



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41762/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th March 2014

Determination Promulgated
On 26th March 2014
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Before

UPPER TRIBUNAL JUDGE RENTON

Between

REENAHIT LEPCHA
(ANOYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Bagral, Counsel instructed by Colvin & Partners Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant is a female citizen of India born on 10th December 1973. On 7th May 2010 she was given leave to enter the UK as a Tier 4 (Student) Migrant until 31st July 2012. On 28th July 2012 the Appellant applied for leave to remain outside the

Immigration Rules on Article 8 ECHR grounds. That application was refused for the reasons given in a Notice of Decision dated 24th September 2013. At the same time, the Respondent decided to remove the Appellant under the provisions of Section 47 Immigration, Asylum and Nationality Act 2006 as amended. The Appellant appealed, and her appeal was heard by Judge of the First-tier Tribunal Beach (the Judge) sitting at Taylor House on 8th January 2014. He decided to allow the appeal on human rights grounds for the reasons given in his Determination dated 22nd January 2014. The Respondent sought leave to appeal that decision, and on 11th February 2014 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.
3. In allowing the appeal on Article 8 ECHR grounds, the Judge followed the format given by the questions of the late Lord Bingham in **R (Razgar) v SSHD [2004] UKHL 27**. The Judge found that during her time as a student in the UK the Appellant had established a private life which would be interfered with by her removal to such a degree of gravity as to engage the Appellant's Article 8 ECHR rights. The Judge went on to find that although such interference was in accordance with the law and necessary in a democratic society, however the interference was disproportionate. In reaching that conclusion, the Judge attached greater weight to the Appellant's medical condition than to the public interest. Whilst lawfully in the UK, the Appellant had been diagnosed with breast cancer in 2011 and had received both radiotherapy and chemotherapy. The Appellant was now in remission, but was required to take a medication known as Tamoxifen for a period of five years and undergo regular reviews. The Appellant was in receipt of physiotherapy. The Judge found credible that the Appellant's only relative in India was a sister who lived in a remote area and had limited means. Therefore it was likely that the Appellant would not be able to access the medication and medical treatment which she continued to need. The Judge referred to the decisions in **Okonkwo (Legacy/Hakemi; health claim) [2013] UKUT 00401 (IAC)** and **Akhalu (Health claim: ECHR Article 8) Nigeria [2013] UKUT 400 (IAC)**.
4. At the hearing, Mr Wilding argued that the Judge had erred in law in coming to this conclusion. He referred to the grounds of application and argued that the approach of the Judge to the Article 8 issue was wrong following the decisions in **MF (Article 8 - new Rules) Nigeria [2012] UKUT 00393 (IAC)**; **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)**; and **R (On the application of Nagre) v SSHD [2013] EWHC 720 (Admin)**. Further, the Judge had erred in law by failing to carry out a full consideration of all relevant factors when assessing proportionality. The Judge had only taken into account the Appellant's medical condition and the availability of medical treatment in India. This was the wrong approach following the decision in **MM (Zimbabwe) v SSHD [2012] EWCA Civ 279**. In this case the Appellant's medical condition was well below the high threshold to found a breach

of Article 3 ECHR decision. That being the case, the Judge was obliged to take into account other factors.

5. In response, Ms Bagral submitted that the Judge had not erred in law. He had come to a decision open to him upon the evidence and had given sufficient reasons for that decision. The Judge had not followed the approach given in **Gulshan**, but that did not amount to a material error of law because it followed that if the Judge found the decision of the Respondent to be disproportionate, then he was satisfied that there were arguably good grounds for granting leave to remain outside the Immigration Rules on the basis that there were compelling circumstances not sufficiently recognised under them. In reaching his decision, the Judge had followed a structured approach, accepting that the Appellant did not qualify for leave to remain under the Immigration Rules. The Judge had applied the correct tests when finding the Respondent's decision to be disproportionate on the basis of the Appellant's medical needs.
6. I preferred the submissions of Mr Wilding and found that the decision of the Judge contained an error of law so that it should be set aside. I agree with the argument of Ms Bagral that it was not an error of law for the Judge not to follow the approach given in **Gulshan**, but if the Judge was then to carry out an assessment of proportionality in accordance with the decision in **Razgar**, it was necessary for him to demonstrate that he had carried out a balancing exercise by referring to and assessing the weight to be attached to all relevant factors. This the Judge had failed to do. The Judge had made no mention of the public interest or the weight to be attached to it, and also had made no mention of the fact that there was very little evidence of the nature and extent of the Appellant's private life in the UK. Instead, according to what the Judge wrote, his only consideration had been that the Appellant continued to require medical treatment which might be difficult for her to access if she returned to India. This was an inadequate assessment of proportionality amounting to an error of law and therefore I set aside the decision of the Judge.

