Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53022/2013

THE IMMIGRATION ACTS

Heard at: Field House
On 22 June 2015

Decision and Reasons Promulgated On 1 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS FAHMIDA ROHI
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Presenting Officer
For the Respondent: Mr S Muquit, Counsel

DECISION AND REASONS

1. The appellant is the Secretary of State for the Home Department and the respondent is a citizen of Pakistan born on 1 January 1946. For the sake of convenience I shall refer to the latter as the "appellant" and to the Secretary of the State as the "respondent", which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant's appeal to the First-tier Tribunal was against the decision of the respondent to refuse the appellant further leave to remain in the United Kingdom pursuant to Article 8 of the European Convention on Human Rights. A Judge of the First-tier Tribunal, Coleman allowed the appellant's appeal pursuant to Article 8 of the European Convention on Human Rights.

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3. First-tier Tribunal Judge Brunnen in a decision dated 19 March 2015 granted the respondent permission to appeal to the Upper Tribunal, it being found to be arguable that the First-tier Tribunal Judge had by misconstruing section 117B of the Nationality, Immigration and Asylum Act 2002 and treating the appellant is exempt by reasons of age from the effects of subsection (2), ability to speak English and (3) relating to financial independence.

4. Thus the appeal came before me.

The first-tier Tribunal's findings

5. The First-tier Tribunal allowed the appellant's appeal, concluding that :

> "[26]." It is argued that paragraph 117B is not fulfilled because the appellant is not able to speak English and does not have skills to make her financially independent. I think this is a misreading of the paragraph. Under all the present rules, English-language requirements are not required for persons over the age of 65. It must therefore be recognised that such a requirement could not be imposed upon the appellant to fulfil Article 8 requirements. Similarly it would not be contemplated that a woman of her age would need to be financially independent by her own earning capacity. It is anticipated in all the rules that in the case of elderly relatives, the test is whether or not the families can maintain and accommodate the appellant without recourse to public funds. In this case the families have provided financial evidence to show that they are in a position to do so and they have as a matter of fact been doing so for the past three years."
>
> [27] "The only basis on which the appellant fails pursuant to the immigration rules is the requirement to return to Pakistan to make an appropriate application to return as a dependent relative. To ask a 69-year-old woman in poor health, wheelchair-bound, to do so must be disproportionate to the need to maintain proper immigration control. I therefore find that the decision does beach the appellant's rights under Article 8 of the ECHR. I allow the appeal on human rights grounds".

Grounds of appeal

6. The grounds of appeal state the following which I summarise. The Judge has materially misdirected himself in respect of the requirements of section 117B. At paragraph 26 of the determination the Judge appears to apply the language requirements of the Immigration Rules when considering the appellant's ability to speak English when having regard to section 117B (2). The approach taken by the Judge is an incorrect interpretation of section 117B. The appellant is over 65 years of age and therefore this is not an exemption named under section 117B (2). The Judge has materially erred in law by finding that this applies to the appellant when considering factors outlined in section 117B.

7. When performing the balancing exercise, the Judge into material error by not taking into account the appellant's inability to speak English is a factor which weighs against the appellant.

8. Similarly, the Judge materially misdirected himself in his consideration of the appellant's financial independence when considering section 117B (3). The Judge has looked at the appellant age instead of her lack of financial independence is weighing against her in the balancing exercise.

9. The Judge failed to take into account the findings in **Akhalu (health claim; ECHR article 8) [2013] UK UT00400 (IAC)** which applies the findings of **MM Zimbabwe [2012] EWCA Civ 279** in the headnote (1) and (2) which states the following.

> (1) **MM (Zimbabwe)v Secretary of State for the Home Department [2012] EWCA Civ** 279 does not established that the claimant is disqualified from assessing the protection of article 8 wherein aspect of her claim is a difficulty or inability to access health care in her country of nationality unless, possibly, a private life has a bearing upon her prognosis. The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few cases.
>
> (2) The consequences of removal for the health of the claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are paying is relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interest in removal.

