



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/17138/2014

**THE IMMIGRATION ACTS**

**Heard in Manchester, Piccadilly  
On 5 November 2014**

**Decision and Reasons  
Promulgated  
On 10 December 2014**

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**ELSAMMA JOSEPH**

**and**

Appellant

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss B Hashmi, Solicitor, Ashwood Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant is a 68 year old national of India who has suffered two recent tragedies. Her husband whom she had been caring for (he suffered dementia and kidney failure) died on 23 June 2013. Two of their three sons who attended the funeral were involved in a rickshaw accident. One died and the other suffered serious injuries. Although the circumstances of the son who died are not clear, the remaining sons are British nationals and live in this country with their families.

2. Thereafter the appellant made a visit to the United Kingdom during which she made application for discretionary leave outside the Rules on the basis of her health difficulties and the absence of any relative she could turn to in India. She relied on a letter from Dr Joseph from the Holy Ghost Mission Hospital who explained that she was  

“... on treatment for osteoarthritis of knee with diffusion - difficulty in walking; type 2 diabetes mellitus with peripheral neuropathy; systemic hypertension; dyslipidemia; cataract - immature B/IIs; early Parkinson’s - with tremors; patient difficulty in emulation and needs support of the family members for the day-to-day activities”.
3. It was conceded before First-tier Tribunal Judge Boyd that the appellant was unable to meet the requirements of Appendix FM or paragraph 276ADE. He dismissed the appeal under the Immigration Rules and on Article 8 grounds.
4. Miss Hashmi agreed that that it was possible to identify the following from the somewhat discursive grounds of appeal:
  - (i) The judge had failed to consider *Gulshan* (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) properly as the appellant's “most compassionate circumstances” had not been taken into consideration.
  - (ii) That the appellant's circumstances amounted to the exceptional; the judge had erred in considering *Razgar* and the guidelines.
  - (iii) The judge had misunderstood the evidence regarding the basis on which the appellant had cared for her husband whilst he was alive and had made no reference to the medical evidence that the appellant had Parkinson’s (disease).
5. Miss Hashmi had no supplementary submissions to make.
6. Before hearing Mr McVeety’s submissions, I asked for clarification why it had been conceded the Rules had not been met. It appears that there are two stumbling blocks. The first is the absence of entry clearance and the second with regard to the issue whether the appellant's needs could be met by a carer funded from abroad.
7. In essence, Mr McVeety argued that the grounds were a re-argument of the case and did not identify error. He made a number of submissions which I considered were to the point. Nothing emerged in Miss Hashmi’s response which is new to the argument set out in the grounds except the possibility that the appellant is now suffering from mental health issues of a rather more serious kind than that presented to the judge.
8. My conclusions are as follows. It is correct that the judge did not refer specifically to *Gulshan* but, in substance, she followed the principles of that case as indicated in her direction at paragraph 24:

“As stated at the outset of this appeal, it was conceded by the appellant's representative that the Appellant cannot meet the requirements of either Appendix FM of paragraph 276ADE of the Immigration Rules and that therefore here application and appeal were restricted to consideration outwith the Immigration Rules. In order to succeed therefore the appellant has to establish a good arguable case for considering Article 8 outside of the Immigration Rules, there has to be compelling or compassionate or exceptional circumstances for the appellant to be successful in her appeal outside of the Immigration Rules.”

