



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

Appeal Number: OA/03508/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 24 February 2015**

**Decision & Reasons Promulgated  
On 18 March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PEART**

**Between**

**MS DIL JAN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Nasim of Counsel

For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Afghanistan born on 15 July 1955. She appealed against the respondent's decision dated 5 February 2014 to refuse leave to enter to join her children in the United Kingdom.
2. The respondent refused the application on the basis that the family reunion provisions did not apply to the appellant and that was conceded at the hearing before Judge Maciel (the judge) by the appellant's Counsel. The judge dismissed the appeal under the Immigration Rules and on human rights grounds. She did not find the appellant's daughters to be

credible. She found there were no credible compelling circumstances to consider the appellant's case outside the Immigration Rules.

3. The grounds at [1]-[5] set out the judge's adverse certificate findings. The grounds claim the judge erred in her adverse credibility findings, in failing to take into account that the appellant's cousin's husband, Abdul Hadi, wrote a letter headed "*Confession of Abdul Hadi*" which was sent with the appellant's application dated 1 October 2013. Mr Hadi confirmed in the letter that he lived in Wardak province, he had taken care of the appellant for one and a half years, he was not in a good state of finance, he had lived in rented property and had to move to his own home province Maidan Wardak to look after his own family, he was disabled and could no longer look after the appellant. The information was provided prior to any rejection from the respondent. It was argued the judge failed to take into account that extremely relevant piece of evidence which supported and corroborated the sponsor's evidence.
4. The judge further rejected the assertion that the appellant did not travel to the UK with her children as there were insufficient funds but there was no evidence to suggest the same. Soma Bakshi gave evidence that when the house was sold there was "*not enough for all of us*". The judge appeared to have rejected the evidence based on the previous adverse findings of credibility which it was claimed were unsafe for the reasons set out.
5. Judge McDade granted permission to appeal as he found it was arguable that the judge's failure to consider the evidence of Abdul Hadi was an arguable error of law.

### **Submissions on Error of Law**

6. Mr Nasim's submissions did not limit themselves to the grounds seeking permission to appeal. He sought to introduce additional issues as follows:
  - (a) There is new provision in the Immigration Rules for a refugee to sponsor a parent.
  - (b) Both the Entry Clearance Officer and the judge failed to consider that new family reunion policy.
  - (c) The judge erred at [35] in finding that there were no credible compelling circumstances to consider the appellant's case outside the Rules. The judge was obliged to carry out a two stage process in terms of **Singh [2015] EWCA Civ 74**. See [66]. A **Razgar** test was necessary and the judge failed to carry it out.
7. Mr Nasim submitted that the judge's failure to consider the letter from Abdul Hadi impacted upon her adverse credibility findings at [30] and [31] of the decision.
8. Mr Jarvis opposed Mr Nasim's application to alter the grounds to include the issues I have set out at [6](a)-(c) above. Nevertheless, he submitted

that even if those issues were allowed in for my consideration, they had no merit.

### **Conclusion on Error of Law**

9. The grounds were drafted by the same Counsel that represented the appellant at the hearing before the judge. The decision was clear that the appellant's Counsel had conceded she could not meet the requirements of the Immigration Rules and that the only issue before the judge was Article 8. See [2] of the decision.
10. What Mr Nasim's submissions attempt is to introduce issues before me which either had not been argued before the judge or alternatively, were not argued in the grounds. There was no suggestion that either case law or the Tribunal Procedure (Upper Tribunal) Rules 2008 provided for allowing into the appeal before me, the matters raised by Mr Nasim. Rather, what he argued was that I had a discretion in that regard and that I should exercise it in favour of the appellant.
11. There are two issues, which I can deal with briefly. I do not accept that Mr Nasim on behalf of the appellant can argue a point which was not put to or considered by the judge. Further, I do not accept in these circumstances that the appellant should be entitled to alter her grounds of appeal, out of time, without notice. Counsel for the appellant was well aware of the issues as of the hearing and when she prepared the grounds.
12. I next consider the ground on which leave was granted, the claim that the judge failed to consider the evidence of Abdul Hadi. The judge clearly had in mind the letter from Mr Hadi. Whilst it was not mentioned in terms at [4], the judge recorded that the evidence was contained in the appellant's application, the notice of appeal and the documents submitted. In submissions, Counsel for the appellant drew the letter from Mr Hadi to the judge's attention in confirmation of the difficulties faced by the appellant in Afghanistan which the judge referred to at [24].
13. What the letter from Mr Hadi says is as follows:

