Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16980/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 February 2015	**On 16 March 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Entry Clearance Officer - Islamabad

Appellant

and

Sadia Kiran
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr G Lee, instructed by Deanmason LLP Solicitors
For the appellant: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Entry Clearance Officer against the determination of First-tier Tribunal Judge Kempton promulgated 14.11.14, allowing on Article 8 grounds the claimant's appeal against the decision of the Entry Clearance Officer, dated 30.8.13, to refuse entry clearance to the United Kingdom for family reunion as the daughter of a refugee, pursuant to paragraph 352D of the Immigration Rules. The Judge heard the appeal on 29.10.14.

2. First-tier Tribunal Judge Cox granted permission to appeal on 8.1.15.

3. Thus the matter came before me on 16.2.15 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Kempton should be set aside.

5. The grounds of application for permission to appeal submit that the decision of the First-tier Tribunal was flawed by: the giving of weight to immaterial matters (in two instances); failing properly to apply relevant case law; misdirection in law; and in failing to provide adequate reasons for material findings.

6. In granting permission to appeal, Judge Cox granted permission on all grounds but specifically found that it was arguable that the First-tier Tribunal Judge materially misdirected himself in law by failing to consider the Immigration Rules relating to Article 8 claims before going on to make an Article 8 assessment outside the Rules. Judge Cox also found that the judge arguably failed to adequately explain why the several factors identified in the claimant's favour outweighed the legitimate public interest in removal. Further, the finding at §16 to the effect that in the past year the claimant's "symptoms have worsened and now require intervention," is not supported by the preceding discussion of the medical evidence from §15. It is clear from §19 that very significant weight was attached to the purported worsening of the claimant's medical condition.

7. I find that the determination is flawed in some, but not all, of the respects asserted in the grounds of appeal, directly affecting the validity of the Article 8 assessment. The only part of the decision that can stand is the finding at §18 that the claimant does not meet the requirements of paragraph 352D for entry clearance to join a parent with refugee status. That part of the decision has not been appealed and Mr Lee accepted that the claimant could not succeed under the family reunion provisions.

8. First and most significantly, I note that from §18 onwards Judge Kempton proceeded to consider the Article 8 ECHR claim following the Razgar steps, but omitted to consider that part of the Immigration Rules which specifically addresses family life claims. The judge properly considered paragraph 352D and recognised that the Entry Clearance Officer's reliance on 352A was incorrect. However, the judge failed to consider whether the claimant could meet the provisions of Appendix FM, such section EC-DR, entry clearance as an adult dependant relative. That failure invalidates the subsequent Article 8 assessment, since it is only necessary to consider the claim outside the Rules if the Rules are not met. As stated in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), "*The Immigration Rules are the important first stage and the focus of Article 8 assessments. Indeed it will be an error of law not to address Article 8 by reference to the Rules*," reliance being placed on Halleemudeen v SSHD [2014] EWCA Civ 558.

9. In considering this issue, Mr Lee submitted that the judge had effectively considered the Rules by the assessment of paragraph 352D. I do not accept that argument. The

purpose of Appendix FM, as explained in GEN1.1 is to set out "the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK," etc.

10. Whilst the claimant has a heart problem and requires a pacemaker, she has no entitlement to free medical treatment in the UK. Whilst the quality of medical services available to her in Pakistan may be inferior to those of the UK, appropriate treatment is nevertheless available. Her father admitted in evidence that there was nothing to prevent him going back to be with her during medical treatment. Whilst medical circumstances may be relevant in the round with other evidence in an Article 8 assessment, it would have been relevant to clarify in a balanced proportionality decision whether the medical conditions were sufficient to meet the requirements for an adult dependant relative, which is the level the Secretary of State considers as the threshold level of care needed to overcome the public interest in the balance between the private and family life rights of an adult relative and that public interest in immigration control.

11. One of the difficulties with the decision of the First-tier Tribunal is that the judge appears to have forgotten that this is an out of country case and therefore that the relevant circumstances to be considered, whether under the Rules or Article 8 outside the Rules, are those prevailing at the date of decision, 30.8.13, and not those at the date of hearing. I note from the careful handwritten record of proceedings that the oral evidence did not address this important distinction. I also note that even at the date of application the claimant was already 19 years of age, an important factor to have been taken into consideration.

12. In that light, I agree with the complaint in the grounds of reliance on alleged worsening in the claimant's symptoms over the 'past year.' Further, it is difficult to decipher from the decision what evidence was relied on. However, Mr Lee was able to point me to the medical examination at A39 dated 19.10.14, suggesting, apparently, that the claimant needed a pacemaker. I also note from the oral evidence that the claimant had decided not to proceed with a pacemaker. Her letter states that she is fine but lonely. If the evidence does amount to a worsening of symptoms, it was not directly relevant to the circumstances prevailing at the date of decision. Whilst the present circumstances may be compassionate, engendering sympathy, it is difficult to understand why the judge placed such reliance on this issue in the Article 8 assessment, as is clear she did from §9 of the decision, and how it demonstrates a disproportionate interference with family life.

