IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: VA/03962/2014
VA/04584/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 August 2015	**On 25 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

MR NACHHATAR RANDHAWA SINGH (FIRST CLAIMANT)
MRS SUKHDEV KAUR GREWAL (SECOND CLAIMANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents/Claimants

Representation:
For the Appellant: Mr P Duffy, Specialist Appeals Team
For the Respondents: Mr R Claire, Counsel instructed by Bernard Chill Axtell Solicitors

DECISION AND REASONS

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer against the decision of the First-tier Tribunal (Judge Y J Jones sitting at Columbus House, Newport on 9 April 2015) allowing on Article 8 grounds the claimants' appeals against the Entry Clearance Officer's decision to refuse them leave to enter as family visitors. The First-tier Tribunal did not make an anonymity direction, and I do not

consider that the claimants require anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission

2. On 19 June 2015 First-tier Tribunal Judge Juliet Grant-Hutchison granted permission to appeal for the following reasons:

> "It is arguable that the Judge has erred in law (a) by making a material misdirection of the law in finding that the stated length of the Appellants' visits were not part of the Immigration Rules when the Appellants made their previous applications in 2008 and 2011 which the Judge states came into force in 6 April, 2013 and not the correct date of 23 May, 1994 which the Judge then places weight on in her proportionality exercise in terms of Article 8; (b) by placing weight on the case of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 without considering other cases such as Kugathas v SSHD [2003] EWCA Civ 31 and Ghising and Others [2013] UKUT 00567 (IAC); (c) by not considering Part 5 of the Nationality, Immigration and Asylum Act 2002 (Section 117B) and (d) for failing to give adequate reasons for her decision."

Relevant Background

3. The claimants are husband and wife respectively, and both of them are nationals of India. They were born in 1946 and they have two children: a son and a daughter. The first claimant worked in New Delhi as a government employee until 31 March 2006. He then retired, and he and his wife relocated to Anadpur Sahib, a holy city in Punjab Province.

4. In May 2014 the claimants applied for entry clearance as family visitors. They planned to arrive in the United Kingdom on 23 June 2014 and stay for three months. Their sponsor was their son Amarjot Randhawa. They planned to be present for the birth of their grandchild and to take part in traditional religious Sikh ceremonies.

5. On 16 June 2014 an Entry Clearance Officer in New Delhi gave his reasons for refusing their applications. He acknowledged the importance of family ties, especially on an occasion such as this, but he was required to look at their previous travel and circumstances in India when reviewing their application. They had previously issued a six month family visit visa on 17 July 2008. They stated in their application they had remained in the UK for only 25 days. But their passports and application forms indicated they had travelled to the UK on 28 July 2008 and returned on 7 January 2009, a period of over five months. They were then issued with a two year visit visa on 5 February 2010 in response to an application where they said they were going to travel to the UK for three months and fifteen days. But their passports and application forms indicated that they travelled to the UK on 17 January 2010 and had returned on 3 August 2010 – a period of over five months. They then travelled to the UK on 9 September 2010 and returned on 3 February 2011 – a period of over five months. They travelled to the UK again on 27 April 2011 and returned on 13 October 2011 – a period of over five months. In none of these cases had they indicated why they travelled for so much longer than was stated in their

applications. In approximately the twenty months between 17 January 2010 and 13 October 2011 they had spent over fifteen months in the UK.

6. Paragraph 41(ii) of the UK Immigration Rules stated that a person seeking entry clearance as a visitor should show they intended to leave the United Kingdom at the end of the period of the visit as stated by him; and did not intend to live for extended periods in the United Kingdom through frequent or successive visits. Based on their previous travel history, he was not satisfied they genuinely intended to leave the United Kingdom at the end of the three month visit as stated by them, and they did not intend to live in the UK for extended periods through frequent and successive visits.

7. They were also refused an adult dependent settlement visa in January 2013. This caused him to further doubt their intentions in wishing to travel to the UK at this time as a visitor, and their intention to leave at the end of the period stated by them.