#### ***"Confession of Abdul Hadi***

*I Abdul Hadi s/o Sadow Khan primary residence of Maidan Wardak province and present residence of Kabul province am a dedicated Son-in-law of Mrs Del Jan the mother of Late Jamil Bakhshi, Salma Bakhshi, Soma Bakhshi, Lamha Bakhshi and Amal Bakhshi.*

*From one year and half I look after Mrs Del Jan in my house. As I am not in a good state of finance recently and live in a rented house I have to move to my home province Maidan Wardak and look after my own family. Also I am a disabled person too and am not able to look after Mrs Del Jan any more. I wish from the son and daughters of Mrs Del Jan to look after their mother afterward and decide about her future.*

*Note: There is a copy of my Disabled Card attached to this Application Form for your consideration.*

14. The judge considered the various contradictions in the evidence of the witnesses at [30] and [31]. The judge did not find the witnesses to be credible regarding where the appellant was currently living which she claimed was Wardak. That was because one witness said that her mother “..... never left the house” whereas her sister said that her mother “..... walked to the pharmacy” when she had to buy medication. The fact that she certainly did leave the house was confirmed by the sponsor commenting that neighbours did not like it when they saw the appellant about the neighbourhood.
15. As I understand the evidence, the claim that the appellant was no longer welcome to live with the Hadi family was only raised when it was understood she would not be automatically entitled to entry clearance under the family reunion provisions. Mr Hadi claimed in his letter to be disabled and not able to look after the appellant any more but there was no suggestion in the oral evidence before the judge regarding his disability or that he could no longer look after the appellant. What the judge was told in oral evidence was that Mr Hadi had lost his job in Kabul. If that was true, it did not explain the sponsor’s oral evidence that Mr Hadi had been a self-employed taxi driver for many years in Kabul such that in the absence of any additional evidence to explain the same, he had not lost his job there. I also bear in mind that there was no suggestion in Mr Hadi’s letter that he had lost his job, although I accept he said he was not in a good state of finance.
16. It was the appellant’s claim and that of the oral witnesses her daughters, that she was living in Wardak province but was no longer welcome with the Hadi family. Further, that she was at risk of being forced into marriage there as she was a widow and that there were difficulties in her obtaining medication without assistance although that evidence was contradicted by the sponsor’s oral evidence that her mother walked to the pharmacy to buy medication when her cousin was not able to get it. In such circumstances, whilst I accept that the judge did not take into account Mr Hadi’s letter at [30] and [31] I do not find the error to be material given that the judge made quite separate adverse credibility findings regarding which the letter did not assist the appellant. The judge gave clear and cogent reasons for rejecting the appellant’s claim that she was living in Maidan Wardak, that there was no credible evidence that she was at risk of being forced into marriage, that her reason for not travelling to the United Kingdom with her children was not insufficient funds to finance the trip, that she did not suffer with medical conditions that rendered her more vulnerable living in Afghanistan, none of which issues were assisted by Mr Hadi’s letter.
17. I have rejected the argument that the grounds be amended to include a challenge to what the judge had to say regarding there being no circumstances to consider the appellant’s case outside the Immigration

Rules because that issue was not raised in Counsel's grounds. See [11] above. Nevertheless, even if I had allowed in that ground, I do not accept that it would assist the appellant. The judge referred to **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)** and found that only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules. Lord Underhill in **Singh [2015] EWCA Civ 74** commenting on **Izuazu (Article 8 - new Rules) [2013] UKUT 45 (IAC)** and **Nagre [2013] EWHC 7200 (Admin)** commented that Article 8 claims "*outside the Rules*" were still possible, though the scope for their operation was reduced. The **Izuazu/Nagre** approach was adopted in **Gulshan** which the judge considered. Taking into account the adverse credibility findings she made, the judge rejected the appellant's evidence of the circumstances in which she was living in Afghanistan. In such circumstances, I do not accept that there was an arguable case that there might be good grounds for granting leave to remain outside the Rules such as to oblige the judge to go on to consider whether for Article 8 purposes there were compelling circumstances not sufficiently recognised under the Rules. Accordingly, I do not accept she was obliged to carry out an Article 8 **Razgar** type assessment "*outside the Rules*" but even if she was so obliged, her adverse credibility findings would have led to the same conclusion; the appellant cannot succeed under Article 8.

18. I conclude that the decision does not contain a material error of law, such that it should be set aside.

### **Notice of Decision**

The decision of the First-tier Tribunal contains no error of law and shall stand.

No anonymity direction is made.

Signed

Date 24 February 2015

Deputy Upper Tribunal Judge Peart