Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: VA/01586/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 29 April 2017	**On 03 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SARWAR KOUSAR
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy (Senior Presenting Officer)
For the Respondent: Mr P Saini

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 17 October 2016 allowing the appeal of Sarwar Kousar, a citizen of Pakistan, itself brought against the refusal of her application to visit her children in the UK, made on 20 February 2015.

2. The judge below summarised the evidence before her. The Appellant, who worked as a nurse, lived in Pakistan with her own mother following her divorce from her husband some years ago; the Appellant had three sons and a daughter in the UK: now they were aged respectively 23, 24, 26 and 27. She was in touch with three of the four. One son, M, had arrived here in March 2013. He was seriously disabled and his doctor had now prohibited him from further travel; he required round the clock care. A

treating doctor stated that he suffered from spastic quadriplegia and was wheelchair bound, and thus unfit to travel to Pakistan; his family reported that he was becoming distressed at his lack of contact with his mother. A Consultant had written that he showed some degree of unnecessary but it was difficult to interpret whether he was in any kind of discomfort.

3. The Judge accepted the historical facts underlying the claim, and then considered the viability of the appeal having regard to Article 8 of the ECHR, and the five stage test set out in *Razgar*. She did not believe that family life was established, because "There was no suggestion that [assistance and support] was now provided by the appellant or that there were emotional ties above and beyond those of a normal mother/son relationship … the relationship does form an important part of the Appellant's private life" with which the refusal of entry clearance interfered.

4. The First-tier Tribunal accepted that the Respondent satisfied the Immigration Rules for visitors, as there was evidence that she could be maintained and accommodated during any stay and that she was clearly a genuine visitor who would not overstay her leave given her connections in her country of origin. It directed itself that there had to be "sufficiently compelling circumstances" before a decision was identified as disproportionate. Applying that threshold, the decision was indeed disproportionate to the private life engaged, because M could not travel to Pakistan, and lacked capacity and understanding to properly appreciate contact by other means such as modern means of communication.

5. The Secretary of State lodged grounds of appeal against this decision, and the First-tier Tribunal granted permission to appeal on 15 March 2017 because the judge had arguably given insufficient reasons for her findings in the context of the elevated threshold required, particularly bearing in mind the fact that the authorities appeared not to recognise the possibility of entry clearance being granted pursuant to a pure private life claim.

6. Mr Duffy submitted that the First-tier Tribunal had essentially allowed the appeal on the basis of private life connections within the UK, given its clear statement that there was no emotional dependency between mother and son exceeding the norm: that was impermissible as it was generally understood that only Article 8 rights in the nature of family life could suffice. Mr Saini argued that there was an overlap between private and family life and that this was a compelling case given the disabled child's inability to travel to visit the mother.

Findings and reasons

7. I reserved my decision at the hearing before me and now provide my findings and reasons. This was an application and appeal pursued firmly outside the Immigration Rules. The First-tier Tribunal correctly identified the basis of its jurisdiction, there being a disjunction between the basis of visitor applications, which are primarily evaluated by the Entry Clearance Officer against the benchmark of the Immigration Rules, and the available grounds of appeal, which are limited to those under the

Human Rights Convention. As explained in *Kaur (visit appeals; Article 8)* [2015] UKUT 487 (IAC), evidence relating to the ability of an appellant to meet the requirements of the Rules must be relevant to the assessment of whether there is a violation of Article 8, there being no significant "gap" between the visitor rules and the requirements of Article 8 of the European Convention on Human Rights. The claimant's ability to satisfy the Immigration Rules is "capable of being a weighty, though not determinative factor when deciding whether such refusal is proportionate".

8. There are clearly unsatisfactory aspects to the decision below. The First-tier Tribunal at one point states that there is no family life in play between the disabled child and the Appellant because there is no emotional dependency exceeding the norm; however, elsewhere its reasoning, accepting as it does the fact that the disabled adult child M misses his mother and is unable to communicate with her other than via personal physical contact, would appear to represent the very epitome of a case where there is indeed family life between mother and adult child.

