



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

Appeal Number:

IA/27923/2013

IA/27926/2013

IA/27929/2013

THE IMMIGRATION ACTS

Heard	at	Field	House
			Determination promulgated
On 30 April 2014		On 4 August 2014	

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

- (1) Jahan Akter**
- (2) Abul Kalam Manjur**
- (3) Mohaiman Bin Manjur**
(Anonymity directions not made)

Appellants

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellants: Ms. M. Ahammed of RMS Immigration Ltd.
For the Respondent: Ms. A. Everett, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Gibbs promulgated on 17 March 2014, dismissing the Appellants' appeals against the Respondent's decisions dated 19 June 2013 to refuse to vary leave to remain in the UK and to remove the Appellants pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The Appellants are nationals of Bangladesh born on 1 December 1978, 2 January 1973, and 10 January 2004 respectively. The Second Appellant is the husband of the First Appellant; the Third Appellant is their son. The First and Second Appellants have a further child, born in the UK on 1 February 2012, who is also subject to immigration control, but has not been included in the relevant applications and appeal proceedings.

3. The respective relevant immigration histories are a matter of record on file, and that of the First Appellant is also summarised at paragraph 1 of the determination of the First-tier Tribunal Judge. It is unnecessary to rehearse the histories here; suffice to say that the Second and Third Appellants have derived their immigration statuses from the First Appellant and to that extent for immigration purposes have been, and continue to be, treated as dependants of the First Appellant. Otherwise, I make reference to the histories as is incidental for the purposes of this determination.

4. Most recently on 30 April 2013 the First Appellant applied for variation of leave to remain as a Tier 4 (General) Student Migrant; the Second and Third Appellants were included in the application as dependants. The Respondent refused the First Appellant's application for reasons set out in a combined Notice of Immigration Decision and 'reasons for refusal letter' ('RFRL') dated 19 June 2013, in which the section 47 removal decision was also communicated. The Second and Third Appellants were refused in line with the First Appellant.

5. The Appellants appealed to the IAC. The First Appellant did not attend the appeal hearing because of illness: see further below. The Second Appellant was in attendance, as was the Appellants' representative. An application for an adjournment was refused by the Judge. Evidence was then heard from the Second Appellant,

followed by submissions from the representatives for the parties. The appeals were dismissed for reasons set out in the First-tier Tribunal Judge's determination promulgated on 17 March 2014.

6. The Appellants sought permission to appeal to the Upper Tribunal which was granted on 2 April 2014 by First-tier Tribunal Judge Andrew. Judge Andrew considered that Judge Gibbs should have adjourned the appeal; further that it was arguable that the best interests of the children had not been taken into account when considering Article 8 of the ECHR.

7. The Respondent has filed a Rule 24 response dated 14 April 2014 resisting the challenge to the First-tier Tribunal's determination.

Consideration

8. Judge Gibbs has set out at paragraph 7 the factual circumstances relied upon in support of the application for an adjournment, and has also noted the existence of supporting evidence. Judge Gibbs did not doubt these circumstances or the supporting evidence in her determination: the adjournment request was not refused because it was considered that the Appellant had not produced evidence to show that she was unfit to attend the hearing; the adjournment was refused because the Judge did not consider the First Appellant's presence was necessary in circumstances where there was a witness statement from the First Appellant and the Second Appellant was present: see paragraph 8.

9. In this context Ms Everett acknowledged that whilst the issue under the Rules was readily amenable to resolution without the presence of the First Appellant (see further below), any exploration of matters relevant to Article 8 *might* have benefited from the presence of the First Appellant given the somewhat perfunctory nature of her witness statement – though it was not accepted that this would have ultimately made any difference to the outcome in light of recent case law (see further below).

10. Whilst this is a fairly made observation in respect of the *potential* additional detail that the First Appellant might have been able to add in oral evidence to the contents of her witness statement, in my judgement on the facts of this particular case this does not form a sound basis for an adjournment – and far less is it indicative of an error of law in not granting an adjournment. It was

incumbent upon the Appellants to set out their cases in their witness statements to an extent that they should not have required amplification by calling any further evidence: Directions in standard form were issued with the Notices of Hearing on 16 October 2013 requiring the Appellants to file "*Witness statements of the evidence to be called at the hearing*". In any event, as observed by the First-tier Tribunal Judge the Second Appellant was present; I observe that there was no basis for the Judge to consider that he was not in every respect able to furnish any further information in relation to any factual issues pertaining to the Appellants' cases under either the Rules or Article 8.

