Upper Tribunal
(Immigration and Asylum Chamber)

Abbasi and another (visits – bereavement – Article 8) [2015] UKUT 463 (IAC)

THE IMMIGRATION ACTS

Heard at Eagle Building, Glasgow
On 29 May 2015

Determination Promulgated

Before

Mr Justice McCloskey, President
Deputy Upper Tribunal Judge Doyle

Between

ANEEQ MAHMOOD ABBASI
ASHAN MAHMOOD ABBASI

Appellants

and

ENTRY CLEARANCE OFFICER OF KARACHI

Respondent

Representation:

Appellants: Mr G Singh of Ethnic Minorities Law Centre
Respondent: Ms C Johnstone, Senior Office Presenting Officer

1. *The refusal of a visa to foreign nationals seeking to enter the United Kingdom for a finite period for the purpose of mourning with family members the recent death of a close relative and visiting the grave of the deceased is capable of constituting a disproportionate interference with the rights of the persons concerned under Article 8 ECHR.*

2. *The question of whether Article 8 applies and, if so, is breached will depend upon the fact sensitive context of the particular case.*

3. *The Tribunal should adopt a structured and sequential approach to the Article 8 issues.*

DECISION AND REASONS

1. The factual matrix of this appeal is uncontroversial. The Appellants are brothers, both nationals of Pakistan, aged 29 and 21 years respectively. They applied to the Entry Clearance Officer of Karachi (the "*ECO*") for a visa to enter the United Kingdom and remain for a period of 4 weeks. In their applications they represented that the purpose of their travel was to visit their grandfather's grave and mourn with family members. Their applications were refused by the ECO, whose core reason for thus deciding was expressed as follows:

> "*… I am not satisfied that you have accurately presented your circumstances or intentions in wishing to enter the UK. This means that I am not satisfied that only a short visit is intended or that you will leave the UK at the end of the period stated.*"

This was followed by a reference to paragraph 42(i) and (ii) of the Immigration Rules. The Appellants' mother made a similar application which was also refused but was granted upon review by the Entry Clearance Manager. As a result, her appeal to the First-tier Tribunal ("the *FtT*") was not pursued.

2. The appeal to the FtT was based on the Appellants' contention that the decisions of the ECO were incompatible with their rights under Article 8 ECHR. The Judge noted that the ECO's decisions were made on 21 November 2013. The Appellants' grandfather had died on 28 September 2013 and their applications for entry clearance were made, tellingly, on 02 October 2013. Their grandfather had been terminally ill. The Judge rehearsed the uncontentous facts that the grandfather had wished to see his daughter and grandchildren before dying and that they had entertained the aspiration, unfulfilled, of doing so. The Appellants' mother has two, or three, brothers who are settled in the United Kingdom. Reunification of all family members for the purpose of mourning was sought. The core of the FtT's reasoning in dismissing the appeals is found in the following passage:

> "*It is understandable that the Appellants may wish to visit family members in the UK during a period of mourning for their grandfather but not being able to do so does not amount to a breach of right to family life under Article 8. The Appellants' close family members, including their parents, are in Pakistan. The Appellants' established family life is in Pakistan. They have family members who have chosen to settle in the UK including three uncles but the Appellants have not had and do not have an established family life in the UK ……..*
>
> *There has not been any evidence to demonstrate that the Appellants and their family members cannot maintain family ties as before or that family members in the UK cannot visit them in Pakistan.*"

3. The issue of law raised in this appeal is illuminated by several decisions of the European Court of Human Rights ("*ECtHR*"). In Znamenskaya v Russia (Application no. 77785/01), the issue was whether a mother could assert a right under Article 8 to change the family name on the tombstone of her still born child.

She asserted a failure by the domestic authorities to discharge their positive obligation to ensure effective respect for her private and family life, invoking the principle that "….*biological and social reality prevail over a legal presumption which ……. flies in the face of both established facts and the wishes of those concerned without actually benefiting anyone*" [Kroon v The Netherlands, Series A Number 297-C, at 40]. The ECtHR held that the application was admissible.

4. In Dodsbo v Sweden [2007] 45 EHRR 22, the ECtHR assumed, without deciding, that a refusal to authorise the transfer of the urn containing the Applicant's husband's ashes from one graveyard to another interfered with her rights under Article 8(1). By a majority of 5 to 3 it was held that the reasons proffered by the Swedish authorities for their decision were relevant and sufficient and that the interference was not disproportionate in consequence, giving determinative weight in the balancing exercise to the principle of the sanctity of graves.

