



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

Appeal Number: VA/17913/2013

THE IMMIGRATION ACTS

**Heard at Birmingham, Sheldon Court
On 2nd October 2014**

**Determination
Promulgated
On 9th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MS FATHIMA SHAHEENA ABDUL SALAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER, CHENNAI

Respondent

Representation:

For the Appellant: Ms M Nnamani (Counsel)
For the Respondent: Mr D Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Thorne promulgated on 25th April 2014, following a hearing at Hatton Cross on 9th April 2014. In the determination, the judge allowed the

appeal of Ms Fathima Salam. The Respondent Entry Clearance Officer, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Sri Lanka, who was born on 3rd March 1988. She appealed against the decision of the Respondent dated 20th August 2013 refusing her application for entry clearance as a visitor under paragraph 41 of HC 395.

The Appellant's Claim

3. The Appellant's claim is that she wishes to come to the UK in order visit her sister and her sister's husband. She herself was a teacher in Sri Lanka teaching at the City College and intended to return back to that employment after the visit.

The Judge's Findings

4. The judge began by making it clear at the outset that the appeal could only succeed only Article 8 grounds of the Human Rights Act (given that as of 25th June 2013 under Section 52 of the Crime and Courts Act 2013 there was a limit to right of appeal on grounds of race discrimination and human rights only). In doing so, the judge emphasised the fact that, "It was made clear that my task on an appeal on an ECHR ground against the decision of the primary decision-maker... was to decide whether the challenged decision was unlawful as incompatible with an ECHR right ..." (paragraph 28).
5. The judge reminded himself that in so doing, the Appellate Authority
"Should bear in mind several factors, including: the general administrative desirability of applying no Rules if a system of immigration control was to be workable, predictable, consistent and fair as between one claimant and another; the damage to good administration...; the need to discourage non-nationals admitted to the UK temporarily from believing that they could commit serious crimes...; and the need to discourage fraud, deception and deliberate breaches of the law" (paragraph 29).
6. The judge considered the factors in the Appellant's favour (see paragraphs 45 to 49) and then concluded that the Appellant was a genuine visitor and that immigration control and the public order were not undermined by allowing her to visit her sister in the UK (see paragraph 50).
7. The appeal was allowed.

Grounds of Application

8. The grounds of application state that the judge erred in law because the ECO had attempted to contact the school where the Appellant alleged to work but there was no answer from the school. Furthermore the Appellant had not been able to demonstrate that she had a relationship with her sister that goes beyond normal emotional ties. Moreover, under Section 52 of the Crime and Courts Act 2013 the judge could only allow the appeal on limited grounds and he did not follow the correct approach when making for his findings as to the Appellant's Article 8 rights to family and private life because he failed to have regard to Appendix FM of the Immigration Rules in making his Article 8 assessment. The judge did not give proper regard to the relevant sections of the Immigration Rules. Finally, the case of **Nagre [2013] EWHC 720** was overlooked.
9. On 29th May 2014, permission to appeal was granted.

Submissions

10. At the hearing before me on 2nd October 2014, Mr Mills, appearing on behalf of the Respondent Entry Clearance Officer submitted that the judge had erred in a number of respects. First, he made findings of fact as if the considerations under paragraph 41 of the Immigration Rules were in issue. When those findings of fact fell in the Appellant's favour, he then proceeded to allow the appeal under Article 8 by relying on those findings and this was an error of law. Second, the decision in **Gulshan** requires some analysis of circumstances justifying Article 8 consideration outside the Rules and the judge here had not engaged with this situation in the proper manner.
11. For her part, Ms Nnamani submitted that there was no material error of law. One had to look at the determination as a whole. It was clear that the judge made himself aware of the nature of his jurisdiction. He reminded himself at the outset (paragraphs 26 to 27) that the appeal could only be allowed on Article 8 grounds, and then examined what this meant for the Immigration Appellate Authorities (see paragraphs 28 to 29). It is true he made findings of fact. However, in making these findings, he then asked himself the relevant human rights question, namely, whether the interference by the Respondent decision-maker was "proportionate" with the rights and interests of the Appellant (see paragraph 43). The judge applied the authorities (see **Huang** and **Beoku-Betts**). Finally, it was spurious to suggest that the authorities had contacted the Appellant's school and met with no reply at the City College because the judge considered this very question and had evidence before him in the form of a letter from the City College dated 24th March 2014 "stating that the Appellant was employed there as a teacher since June 2012" and the judge held "I accept her explanation as to why no-one at the school answered the phone" (see paragraph 47).
12. In reply, Mr Mills submitted that if one looks at the findings that the judge actually made (at paragraphs 45 to 49) it is clear that he has almost directly quoted from the old paragraph 41 requirements by stating that

