



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

Appeal number: IA/42136/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgation**

On November 16, 2015

On November 19, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MRS MORIOM KHATUN
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant

Mr Singer, Counsel, instructed by PGA Solicitors LLP

Respondent

Mr Bramble (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant, citizen of Bangladesh entered the United Kingdom as a visitor on January 18, 2011. Her leave was due to expire on July 18, 2011. On June 16, 2011 she applied for indefinite leave to remain as a dependent relative of a person present and settled in the United Kingdom. The application was refused on November 10, 2011 and no appeal was lodged. On July 12, 2012 she lodged a fresh application but this was refused by the respondent on August 7, 2013 and at the same time a direction to remove under section 10 of the Immigration and Asylum Act

1999 was made. The appellant appealed this decision on August 29, 2013 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

2. The appeal originally came before Judge of the First-tier Tribunal Beach on July 18, 2014 and she allowed the appellant's appeal under the Rules and under ECHR legislation. The respondent appealed that decision and the matter eventually came before Deputy Upper Tribunal Judge Manuel who found an error in law and remitted the matter back to the First-tier Tribunal. The appeal then came before Judge of the First-tier Tribunal Carroll on April 29, 2015 and in a decision promulgated on May 14, 2015 she allowed the appeal under Article 8 ECHR. No appeal on that occasion was pursued under the Rules.
3. The respondent sought permission to appeal that decision on May 20, 2015 on the grounds the Tribunal had approached the issue of Article 8 incorrectly and had then failed to have regard to the factors contained in section 117B of the 2002 Act. At an earlier hearing I found there had been an error in law because the Tribunal failed to properly have regard to two important matters:
 - a. The appellant had laser eye surgery for her deteriorating eyesight, had been provided with a compressed air unit for when she sleeps and was attending numerous doctor's appointments. She clearly was a financial burden on the state as there was no evidence adduced that she was paying for her medical treatment privately.
 - b. The maintenance of effective immigration controls remained in the public interest
4. There is a principle in the proportionality balancing exercise (described in Razgar (2004) UKHL 00027) that the public interest in maintaining firm immigration control qualifies for greater weight, or is enhanced and fortified, in circumstances where the Article 8 claimant is and/or is likely to be a financial burden on the state. I was satisfied the Tribunal took an extremely narrow view of financial independence because it had no regard to the matter referred to in paragraph 3(a) above. I found the Tribunal materially erred because when considering the appellant's appeal, the Tribunal should have had regard to relevant factors raised in section 117B of the 2002 Act.
5. I adjourned the case with directions.
6. The matter next came before me on the above date for submission. Mr Singer indicated he had only recently been instructed and had no further evidence, at this late stage, to submit but he was instructed the appellant's condition had worsened. I indicated that I was not prepared to adjourn the matter for further evidence. This opportunity had already been afforded to the appellant and his former representatives and whilst I acknowledged his instructing solicitor's difficulties in obtaining the previous bundle this would not have prevented further evidence being submitted. Mr Singer confirmed he was in a position to proceed today and

in the circumstances I invited submissions from both representatives. The appellant and her family were present at today's hearing.

7. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

SUBMISSIONS

8. Mr Bramble that the "error of law" hearing highlighted matters that needed to be considered. It was not disputed the appellant had some medical problems but in considering the public interest set out in Section 117B(1) of the 2002 Act the Tribunal could not overlook the fact:
 - a. The appellant could not speak English.
 - b. She was not financially independent and clear evidence that she had used NHS facilities for her medical condition.
 - c. Whilst she came here lawfully as a visitor she had been here unlawfully since November 10, 2011.
 - d. Her private life was precarious as she only ever had leave as a family visitor.

The medical position remained the same as no further evidence. None of the issues raised previous had been addressed and there was no evidence she was unable to travel. She has family in Bangladesh and demonstrated she had lived there most of her life. All of these factors support the maintenance of immigration control and her appeal should be dismissed under Article 8 ECHR.

9. Mr Singer relied on factual findings made by the previous Tribunal in relation to her medical condition and personal circumstances as set out in paragraphs [9] and [10] of the previous decision. Whilst it was accepted she was now here unlawfully Mr Singer submitted she had been here lawfully and had been given bad legal advice in November 2011. It was also accepted she did not speak English and had received assistance on the NHS but the current medical evidence made removal disproportionate especially in light of her current circumstances. He submitted there were sufficiently compelling factors that meant she should be granted permission to remain under Article 8 based on both her family and private life.
10. Following these submissions, I reserved my decision.

DISCUSSION

11. When this appeal came before the Tribunal on April 29, 2015 Judge of the First-tier Tribunal Carroll found the appellant had come here for a lawful purpose and that she needed a break with her family here because of tensions in Bangladesh. Since being here she has suffered a stroke and she also had a pre-existing eye-condition, mobility problems and was reliant on others for everyday tasks.

