



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13940/2019

THE IMMIGRATION ACTS

Heard at Field House
On 2 December 2020

Decision & Reasons Promulgated
On 30 December 2020

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MAHIMA KHATUN
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Sonali Naik QC, instructed by Bajaria solicitors

For the respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing her appeal against the Secretary of State's decision on 31 July 2019, refusing her application to remain in the United Kingdom on human rights grounds, either within or outwith the Immigration Rules HC 395 (as amended).

2. The appellant had a number of firms of solicitors representing her since 2014. In 2014, she instructed Syed Shaheen solicitors to submit a human rights application. In 2015, she was represented by Bajwa & Co in her second human rights application.
3. Her first EEA derivative residence card application in 2016 was submitted by A1 Law Chambers, from whom the appellant's present representatives, Bajaria Solicitors, have been unable to obtain any papers. There was then a second derivative residence card application in 2016, this time through Londonium Solicitors, and a third in 2017, through Law Dale Solicitors.
4. The appellant then instructed Barlow and Spencer solicitors to make a private and family life application in early 2017, but by October 2019 the firm had closed down, taking with it an £1800 advance payment which the interveners did not repay to her. On 3 January 2020, the appellant appeared before the First-tier Tribunal unrepresented.
5. Following the dismissal of her appeal, the appellant instructed her present firm, Bajaria Solicitors, who informed the Upper Tribunal on 15 April 2020 of her uncle's death, just over two weeks before it occurred. They have managed to assemble a significant body of retrospective documentary evidence which has been of great assistance in mastering the history of this appeal.

Background

6. The appellant is a citizen of Bangladesh, born on 16 June 1978, so she is now 42 years old. Her mother died in Bangladesh in August 2010, just two months before the appellant received her Tier 4 visa on 11 October 2009, enabling her to come here to study for her ACCA examinations. She has a large family in Bangladesh, a brother and five married sisters, all with their own households.
7. The appellant arrived in the United Kingdom on 28 October 2009. She had leave to remain as a student continuously until it was curtailed on 10 November 2014, when she was discovered to be working in breach of her visa conditions at a charity, Help for Change Trust. The appellant challenged that decision by judicial review at the time, arguing that she was merely volunteering, to build her social confidence. Help for Change wrote a supporting letter confirming that, but the judicial review was unsuccessful.
8. The appellant has had no extant leave now for over 6 years. While in the United Kingdom, the appellant has taken and passed almost all of her ACCA examinations (see [13]-[14] below). In 2013, her studies were interrupted by a road accident: she was run over, and her ankle badly fractured (an open distal fibula fracture). The appellant is now partially disabled. She had surgery, and owes the NHS a sum in excess of £4000, which she has been repaying, initially at £100 per month, now at £10 per month.
9. Following her arrest on 10 November 2014, the appellant was detained at Yarls Wood until 8 December 2014. When released, she did not embark for Bangladesh, but remained in the United Kingdom, continuing from time to time to take and pass further ACCA examinations (without leave to do so) and helping to care for her elderly

uncle with whom she was living, who was recently divorced and had dementia, so needed a lot of personal care.

10. The uncle had a son, who divided his time between the United Kingdom and the United States (except this year, of course, due to the COVID-19 pandemic). The son visited his father twice a month on average, and the uncle also had a privately employed carer who came every day, and a care plan through Social Services. The appellant's account was that she did everything else, to ensure high quality care for her uncle.
11. The appellant made applications for leave to remain on 12 November 2014, just after her arrest, and again on 12 August 2015, but both applications were refused. She then made a number of derivative residence card EEA applications in 2016, based on being her uncle's non-EEA extended family member, the last of which was refused on 8 October 2018.
12. The present application was made on 5 November 2018, on Article 8 ECHR grounds, and refused on 31 July 2019. The appellant appealed to the First-tier Tribunal, which dismissed her appeal. The appellant then appealed to the Upper Tribunal.