5. In Yildirim v Turkey (Application no. 25327/02) the Court accepted that Article 8 was engaged in circumstances where a mother complained that the hospital authorities had refused her permission to take the corpse of her still born child for religious and burial purposes. The complaint was declared inadmissible on a factual basis, the Court noting the absence of any convincing evidence to counter the Government's claim that the Applicant and her husband had not claimed the baby's body and were well aware that, in such circumstances, the authorities would proceed with the burial.

6. The decisions summarised above illustrate the versatility of Article 8 ECHR, together with the difficulty of drawing a clear boundary between its private and family life dimensions in certain factual contexts. While each belongs to its discrete factual context, these decisions nonetheless illustrate that matters relating to death, burial, mourning and associated rites have been held to fall within the ambit of Article 8. Three further decisions of the ECHtR have a factual matrix closely comparable to that of the present appeals.

7. The first is Sargsyan v Azerbaijan [2011] ECHR 2337, where the Applicant, who had been forcibly displaced from his home during Government military activities, complained that a failure to facilitate his proposed visit to cemeteries for the purpose of visiting and maintaining the graves of deceased relatives infringed his rights under Article 8. He contended that he had sufficient and continuous links and/or concrete and persisting links with the location concerned. The Grand Chamber held that his complaint was admissible.

8. In Kochieva v Sweden [2012] ECHR 549 a mother and three children were in the process of appealing against asylum refusal decisions when one of the children was killed in a road accident and buried in Sweden. One of the contentions which they advanced was that their expulsion from Sweden would make it impossible for them to visit the child's grave there, in contravention of their rights under Article 8. In declaring their complaint manifestly ill founded, the ECtHR reasoned, *inter alia*, that the Applicants would be at liberty to apply for visits to visit Sweden for the purpose concerned.

9. Finally, in Sabanchiyeva v Russia [2014] 58 EHRR 14 the Applicants, invoking Article 8 ECHR, complained about a refusal to return to them the bodies of certain relatives who had died in an attack on military agencies. The Court, having reviewed some of its earlier decisions, including that in Dodsbo, reiterated that the concepts of private life and family life are broad, not susceptible to exhaustive definition. It held that the complaints fell within the ambit of Article 8 and that, in 18 of the 19 cases, an interference was established. Having found that the interference was in accordance with the law and that it had a legitimate aim, namely the suppression of terrorist propaganda and the avoidance of inter- ethnic and religious tension, it turned to examine the question of proportionality. The court said the following, at [138]:

> "*Turning to the circumstances of the present case, the Court notes that …….. the Applicants were deprived of an opportunity, otherwise guaranteed to the close relatives of any deceased person in Russia, to organise and take part in the burial of the body of a deceased family member and also to ascertain the location of the grave site and to visit it subsequently. The Court finds that the interference with the Applicants' Article 8 rights resulting from the said measure was particularly severe in that it completely precluded them from any participation in the relevant funeral ceremonies and involved a ban on the disclosure of the location of the grave, thus permanently cutting the links between the Applicants and the location of the deceased's remains ……*"

The Court held that there had been a violation of Article 8 ECHR. Notably, it so decided without making any distinction between the private life and family life dimensions.

10. There is an interesting interplay between the decisions in Dodsbo and Sabanchiyeva (*supra*) and English ecclesiastical law which, in effect, operates a presumption against exhumation: see Re Christ Church, Alsager [1999] 1 ALL ER 117 and Re Blagdon Cemetery [2002] Fam. 299 regarding the exceptional nature of the grant of the faculty of exhumation. It is also noteworthy that the tendency in the English Consistory Court decisions has been to invoke Article 9 ECHR which, broadly, protects religious freedom, rather than Article 8: see, for example, Re Durrington Cemetery [2001] Fam 33, followed by Re Crawley Green Road Cemetery, Luton [2001] Fam 308, where the Chancellor decided that a refusal to grant a faculty for exhumation of the remains of the deceased would infringe the Article 9 rights of the petitioner, widow of the deceased. It is striking that Article 9 has not featured in the Strasbourg stream of authority to date.

11. As the decided cases of the ECtHR make clear, the FtT's decision that the Appellants' appeals did not fall within the ambit of Article 8 ECHR is unsustainable. The Judge's error was driven by an impermissibly narrow approach to the scope of Article 8 protection and a concentration on the Appellants' family life in Pakistan, to the exclusion of both their family ties in the United Kingdom and the central purpose of their proposed visit. The essence of the error was a failure to recognise that the particular aspect of private and family life invoked by the Appellants was capable of being encompassed by Article 8 ECHR. The protection, or benefit, which they were asserting had the potential of being protected by Article 8 ECHR. The first question for the Judge should have been whether, having regard to all relevant facts and circumstances, it was. The Judge's error was committed at this preliminary stage. It

consisted of a failure to recognise that the Appellants were asserting a discrete facet of family and private life which Article 8 is capable of protecting. In consequence of this error of law the Judge did not proceed to consider any of the succeeding stages of the exercise, namely interference, legitimate aim and proportionality.