8. The Entry Clearance Officer proceeded to refuse the applications by reference to sub-paragraphs (i) and (ii) of paragraph 41 of the Rules.

9. The claimants' representatives settled extensive grounds of appeal. The claimants had stayed longer than anticipated due to unforeseen family circumstances. Their daughter-in-law experienced difficulties during her first pregnancy and the birth of her daughter Jasmine. Another reason for staying longer than first indicated was the sponsor's need for parental support and guidance when setting up his Sanja Restaurant business. In hindsight, the claimants accepted they should have informed the UK Home Office of their intention to stay longer than first indicated on their applications. This requirement was not communicated to them on any subsequent visits or visa applications. In any event each time the claimants had returned to India without overstaying or breaching the Rules.

10. While the claimants were refused an adult settlement visa in January 2013, they would still have intended to leave the United Kingdom and return to India. Refusing them a family visit visa now was an infringement on Mr Randhawa's Article 8 rights. It was a direct and unjust interference with his right to have direct contact with his parents. The interference was preventing him from conducting traditional Sikh and religious ceremonies which required the presence of his parents. While it might be suggested that Mr Randhawa was not prevented from visiting his parents in India, this was wholly inappropriate given his present circumstances and commitments: namely his wife, their newborn son, their daughter Jasmine, and his Sanja Restaurant business.

11. On 18 November 2014 an Entry Clearance Manager gave his reasons for upholding the refusal decisions in an Entry Clearance Manager's review:

> "These cases are particularly difficult to assess against the limited appeal rights that they have been afforded, however considering that the appellants previously wanted to settle with their UK sponsor in the UK I, like the ECO, cannot be satisfied that they

will leave the UK at the end of their proposed visit or that they have sufficient ties to return to.

I must admit that the appellants are in a tough position being unable to meet the requirements of the adult dependent relative Rules and now unable to meet the requirements of the visitor Rules because of their intention to settle in the UK, however I note there are no insurmountable obstacles preventing the sponsor from visiting the appellants or from relocating to be with them in a more permanent way if necessary.

Given that there are no insurmountable obstacles and no exceptional circumstances which constitute considering issuing leave to remain outside of the Rules, I am satisfied that the decision is proportionate and appropriate. Whilst the appellants' Article 8 rights can clearly be engaged I am satisfied from the above, that the decision does not breach these."

The Findings of the First-tier Tribunal

12. Both parties were legally represented before Judge Jones. Both representatives relied for different reasons on the previous decision of Judge Prior promulgated on 10 November 2013 giving his reasons for dismissing the claimants' appeals against the decision to refuse them entry clearance for the purposes of settlement as elderly dependent relatives.

13. Judge Jones set out her findings at paragraphs [28] onwards. She was satisfied that the sponsor was a credible witness, and was further satisfied that the application for a family visit was genuine and that the claimants would return to India after their visit to their son and family. At paragraph 31 she set out the five questions identified by Lord Bingham in **R v SSHD ex parte Razgar [2004] UKHL 27**. The judge continued:

> "32. It has not been argued that family life does not exist between the sponsor and his parents, the appellants. They have previously been granted visas on the basis of being family members. The obligation imposed by Article 8 is to promote the family life of those affected by the decision. In this case the family life between the sponsor and his family and his parents, the appellants. The refusal decision has had a material impact on their right to enjoy family life. It means that the appellants may not visit the sponsor and his family in the UK. This is something they have done four times before between 2008 and 2011. The issue is whether refusing the appellants entry clearance for the specific and limited purpose sought interferes disproportionately with the family life of those concerned.
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> 33. It is for the respondent to satisfy me that the interference is proportionate. The respondent has argued that between 2008 and 2011 the appellants visited the UK and overstayed the stated length of their visits. However the law at that time did not include a requirement that they must not exceed the stated length of their visit.
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> 34. On 6 April 2013 the law changed and paragraph 41(ii) was amended to include:
>
> > '(ii) intends to leave the United Kingdom at the end of the period of the visit *as stated by him*; and [does not intend to live for extended periods in the UK through frequent or successive visits;]'