ACCA examinations

13. The chronology prepared by the appellant's solicitors and Counsel for the hearing show her progress towards the ACCA qualification. The appellant registered with ACCA on 12 July 2010.
14. My attention was not drawn to any evidence as to how many papers the ACCA requires students to pass in order to obtain its accountancy qualification, but the chronology shows that in the 10 years she has been in the United Kingdom, six of them without leave, the appellant has managed to pass a total of 11 ACCA papers, 5 of them after the curtailment of her leave, presumably by self-study:

<u>Date</u>	<u>Paper</u>
December 2010 [At Brit College]	F1 - Accountant in business F2 - Management Accounting F3 - Financial Accounting F4 - Corporate and Business Law
June 2012 [at Kaplan Financial]	F5 - Performance Management F6 - Taxation (United Kingdom)
September 2016 [No College named]	F9 - Financial Management
December 2016 [No College named]	F8 - Audit and Assurance
September 2017 [No College named]	F7 - Financial Reporting
June 2018 [No College named]	P2INT - Corporate Reporting (International)
March 2019	SBL - Strategic Business Leader

[No College named]

15. The appellant was due to sit her final examinations before qualifying as an ACCA accountant on 8 December 2020, 6 days after the Upper Tribunal hearing. I take judicial notice of her success over the previous decade and accept Ms Naik's submission that she is likely to be a fully qualified accountant at, or soon after, that date.

First-tier Tribunal decision

16. Before the First-tier Tribunal, the appellant appeared in person. Her appeal was firmly based on her uncle's circumstances and her caring responsibilities towards him. First-tier Judge Sweet considered that there was a lack of documentary evidence about the arrangements made for her uncle's care, noting that the uncle was about to have a fresh care assessment and also received care from the State, as well as having a son who could help him and was United Kingdom-based.

17. The First-tier Judge did not accept that the appellant was paying her NHS debt. That is now accepted to have been an error of fact and Mr Tufan does not seek to maintain that position. The judge considered that the appellant could complete her remaining few papers (perhaps as few as two) in Bangladesh, or remotely, and that it would not be disproportionate to expect her to do so.

18. The appellant appealed to the Upper Tribunal.

Permission to appeal

19. The grounds of appeal, settled on 17 January 2020 by Ms Miranda Butler of Counsel, are prolix. They are, however, summarised at [3]:

"3. In summary, the appellant appeals on the grounds that:

- (a) The judge failed to assess the existence of family life between herself and her dependent uncle [name] to make findings on this part of her claim, or to give adequate reasons for dismissing her appeal on these grounds;
- (b) The judge failed to take into account relevant evidence regarding the lawfulness of the curtailment of the appellant's leave [in 2014];
- (c) The judge did not consider the appellant's human rights claim with anxious scrutiny; and
- (d) The hearing was procedurally unfair. "

20. Permission to appeal was granted by First-tier Judge O'Brien, principally on ground (a), although he expressed concern about the NHS point, now resolved. No ground of appeal was excluded from consideration.

Rule 24 Reply

21. There was no Rule 24 reply on behalf of the respondent.

22. Triage directions were given on 19 June 2020 by Upper Tribunal Judge Coker, and again on 7 September 2020 by Upper Tribunal Judge Owens. The appellant has now instructed new representatives, Bajaria Solicitors, who notified the Upper Tribunal of the change of representation on 18 October 2020.
23. That is the basis on which this appeal came before the Upper Tribunal. It was listed for a face to face hearing, although Ms Naik appeared remotely, by arrangement with the Upper Tribunal.

Documents before the Upper Tribunal

24. On 25 November 2020, Garden Court Chambers (where Counsel, Ms Naik, has her Chambers), sent a lever arch file of documents for the upcoming hearing. It filled a lever arch file and was not supplied electronically. As the documents were not sequentially numbered, an alphanumeric system being used (A1, A2, B1 and so on) it is not possible to say how many pages were in the bundle. Fortunately, the documents therein contained were not novel in the context of these proceedings.
25. On 1 December 2020, the day before the hearing, Ms Naik provided the Tribunal with a skeleton argument and a chronology, which has been very helpful in getting a clear picture of what has happened over the decade that the appellant has been here. I am grateful to her for the breadth of her submissions, which were reinforced orally at the hearing.

Upper Tribunal hearing

26. By the time the appeal came before me, there had been a significant change in circumstances. The appellant's uncle, frail at the beginning of these proceedings, unfortunately died on 31 March 2020 of COVID-19. His son, the appellant's cousin, inherited his house but chose not to live there.
27. The appellant's evidence is that her cousin has put the house on the market, but that in the meantime, she has been permitted to continue living there, and to be joined by her partner, with whom until this year she had been in a non-cohabiting relationship which began in 2016. He has a very good job, working for TATA Steel as an Associate Consultant Software Engineer, and is earning £71,328 a year. His visa allows him to have a dependant partner, who, if not a visitor, may switch from an existing status to that status of dependant.
28. The appellant now seeks to rely on the private and family life she has with her partner, rather than family life with her uncle. The Secretary of State has not had any opportunity to make a decision on this changed factual matrix.

