Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09474/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 July 2014	**On 07 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MS RUKHSANA BEGUM

Appellant/Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Appellant

Representation:

For the Appellant/Respondent: Miss M Jarvis Legg of Counsel
For the Respondent/Appellant: Mr E Tufan, a Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. This is an appeal by the respondent in the Tribunal below, the appellant in this Tribunal. I will refer to the respondent/appellant as "the Secretary of State" and the appellant below/respondent in this Tribunal as "the appellant ".

2. The appellant is a citizen of Bangladesh who was born on 16 March 1994. On 20 February 2012 she applied for settlement to the UK to join her mother, who is a British citizen. However, the respondent refused her application on 24 April 2012. In the Entry Clearance Officer's refusal dated 24 April 2012 he explains that the appellant did not qualify under paragraph 297 of the Immigration Rules because there was no evidence to demonstrate that the appellant was living alone outside the UK in the most exceptional compassionate circumstances and was mainly dependent financially on relatives settled in the UK. Furthermore, she provided no satisfactory evidence of her sponsor's financial circumstances and the ECO was not satisfied the appellant could be maintained adequately in the UK. He had regard to her human rights under Article 8 of the European Convention on Human Rights (ECHR). However, having considered the need to exercise proper control over immigration the ECO was satisfied there was no unjustified interference with her human rights.

Appeal Proceedings

3. The appellant appealed to the First-tier Tribunal and a hearing took place at Hatton Cross on 18 February 2014. First-tier Tribunal Judge Raymond (the Immigration Judge) dismissed the appeal under the Immigration Rules but allowed it under Article 8. This is because he was not satisfied that it would be necessary and in accordance with a legitimate aim of immigration control to refuse Mrs Begum entry to the UK, where she could continue to nurture her natural affection and support for her mother. The Immigration Judge noted that the appellant's father, who lived in Bangladesh, suffered from serious mental illness and the best interests of the appellant were served by allowing her admission to the UK.

4. The Secretary of State made her application for permission to appeal to the Upper Tribunal on the appropriate form. This was received on 30 April 2014. It is contended on her behalf that the Immigration Judge materially misdirected himself by finding a disproportionate interference with the appellant's human rights. He should have started by considering Appendix FM at paragraph 276ADE of the Immigration Rules. Even if the Immigration Judge was correct in finding that the appellant's case should only be considered under Article 8 the Immigration Judge nevertheless misdirected himself on the law. The correct test was set out in **VW Uganda [2008] UKAIT 21**. The appellant had to demonstrate that there were insurmountable obstacles to family members accompanying the appellant abroad and no good reason had been shown for finding that the interference with the appellant's human rights would be disproportionate.

5. Designated Judge of the First-tier Tribunal McClure considered the grounds of appeal to be at least arguable in that **VW** and the case law that has developed since make the point that the Rules are to be seen as the response in a democratic society to the obligations under Article 8. The sponsor came to the UK in 2010 leaving the appellant in Bangladesh.

There had never been an expectation that the sponsor and appellant would be allowed to remain in the UK outside the Rules.

6. Judge Southern caused to be sent out standard directions to the parties on 23 May 2014 indicating that the Tribunal would not hear new evidence which had not been produced before the First-tier Tribunal without an appropriate application.

The Hearing

7. At the hearing I heard submissions by both representatives. The Secretary of State explained that the appellant had made the application on 20th February 2012, just before her 18th birthday on 19 March 2012. The sponsor only came to the UK four years ago leaving her husband and the appellant in Bangladesh. According to the appellant's application form her mother is a British national. Mr Tufan submitted that there were two criticisms of the Immigration Judge:

   (1) The effect of Appendix FM did not apply directly to this case since the application had been made before it came into force on 9 July 2012. However, the decision was not in accordance with recent case law which is informed by the changes in the Immigration Rules that have taken place.

   (2) Even if exceptional or compassionate circumstances existed for granting the appellant entry clearance to the UK outside the Immigration Rules, the assessment of the free-standing Article 8 claim was flawed.

   (3) Mr Tufan did not seek to go behind the favourable findings in favour of the appellant but did challenge the **Razgar** assessment at paragraph 37. The Immigration Judge had failed to attach sufficient importance to the economic factors inherent in the balancing exercise conducted by the Secretary of State. Merely because the appellant had a mother with a right of abode in the UK did not make it disproportionate to refuse her entry to that country. The decision was irrational and unreasoned and it lacked analysis.