35. That requirement was not in place between 2008 and 2011 and I find that the Entry Clearance Officer was wrong to place reliance on (ii) now, in respect of those applications. The previous history of the appellants indicates compliance although they stayed longer than the time stated on their visa applications. It is also pertinent to note that the Entry Clearance Officers issued visas to the appellants over that period despite knowing that the had stayed longer than the periods stated on their applications.

36. I must also consider the findings of Immigration Judge Prior in November 2011. Although he did not specifically make a finding of family life existing between the appellants and the sponsor when he refused their appeal against the settlement decision by the respondent, he said this: 'I take the view that family life can be continued as before by the regular exchange of visits and, again as before, extended family visits by the appellants to the United Kingdom'.

37. The implication is that the parties did have a family life maintained by visits and I find that there is a family life between the sponsor and the appellants on that basis. This decision interferes with that family life and it is disproportionate despite the fact that the sponsor and his family can visit the appellants in India.

38. Various difficulties were brought to my attention in respect of the sponsor and his family visiting India. He did visit in January 2015 with his daughter but his wife was unable to go because of ill-health before and after the birth of her son. In particular she suffered from postnatal depression. I have no doubt that the appellants, now they know about the contained in paragraph 41(ii), will abide by the terms stated in their visa applications as now required by law."

The Hearing in the Upper Tribunal

14. At the hearing before me, Mr Duffy referred me to **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)** and to **Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC)**. On behalf of the claimants, Mr Claire submitted that the judge had followed the correct legal approach, and had given adequate reasons for finding that the claimants' Article 8 rights were engaged, and that the refusal of entry clearance was thereby not in accordance with the law and disproportionate. He relied on the following passage at paragraph [24] of **Mostafa**:

> "In the limited class of cases where Article 8(1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate. 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."

15. I ruled that an error of law was made out, and gave my reasons for so finding in short form. My extended reasons are set out below.

Reasons for Finding an Error of Law

16. In **MS (Article 8 – family life – dependency – proportionality) Uganda [2004] UKIAT 0064** at paragraph [8] the Tribunal said it was accepted law that in circumstances where family life is put forward as existing between an adult child and his parents, "there need to be further elements of dependency involving more

than emotional ties". This mirrors what was said by the Court of Appeal at paragraph [25] of **Kugathas v SSHD [2003] EWCA Civ 31**. The following passage at paragraph [20] of **Kugathas** is also pertinent:

> "... Neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together in my judgment, enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8."

17. At paragraph [17] of **Adjei,** which was promulgated on 6 May 2015, Upper Tribunal Judge Southern said:

> "It is a question of fact in each case, of course, whether relationships between adult relatives disclose sufficiently strong ties such as to fall within the scope of Article 8. Ties between young adults who have yet to establish their own family life separate from their parents may constitute family life: see **Nasri v France 21 EHRR 458**. But this claimant has established her own family life in Ghana with her partner and their daughter and while her adult siblings in the United Kingdom have not yet done so, it is established by **Advic v United Kingdom (1995) 20 EHRR CD125** that the protection of Article 8 does not extend to links between adult siblings living apart for a long period where they were not dependent upon each other. There is no evidence of such dependence between these siblings or step-siblings. Finally it is well established that there must be more than the normal emotional ties between adult relatives for family life to exist for the purposes of Article 8 of the ECHR: **Kugathas v IAT [2003] EWCA Civ 31**"

18. At the beginning of paragraph [24] of **Mostafa** the Presidential panel said:

> "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."

