Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/06723/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 February 2016	**On 9 March 2016**

Before

DEPUTY JUDGE DRABU CBE

Between

[A E]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Sirikanda, Solicitor
For the Respondent: Mr I Jarvis, Senior Presenting Officer.

DECISION AND REASONS

1. The appellant, a 56-year-old a citizen of Turkey was refused a visit visa for the purpose of making a 9-day family visit to see her son, her daughter, her sister and two brothers, all of whom are British citizens or are resident in the UK. The decision to refuse her visa was made on 25 September 2014. Her appeal against the decision was heard at Hatton Cross by Judge David Taylor, a Judge of the First–tier Tribunal. He heard oral evidence from the sponsor – the appellant's son named [IA] and her brother [KE]. With regard to the evidence of the sponsor and the appellant's brother the Judge in paragraph 8 of his determination said, "I find firstly that I can accept the evidence of the sponsor and his uncle. I

had no reason to doubt the truth of anything that they told me." He then went on to conclude that family life between the sponsor and her other relatives that she wished to visit does not exist and the consequences of denial of visit visa to her are not of such gravity as to engage Article 8 of the ECHR.

2. In concluding that family life between the sponsor and other relatives of the appellant does not exist, the Judge first found that there is no dependency by the one of them on the other. In paragraph 10 of his determination the Judge said, "They are adult family members who simply would like to be able to visit each other. I bear in mind the Court of Appeal decision in *Kugathas [2003] EWCA Civ 31* which held that, as between adults, for the purposes of Article 8, there must be more than the normal close emotional and other ties that exist between family members." Judge David Taylor said in penultimate paragraph of his determination, "I bear in mind that the appellant's brother and possibly her daughter have refugee status and are unable to visit her in Turkey but there is nothing to prevent them from all meeting in a safe third country if so minded."

3. The appellants were granted permission to appeal to the Upper Tribunal on 20 January 2016 by Judge Zucker, a Designated First tier Tribunal Judge. In granting permission Judge Zucker said, "The grounds submit that the Judge's approach to article 8 ECHR was flawed. In the light of the guidance in the case of *Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)* it is arguable that the Judge erred."

4. I received submissions from Ms Sirikanda and Mr Jarvis at the hearing before me. My attention was drawn to the relevant authorities by both advocates but the main focus was placed on the **Kugathas** decision and the guidance set out in **Mostafa** by the Upper Tribunal Presidential panel. Ms Sirikanda argued that in family visit cases it was necessary to make findings on requirements under immigration rules as in the proportionality assessment made for the purposes of determining the appeal under Article 8, the extent to which an applicant met the requirements of the Rules was a relevant though not a determinative factor. She submitted that there had been a singular failure on the part of Judge David Taylor to engage with evidence relating to the intention of the appellant, her financial ability, accommodation etc. as provided for in Rule 41 of the Immigration Rules applicable to visitors. This failure in itself was a material error of law as the respondent himself had made adverse findings / observations / comments in relation to fulfilment of requirements under the Rules. She also argued that the principle set out in **Kugathas** and applied by the Judge in this case was a misdirection as the *dicta* in **Kugathas** had very limited relevance to the facts of this case as some of the relatives that the appellant wished to visit are refugees and hence incapable of going to see the appellant in Turkey. She contended that the jurisprudence that followed the decision in **Kugathas** had mitigated the harshness of the *dicta* in **Kugathas** especially in cases where people were seeking entry for temporary purposes such as visits. In support of this submission she relied on the Presidential Panel decision in **Mostafa** and also the decision of the

Grand Chamber in the case of **Khoroshenko v Russia** – a judgement delivered in Strasbourg on 30 June 2015 as well as that of the Upper Tribunal in **Kaur (visit appeals; Article 8) [2015] UKUT 487**. She asked that the decision of Judge David Taylor be set aside as being in material error of law for his misconceived view of **Kugathas** decision and his failure to make material findings of fact. She asked that the appeal be directed to be heard afresh by the First Tier Tribunal as the appellant had so far not had a fair hearing.

