeal at which his criminal conviction was considered. He quotes from the earlier determination which refers to the fact that the offence was over 30 years

ago. The judge also refers to the fact that following this the appellant complied with the terms of entry and has travelled extensively. At paragraph 77 the judge records that on the current application under the rules there is an automatic refusal. He then feels able to allow the appeal notwithstanding this on the basis of the proportionality exercise under Article 8.

18. The permission to appeal suggests that the judge did not deal with the mandatory refusal. In fact the judge did and acknowledged that the application could not succeed under the rules. However, I find the approach to the proportionality issue misconceived. This is particularly so in light of the decision of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) .That decision points out that visit visas appeals are now largely based upon Article 8 arguments and the issue for the tribunal is not an appellant's ability to satisfy the rules. However, their ability to meet the rules is relevant when considering the proportionality argument. The decision of Shamin Box [2002] UKIAT 02212 was referred to. It pointed out that the obligation imposed by Article 8 is to promote the family life of those affected by the decision. In the Article 8 balancing exercise the rights of all those closely affected by the decision had to be considered. At paragraph 16 of Mostafa the Upper Tribunal indicated that it would be almost certainly proportionate to refuse entry clearance if the appellant did not comply with the rules. In the present case the issue is not so much compliance as a clear fact that the appellant cannot succeed under the rules. I find there was an error of law in the way the judge dealt with the proportionality assessment given the fact the immigration rules, as amended, create a complete.

Disposal

19. The judge made clear sustainable findings of fact which have not been challenged. On reflection, I can see no reason why the matter should be remitted to the First-tier Tribunal nor is there a need for further evidence.

20. The appeal cannot succeed under the immigration rules by reason of paragraph 320 (2)(b).

21. Dealing with Article 8 the position in relation to the appellant's adult children is adequately covered by Kugathas v SSHD [2003] EWCA Civ 31.They are leading independent lives. They are not financially dependent upon the appellant. There are the natural ties of love and affection. I do not see any demands greater than this. They have visited the appellant before in Pakistan and can do so again. The immigration judge referred to reluctance on their part to travel to Pakistan. They may well have some hesitancy due to concerns for their safety but their father is able to live there and people do travel to Pakistan for holidays. They can also meet in third countries. Contact can also be maintained by other means.

22. The position in relation to the appellant's wife is more complex. On the one hand they continue to be married. I bear in mind the nature of a

marriage relationship. They continue to have contact. There is the bond of the children. The judge recorded that she married the appellant in 1985 and they lived together in Pakistan until 2004. She came to the United Kingdom. She returned to Pakistan the following year when her parents became unwell and resumed living with the appellant. She then left Pakistan in 2010 for the United Kingdom where she has lived since. She has British citizenship. Against this they have chosen to be apart. Thee position is different from a married couple who want to live their life together. His wife could visit him in Pakistan.

23. I acknowledged that the claim is stronger in relation to his wife than for his children. However, in considering Article 8 the proportionality in relation to her is overshadowed by the effect of his criminal conviction on the proportionality issue. Albeit his offence was 30 years ago it was a most serious offence for which he received six years imprisonment. It was a crime against society. The immigration rules impose a strict sanction in the circumstance. The immigration judge acknowledged the appeal could not succeed under the rules because of this. Bearing in mind the issue relates to a visit for temporary purposes and that there are alternative avenues of contact my conclusion is that the appellant's conviction albeit many years ago renders the respondent's decision proportionate in relation to his Article 8 rights.

DECISION

24. The Immigration Judge made an error on a point of law and I re-make the decision and dismiss the appeal under the immigration rules. The decision of the respondent does not breach Article 8.

Signed

Francis J Farrelly
Deputy Immigration Judge of the Upper Tribunal