



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: VA/03638/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3rd December 2015**

**Decision & Reasons Promulgated
On 6th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M B

~~{ANONYMITY DIRECTION NOT MADE}~~

Respondent

Representation:

For the Appellant: Mr S Kotas, Home Office Presenting Officer

For the Respondent: Mr D Bazini, Counsel instructed by Mustak Mahammed
Gulamrasul Basar

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a citizen of India, is a child who applied for entry clearance to visit the United Kingdom for two weeks. His application for entry clearance was refused by the Entry Clearance Officer on 28th May 2014 and an appeal against that decision was allowed by First-tier Tribunal

Judge Greasley in a determination dated 14th May 2015. The Secretary of State appeals with permission against that decision.

3. The Appellant's application for entry clearance was refused under paragraph 46A of the Immigration Rules on the basis that the Appellant had applied for a visa along with his grandmother but, as her application had been refused and she was no longer travelling to the UK, the Entry Clearance Officer (ECO) was not satisfied that suitable arrangements had been made for the Appellant's travel to and reception and care in the UK and was not satisfied that the Appellant met the requirements of paragraph 41 and 46A of the Immigration Rules.
4. The background to this appeal is that the Appellant was born on 26th November 2011 in the United Kingdom. His parents were in the United Kingdom on a temporary basis. After the birth of the child the Appellant's mother was diagnosed with advanced heart failure and was seriously ill. Due to his mother's illness the Appellant's parents decided to send the Appellant to India to be taken care of by his grandparents. An application was made for entry clearance so that the Appellant could come to the UK to visit his mother.
5. In considering this appeal the First-tier Tribunal Judge heard oral evidence from the Appellant's mother and father. The judge accepted the evidence put forward by both witnesses. The judge accepted that adequate maintenance and accommodation is available in the United Kingdom for the child and that there is a genuine reason for the visit. The judge accepted that the evidence from the Appellant's parents that they will ensure his return to India and accepted that he had received credible evidence from the parties. The judge accepted that there was credible medical evidence in relation to the mother's ongoing medical condition and treatment [12]. The judge also accepted that there was credible medical evidence that the mother has been unable to travel to India due to her medical coronary conditions and that the father has equally been unable to do so because his application for leave to remain in the UK had been with the Home Office [12].
6. The evidence before the judge was that when the Appellant applied for entry clearance the mother's application for leave to remain was pending with the Home Office along with that of her spouse but that circumstances had now changed and they both had leave to remain in the United Kingdom until June 2017. This meant that, although the Appellant's father had previously been unable to travel to India to bring their son to the UK and they had accordingly made alternative arrangements for the grandmother to travel with him, now that the Appellant's father had obtained leave to remain he could travel and intended to travel to India to bring the child back for a visit to see his parents. The judge accepted that evidence. The judge accepted that there was a genuine wish by the parents to see the Appellant, who is now 3 years old, and that they had last seen him when he was only 3 months old.

7. The judge went on to allow the appeal under paragraphs 41 and 46 of the Immigration Rules.

Error of Law

8. The Grounds of Appeal contend, and this was accepted by Mr Bazini on behalf of the Appellant, that the judge made a material misdirection of law in that, since the commencement of Section 52 of the Crime and Courts Act on 25th June 2013, the right of appeal for visitors coming to visit family members in the UK has been restricted to two grounds which are that the decision is unlawful on race relation grounds or is contrary to Section 6 of the Human Rights Act 1998.
9. It is clear from the judge's determination that the judge failed to appreciate that the Grounds of Appeal were limited in this case. The judge did not refer at all to the human rights Grounds of Appeal and made no decision in relation to that ground. The judge's decision therefore contains a material error of law and I set it aside.
10. There has been no challenge to the judge's findings of fact and I therefore preserve all of those findings. I proceed to remake the decision on the basis of the evidence before me and on the basis of those findings of fact.

Remaking the Decision

11. In terms of remaking the decision Mr Bazini relied on the cases of **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)** and **Kaur (visit appeals; Article 8) [2015] UKUT 00487 (IAC)**. He submitted that Article 8 is engaged in this case in that on the findings of the judge there is family life between the Appellant and his parents. He submitted that the Immigration Rules have been met and that this is a compelling case. The judge accepted that the Appellant's mother cannot fly. He accepted that the child would go back to India after the visit.
12. I have considered the guidance given by the Court of Appeal in **SS (Congo) [2015] EWCA Civ 387** confirming that the state has a wider margin of appreciation in determining the conditions to be satisfied in entry clearance cases compared to applications for leave to remain and that an appellant needs to show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a strong claim that compelling circumstances may exist to justify the grant of leave to enter outside the rules [40] [56].
13. I have considered the findings of fact made by the judge. I have considered the five steps set out in the decision of **R v SSHD ex parte Razgar [2004] UKHL 27**. I accept that the relationship between the Appellant and his parents constitute family life. I accept that the decision to refuse entry clearance is an interference with that family life. I take into account the circumstances and reasons why the Appellant is residing in

India apart from his parents and the Appellant's mother's medical condition. I bear in mind that the Appellant has now demonstrated that he can meet the requirements of the Immigration Rules as his father can now accompany him to the UK.

14. I also consider the factors set out in Section 117B of the Nationality, Immigration and Asylum Act 2002. The Appellant here is a young child and it is not necessarily appropriate to expect him to speak English however his parents are financially independent. The relationship has not been developed whilst the appellant or his parents were in the UK unlawfully.

15. I am satisfied that it is proportionate in all the circumstances of this case to allow the appeal under Article 8.

Notice of Decision

The decision of the First-tier Tribunal Judge contained a material error of law and I set that decision aside.

I remake the decision by allowing the appeal on human rights grounds.

~~No anonymity direction is made.~~

Signed

Date: 4th January 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because the Appellant's circumstances have changed since the date of the application.

Signed

Date: 4th January 2016

Deputy Upper Tribunal Judge Grimes