8. The appellant, on the other hand submitted that the first and foremost consideration was whether the Immigration Judge had been entitled to consider a free-standing Article 8 claim. The answer was that he had, given that this application predated the introduction of the current Immigration Rules. An error of law that follows a proper analysis of Article 8 would be immaterial. The Immigration Judge had applied the correct test having considered the relevant case law. It was submitted that the correct test was: whether there were insurmountable obstacles to family life continuing from abroad or whether there were special reasons why it would be unlawful to break up the family? It was submitted that the Immigration Judge had analysed the matter in terms of "special reasons"

and concluded that the various factors that were relevant had been set out in paragraph 35 of the determination. The appellant's mother had now been in the UK for four years. Proportionality was a discretionary tool. It had to be assessed in the round taking into account all relevant factors. This determination contained a comprehensive analysis by the Immigration Judge which the Upper Tribunal should not interfere with. The appellant had not entered the UK illegally. I was referred to the case of **Halamunden** at paragraph 61 but not given a copy or the full reference. This was a factual judgment and a balancing exercise. The Immigration Judge had correctly applied **Razgar**. The Rules did not apply and the Immigration Judge's decision to consider a "free-standing" article 8 claim did not amount to a material error of law. The Immigration Judge had considered all relevant matters therefore.

9. Mr Tufan replied to say that just because the sponsor had employment in the UK did not mean the economic considerations which the Secretary of State had to weigh in the balance had been properly considered. No satisfactory reasons had been given for permitting the appellant entry to the UK to join her mother.

10. At the conclusion of the hearing I reserved the decision as to whether or not there was a material error of law.

Discussion

11. In her Grounds of Appeal the Secretary of State recognises that the requirements of the Immigration Rules now found in Appendix FM were not in force at the time of this application (see paragraph 4 of those grounds). However, with respect, this does not mean the Immigration Judge could simply ignore the Immigration Rules altogether. The Immigration Rules in their pre 9 July 2012 state provided recognition of the need to facilitate family reunion in certain circumstances and the ECO gave detailed consideration to the family circumstances. The Entry Clearance Manager also noted the family circumstances in Bangladesh but found that the application did not comply with paragraph 297 of the Immigration Rules and that the Secretary of State's decision was not such as to unlawfully interfere with the appellant's protected human rights under Article 8. This family had a choice as to where to conduct their family life.

12. Having carefully considered the matter, the Immigration Judge's Article 8 assessment, particularly in paragraph 37, appears flawed.

13. Her mother had lived in the UK for a relatively short period of time in modest financial circumstances. The appellant had a father living in Bangladesh. By the date of the hearing the appellant was an adult. There were, in my view, no insurmountable obstacles to family life continuing abroad.

14. Miss Jarvis-Legg correctly submits that the test is not simply one of "insurmountable obstacles" in entry clearance cases. As she submitted, "special reasons" may be shown why the decision would be disproportionate. However, it seemed to be accepted that the appellant had the burden of showing that a degree of hardship if she is to succeed in establishing that exceptionally her application should be allowed under Article 8 where it fails under the Rules. It is clear from a number of cases since **Razgar** that the courts require insurmountable obstacles or special reasons to be shown.

15. The appellant had a father and brothers living in Bangladesh. The fact that her mother had developed a close relationship with her did not mean that there was probably going to be a "grave" interference with family life if the appellant were prevented from coming to the UK.

16. Secondly, to suggest that there was no legitimate aim is served by putting effective immigration controls in place, as the Immigration Judge appears to have suggested in paragraph 37 of his determination, appears to be wrong. It has been accepted in a number of the recent cases that immigration has both cultural and financial costs associated with it. This informs the policies pursued by the Secretary of State. Provided they are properly and consistently applied between different cases the Secretary of State would be able to discharge the burden of showing that the requirements of Article 8(2) of the Human Rights Convention were met. I find that the Secretary of State discharged the burden of showing that Article 8 (2) was satisfied in this case. Specifically she had shown that the decision was in accordance with the need to have proper immigration controls in place.

Conclusions

17. The Immigration Judge was plainly wrong in a number of respects as the discussion above makes clear. The Immigration Judge was entitled to make a favourable assessment of the appellant and the sponsor and the degree of their relationship. None of that is the subject of the present appeal which purely relates to the application of the law to the facts as found. I find that the interference with human rights was modest and in any event the insurmountable obstacles or special reasons test plainly was not met. Furthermore, the Immigration Judge failed to attach proper weight to those factors considered by the Secretary of State to be important in cases of this type. In the circumstances the Immigration Judge erred in law.

My Decision

18. The Secretary of State's appeal is allowed. Having found that there was a material error of law in the decision of the First-tier Tribunal that decision is set aside and the decision of the Secretary of State to refuse entry clearance is reinstated.

19. I set aside the fee award as this appeal has been successful.

Signed Date

Deputy Upper Tribunal Judge Hanbury