5. Mr Jarvis in his submissions reminded me that he had personal connection with the case of **Mostafa** as he had represented the respondent in that appeal too. Mr Jarvis argued that the decision of the First Tier Tribunal was not in material error of law. The Judge had correctly and properly dismissed the appeal based upon his reliance on the *dicta* in **Kugathas**. He submitted that the decision in **Adjei [2015 UKUT 0261 (IAC)** made by the Upper Tribunal Judge Southern should be followed and preferred to the guidance given in **Mostafa**. He drew my particular attention to paragraphs 8, 9 and 15 of the determination. Mr Jarvis also relied on the decision of the Court of Appeal in **Singh & Another v The Secretary of State for the Home Department [2015] EWCA Civ 630**. He argued that the decision in the case of **Khorashenko** had no relevance to the facts of the case before me. He submitted that as the determination of Judge David Taylor was not in material error of law, it should not be disturbed.

6. I have given careful consideration to all the relevant documents, the oral submissions made before me and the case law relied upon by the parties. On first sight the case law tendered by the parties appear to be in conflict but a closer analysis makes the position clearer. Whilst a family visit appeal cannot be allowed under the Immigration Rules (**Mostafa**, **Adjei** and **Kaur**) that does not mean that the First Tier Tribunal is absolved from its responsibility to make findings on facts relevant under the immigration rules (paragraph 41). As was said in the decision in **Kaur (visit appeals; Article 8) [2015] UKUT 487 (IAC)** "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 visa-Article 8) [2015] UKUT 0261(IAC)*), the starting –point for deciding that must be the state of evidence about the appellant's ability to meet the requirements the requirements of paragraph 41 of the immigration rules." I respectfully follow that *dicta* and prefer it to the apparently contrary view of the Tribunal in **Adjei**. Facts that are relevant to the claim to seek entry to the United Kingdom have to be engaged with and clear findings made thereon before the law on Article 8 is brought into the fray. Of course Article 8 engagement requires a finding on family and private life but the making of that finding has to take account of all the relevant facts which may or may not have a bearing, determinative or otherwise, on the engagement of Article 8 of the ECHR. In the appeal before me Judge David Taylor heard oral evidence from the sponsor and the appellant's brother

and said, “I had no reason to doubt the truth of anything that they told me.” Yet the Judge made no findings on the adverse credibility comments made by the respondent. Although it can perhaps be implied that the Judge was satisfied that the appellant intended to leave the United Kingdom at the end of her stated period of stay and that the purpose of the visit was none other than that stated, that there were no issues on finance and or accommodation, the Judge did not put these factors in the balancing exercise for engagement of Article 8. With the greatest respect Judge David Taylor applied the *dicta* set out in **Kugathas** too narrowly leading him to the somewhat absurd observation that the appellant could meet up with her relatives, some of who are refugees and cannot visit her in Turkey, in a safe third country. As British citizens or lawful residents of this country, they cannot, in normal circumstances be denied the right to be visited by their close family members without good reason. The immigration rules set out those good reasons for refusal and each case has to [be] decided on its own facts. In this context I am reminded of how Sir Stanley Burton described the decision or facts in **Kugathas**. He said in Paragraph 8 of his judgment in Singh that “the facts of *Kugathas* were extreme.” In **Kugathas** the relevant facts were materially different to the facts in this visit visa appeal and where it is accepted that some of the relatives supporting the grant of visit visa to the appellant cannot visit her in her country of residence because they fear persecution in that country. These are factors that need to be aired and resolved before the First Tier Tribunal when it hears this appeal afresh.

7. For the reasons given above I set aside the decision of Judge David Taylor as having been made in material error of law. I direct that the appeal be heard afresh by any Judge of the First Tier Tribunal other than Judge David Taylor.

K Drabu CBE
Deputy Judge of the Upper Tribunal.
29 February 2016