19. The relationship between the UK sponsor and his parents in India does not come within the scope of what the Presidential panel envisaged as being "in practical terms" a relationship that was likely to engage Article 8(1) in the context of a family visit. This does not mean that refusal of entry clearance to the parents cannot come within the scope of Article 8(1), but in order to do there has to exist more than normal emotional ties between the UK sponsor and his parents.

20. The judge failed to identify in her reasoning any further elements of dependency involving more than normal emotional family ties between an adult child and his parents. Instead, the judge made an erroneous extrapolation from a finding made by Judge Prior when dismissing the claimants' previous appeal against a refusal of entry clearance for the purposes of settlement as adult dependent relatives.

21. At paragraph [13] of his decision, Judge Prior said:

> "I was further not satisfied that the birth of a child to the sponsor and his wife would significantly inhibit the couple, whether individually or otherwise, continuing the regular visits that are made to the appellants in India. I noted that the appellants have made no visit to the United Kingdom for two years and that the applications under appeal were made on 19 September 2012. I take the view that family life can be continued, as before, by the regular exchange of visits and, again as before, extended family visits by the appellants to the United Kingdom. I am not satisfied that Article 8 has been engaged by the refusal of the appellants' applications."

22. When dismissing the claimants' applications for permission to appeal to the Upper Tribunal against the decision of Judge Prior, Judge Astill observed as follows at paragraph [5] of his decision:

> "Whilst the judge did not make a clear finding that family life existed between the parties *he did find that family life could continue as before and in consequence that Article 8 was not engaged* (my emphasis). The grounds amount to nothing more than a disagreement with the findings of the judge, findings that were properly open to him on the evidence before him. They disclose no arguable error of law."

23. The upshot of the unsuccessful attempt to appeal against the decision of Judge Prior is that, on **Devaseelan** principles, the starting point for Judge Jones' assessment was that, as of 2013, the exclusion of the claimants from the UK for the purposes of family reunion did not have consequences of such gravity as to engage the operation of Article 8 ECHR.

24. Judge Prior's observation that family life could continue as before by the regular exchange of visits is not incompatible with the parallel finding that Article 8 was not engaged. It is apparent from the context that what Judge Prior is referring to is the continuation of family life which does not engage Article 8 as opposed to family life which does. So the judge was wrong to infer that because the parties had a family life maintained by visits, this constituted a family life between the sponsor and his parents such as to engage Article 8(1) ECHR. This conclusion runs contrary to Judge Prior's overarching findings, and is also not supported by the evidence that was placed before Judge Jones. It was not part of the case presented to Judge Jones that there were elements of dependency going beyond normal emotional ties between an adult child and his parents, and she made no finding to this effect.

25. Accordingly, following **Adjei**, the decision of the First-tier Tribunal is vitiated by a material error of law as the First-tier Tribunal has not given adequate reasons for finding that Article 8 is engaged at all.

The Remaking of the Decision

26. I gave Mr Claire the option of calling further evidence from the sponsor for the purposes of the remaking of the decision, and he took up this invitation. The sponsor adopted as his evidence-in-chief his witness statement in the claimants' bundle. He wished his parents to come to the United Kingdom to meet their grandchild, Jasjot, who had been born on 3 July 2014. It was traditional in Sikh culture that on the birth of a child, the family, and in particular the grandparents, bless the birth through several religious ceremonies, specifically the Godh Bharai, the Bidh and Akndh Paath. To date these religious celebrations had not been celebrated as a result of the Entry Clearance Officer's refusal decision. He was self-employed, and ran a successful Indian restaurant and events management company in Southampton. He had approximately £40,000 in savings. Since relocating to the United Kingdom, he had not had the opportunity to see his parents as much as he had hoped as a result of his work and family commitments here.

27. In answer to supplementary questions from Mr Claire, the sponsor confirmed that he had travelled to India with his daughter Jasmine, aged $5^1/_2$, in January 2015. He had gone there to see his parents, and he had stayed for two and a half weeks. He had not been accompanied by his wife, as she was not in the best of health, or by his son, on account of his age. He had had to take Jasmine out of school in order for her to accompany him on the trip, and the school had given him a warning that he could not do this in the future. It was not possible for the whole family to go out together as his events management company specialised in Indian weddings, and he was busiest during holiday seasons.