9. It is necessary to look at the leading authorities on the nature of family life between adults, and as to the overlap between private and family life. As stated in *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 00160:

> "62. The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment, rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). As Wall LJ explained, in the context of family life between adult siblings:
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> > "We do not think that *Advic* is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life it is sought to establish is that between adult siblings living together. In our judgment, the recognition in *Advic* that, whilst some generalisations are possible, each case is fact-sensitive places an obligation on both Adjudicators and the IAT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that Article 8 is or is not engaged in a given case." (*Senthuran v Secretary of State for the Home Department* [2004] EWCA Civ 950).""

10. Thus in *AA v United Kingdom* (Application no 8000/08; 20 September 2011) the European Court of Human Rights stated that:

> "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'."

11. And the President of this Chamber of the Upper Tribunal stated in *Lama* [2017] UKUT 16 (IAC):

> "32 …at its heart, family life denotes real or committed personal support between or among the persons concerned."

12. In *Nhundu & Chiwera* [2001] UKIAT 00613 §26 the Tribunal stated that

> "The Court views the private life concept as a broad one that includes not only the idea of an "inner circle" in which individuals may live their personal lives as they choose without interference from the state; it also covers the right to develop one`s own personality and to create and foster relationships with others: *Niemietz v Germany* (1993) 16 EHRR 97. In the context of immigration and asylum cases, the Court has come to view the right to respect for private and family life as a composite right. This approach requires the decision-maker to avoid restricting himself to looking at the circumstances of "family life" and to take into account also significant elements of the much wider sphere of "private life" …"

13. In *Nasim*, the Upper Tribunal revisited Lord Carnwath's formulation in *Patel* at 57 (ie that Article 8 is not a general dispensing power), invoking it in support of the proposition that Article 8 is of –

> " ….. limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra."

14. Rix LJ in *CH (Jamaica)* [2007] EWCA Civ 792

> "it is necessary to remind oneself, as the immigration judge apparently did not, how relatively high the bar is set in this context in terms of a finding of an unjustified interference in private life, for all that the concept of private life is a broad based continuum, described in Lester & Pannick, *Human Rights Law and Practice*, 2nd ed, 2004, at para 4.8.2 as "starting from an inviolable core of personal autonomy and radiating out…into personal and social friendships". Thus many of the essential notions of private life, such as bodily integrity, personal identity, sexual identity, and privacy, are not in focus in this context."

15. The conclusion to be drawn from these authorities is that the existence of family life between an adult child and parent is essentially a question of fact. It will doubtless be rare for family life to endure between mother and son when they have lived apart in recent years, but where a young person has lived with a parent relatively recently, and has subsequently become distressed at the lack of close personal contact with them, in circumstances where they are unable to meaningfully enjoy close human relations absent face-to-face physical contact, it is clearly possible to countenance the situation as one of enduring family life. Private life itself takes many forms, from close personal relationships that are akin to family life, to a person's own physical and moral integrity and to aspects of their personal identity. I have no doubt, given the circumstances of this case, that the First-tier Tribunal was right to treat the relationship between mother and son as central to the identity of both, and as effectively one where there was, in truth, emotional dependency between mother and son exceeding the norm.

16. In these circumstances I consider that the Secretary of State's attempt to categorise the decision as one permitting a form of Article 8 interest that is too remote from core family life to justify the grant of entry clearance to be misguided. The reality is that either the First-tier Tribunal treated the relationship as the very strongest form of private life that is akin to a family life interest; or it wrongly described its factual findings, themselves unimpeachable and indeed unchallenged, as constituting private rather than family life.

17. This is accordingly an appeal where the enjoinder in *Piglowska v Piglowski* [1999] 1 WLR 1360 (endorsed in the immigration context in *EA* [2017] EWCA Civ 10 §27) is relevant: "reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account … [an] appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself". I am confident that any infelicities of expression in the First-tier Tribunal's decision do not constitute a material error of law and I dismiss the appeal.

Decision:

The decision of the First-tier Tribunal did not contain a material error of law.
The appeal is dismissed

Signed: Date: 29 April 2017
Deputy Upper Tribunal Judge Symes