11. Indeed in this latter regard I invited Ms Ahammed to identify what, if anything, it had not been possible to advance before the Judge because of the absence of the First Appellant. In response she said little more than that it was unfair and that the First Appellant could have addressed the impact on her older child if he were to have to quit the UK in the middle of a school year. I am unable to see that this was something the Second Appellant would have been unable to articulate before the First-tier Tribunal. There was in any event no indication of any factual assertion or any relevant supporting evidence in respect of the children in the witness statement of the First Appellant, the statutory declaration of the Second Appellant, and the Appellants' Bundle filed before the First-tier Tribunal. Be that as it may, paragraph 10 of the determination indicates that the Second Appellant gave evidence in respect of such matters - and so there was no denial of opportunity to advance the Appellants' cases. I am unable to see that there is any basis to impugn the Judge for concluding that the Appellants' cases could be advanced in all material respects via the Second Appellant and the representative.

12. I note that the First-tier Tribunal Judge did not expressly address herself either to rule 19 (hearing appeal in absence of a party) or rule 21 (adjournment of appeals) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. However, it is to be noted that whilst rule 19(1) did not apply because there was good reason for the First Appellant's absence, rule 19(2) empowers the Tribunal to hear an appeal in the absence of a party if satisfied in respect of one of a number of conditions, which include: the presence of a representative (19(2)(a)); and the party being unable to attend because of illness (19(2)(d)). Further in this context given that subparagraph 19(2)(f) relates to consent, in my judgement this is indicative that where the circumstances in (a)-(e) apply consent of the party is not a prerequisite to hearing the appeal in his or her absence.

13. As regards rule 21, in my judgement the Judge must have had this familiar provision in mind when stating at paragraph 8 that she *“did not consider that the adjournment was necessary or that it was in the interests of justice”*: compare with the wording of rule 21(2) – *“The Tribunal must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined”*.

14. It follows, in my judgement, that the Tribunal had power to hear the appeal in the absence of the First Appellant; further in considering whether or not to adjourn rather than proceeding in the absence of the Appellant the Judge had due regard for the relevant principles. Moreover, in my judgement the Judge adequately explained her reasons for proceeding: essentially that the presence of the First Appellant was not required in that any matters relevant to the factual issues could be advanced through the evidence of the Second Appellant, and otherwise dealt with in submissions from the representative. In as much as the First Appellant’s witness statement was unsigned it is clear that the Judge was prepared to accept it at face value.

15. In such circumstances, whilst at first blush it seemed to me that the significance of the First Appellant being present at the hearing of her own appeal was of such fundamental importance that it demanded an adjournment (as indeed seems to have been the view of Judge Andrew in granting permission to appeal), closer scrutiny of the relevant procedure rules indicates that presence of a party is not such a paramount consideration. This is in keeping with the ‘overriding objective’ set out in paragraph 4 of the Procedure Rules.

16. On the facts of this particular case the Judge considered the relevant circumstance and reached a conclusion - that was essentially a matter for her evaluation - that an adjournment for the attendance of the First Appellant was not necessary justly to determine the appeal. In doing so the Judge did not exceed her jurisdiction and did not offend against any principle of law. Nor can it be said that her decision to proceed was one that no reasonable judge could have made.

17. Accordingly in all of the circumstances I conclude that there was no error of law in the Judge deciding to proceed with the appeal in the absence of the First Appellant.

18. I turn then to a consideration of the challenge to the substantive decisions.

19. As regards the decision in respect of the First Appellant under the Immigration Rules, I have little hesitation in rejecting the challenge. The First Appellant's application was refused with reference to paragraph 245ZX(d) and paragraphs 1A and 11 of Appendix C of the Rules essentially on the basis that the requisite maintenance funds were not held by the First Appellant, but were held by her husband: the Rules require that such funds be held in the name of the applicant or a legal guardian. The Appellants have maintained both before the First-tier Tribunal and before me that the First Appellant's husband, the Second Appellant, is her legal guardian. The First-tier Tribunal Judge dealt with this at paragraphs 16 and 17. In my judgement she did so adequately and made no error of law: a husband is not the legal guardian of his wife unless appointed to be so for some reason of incapacity. There is no merit in the argument repeated before me that a husband is in some way culturally a 'legal guardian' of his wife in Bangladesh.

20. The appropriate dismissal of the First Appellant's appeal under the Rules necessarily means that the Judge did not err in also dismissing the appeals of the other Appellants under the Rules.

21. The Judge dealt relatively briefly with Article 8: see determination at paragraph 20. This brevity, necessarily, must be seen in the context of the case as advanced in support of Article 8 – which is adverted to in the determination by reference to the oral testimony of the Second Appellant (paragraphs 10 and 11) and the representative's submissions (paragraph 13), wherein reliance was placed on the Skeleton Argument, with emphasis on the fact that the First Appellant was in the middle of her studies, and that her son was in the middle of his. Otherwise, as noted above, the First Appellant's witness statement and the Second Appellant's statutory declaration, and the materials in the Appellants' Bundle contained no meaningful information about the private life of any of the Appellants, and provided no supporting materials in respect of the education of the Third Appellant.