28. The sponsor was cross-examined by Mr Duffy, and he answered questions for clarification purposes from me. The sponsor said he had lived in the UK since August 2001. He used to go back every year to see his parents up to 2007, up to which point his father was working in New Delhi in a government post. Following his retirement, his parents moved to the holy city of Anandpura Sahib in Punjab Province, and this was a long car journey from New Delhi. It took eight and a half hours to travel by car from the airport to his parents.

29. His wife had suffered from post natal depression following the birth of their son, as she had done following the birth of their daughter. His mother had helped his wife with it last time, referring to the period following the birth of Jasmine. His wife is a bit better now. She is not 100% there, but she was getting there. She had not been prescribed with any antidepressant medication. Ladies from the temple were helping her.

30. He had started his business in 2007. He is now starting to employ managers to assist him in running his businesses. He could not go to India for long periods of time. When he was in India, he took and made calls on his mobile telephone relating to his businesses here. He was aged 21 when he first came to the UK. Prior to that, he had been living with his parents apart from spending three years between the age of 16 and 19 studying at a college which was four hours away.

31. In his closing submissions on behalf of the Entry Clearance Officer, Mr Duffy submitted that family life did not exist between the sponsor and his parents for the purposes of Article 8. He had been living away from his parents for the past fifteen years. The Entry Clearance Officer had reasonably refused the applications in the light of the claimants' previous immigration histories. It was not a case where the Rules were manifestly satisfied.

32. In reply, Mr Claire referred to a passage at paragraph [16] of **Mostafa**, where the Presidential panel held that the decision in **Shamin Box [2002] UKIAT 02212** is to be followed and the obligation imposed by Article 8 is to promote the family life of those affected by the decision. He submitted that the closeness of the family members was demonstrated by the frequency and length of the visits made by the parents to the sponsor in the UK from 2010 onwards. One of the reasons why the settlement appeal was dismissed was that the sponsor had told Judge Prior they did not actually want to settle in the United Kingdom, but just wanted to have the freedom to come and go (unconstrained by visit visa requirements).

Discussion and Findings on Remaking

33. As is alluded to in the Entry Clearance Manager's review, there is an inevitable tension between the position taken by the claimants in their application for settlement as dependent adult relatives and in their subsequent application for entry clearance as family visitors. It is apparent from the determination of Judge Prior that the case put forward to him was that the claimants had reached a point in their lives when they had become dependent on their son in the UK to be a carer for them on a day-to-day basis, on account of their age and infirmities. They could not look to their daughter in India to fulfil this role, as she lived four hours away in Jalanbhar, and in any event she had her own responsibilities to her husband, two children and her in-laws.

34. The claimants did not qualify for entry clearance under the Rules because they could not show that they were unable, even with the practical and financial help of the sponsor, to obtain the required level of care in India on account of it not being available and on account of there being no person in that country who could reasonably provide it. The fact that the claimants failed under the Rules, and also in an alternative claim under Article 8 ECHR, does not change the fact that their stated position as of November 2013 was that they were, "particularly dependent upon the sponsor and his wife for the necessary level of care that only those individuals could ensure that the [claimants] were provided with".

35. In their application for a visit visa, the claimants did not declare that there had been a change of circumstances since November 2013 whereby they no longer regarded themselves as being particularly dependent upon the sponsor and his wife. So it was reasonable for the Entry Clearance Officer and Entry Clearance Manager on the available information not to accept that the claimants were genuine visitors. Given that the claimants had spent more time in the UK than in India during the currency of their multiple two year visit visas, and their subsequent assertion that they needed

to reside in the UK on a permanent basis with the sponsor and his wife to achieve the necessary level of care that they required, their incentive to return to India on completion of a three month visit was objectively very weak.