12. Today's appeal is brought on family and private life grounds. At paragraph [11] of its decision the Tribunal recorded that the respondent accepted there was family life between the appellant and her UK based family and it is now argued that her health raises private life fears under Article 8 ECHR. Mr Singer argues that the medical factors take this case beyond the normal Article 8 health case.
13. Both representatives agreed that the correct approach to take is set out in Razagar [2004] UKHL 00027 and agreed that the issues for this Tribunal were whether removal was proportionate.
14. It is well established that where the Article 3 medical claim failed an Article 8 claim could not prosper without some separate or additional factual element which brought the case within the Article 8 paradigm. That means a specific case must be made under Article 8. Although the UK courts have declined to state that Article 8 could never be engaged by the health consequences of removal from the UK, the circumstances would have to be truly exceptional before such a breach could be established.
15. At paragraph 111 of BA (Ghana) and KK (DRC) v SSHD [2015] EWCA Civ 40 Underhill LJ said, "First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging Article 8: if that is all there is, the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle."
16. In MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 and May 2012 the Court of Appeal noted that the courts had declined to say that Article 8 could never be engaged by the health consequences of removal but they had never found such a breach and had not been able to postulate circumstances in which such a breach was likely to be established. The only cases where the absence of adequate medical treatment in the country to which a person was to be deported would be relevant to Article 8 was where it was an additional factor to be weighed in the balance with other factors that engaged Article 8 (paras 17 - 23).
17. When this matter first came before me on October 6, 2015 I too accepted that the appellant had not intended to remain when she first came to the United Kingdom and I also accepted the appellant would struggle to return to Bangladesh. However, in so far as this latter point was concerned I do not accept she would be unable to travel at all because the medical evidence does not say this.
18. The issue is whether it would be proportionate to require the appellant to leave the United Kingdom and whether removal would breach her private and family life.

19. The Tribunal in Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) at paragraph [17] set out the correct approach when analysing sections 117A and 117B to be as follows:

“17(a) These provisions apply in every case where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person’s right to respect for private and family life under Article 8 ECHR and, as a result, would be unlawful under section 6 of the Human Rights Act 1998. Where a Court or Tribunal is not required to make this determination, these provisions do not apply.

(b) The so-called “*public interest question*” is “*the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).*”, which appears to embrace the entirety of the proportionality exercise.

(c) In considering the public interest question, the court or tribunal must have regard to the considerations listed in section 117B in all cases: per section 117A(1) and (2).

(d) In considering the public interest question in cases concerning the deportation of foreign criminals, the court or tribunal must have regard to the section 117B considerations and the considerations listed in section 117C.

(e) The list of considerations in sections 117B and 117C is not exhaustive: this is clear from the words in parenthesis “(*in particular*)”.

(f) The court or tribunal concerned has no choice: it must have regard to the listed considerations.

While the court or tribunal is clearly entitled to take into account considerations other than those listed in section 117B (and, where appropriate, section 117C), any additional factors considered must be relevant, in the sense that they properly bear on the “*public interest question*”. In this discrete respect, some assistance is provided by reflecting on the public law obligation to take into account all material considerations which, by definition, prohibits the intrusion of immaterial factors. We are not required to decide in the present case whether there is any tension between section 117A (2), which obliges the court or tribunal concerned to have regard to the list of considerations listed in section 117B and, where appropriate, section 117C) and the contrasting terms of section 117B (5) and (6) which are framed as an instruction to the court or tribunal to attribute little weight to the two considerations specified.”

20. The appellant may have come here lawfully but she came here only intending to stay for a definitive period. On advice, she applied to remain but when that appeal failed on November 10, 2011 she did not appeal that decision and accordingly, she was here unlawfully when the appeal came before the First-tier Tribunal. It is also clear that any private life she has developed had been created at a time when her status was precarious. She does not speak English and she is not only not financially independent but she has used the National Health Service at a time when she had no legitimate right to use the same. She did not meet the Immigration Rules

and all of these factors are strong factors to support Section 117B(1) of the 2002 Act.

21. The issue for me to decide is whether the appellant's family and health circumstances outweigh the importance of immigration control. Whilst Mr Singer made a passionate argument in relation to the appellant's medical condition case law is against the appellant. I am unable to find that on the current medical evidence that removal would breach her Article 8 private life claim and that is even before I have to take into account the Section 117B factors. There is no doubt the appellant has a number of health issues but the medical evidence does not take this case into the type of exceptional case that Mr Singer agrees would have to be shown and after applying the negative factors arising from section 117B I am satisfied that removal would not breach her right to private life.
22. I have also considered her family life position. As stated earlier I accept there is family life and again the issue for me to consider is proportionality of removal.
23. I have to have regard to relevant section 117B factors (set out above) as well as the appellant's claim that she would not receive the same level of care from family in Bangladesh. The appellant is an adult who has spent virtually all of her life in Bangladesh. For many years she lived in Bangladesh and enjoyed "family life" with her UK based family from a distance. Whilst I note the content of the witness statements of Ms Anwara Begum and Md Amirul Islam I find these statements have to be considered against the background that she has lived there all her life with many of the problems she currently has as evidenced by the medical report from Bangladesh dated April 6, 2015 and contained within the appellant's bundle at exhibit RK2. Her condition may have worsened since being in the United Kingdom but I am not dealing with an appellant who was in good health before her visit to the United Kingdom. I do not find it credible Mr Islam would turn his back on his aunt. It may not be ideal for him but he had taken on responsibility for her for many years.
24. Any family life claim under Article 8 has to be considered having regard to Section 117B of the 2002 Act. Her family life existed before she came to the United Kingdom so I do not attach any weight in this assessment to any submission she has created family life whilst here unlawfully or precariously but I have to have regard to the other factors namely she can neither speak English nor is she financially independent. Her family, to an extent, financially support her but the substantial medical bills have been at the expense of the NHS because she did not have any private medical insurance.
25. The issue is one of proportionality and based on all of the evidence before and the importance of immigration control I find that refusing this application on both family and private life grounds will not breach the appellant's Article 8 rights.

DECISION

26. I have previously set aside the earlier decision to allow this appeal under Article 8 ECHR as there was a material error.
27. I dismiss the appeal under Article 8 ECHR.
28. I uphold the earlier dismissal of the appellant's appeal under the Immigration Rules.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis

FEE AWARD

I make no fee award as I have dismissed the appeal.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis