



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

Appeal Numbers: IA/06259/2014
IA/06266/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 4th February 2015**

**Determination Promulgated
On 10th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

**MR MOHAMMAD ATIQUL HAQUE (FIRST APPELLANT)
MRS SALEHA KHANAM (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Thornhill
For the Respondent: Miss Johnstone

DECISION AND REASONS

Introduction

1. The Appellants born on 1st March 1943 and 3rd April 1949 respectively are husband and wife and both citizens of Bangladesh. The Appellants were represented by Mr Thornhill. The Respondent was represented by Miss Johnstone a Presenting Officer.

Substantive Issues under Appeal

2. There was a substantial immigration history to this case, a summary of which is set out below but culminated in the Appellants making application on the basis that their removal would be a breach of Article 8 of the ECHR. The Respondent had refused that application by refusal letter dated 20th January 2014 in which the Respondent had considered their position under the Immigration Rules, Article 3, and Article 8 of the ECHR.
3. That decision had been appealed by the Appellants and the appeal was heard by First-tier Tribunal Judge Herwald sitting at Manchester on 22nd May 2014. He had dismissed the appeal under the Immigration Rules and under Article 8 of the ECHR. Application for permission to appeal was lodged on 12th June 2014 with lengthy Grounds of Appeal submitted by Mr Nicholson of Counsel. Permission to appeal was refused by First-tier Tribunal Judge Kelly on 29th July 2014. In refusing that application the judge had noted that the application was essentially a running commentary upon the Tribunal's determination in which the author expresses his disagreement with weight that had been attached to various factors that found the Tribunal had directed itself in accordance with the law and reached conclusions that were reasonably open to it on the evidence. The application was renewed to the Upper Tribunal in largely similar terms again drafted by Mr Nicholson of Counsel and on 14th October 2014 Upper Tribunal Judge Goldstein granted permission to appeal. He indicated that without wishing to unduly raise the Appellants' hopes he found the First-tier Tribunal may have made an error of law in failing to give adequate reasons and the grounds raised arguable issues as to whether he was entitled to reach the conclusions that he did and granted permission in respect of all of the grounds. Directions were issued for the Upper Tribunal to decide firstly whether an error of law had been made in this case and the matter comes before me in accordance with those directions.

Submissions on Behalf of the Appellant

4. Mr Thornhill, an able and experienced immigration practitioner did not adopt or associate himself with the lengthy Grounds of Appeal that had hitherto been submitted. That was an understandable approach taken and Mr Thornhill focused on specific matters that he submitted raised an error of law. Firstly he indicated that the judge may have used the wrong threshold where he referred to "exceptional circumstances". Secondly he said the judge had failed to consider the evidence of the daughter-in-law and thirdly he said there was an over emphasis on the earlier judge's decision and insufficient regard to the position of the Appellants in respect of their relationship with the grandson and therefore an inadequate consideration of **Razgar**.

Submissions on Behalf of the Respondent

5. Miss Johnstone submitted that the First-tier Tribunal Judge's decision was entirely correct both in law and was reasonable and in part referred to the decision made by the First-tier Tribunal Judge who had originally refused permission.
6. At the conclusion of the hearing I reserved my decision to consider the submissions and evidence provided and I now provide that decision below.

Decision and Reasons

7. The Appellants had been granted a two year multivisit visa in April 2007 valid until 5th April 2009. They had come to the UK in late 2007 on those visas and had then returned to Bangladesh. They had then returned to the UK in late 2008 on those same visas and shortly before the expiry of those visas in March 2009 applied for indefinite leave to remain as dependent relatives of a settled person. That application had been refused and they had appealed such decision and their appeal had been heard by First-tier Tribunal Judge Lowe on 13th November 2009. She had dismissed those appeals under both the Immigration Rules and under the ECHR. The Appellants had become appeal rights exhausted on 8th January 2010. On 15th August 2012 the Appellants were served with a notice of a person liable to removal.
8. Thereafter there appears to have been substantial correspondence and action taken on behalf of the Appellants to prevent their removal including the seeking of judicial review, the result of which prevented the Respondent's intent to remove the Appellants, and for the Respondent to regard previous correspondence and submissions as resulting in a fresh claim such that would lead to the Respondent having to reconsider the Appellants' claim and if appropriate provide an in-country right of appeal. The Respondent had duly reconsidered the Appellants' claim under the terms of the Immigration Rules, Article 3 and Article 8 of the ECHR and had refused the Appellants' claims by letter dated 20th January 2014. Removal directions had also been set dated 20th January 2014. It was against that removal decision that the Appellants had brought their appeal before First-tier Tribunal Judge Herwald who had heard that appeal on 22nd May 2014.
9. The judge had noted at paragraph 2 of the decision that it had been conceded on behalf of the Appellants by Mr Nicholson that their appeals could not succeed under the Immigration Rules. The judge had also noted at paragraph 13(b) that the Appellants did not seek to persuade the judge that their claim could succeed under Article 3 of the ECHR and to that extent the judge was focused on the submission made on behalf of the Appellants, as recorded at paragraph 2 of the decision that there were exceptional circumstances that would lead the judge to conclude that the appeal should succeed under Article 8 of the ECHR.
10. The judge had properly noted that the Appellants' case had been previously decided on appeal in November 2009 by Immigration Judge

Lowe. He had noted at paragraph 8 of the decision that both parties had referred him to the previous determination made in respect of the Appellants. In that same paragraph the judge had correctly stated "Insofar as it is relevant I indeed take that (the previous determination) as my starting point". The judge was correct in identifying the principles set out in **Devaseelan** insofar as that previous determination was concerned. That previous decision was based on the Respondent's refusal to allow the Appellants' application under paragraph 319 of the Immigration Rules and under Article 8 of the ECHR. To the extent that the earlier judge was therefore looking at the financial and personal circumstances of the Appellants and perhaps more particularly their claim under Article 8 of the ECHR that earlier decision was clearly an important starting point for First-tier Tribunal Judge Herwald. Indeed at paragraph 22 First-tier Tribunal Judge Herwald had stated:

"My starting point in this appeal must be the decision of Judge Lowe insofar as it has not been altered by intervening events. Of course that decision was dealing with the old Immigration Rules but there are certain striking findings in the decision."

11. The previous judge had heard evidence from the first Appellant and the Sponsor son and had reached conclusions upon the consistency and credibility of the evidence that had been provided before him in 2009 in terms of the Appellants' circumstances in Bangladesh, the composition of the family both in Bangladesh and in the UK, the medical health of the Appellants and the dependency or otherwise between the Appellants and the Sponsors in the UK. First-tier Tribunal Judge Herwald had, within his decision, quoted and referred to extracts from the earlier decision in terms of the circumstances and findings made by the judge in November 2009. He was entitled to make such references to the earlier decision and the findings contained therein.
12. At paragraph 26 he had indeed stated "I cite this decision at length because I find that the personal circumstances of all concerned had changed little in the interim despite some unacceptable delay by the Respondent to which I shall refer later".
13. However the judge had not stopped at that point but correctly and in terms of **Devaseelan** had referred himself to what had changed since that earlier decision had been made. He had at paragraphs 27 and 28 in summary reminded himself of the changes since that earlier decision. He had noted, quite obviously, that both Appellants were now older. He had noted the medical condition of the Appellants and had referred himself to the medical reports contained within the Appellants' bundle. He had noted as had the previous judge that although the first Appellant had had a heart attack that had occurred in 2002 several years before he applied for settlement in the UK and that the first Appellant had had medical treatment in Bangladesh with fees paid for several years prior to his application for settlement in the UK. It had also been noted by the previous judge that given the historical nature of that heart attack and

circumstances generally it could not be said that the application for settlement shortly after the Appellants' arrival on a visit visa had been prompted by a deterioration of that health. First-tier Tribunal Judge Herwald had also noted from the medical reports that the first Appellant was well-mediated. He had also noted that the other change in circumstance was that both Appellants now had diabetes but both were well controlled by medication or by diet, both of which was readily available in Bangladesh. Finally he had noted that the Appellants had developed closer and warmer relationships as one would expect with their family and in particular the 6 year old grandson.

14. Set against the clear findings made by Judge Lowe in 2009 which had examined in detail the background of the Appellants and their circumstances in Bangladesh prior to coming to the UK, it was reasonable for Judge Herwald to have concluded that in reality and in summary the only change to the Appellants' circumstances were those summarised in paragraphs 27 and 28 of his decision. It is clear that in reaching those findings he had looked beyond the original judge's decision and had considered the evidence presented within the Appellants' bundles as he clearly indicated at paragraph 5 of his decision.
15. This was not a case where the judge had placed undue or unlawful emphasis upon that earlier decision. He was entitled to look carefully at that earlier decision because the application then concerned as it was in large part with Article 8 of the ECHR was precisely the matter that was before him for consideration. Secondly the earlier decision gave a detailed background and account of the Appellants' circumstances in Bangladesh prior to coming to the UK and the relationship between family members. Further as parties had given oral evidence at the earlier appeal hearing and had had that evidence tested, Judge Herwald was entitled to take as a starting point the findings reached by the judge in respect of that evidence. It is also clear however as stated above that he had properly in accordance with the guidance in **Devaseelan** gone beyond the earlier decision and examined the available evidence before him and had thereafter considered and set out in summary form the changes in circumstances since that earlier decision that would require him to go beyond that finding.
16. It was submitted that the judge had failed to consider the daughter-in-law's evidence. In the previous appeal hearing evidence had been provided by the first male Appellant and the Sponsor son. On this occasion the decision taken by the Appellants presumably with legal advice was that again only the male Appellant gave evidence and on this occasion the Sponsor son did not give evidence but evidence was provided by the Sponsor daughter-in-law. It was also noted by the judge at paragraph 13F that he did not even have a written witness statement from the second Appellant. It is clear however that the judge had before him and had considered the written witness statements of the first Appellant and the Sponsor daughter-in-law. The judge had also made it clear at paragraph 5 that he had heard the oral evidence of the Appellant and

Sponsor daughter-in-law and had set out their evidence in the Record of Proceedings and that had been taken into account together with submissions and the documentary evidence. It is not incumbent upon a judge to recite within a decision all the evidence provided in a case and to do so often creates unnecessary long and laborious decisions. In this instance the judge had summarised the Appellants' claim including the evidence from the daughter-in-law at paragraph 13A to F in his decision. That was sufficient and there is no evidence to suggest that the judge had not taken full regard of the daughter-in-law's evidence. Indeed an analysis of the daughter-in-law's written statement indicates that in reality there were only three paragraphs that dealt with her observations of the health of the Appellants and that which she did for them. Essentially that appeared to be she checked that the Appellants had a correct diet and she provided them with meals. She referred to the closeness of the Appellants to her son and provided as an example the fact that her son attended the local mosque each week needing no encouragement to go if he was aware that the first Appellant was also attending. In summary therefore there was not a substantial body of evidence presented by her and no evidence to suggest the judge had not taken proper account of her written and oral evidence.

17. It was submitted that in terms of an examination of Article 8 the judge had adopted the wrong test or threshold.
18. The judge had firstly found that the Appellants did not meet the requirements of the Immigration Rules making such findings additional to the fact that it was conceded on behalf of the Appellants they could not meet the Immigration Rules. At paragraph 20 the judge had specifically noted that Article 8 required further consideration and set out at paragraph 20 the relationship between the Immigration Rules and Article 8. In that paragraph the judge had given in summary his understanding of that relationship. He stated:

"I bear in mind that where the Immigration Rules and the learning on Article 8 are in harmony the answer given by the Rules might render further enquiry unnecessary outwith exceptional circumstances. I note that after applying the requirements of the Immigration Rules only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised by the Rules. The term 'insurmountable obstacles' in the Rules are not according to the case of **Gulshan** obstacles which are impossible to surmount."

19. That is a fair and clear assessment of consideration of Article 8 outside of the Rules and that was a matter clearly in the judge's mind. The judge at paragraph 20 had further noted:

"As the higher courts continue to tie themselves in knots on the subject of Article 8 I have to decide on the practical possibilities of relocation. In the absence of such obstacles it is necessary to show other non-standard and

particular features demonstrating that removal would be unjustifiably harsh
Nagre [2013] EWHC 720."

20. The judge perhaps discloses some exasperation that following the advent of the changes to the Immigration Rules in July 2012 there has not necessarily been a clear consistent formula to assist judges in determining Article 8 outside of the Rules despite the passage of time and the substantial volume of cases that are appealed on this particular matter.
21. As noted above the judge clearly had in his mind all the circumstances of the Appellants' case including the circumstances and findings made by the earlier judge and the circumstances that existed thereafter. He had taken into account the best interests of the grandson (paragraph 29) and he had further taken account of delays in this case. He was right to refer to delays caused by the Home Office but he was also right to note that not only had the Appellants failed to return to Bangladesh when they became appeal rights exhausted in 2010 but thereafter the various means by which they had used the Appellate system in order to remain in the UK. That view of the judge, inherent within paragraph 29 of his decision resonates with the view clearly expressed by the earlier judge as to the attitude and intent of the Appellants and their Sponsors in the decision made in 2009. The judge was entitled therefore at paragraph 30 that having carefully considered the line of cases including **Gulshan** he was not persuaded it was necessary for him to look outside of the Immigration Rules. The judge stated "Whatever jargon or legal language one uses there are simply not exceptional circumstances here". The use of the term exceptional circumstance in that context does not demonstrate an error of law. A variety of phraseology is used in case law which may or may not amount to the same thing but there is nothing to indicate this experienced judge did not apply the proper approach. Indeed at paragraph 31 the judge made clear that even if he had gone on to consider Article 8 he did not find circumstances such that he would depart from the findings of the earlier judge to the effect that such removal would be disproportionate. At paragraphs 31 and 32 he essentially in summary form performed a "**Razgar**" five stage test.
22. In summary as properly noted by the judge who refused the application for permission to appeal, the judge's findings were lawful and the conclusions reached by him reasonable on the evidence available and there was no material error of law made in this case.

Notice of Decision

No error of law was made by the judge in this case and I uphold the decision of the First-tier Tribunal.

No anonymity direction is made.

Signed

Date **10th March 2015**

Deputy Upper Tribunal Judge Lever