36. In remaking the decision, I am not confined to the evidence that was before the Entry Clearance Officer and Entry Clearance Manager. I can take account of the evidence received by the First-tier Tribunal, and also the evidence received by me, insofar as it casts light upon the circumstances which truly appertained at the date of the refusal decision. I am prepared to accept, as Mr Claire and the sponsor invite me to do, that there was not a dependency relationship between the sponsor's parents and the sponsor as of November 2013, or as of the date of the decision to refuse them visit visas. I find that the claimants have at all material times been able to lead independent lives in their home city, and that they have not reached a stage in their lives where they are dependent on their son in the UK and his wife such that they can be said to enjoy family life with the sponsor and his wife for the purposes of Article 8 ECHR.

37. That is not the end of the matter, as the impact on the sponsor's private life rights must also be considered. It is much more convenient for the claimants to visit the sponsor and his family in the United Kingdom for two reasons. Firstly, they have no commitments in India which place any limit upon the amount of time that they can spend with the sponsor and his family in the UK. Conversely, the sponsor has a number of businesses to run in the UK, and so the frequency and duration of his visits to India are correspondingly highly restricted. Secondly, he prefers not to undertake visits to India during the school holidays, as this is when his events management business tends to be most active.

38. But there are not insurmountable obstacles to the sponsor visiting his parents in India from time to time, either on his own or with other members of his family. Both before and after the refusal decision it was open to the sponsor to arrange his affairs so as to be able to undertake family visits to his parents in India. It was also open to the sponsor to make arrangements for the Sikh ceremonies which he wishes to be performed for his son to be conducted in a city where his parents live, or in the city where his sister lives.

39. Accordingly, I answer questions 1 and 2 of the **Razgar** test in favour of the Entry Clearance Officer. I find that the interference consequential upon the refusal of entry clearance did not have consequences of such gravity as potentially to engage the operation of Article 8 ECHR.

40. In **Adjei**, Upper Tribunal Judge Southern held that if Article 8 was engaged, the Tribunal might need to look at the extent to which the claimant was said to have failed to meet the requirements of the Rules because that might inform the proportionality balancing exercise that followed. As I have found that Article 8 is not engaged, I do not propose to conduct a proportionality balancing exercise. However, by way of assistance to the claimants in any future visit visa application which they may choose to make, I draw attention to the fact that my finding that Article 8 is not

engaged is consistent with, and indeed supported by, the finding of the First-tier Tribunal that the requirements of paragraph (i) and (ii) of Rule 41 were in fact met at the date of decision. It is precisely because the claimants are not dependent on their UK sponsor, emotionally or otherwise, and that they do not want to settle in the UK (contrary to the position taken by way of appeal before Judge Prior), that Judge Jones could make a sustainable finding that the claimants were genuine visitors, who genuinely intended to return to India after completion of a three month visit to the United Kingdom for the purposes of meeting their grandson for the first time and attending various Sikh ceremonies to celebrate his birth.

41. Paragraph 2 of the head note in **Adjei** states as follows:

> "As compliance with paragraph 41 of HC 395 is not a ground of appeal to be decided by a Tribunal, any findings concerning that will carry little weight, especially if based upon arguments advanced only by the appellant. If the appellant were to make a fresh application for entry clearance the ECO will, if requested to do so, have regard to the assessment carried out by the judge but will not be bound by those findings to treat the appellant as a person who, at least at the date of the appeal hearing, met the requirements of paragraph 41."

42. While the Entry Clearance Officer will not be bound by the favourable findings of Judge Jones on compliance with the rules, he can be asked to take them into account.

Notice of Decision

The decision of the First-tier Tribunal allowing the claimants' appeals against the refusal of entry clearance as family visitors contained an error of law, and accordingly the decision is set aside and the following decision is substituted: these appeals on Article 8 grounds are dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson