



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

Appeal Number: IA/40496/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 22nd August 2014**

**Determination
Promulgated
On 27th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS HOMERA AHMED
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondent: Mr J Walsh, Counsel, instructed by Bindmans LLP

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Secretary of State but I will refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Bangladesh born on 18th June 1933. She is therefore 81 years old. She arrived in the UK on 12th May 2012 with a visit visa. On 30th October 2012 she applied for indefinite leave to remain to stay in the UK as the dependent of her son, Mr Afzal Ahmed, who is a British citizen. She said that there was no one to care for her in Bangladesh. The application was refused on 13th September 2013. Her appeal against the decision to refuse indefinite leave to remain as an adult dependent was dismissed by First-tier Tribunal Judge Callow under the Immigration Rules but allowed in accordance with the UK's obligations under Article 8 ECHR in a determination promulgated on the 5th June 2014.
3. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal Chambers on 2nd July 2014 on the basis that it was arguable that the First-tier judge had erred in law in failing to apply Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 as he did not adequately identify compelling factors which made the outcome under the Immigration Rules unjustifiably harsh.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law. Mr Duffy had not received Mr Walsh's Rule 24 response so he was given an opportunity to read this document before the hearing started.

Submissions

5. Mr Duffy relied upon the Secretary of State's grounds of appeal. In these grounds it is noted that Judge Callow had found that the appellant could not meet the requirements of Appendix FM to the Immigration Rules for an adult dependent relative. The Secretary of State submits that there are no compelling circumstances not sufficiently recognised by the Immigration Rules and that as the appellant's circumstances are not exceptional the refusal is not unjustifiably harsh. The appellant had lived on her own in Bangladesh until May 2012 and the sponsor could care for her in that country, and/or she could apply for entry clearance as an adult dependent. Further the appellant was receiving NHS care in the UK. The appellant's return to Bangladesh to obtain entry clearance would not be a mere formality as she might be refused a visa under the Immigration Rules as the sponsor had not shown he could not maintain and pay for her care in Bangladesh. It was not therefore correct, in these circumstances, to rely upon Chikwamba v SSHD 2008 UKHL 40. I asked Mr Duffy to point to errors in the determination under Article 8 ECHR by the First-tier Tribunal. He said that in this case the factors which had led her to succeed had not been different from those looked at under the Immigration Rules. This was not a case where there were a multiplicity of factors not given weight under the Rules.
6. Mr Walsh relied upon his Rule 24 reply. He noted that the appellant's daughter, Rehana, with whom she had previously lived in Bangladesh had now gone to live with her daughters in the USA. He noted that she

suffers from arthritis, glaucoma and deafness. The First-tier Tribunal had concluded at paragraph 17 that it would be “unjustifiably harsh” for the appellant to return to Bangladesh as: “an 80 year old widow enduring the effects of the ageing process without a home and family in Bangladesh,” It was also considered unreasonable to make her return to Bangladesh to obtain entry clearance to re-enter the UK at paragraph 18 of the determination.

7. Judge Callow had followed a legally correct approach in first establishing that the case could not succeed under the Immigration Rules; secondly establishing that there were arguable grounds under Article 8 and thirdly finding that there were compelling circumstances in this case. The approach in Gulshan and R (Nagre) v SSHD [2013] EWHC 70 (Admin) is that there is no test of exceptionality but that particular features of the case should be identified to show that that removal would be unjustifiably harsh.
8. In this determination Judge Callow sets out the respondent’s refusal in detail at paragraph 5 of his determination. He then identifies that “family life” exists at paragraph 8 of his determination. This is important as it would not always be that Article 8 “family life” exists in every adult dependency case. At paragraphs 9, 16 and 17 he considers the public interest in maintaining immigration control. At paragraphs 10 and 11 Judge Callow summarises Gulshan and MF (Nigeria) v SSHD [2013] EWCA 1192. He notes that there is no exceptionality test, but there must be an assessment of all factors relevant to proportionality, following the approach set out in MF. At paragraph 15 Judge Callow identifies the legitimate aim and at paragraphs 16 and 17 he deals with proportionality whilst continuing to remind himself of the public interest in maintaining immigration control. It was open to Judge Callow to make the comments he did regarding it not being appropriate for the appellant to return to obtain entry clearance, at paragraph 18 of his determination, given the facts of the case.
9. The grounds of appeal contend that the facts are not sufficiently compelling but this is a challenge to a finding of fact made by the First-tier Tribunal and not an issue of law. In effect the Secretary of State is expressing a disagreement with Judge Callow’s factual assessment not identifying an error of law. There are no grounds here for saying that the factual decision is perverse given the factual background that there is family life between appellant and sponsor and his family; that she is over 80 years old; that she suffers from problems relating to the ageing process; and that she would be without a home and family in Bangladesh.
10. At the end of the hearing I told the parties that I found that the First-tier Tribunal had not erred in law, but that I would put my full reasons, as set out below, in writing.

Conclusions

11. As contended by Mr Walsh I find that Judge Callow had properly and explicitly applied the approach set out in Nagre and Gulshan. He sets the required approach from these cases out correctly at paragraph 10 and 11 of his determination. He then follows a Razgar analysis of Article 8 ECHR with respect to the facts of this case between paragraphs 13 and 17, having already identified, at paragraph 8, that there is family life between the appellant and sponsor with reference to the correct legal test as set out in Kugathas [2003] EWCA Civ 31.
12. Judge Callow's approach is at all times legally correct, and as Mr Walsh has argued he identifies the legitimate aim of immigration control and gives appropriate weight and consideration to maintaining immigration control through consistent application of clear and fixed immigration rules. Ultimately at paragraph 17 he finds that it would however be a breach of Article 8 ECHR in this case for the appellant not to be allowed to remain in the UK given her age; the effects of the ageing process and her return to Bangladesh where she would be without a home or family. The particulars relating to these factors are set out in detail at paragraph 4 of the determination, and thus I do not find that there are inadequate reasons for his conclusions. In paragraph 17 Judge Callow explicitly finds that the facts of her case constitute "compelling circumstances" and that to return the appellant to Bangladesh would result in unjustifiably harsh consequences for her.
13. At paragraph 18 Judge Callow finds it would not be right to require the appellant to return to obtain entry clearance. Whilst the facts of this case are not the same as in Chikwamba Judge Callow does assess whether it would be reasonable for the appellant to return to obtain entry clearance, which it was appropriate for him to do, and finds that it would not as she would inevitably be allowed to return. He was entitled to reach that conclusion given his firm conclusions set out at paragraph 17 of his determination in relation to her entitlement to remain in the UK in accordance with Article 8 ECHR and given the vulnerabilities he identifies in the appellant which are central to his Article 8 ECHR decision.
14. The grounds of appeal by the Secretary of State and the submissions by Mr Duffy do not contend that the factual reasons found by Judge Callow to show compelling circumstances and that removal would be unjustifiably harsh were perverse, and I do not find them to be so. I agree with Mr Walsh that the Secretary of State's challenge is essentially a disagreement over the weight the First-tier Tribunal gave to the facts of the case, and that is not a challenge which identifies an error of law.

Decision

15. The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

16. The decision of the First-tier Tribunal allowing the appeal under Article 8 ECHR is upheld.

Deputy Upper Tribunal Judge Lindsley
26th August 2014