10. The Judge's finding that the appellant's removal is disproportionate, has placed significant weight on the appellant's health. In the case of **Akhalu**, the appellant's requirement to seek NHS treatment for her medical treatment should weigh heavily against her in the balancing exercise. There is no evidence to suggest that the appellant has private medical insurance/treatment or that treatment for her condition is unavailable in Pakistan. The Judge has not taken this into account in the balancing exercise, and has therefore materially erred in law by finding the appellant's removal is disproportionate.

Decision on the error of law

11. Having considered the determination as a whole, I find the Judge's consideration of the appellant's appeal in respect of Article 8 is materially flawed. The Judge comes across clearly confused in his determination as to the factors he must take into consideration and to place the correct emphasis on these factors. The Judge's evaluation of the public interest question of the public interest was cursory at best in the determination.

12. The appellant considered the criteria set out in the Immigration Rules and s117B in his assessment of Article 8 when all he was required to do was to consider the appellant's failure to meet the Immigration Rules as the starting point and then go on to consider the Strasbourg jurisprudence in respect of Article 8 of the European Convention on Human Rights. Section 117A-117D is not to be taken to override the previous case law on Article 8 and needs for a structured approach.

13. The Judge has to take into account the five questions set out in **Razgar [2004] UK HL 27.** The effects in section 117 a-117D is a further elaboration of these five questions which is essentially about proportionality and justify ability in respect of proportionality. The definition in section 117 a (3) states:

> (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is **justified** under Article 8. [Emphasis added]

14. Mr Muquit argued that in this appeal, "money is not the problem" as the appellant and her family members have sufficient money. He argued that the Judge took into account that the appellant's doctor's evidence that the appellant needs emotional care and section 117 issue are in any case, a red herring and irrelevant to the issues in this appeal. He emphasised that he is not saying that this is a "near miss" argument but argued that the more a person can demonstrate that he/she is able to meet the Immigration Rules, is relevant to the Article 8 proportionality exercise.

15. Part 5A only applies where the Tribunal considers article 8(2) ECHR directly which the Judge did in this case. The Immigration Rules already contain "the public interest question". Although case law continues to develop, the current position is perhaps best expressed in paragraph 135 of **R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985**:

> Where the relevant group of IRs [immigration rules], upon their proper construction provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to "exceptional circumstances" in the code will nonetheless entail a

> proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law."

16. The appellant's application was made primarily pursuant to Article 8 of the European convention on Human Rights in respect of her family life in the United Kingdom. There was no dispute that the appellant did not meet all the requirements of the Immigration Rules, even if as Mr Muquit argues, she met some of them.

17. The Judge essentially found that that the appellant has been diagnosed with Parkinson's disease while in the United Kingdom and is wheelchair bound and that should somehow exempt from all the "requirements of s 117B". Section 117B is not a list of requirements which if fulfilled, will entitle the appellant to live in this country but they are merely considerations to be taken into account.

18. The Judge failed to apply the principles set out in **Akhalu** and failed to treat the appellant's dependence on medical treatment at the public expense as a factor weighing against her. At the hearing it was alleged that the appellant has paid or is going to pay the NHS for the medical treatment received. This is one of the questions which will have to be resolved at the rehearing.

19. Having considered the determination as a whole I conclude that the Judge erred in law in his evaluation of the appellant's appeal and I therefore set aside the decision. Mr Muquit requested that in the event that I was to find an error of law I should submit the appeal to the First-tier Tribunal for rehearing because findings of fact have to be made and potentially as to whether the appellant has been a burden on the public purse by utilising the NHS for her medical conditions or whether she has paid for her medical treatment in this country.

20. For the reasons given above, the determination of the First-tier Tribunal is set aside as it is infected by material error. I preserve none of the findings. I direct that the appeal be listed before a Judge of the first-tier Tribunal other than Judge Coleman on the first available date to remake the decision.

21. I further direct that the appellant provide evidence to the First-tier Tribunal that she paid for her medical treatment from the NHS as claimed.

DECISION

The Secretary of State's appeal is allowed and the appeal be sent back to the First-tier Tribunal

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal the 23rd day of June 2015