

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: VA/02534/2015**

**VA/02535/2015**

**THE IMMIGRATION ACTS**

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| **Heard at Liverpool** | **Decision & Reasons Promulgated** | |
| **On June 7, 2018** | **On June 12, 2018** | |
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**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**the ENTRY CLEARANCE OFFICER**

Appellant

**and**

**MS RABYA BEGUM**

**MISS ROSHIMA BEGUM**

(NO ANONYMITY DIRECTION made)

Respondents

**Representation:**

For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer

For the Respondent: Mr Hassan. Legal Representative

**DECISION AND REASONS**

1. I do not make an anonymity direction.
2. The respondent in these proceedings was the appellant before the First-tier Tribunal. From hereon I have referred to the parties as they were in the First-tier Tribunal so that, for example, reference to the respondent is a reference to the Entry Clearance Officer.
3. The appellants are Bangladeshi nationals and they lodged applications for entry clearance on March 8, 2015 in order to visit their son and brother respectively.
4. The respondent refused their applications on March 13, 2015 and the appellants appealed those decisions. Originally their appeals came before Judge of the First-tier Tribunal McIntosh on July 29, 2016. Their appeals were allowed and the respondent appealed those decisions and when the matter was re-considered by Deputy Upper Tribunal Judge Mahmoud on January 17, 2017 that decision was overturned. The Deputy Upper Tribunal Judge made clear that for the appellants to succeed they would have to put forward “further evidence in relation to matters which go to the required Kugathas standard”.
5. The appeal was relisted before Judge of the First-tier Tribunal Herbert OBE on July 25, 2017 and in a decision promulgated on August 21, 2017 he again allowed the appeals under article 8 ECHR.
6. The respondent appealed this decision on August 25, 2017 arguing firstly that the Judge had failed to adequately explain how the circumstances in this case amounted to “a dependency over and above normal emotional ties” and secondly, by failing to give adequate reasons to allow the appeal outside the Immigration Rules.
7. Permission to appeal was granted by Judge of the First-tier Tribunal Grant-Hutchinson on February 7, 2018 on the basis it was arguable the Judge had misdirected himself in failing to give adequate reasons as to how the circumstances in this particular case amounted to (a) a dependency over and above normal emotional ties and (b) compelling circumstances such as to invoke a consideration of article 8 outside the Immigration Rules.

**SUBMISSIONS**

1. Mr Diwnycz relied on the grounds of appeal and the grant of permission and submitted that established case law demonstrated that family life, within the meaning of article 8, would not normally exist between adult siblings, parents and adult children. Even if family life did exist then generally article 8 would not be engaged because the nature of the application was to enter the United Kingdom as a visitor for a temporary visit of limited duration and the requirements that need to be met to qualify under the Immigration Rules are necessary for legitimate aims and were proportionate. Whilst the Judge may have had regard to the decision of Pritam Kaur (Visit appeals; Article 8) [2015] UKUT 487 (IAC) he submitted the Judge had failed to adequately explain how the circumstances in this particular case amounted to a dependency over and above normal emotional ties. Mr Diwnycz further argued that the Judge had erroneously allowed the appeal on the basis that having satisfied himself the Immigration Rules were met he then used article 8 as a general dispensing power. The appellant had to show compelling circumstances such as to invoke a consideration under article 8 outside the Immigration Rules and there were no such compelling circumstances.
2. Mr Hassan opposed the application and invited me to uphold the Judge’s decision. The Judge had given reasons why he viewed the relationship of grandparent and children as important. There was support for his approach in the decision of Kaur and he invited the court to find that the Judge was entitled to conclude there was a “dependency over and above normal emotional ties” and that there were compelling circumstances enabling the appeal to be allowed under article 8 and outside the Immigration Rules.

**FINDINGS**

1. The matter came before me on the above-date. I pointed out to the parties the recent decision of [**Secretary of State for the Home Department v Onuorah [2017] EWCA Civ 1757**](http://www.bailii.org/ew/cases/EWCA/Civ/2017/1757.html)in which the Court of Appeal **unanimously held that short visits to the UK do not engage either family life or private life within the meaning of**[article 8](https://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/7)[ECHR](http://www.echr.coe.int/Documents/Convention_ENG.pdf)**. I also have had regard to** TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109**.**
2. Judge Herbert was tasked with dealing with a rehearing of an appeal against the respondent’s decision to refuse entry clearance for the purpose of a family visit on March 13, 2015. The first-named appellant wished to visit her son and his family whereas the second-named appellant wished to visit her brother and his family.
3. In refusing the applications the respondent was not satisfied that the appellants intended to leave the United Kingdom at the conclusion of their visit.
4. The Judge heard evidence that the first-named appellant relied on her son for some financial support and during their regular contact he ensured that she took her daily medication and ensured that she was well. He was unable to travel to Bangladesh on a regular basis because he was self-employed and was not paid whilst on vacation. The Judge noted that both appellants had previously visited the United Kingdom and had stayed with family. The Judge placed significant weight on the relationship between a grandparent and grandchild and observed that unless she was granted entry clearance she would be unable to have the connection she desired with her grandchildren.
5. The Judge concluded that the Immigration Rules were met and that the appellants had strong community ties in Bangladesh and that electronic means of communication were no substitute for grandparents and aunts with young children. The economic cost of taking a family to Bangladesh was far greater than the appellants visiting the United Kingdom.
6. It is clear from the findings of fact made that the Judge formed the view that the appellants’ entry clearance applications should have been allowed. The Judge said as much in paragraph 12 of his decision.
7. The challenge to the Judge’s decision is that the Judge failed to identify why article 8 was engaged. The mere fact they are related is insufficient and Mr Hassan relies on the decision of Kaur to support his argument that the Judge reached a finding that was open to him.
8. The Tribunal in Kaur stated-