13. The grounds assert that the judge placed significant reliance on or given weight to immaterial matters. There are a number of allegedly unwarranted and unjustified assertions and assumptions in the decision, unsupported by evidence or cogent reasoning. For example, at §13 the judge finds it reasonable to assume that the claimant has a genuine fear of being found to be a daughter of her mother, and that she is from an Ahmadi family. The First-tier Tribunal decision purports to rely on

judicial knowledge but does not justify the finding that family members of Ahmadis are per se subject to persecution. The claimant did not assert that she was in fear or at risk, or if she did it is not recorded in the decision. Her statement at A11 expresses the belief that she would be killed or kidnapped, and that she was vulnerable, a theme reflected in the witness statement of the parents. Mr Jarvis submitted that it borders on speculation for the judge to 'assume' that the claimant has a genuine fear, especially since fear must be a subjective experience. On the whole, however, I am satisfied it was reasonable for the judge to equate the evidence to a fear on the part of the claimant.

14. Similarly, at §17 it is asserted that the judge makes assumptions unsupported by evidence and for which cogent reasoning is said to be absent. The judge assumes that as the eldest child of her parents and the only daughter amongst three siblings, the claimant must have a particular bond with her mother. As the grounds assert, the judge "may have imported personal and cultural expectations of family relationships into the appellant's personal circumstances." Whilst it is of marginal importance in the overall assessment, I do agree that the judge appears to have preferred her personal opinion over specific evidence.

15. At §18 of the decision the judge cited Kugathas and the well-know dicta that without evidence of further elements of dependency involving more than the normal emotional ties, relationships between adult family members is not within family life protected by Article 8 ECHR. But the judge went on to say, without evidential foundation, that the claimant has ties with minor brothers "who will wish to be re-united with their sister," and at §20 "This appellant ought to be with her parents and her siblings who are also deprived of their right to family life by her continued exclusion from the UK." These comments and discussion assume that the claimant continues to have family life with her parents and siblings, but does identify what evidence demonstrates more than the normal emotional times and does not take any adequate account of the fact that the claimant has been living apart from the family since before they left for the UK. The evidence was that she had been at college studying for a degree since 2011 and resided term-time since the commencement of those studies in a student hostel and went to her aunt's during holidays. The witness statements do not help me distinguish the period of time up to the date of decision and from when the claimant was living away from home. In examining the handwritten record of proceedings I can see that her father claimed that she had lived with him during the year before he and his son came to the UK in 2013. However, on cross-examination it was made clear that it was during one school holiday when the hostel was closed and the claimant did not want to go to her aunt's, as she usually did, some 45Km away. I do not accept the submission made by Mr Lee at the outset that the judge's finding at §19 that she had never lived apart from her parents until her mother had to flee Pakistan can be justified on the evidence as being accurate or open to the judge to make. It is clear that she left home to study at college and apparently did not return to the family home until after her mother had left Pakistan and the length of her stay with her father on that one occasion is not entirely clear.

16. This does not necessarily mean that there can be no extant family life between the claimant and her family members in the UK; each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). It has been recognised that family life may continue between parent and child even after the child has attained his majority: see Etti-Adegbola v Secretary of State for the Home Department [2009] EWCA Civ 1319. However, it should be remembered that there is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors, including identifying who are the near relatives of the claimant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life. It appears to me that the judge has made a presumption of family life without identifying those factors which justify such a conclusion. I find that the judge has failed to identify or reference the evidence and provide rational reasons for concluding that family life continued sufficient to engage the protection of Article 8 in a person who was an adult before the date of application in 2013.

17. There appears to be no valid reason for the judge to recite section E-ILRDR in the decision.

18. I also note that whilst the judge set out section 117B, she failed in the proportionality balancing exercise between on the one hand the rights of the claimant and her family members and on the other the legitimate and necessary public interest in protecting the economic well-being of the UK through immigration control, to take into account that immigration control is in the public interest and that it appears that the claimant neither speaks English nor is financially independent, both of which considerations are specifically directed at those who seek to enter (or remain in) the UK. The decision fails to factor in any direct reference to section 117B other than to set it out in full before embarking on the reasons for the decision. The Tribunal is required to have regard to these public interest considerations in the proportionality balancing exercise.

19. In the circumstances, taken as a whole, I find that the Article 8 assessment, sympathetic as it is to the claimant's circumstances, comes dangerously close to the supplanting of a fact-based and reasoned analysis with a subjective assessment. It may be that there lies within parts of the oral or documentary evidence facts which supported the conclusions drawn, but it is difficult to determine that from the decision itself. It is not necessary for the judge to set out or recite all the evidence relied on, but it must be clear on what factual basis the judge has reached the conclusions drawn. As a whole, I find the Article 8 assessment cannot withstand scrutiny and is flawed so that it amounts to an error of law requiring the decision to be set aside and remade.

20. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal.

The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the findings are unsupported and inadequately justified on crucial issues at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal vitiates the findings of fact and the conclusions from those facts, so that there has not been a valid determination of the issues in the appeal.

21. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the Secretary of State of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusion & Decision:

22. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision to the First-tier Tribunal to be remade afresh.

Signed: Date: 16 February 2015

Deputy Upper Tribunal Judge Pickup

Consequential Directions

23. The appeal is to be reheard in the First-tier Tribunal for a de novo hearing with no findings preserved;

24. The appeal should be listed at Hatton Cross, with a time estimate of 2 hours;

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed: Date: 16 February 2015

Deputy Upper Tribunal Judge Pickup