Submissions

29. I have had regard to Ms Naik's submissions, both oral and written, and to those of Mr Tufan.

30. Ms Naik contends, dealing with the relationship between the appellant and her uncle, that the First-tier Judge's failure to make a proper assessment of the level of the dependency of the appellant's late uncle on her, or her on the uncle, as contemplated in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, is a material error of law in the First-tier Tribunal's decision, and that any judge, properly directing himself on the evidence below, and making appropriate adjustment for the appellant's limited ability to argue the point because she was unrepresented, would have concluded that there was family life between appellant and uncle, which would have been likely to make her removal disproportionate. Ms Naik contends that the uncle's death does not make these arguments academic since materiality is to be assessed based on the evidence and circumstances at the date of hearing;
31. In relation to the 2014 curtailment, Ms Naik argued that the judge who then heard the matter failed to have proper regard to the appellant's evidence, supported by Help for Change Trust, that she was not working, but observing and socialising, and had never received any financial remuneration for anything she did there. Ms Naik relies on *Ahsan v The Secretary of State for the Home Department (Rev 1)* [2017] EWCA Civ 2009 and *Balajigari v The Secretary of State for the Home Department* [2019] EWCA Civ 673, arguing that the test in judicial review now is not whether the Secretary of State's decision was perverse or *Wednesbury* unreasonable, but rather, that a decision of precedent fact needs to be made in all cases before the Secretary of State's decision can be properly assessed and upheld or quashed.
32. Ms Naik accepted that such was not the legal landscape in 2014, when the judicial review was decided. However, she submitted that the First-tier Judge should, of his own motion, have looked behind the decision of the judicial review judge and considered whether, if the respondent's curtailment decision were challenged today, it would be upheld. If it would not, then the First-tier Tribunal should have presumed that the appellant would have gone on to have further leave to remain as a student, and would eventually have achieved indefinite leave to remain. In that case, when making the proportionality assessment, the weight to be attached to the public interest served by the appellant's removal would be manifestly diminished.
33. In the future, and despite her debt to the NHS, the appellant as an accountant would be self-sufficient and no burden on public funds. She was able and willing in future to pay her NHS surcharge, either as an employed person by paying tax to the State, or as a self-employed accountant, possibly providing employment to others in the United Kingdom as well as herself.
34. The anxious scrutiny element of the claim repeats that assertion, relying on *R (YH) v Secretary of State for the Home Department* [2010] EWCA Civ 116. The respondent should be required to give the appellant a further 60 days now to find a new Tier 4 sponsor, alternatively 30 months' discretionary leave to enable her to qualify for settlement, 'or to further regularise her situation such that she can apply for further leave in another capacity'.

35. On the question of procedural fairness, Ms Naik relied on the judge's error on the NHS debt payment plan, on the Tribunal's duty to give her every assistance as an unrepresented litigant (see *MNM (Surendran guidelines for adjudicators)* [2000] UKIAT 5 and *WN (Surendran, credibility, new evidence)* [2004] UKIAT 213), and to take notice of medical evidence which the appellant had not thought to bring to the hearing, having previously provided it to the respondent, which showed that she had serious mental health problems and suicidal ideation.
36. Ms Naik invited me to allow the appeal. If the decision were to be set aside, the appellant would seek to introduce further evidence: bank statements showing her NHS debt payments; evidence about her mental health, including the impact of losing her uncle; an updated statement showing that she would complete her ACCA examinations on 8 December 2020 and would then be a fully qualified accountant; and a statement from her partner, showing that he had leave to remain in the United Kingdom as an intra company transferee and could support and accommodate her, if required.
37. For the respondent, Mr Tufan noted that this application had not been a family life one, but had been based solely on private life, for leave to remain outside the Rules. It was right to say that there was reference to the appellant's uncle at part 6 of the application form. There was no evidence before the First-tier Tribunal from the appellant's cousin, her uncle's son, as to his own contribution to his uncle's welfare.
38. The curtailment was no longer open to challenge, having been 'done and dusted' in 2014. The appellant was asked at the hearing, and confirmed that judicial review of that decision had been refused. *Balajigari* and *Ahsan* were issue-specific and the *Wednesbury* principle in judicial review was not defunct, as Ms Naik appeared to be suggesting.
39. The NHS debt issue was not relied upon in the refusal letter. The judge had misdirected himself, but Mr Tufan accepted that the appellant was paying her debt. That error of fact was not of itself sufficient reason to set aside the First-tier Judge's conclusions. The decision of the First-tier Tribunal under section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) was sustainable, and had been open to the judge on the evidence and argument before him.
40. All of the other issues raised post-dated both the decision under challenge and the First-tier Judge's decision and could not form a proper reason for concluding that the First-tier Judge made a material error of law in his decision.
41. Mr Tufan asked me to uphold the decision of the First-tier Judge and dismiss the appeal.