“In visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. Whilst judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the Human Rights Act 1998 (or shows unlawful discrimination) (see Mostafa (Article 8 in entry clearance)[2015] UKUT 00112 (IAC**)** and Adjei (visit visas – Article 8)[2015] UKUT 0261 (IAC)), the starting-point for deciding that must be the state of the evidence about the appellant’s ability to meet the requirements of paragraph 41 of the immigration rules.

The restriction in visitor cases of grounds of appeal to human rights does not mean that judges are relieved of their ordinary duties of fact-finding or that they must approach these in a qualitatively different way. Where relevant to the Article 8 assessment, disputes as to the facts must be resolved by taking into account the evidence on both sides: see Adjei at [10] bearing in mind that the burden of proof rests on the appellant.

Unless an appellant can 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 LTE [Leave to Enter] outside the rules”: (see SS (Congo) [2015] EWCA Civ 387 at [40] and [56]) he or she is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals.”

1. In considering whether there has been an error in law I start from the position, outlined in Kaur, that the starting point is the appellants’ ability to meet the requirements of the Immigration Rules.
2. In the current appeals before me, Judge Herbert concluded that the Rules were met. Reliance is placed by Mr Hassan on what the Tribunal stated at paragraphs 38 and 39 of the Kaur decision.
3. Mr Hassan submitted that the Tribunal in Mostafa did not rule out human rights appeals in entry clearance applications for people other than married couples and argued that the Judge was entitled to find the relationship between the first-named appellant’s grandchildren and the first named appellant was sufficient to engage article 8 because she played a considerable part in their family life. He further argued, relying on Kaur, that ties between an elderly grandmother and her son/grandchildren could fall within the scope of article 8 ECHR.
4. Permission to appeal was given on the basis that the Judge had failed to explain how these circumstances amounted to “a dependency over and above normal emotional ties”.
5. The Judge appears to have fallen into the same trap that Judge Macintosh fell into namely he satisfied himself that the Rules were met and although he attempted to give reasons why their circumstances amounted to “a dependency over and above normal emotional ties” I am satisfied that when the decision is read as a whole there is very little, if anything, to support his conclusion.
6. Dealing with the first-named appellant’s case the Judge appears to have allowed the appeal because the first-named appellant’s son regularly speaks to her, provides financial support and it is not practical for him to visit his mother in Bangladesh. Those reasons do not amount to a dependency over and above normal emotional ties. They in fact would apply to any family who are separated because they live in different countries.
7. With regard to the second-named appellant there is even less evidence of dependency. The Judge’s decision fails to address her claim effectively tagging the granting of her appeal on the back of her mother’s case.
8. The Court of Appeal in [**Secretary of State for the Home Department v Onuorah [2017] EWCA Civ 1757**](http://www.bailii.org/ew/cases/EWCA/Civ/2017/1757.html)made clear at paragraph 35, “… the question whether there is "family life" for the purpose of Article 8 is a logically prior question and cannot depend on the purpose for which an application for entry clearance is made. Secondly, the shortness of the proposed visit is, if anything, an indication that the refusal of leave to enter did not involve any want of respect for the Respondent's family life for the purpose of Article 8.”
9. The Court of Appeal in Entry Clearance Officer and Kopoi [2017] EWCA 1511 made clear at paragraph 30 “… the shortness of the proposed visit in the present case is a yet further indication that the refusal of leave to enter did not involve any want of respect for anyone's family life for the purposes of Article 8. A three-week visit would not involve a significant contribution to "family life" in the sense in which that term is used in Article 8. Of course, it would often be nice for family members to meet up and visit in this way. But a short visit of this kind will not establish a relationship between any of the individuals concerned of support going beyond normal emotional ties, even if there were a positive obligation under Article 8 (which there is not) to allow a person to enter the UK to try to develop a "family life" which does not currently exist.”
10. In other words, the Judge erred by erroneously finding article 8(1) was engaged. The Court of Appeal has made clear that family life does not depend on the purpose of the visit and because of the nature of the respective relationships there had to be a dependency over and above normal emotional ties and although the Judge suggested there were I find his approach erroneous in both instances.
11. Even if article 8(1) had been demonstrated the appellant still had to demonstrate compelling evidence in light of the recent decision of TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 in which the Court of Appeal confirmed the Secretary of State is entitled to apply a test within the Rules and a test of exceptional circumstances as described outside the Rules. This had not been demonstrated in this appeal.
12. I indicated to the representatives that in the event I found an error in law that I would proceed to remake the decision based on the evidence before me as this was not a case that should be returned back to the First-tier Tribunal as this had already happened hence the second round of appeals. Both representatives agreed with this approach.

**DECISION**

1. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision and I dismiss the appeals.

Signed Date 07/06/2018



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT**

**FEE AWARD**

I do not make a fee award because I have dismissed the appeals.

Signed Date 07/06/2018



Deputy Upper Tribunal Judge Alis