22. The Skeleton Argument (which is actually headed 'Grounds of Appeal' in the Appellants' First-tier Tribunal bundle) places reliance in the context of Article 8 on *"The [First] Appellant ha[ving] established a private life through her studies, employment and through her residence here with her family. The Appellant has been*

in the UK for a number of years” (paragraph 11). The case of **CDS Brazil [2010] UKUT 305 (IAC)** was also pleaded (paragraph 19) – and indeed has been pleaded in the grounds in support of the application for permission to appeal; see also paragraph 21 of the ‘Skeleton Argument’. It may be seen that nothing more than a generalised reference was made to the Third Appellant’s studies; no specific evidence was filed in relation to such studies; far less was any evidence filed as to the potential impact of his returning to Bangladesh in the company of his parents either generally or in the context of resuming schooling in the country of his nationality.

23. The reality is that beyond the fact of the First Appellant’s studies, the fact that the Third Appellant was also in education in the UK, and the period of time spent in the UK, nothing else was advanced before the First-tier Tribunal in respect of Article 8 private life. (So far as family life was concerned there has at no point been any suggestion of any wider family connections with the UK, and at all material times it has been envisaged that the family would be required to quit, or be removed from, the UK as a family unit. Reliance has not been placed on the ‘family’ life aspect of Article 8.)

24. As regards the pursuit of studies, and the reliance upon **CDS Brazil**, the substance of the Appellants’ cases must be seen in the context of the decisions in **Patel and others [2013] UKSC 72** (see in particular per Lord Carnwath at paragraph 57) and **Nasim and others (Article 8) [2014] UKUT 00025 (IAC)**.

25. As regards the length of time spent in the UK, it is not suggested that this in any way approaches the requirements of paragraph 276ADE of the Rules, which is the relevant rule in respect of private life.

26. As regards any issue of ‘best interests’ of the children, this must be seen in the context of there being no threat to the integrity of the family unit by reason of the Respondent’s decisions and the absence of any evidence before the First-tier Tribunal of any detriment to either child if returning to Bangladesh with their parents.

27. In all such circumstances, in my judgement the Judge’s approach at paragraph 20 in reliance upon **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 720 (Admin)**, was entirely in keeping with those decisions. Whilst it might now be said that pursuant to **MM**

(Lebanon) [2014] EWCA Civ 985 (see paragraph 128) some doubt is cast on the ‘intermediate step’ identified in **Nagre**, such doubt is immaterial where the Judge herein concluded – as she was entitled to do on the evidence and entirely sustainably – that there was no arguably good grounds for granting leave outside the Rules. Inevitably this encompassed a conclusion that there were no ‘exceptional’ or ‘compelling circumstances’ to warrant departing from the express wording of the Rules on human rights grounds.

28. Accordingly I find nothing of material substance in the challenge to the First-tier Tribunal Judge’s determination in respect of Article 8.

29. For completeness I make the following observations.

(i) During the hearing I reserved my determination in respect of error of law, but nonetheless invited the parties’ submissions as to how the appeal should be remade in the event that it was necessary to do so. In this context I permitted Ms Ahammed to call evidence from the First Appellant. I have made a note of that evidence in the record of proceedings, which is on file. The First Appellant ‘put some flesh on the bones’ of the case as advanced before the First-tier Tribunal, but, in my judgement, did not advance anything of specific substance such as to render the Judge’s decision to proceed in her absence materially significant, or otherwise to suggest that the Judge reached a decision on human rights that was not in all material respects an appropriate decision.

(ii) Lest it became necessary to re-make the decision I also invited Ms Everett’s submissions as to any policy justification in requiring a student to hold funds either personally or through a legal guardian – and thereby the exclusion of reliance upon funds held by a third party including a spouse. Ms Everett was not able to assist directly, but indicated that she would make endeavour to make inquiries and forward any information to the Tribunal (with the caveat that the Appellants would then be permitted to make a suitable response). In the event, if anything was forwarded it has not reached me. I suspect the answer lies in ensuring that the funds are directly under the control of an applicant (or their legal guardian who has a legal obligation towards them) to avoid the possibly detrimental impact of unforeseen changes of circumstances – or changes of mind – of third parties. Be that as it may, in the event nothing turns on this in circumstances where I have upheld the determination of the First-tier Tribunal.

Decisions

30. The decisions of the First-tier Tribunal Judge did not contain any material errors of law and accordingly stand.

31. The appeals are dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 31 July 2014