Analysis

42. It is right to say that there is inadequate, if any, reasoning in the First-tier Judge's decision on the *Kugathas* issue. However, that error of law is not now a material error. The caring relationship which is at the heart of it has ended with the uncle's death.

Moreover, on the limited evidence presented about the rest of the caring roles in her uncle's life, the date when he became divorced and needed family support, and his son's contribution, I am not as sanguine as Ms Naik is that the outcome would have been different had the judge applied his mind properly to whether there was family life between uncle and niece.

43. Nor do I consider that the error of fact, patent though it is, regarding the NHS debt is such as to make the First-tier Judge's decision unsound. He was certainly wrong: the appellant had not brought with her the evidence of payment and he jumped to conclusions. But the appellant's case was weak and would have failed for other reasons.
44. As regards the judicial review issue, Ms Naik's submissions are unarguable. It would be impossible, and improper, to proceed in this appeal as though the curtailment had not occurred, and then to postulate various further extensions of student leave and eventual indefinite leave to remain, ending by directing the Secretary of State to take any of the steps set out at [33] above.
45. The appellant had, and took, the opportunity to judicially review the curtailment decision in 2014, based on the same evidence which is now produced. She was unsuccessful. There have been five subsequent applications for various types of leave in the meantime. The present application is not an application for an out of time appeal against the 2014 judicial review decision, but an appeal against the Secretary of State's decision in an entirely different application.
46. The procedural fairness argument is equally unsound. The appellant appeared unrepresented, although she had previously had representation from a number of experienced immigration firms. She made her arguments, and the judge considered them in the light of the evidence actually produced. It would be impossible for the judge to have considered evidence which was not before him and unreasonable to expect him to deduce evidence of mental health issues, suicidal ideation, or a non-resident partner with whom she had been in a relationship since 2016, if the appellant did not tell him of these matters.
47. The reference to the *Surendran* guidelines cases mistakes their relevance. These cases give guidance to judges as to how to proceed when faced with an appellant, but no Home Office Presenting Officer. The *Surendran* guidelines tell a judge how to manage where he does not have that assistance. That was not the situation here: there was a Home Office Presenting Officer before the First-tier Tribunal who was able to test the appellant's evidence in the ordinary adversarial process.
48. I note that the appellant's argument before the First-tier Judge that she would be unable to complete her ACCA qualification from Bangladesh is now irrelevant. She has sat her final examinations and presumably is now a fully qualified accountant. Additionally, it is clear that she has been able to take 5 of the 11 ACCA papers without attending any College, either by self-study, or online course, or in some other manner

which has not been explained. If any retakes are necessary, she could do that equally well from Bangladesh, as the First-tier Judge found.

49. Finally, I deal with the appellant's new relationship circumstances. The person with whom she has this relationship has not been mentioned before. The Secretary of State has not had an opportunity to make any decision on this situation and it is, of course, open to the appellant to make a paid application or further submissions and invite her to do so. The situation may be short lived, if the appellant's cousin, her uncle's son, finds a buyer for the uncle's house swiftly. In those circumstances, the appellant will have no home in the United Kingdom.
50. For all these reasons, I conclude that the First-tier Judge did not materially err in concluding that it would not be disproportionate to expect the appellant to embark for Bangladesh now, after spending four years lawfully and six years unlawfully in the United Kingdom.
51. This appeal is dismissed.

DECISION

52. For the foregoing reasons, my decision is as follows:

The making of the previous decision did not involve the making of a material error of law.

I do not set aside the previous decision. The decision of the First-tier Tribunal is upheld.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 10 December 2020