the Appellant has to be a person who is “genuinely seeking entry as a visitor for the limited period” and that “she intended to leave the United Kingdom at the end of the proposed visit” (paragraph 45) before also addressing the question of whether “the Sponsor can provide sufficient accommodation and maintenance” (paragraph 46), none of which was relevant to the question of a human rights appeal. It was clear that the judge had erred in law.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision and remake the decision. My reasons are as follows.
14. First, the judge reminds himself that this is a human rights appeal and that, “the Appellate Immigration Authority had to decide for itself whether the impugned decision was lawful, and, if not, but only if not, reverse it” (paragraph 28). The judge set out the relevant considerations (paragraph 29). Thereafter, the judge broke up the consideration of the facts and issues before him on the basis of language that is drawn directly, not from the Immigration Rules, but from human rights law, setting out the questions as to whether a protected right was engaged (paragraph 34), whether there was interference (paragraph 36), whether there was a legitimate aim being pursued (paragraph 38), whether the decision was in accordance with the law (paragraph 40) and whether the decision in question was proportionate (paragraph 42).
15. It is true that the judge thereafter considered (at paragraph 45) whether the Appellant was genuinely seeking entry as a visitor for a limited period, but it is significant that the judge does not refer here to the requirements of paragraph 41, but only to making findings of relevant facts, which are subsequently to be taken into account in the overall assessment of the Appellant’s human rights. The judge thereafter finds facts that are overwhelmingly in the Appellant’s favour (see paragraphs 45 to 49).
16. It is only after this is done, that the judge then proceeds to consider whether “the human rights of the Appellant (and her family in the UK) are not outweighed by the public interest” (paragraph 51). Had the judge stopped earlier, it may well have been argued that the judge has simply transposed a consideration of findings in relation to paragraph 41 into a decision under human rights law. It is clear that the judge did no such thing. He proceeded (after paragraph 51) to then weigh in the balance the requirements of “effective immigration control” (see paragraph 52) with the Appellant’s right to visit and her sister’s right to be visited by the Appellant.

17. Important case law was then brought into play, namely, the case of **Chikwamba** where Lord Scott had famously stated that, “policies that involve people cannot be, and should not be allowed to become, rigid, inflexible Rules” and invoking the spectre of *Kafka* and warning that this should not be allowed to take root in this country. What is important about this analysis by the judge is that he addresses the very question, which the Respondent may well rely upon, namely, of an Appellant, who cannot succeed under the Immigration Rules, thereafter simply applying and reapplying again.
18. Faced with this scenario, the judge is clear that, “it seems to me that refusing the Appellant’s appeal in these circumstances (where I am satisfied that she is and was always a genuine visitor) and requiring her to reapply would be wholly disproportionate and Kafkaesque in the extreme” .
19. Another judge, of course, may well have decided the matter differently. What is clear about this determination, however, is that the judge does go out of his way to consider the position specifically under human rights law, in the way that it is not necessary to consider under the application of domestic Immigration Rules, and in so doing, allows the appeal because it would be wholly disproportionate not to.
20. Second, as to the suggestion that the judge ought to have had regard to Appendix FM because this is a “complete code” such that the case of **Gulshan** requires some analysis of circumstances justifying Article 8 consideration outside the Rules, the judgment of Lord Aikens in **MM (Lebanon) [2014] EWCA Civ 985** was emphatic in stating that there is not much utility in imposing a further intermediary test, if an Appellant cannot comply with the Immigration Rules, because, “if the applicant cannot satisfy the Rules, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker” (see paragraph 128). In this case, the judge did address this specific question, and having addressed it, allowed the appeal. It was a matter for the judge to do so.

Decision

21. There is no material error of law in the original judge’s decision. The determination shall stand.
22. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

8th October 2014