12. The analysis in [11] above highlights the need for a structured, sequential approach in cases of this kind and in Article 8 cases generally: see Razgar v SSHD [2004] UKHL 27, at [17]. The first question for the tribunal is whether the benefit, or facility which the Secretary of State is requested to confer - in this case, an entry visa for the specific and time limited purpose advanced - is protected by Article 8. If this yields an affirmative answer, the second question is whether the impugned decision interferes with the claimant's right to respect to private and/or family life. If this question also is answered affirmatively, the enquiry then shifts to the territory of Article 8(2), raising the third question, namely whether any of the specified legitimate aims is engaged. If this produces a negative answer a breach of Article 8 is thereby established. On the other hand, if a legitimate aim is identified, the fourth, and final, question to be addressed is whether the interference is a proportionate means of promoting the aim in question. It is in this context and at this stage that issues relating to the extent and impact of the interference will be considered in the balancing exercise.

The FtT's Decision Re-made

13. As we have highlighted above, the factual matrix is uncontentious. We consider that we are well equipped to re-make the decision. We do so via the following analysis. First, applying the Strasbourg jurisprudence to the factual matrix we consider that the benefit, or facility, which the Appellants are seeking of the Secretary of State constitutes a matter of private and family life protected by Article 8 (1) ECHR. Second, the decisions of the ECO plainly interfere with the family and private life rights of the Appellants and other family members. In this context, we consider it appropriate to take into account the several members of the family unit affected by the ECO's decisions.

14. We turn to consider legitimate aim. The impugned decisions of the ECO do not invoke any legitimate aim. However, we recognise that the public interest in the maintenance of firm immigration control is engaged and we acknowledge that this has statutory endorsement by virtue of section 117B(1) of the Nationality, Immigration and Asylum Act 2002. As regards the other provisions of section 117B, the ECO expressed his satisfaction that the Appellants' uncle would be able to provide them with maintenance and accommodation during their visit. Thus the public interest expressed in section 117B(3) does not arise. The only negative aspect of the impugned decisions was the doubt expressed by the ECO about the Appellants' father's intention and capacity to finance the travel of the Appellants and their mother to the United Kingdom and back. This consideration was not advanced with any force in argument before us. None of the other section 117B considerations arises.

15. Given that the public interest in the maintenance of firm immigration control is engaged, the fourth, and final, question to be addressed is that of proportionality.

This invites consideration of, firstly, the extent and impact of the interference with the private and family life rights of the Appellants and other family members occasioned by the ECOs refusal decisions. We consider that the interference is substantial and profound, given that there is no other way in which the avowed purpose of visiting the grandfather's grave and grieving with family members can be achieved and the plans and intentions of the Appellants have been thwarted outright. We further consider that what is proposed by the Appellants, in conjunction with the others concerned, both immediate and distant relatives, is a matter of substantial importance to them, arising out of their cultural and religious convictions. This is illustrated by, *inter alia,* the speed with which they submitted their applications to the ECO following their grandfather's death. The visitation and maintenance of the graves of family members and the act of grieving with others, whether ritualistic or otherwise, is an intrinsic feature of civilised society throughout the world.

16. We further take into account that the proposed sojourn of the Appellants in the United Kingdom will be for a modest and finite period. The final factor to be considered is that what they are proposing viz visiting their grandfather's grave and grieving with other family members cannot be achieved in any other way and has no discernible substitute. On these facts and given these considerations, the public interest in maintaining firm immigration control is, in our judgment, less potent than in other contexts. Balancing this public interest with the various facts and considerations highlighted above, we conclude that the impugned decisions represent a disproportionate interference with the right to respect for both private and family life enjoyed by the Appellants and the other family members and relatives concerned.

17. It follows that a breach of Article 8 ECHR is established. We add the final observation that cases of this kind will inevitably be fact sensitive.

DECISION

18. Giving effect to the above findings and conclusions:

    (i) We set aside the decision of the FtT.

    (ii) We re-make such decision by allowing the Appellants' appeals.

    (iii) It will now be incumbent on the ECO to make a fresh decision in each case, guided by and giving effect to this judgment.

Signed

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 29 JULY 2015