Re-made Decision

7. I proceeded to re-make the decision upon the evidence that was before the Judge. There was no further evidence adduced. However, I heard further submissions. Mr Wilding argued that the decision of the Respondent was proportionate. The Appellant's case was not that treatment was not available to her in India, but that she preferred to continue her treatment in the UK. That was a position which carried little weight. What was of greater significance was that the Appellant had spent only a short time in the UK, and that there was little detail of her private life there.
8. In response, Ms Bagral said that she adopted the submissions made to the Judge. The Appellant's circumstances carried the greater weight because she had fallen ill when lawfully in the UK, and her treatment on the NHS had been exempt from charge. The Appellant had been prevented from completing her studies, and was still in need of significant medical treatment which she would not be able to access in India.

9. The facts of this matter, which have never been in dispute, are that the Appellant entered the UK in May 2010 with permission to study until July 2012. She has remained lawfully since. The Appellant was unable to complete her studies as she was diagnosed with breast cancer in July 2011.
10. The Appellant originates from a mountainous area of India situate near West Bengal, although she had lived in Mumbai for two years prior to coming to the UK. Both her parents are deceased, and the only relative with whom the Appellant has any contact in India is her sister who lived in a remote area. Her sister was a housewife whose husband was unemployed. They had two young children.
11. Following the diagnosis of breast cancer, the Appellant had been treated with chemotherapy and radiotherapy which had now finished. However, the Appellant required an annual mammogram check, and for the next five years she would have to take a daily dosage of Tamoxifen. She had also been diagnosed with Type 2 diabetes for which she took medication.
12. The Appellant shared accommodation in the UK with two friends who to some extent had supported her during her illness. She had also had the services of a Macmillan nurse.
13. The oncology treatment still required by the Appellant, and the medication, are available in India.
14. I find that the public interest in this case carries much weight. The Appellant was admitted to the UK for a limited period of time in order to study on the basis that she would return to India. Although it was most unfortunate to say the least that the Appellant was unable to complete her studies through reasons beyond her control, and although the Appellant does not have an adverse immigration history, it is the case she does not qualify for leave to remain under the Immigration Rules, and therefore the economic well-being of the country represented by the need to maintain an effective immigration control must carry considerable weight.
15. On the other side of the balance, during her short period in the UK the Appellant has developed a private life with the two friends with whom she shares accommodation and who have given her some degree of support during her illness. The Appellant has only her sister in India to whom she could turn for help, and that help would be very limited as her sister lives in a remote area in somewhat impecunious circumstances. However, the Appellant had lived independently in Mumbai in the past. The Appellant still requires medical treatment as detailed above, but that treatment does exist in India. The fact that the Appellant may have difficulties in accessing that treatment is not determinative of this appeal. The Appellant's circumstances can be distinguished from those considered in Okonkwo, and the Appellant's case can be put no higher than that it would be more convenient for her to continue her medical treatment in the UK which is what she would prefer to do. In my view, such a consideration carries little weight, and less weight than the public

interest. I therefore find that the decision of the Respondent does not amount to a disproportionate breach of the Appellant's Article 8 ECHR rights.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remake the decision in the appeal by dismissing it.

Anonymity

The First-tier Tribunal did not an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I find no reason to do so.

Signed

Date

Upper Tribunal Judge Renton