9. I do not consider the first ground has any merit.
10. I turn to the next ground. This requires consideration whether there is a rational connection between the findings of fact made and the judge's conclusions on the nature of the circumstances when considered outside the Rules under Article 8.
11. At [25] the judge noted some confusion in the evidence. The appellant had stated that when her husband was alive they had lived together and were the only persons living in the house and that she had looked after him. According to the son who gave evidence (Suji Joseph) she had a servant. The judge could not see why there would be any inherent problems in employing that servant again.
12. At [26] the judge considered it clear that the family home was still available to the appellant and rejected the evidence that it had ceased to be habitable, giving reasons for this conclusion. She also observed that the appellant's son who was said to be the owner had recently gone there for two months and stayed in the house. This led the judge to conclude at [27] that were the appellant to return she would be able to live in the house which is habitable, that her son could continue to support her financially pending any application to return as a dependent relative under the Rules with the assistance of a servant.
13. The judge was clearly sympathetic to the circumstances, noting that she had before her a caring family who worried about their elderly mother. The judge observed that the appellant had appeared lucid and answered questions clearly and furthermore had not noticed any shaking. Her daughter-in-law had confirmed she is able to do things for herself and the judge observed that the care required seemed to be extremely vaguely expressed. As to her medical conditions, the judge observed that there was no evidence that there had been a need for the appellant to attend the hospitals or a doctor in the United Kingdom.
14. At [31] the judge concluded that she was not satisfied there was a good arguable case for the matter to be considered outside the Rules and observed that if there were, she would have to consider Article 8. In *MM and Ors, Respondent (On the Application Of) v SSHD* [2014] Civ 98, Aitkins LJ at [129] observed “ *Nagre* does not add anything to the debate, save for

the statement that if a particular person is outside the rule then he has to demonstrate as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave I cannot see much utility in enclosing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.”

15. I do not consider that with the judge’s approach resulted in error as the judge in fact addressed Article 8, in particular proportionality. In a sense this exercise had already been anticipated in the enquiry into whether there were exceptional circumstances for the case to be considered outside the Rules. The proportionality considerations encapsulate the essence of the matters the judge had in mind and had previously addressed. The judge concluded at [32]:

“In essence, the question would be whether or not the refusal of the appellant's appeal and the removal back to India at the age of 68 would be disproportionate. I am not satisfied it would be disproportionate, essentially for the reasons given aforesaid, namely that she is a 68 year old woman, whose health conditions are managed by medication, which medication is available in India. She lived alone in India after the death of her husband before she came to the United Kingdom. There is family home in India to which she could return, a servant could be arranged as before and despite the claims to the contrary I am satisfied the appellant has made friends and acquaintances in India who would be of assistance. At the appellant's son's funeral, as she herself has stated, there were hundreds there. While a number may well have travelled from the United Kingdom, I am satisfied that, on the balance of probabilities, the vast majority of those attending would have been from the appellant's own area and were therefore likely to be friends, acquaintances and perhaps relatives of the appellant and her family.”

16. I am unable to discern from the judge’s approach any irrationality in the conclusions reached. I consider that the findings of fact were open to her on the evidence and that she carried out a correct an analysis of the Article 8 criteria she was required to apply. As observed in the grant of permission, the judge has not undertaken a five stage *Razgar* test but I do not think this is fatal to the determination. The appellant had lived apart from her children for, it appears, a lengthy period and the evidence did not point to family life established in the United Kingdom of the kind that required protection. Nevertheless the judge considered proportionality on the basis that Article 8 was engaged and reached a conclusion on proportionality that was rationally open to her.
17. The final ground argues the judge misunderstood the evidence regarding the nature of the household and the way in which the appellant had provided care to her husband when he was alive. Furthermore no reference had been made to the medical evidence. In my view this ground

is misconceived. The judge referred at [16] to the son's evidence and reached her conclusions on how matters had been before the appellant's husband's death at [25]. It is clear that the judge had the medical evidence from Dr Joseph in mind. She observed that treatment was available for the conditions identified noting in particular the evidence that medication had been sent over to her from India. Whilst the judge was not competent to give her own assessment of the progress of Parkinson's disease, the evidence by Dr Joseph was limited to the observation that the appellant had "early Parkinsonism - with tremors" with no indication that this required care or special assistance. Any error by the judge was not material and could have affected the outcome.

18. The appellant's case invokes sympathy. The revised Rules set demanding criteria for dependent elderly relatives to settle with their family in the United Kingdom. It was conceded in this case that the appellant could not meet those requirements at the time she applied or indeed at the hearing. I find no material error in the judge's analysis of that evidence in deciding whether the circumstances nevertheless warranted a grant of leave outside the Rules. To the extent that the appellant's condition has deteriorated it will be open to the parties to make further submissions to the Secretary of State as confirmed by Mr McVeety.
19. This appeal is dismissed.

Signed

Date 9 December 2014

A handwritten signature in blue ink, appearing to read "Dawson", with a horizontal line extending to the right.

Upper Tribunal Judge Dawson