Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Masuma Rahman) v Secretary of State for the Home Department IJR [2014] UKUT 00374 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 14 July 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE QUEEN ON THE APPLICATION OF

MASUMA RAHMAN

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, instructed by Duncan Lewis Solicitors
For the Respondent: Ms K Olley, instructed by the Treasury Solicitor

1. The applicant applies with permission for judicial review of a decision of the respondent dated 2 July 2013 refusing to grant leave to remain in the United Kingdom. There is also a supplementary decision of 18 March 2014 which also requires to be taken into account.

2. The application was made on 7 November 2012. It set out the applicant's immigration history. She was born on 7 December 1994 and arrived in the United Kingdom with her mother, Jabun Rahman and her younger sister, Masuda Rahman, in July 2008. Masuda was born on 29 July 2003. The applicant and her sister were dependents on their mother's visitors visa which was valid for six months. It is said that the mother lost the children's passport while in the United Kingdom and returned to Bangladesh alone with the intention of obtaining new passports for the children. They were left in the care of their maternal aunt, Nurjahan Sheuli, who is a British citizen. The mother never returned to the United Kingdom and it is said that her whereabouts are unknown.

3. Mrs Sheuli also had contact with the applicant's father on one occasion and was told that the mother's mental state had deteriorated even further and there were no arrangements in place for the children to return to Bangladesh and it was understood that the parents had moved from the family home. The applicant's grandmother and uncle went to Bangladesh in January 2011 in order to trace the children's mother but they were unsuccessful.

4. The applicant has studied successfully while in the United Kingdom. At the time of the application letter she was studying for A levels in four subjects and was hoping to go on into higher education. As well as her aunt and her family, including her aunt's daughter with whom the applicant is very close, the applicant has also uncles and grandparents in the United Kingdom with whom she maintains regular contact.

5. A similar application was made in respect of the applicant's sister Masuda. That application was also refused, and judicial review proceedings were commenced. Limited leave to remain was granted on 2 January 2014 and as a consequence the proceedings were withdrawn.

6. In the decision of 2 July 2013 the respondent gave consideration to the applicant's family life under Article 8 which, it was noted, from 9 July 2012 fell under Appendix FM of the Rules. It was considered on the basis of whether the applicant met the relevant requirements for leave to remain as a child, and it was concluded that neither of her parents had leave to remain in the United Kingdom and she therefore failed E-LTRC.1.6 of Appendix FM .

7. The decision maker went on to say that consideration had also been given to whether her application raised or contained any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the respondent of a grant of leave to remain in the United Kingdom outside the requirements of the

Immigration Rules. It had been concluded that it did not and the application was therefore refused.

8. Thereafter a letter before action was sent on 22 July 2013, to which there was no response. The application for judicial review was filed on 1 October 2013. In the grounds it was argued that the respondent had failed to engage with the highly unusual facts of the case, referring inter alia to what had been said by the Upper Tribunal in MF (Article 8 – new Rules) [2012] UKUT 00393 (IAC) and R (on the application of Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin). It was argued that the decision was unlawful because the applicant's Article 8 rights had not received discrete and separate consideration outside the Immigration Rules.

9. It was also argued that this was a case where the respondent was required to make an immigration decision providing a right of appeal, noting that the applicant had been a child when the application was made although she was now 18, and the decision did not conform with the respondent's own policy "Requests for removal decisions".

10. In her summary grounds, the respondent contended that there was no basis for a grant of leave to remain on Article 8 grounds, whether under the Immigration Rules or otherwise, and that she was not obliged to issue a removal decision, bearing in mind inter alia what had been said by the Court of Appeal in Daley-Murdock v Secretary of State for the Home Department [2011] EWCA Civ 161.

11. On 27 January 2014 Upper Tribunal Judge King granted permission to the applicant on the basis that, although she might not meet the Immigration Rules, it was unclear from the decision letter what factors were taken into account in concluding as the respondent did in respect of Article 8.

12. Subsequently, on 18 March 2014, the respondent sent a supplementary decision letter. In that letter she noted the applicant's immigration history and considered her private life under paragraph 276ADE of HC 395. It was concluded that the applicant was not able to meet the requirements of paragraph 276ADE.

13. The decision maker went on to consider the application in light of the guidance in MF (Nigeria) [2013] EWCA Civ 1192, which was the appeal against the earlier decision of the Tribunal referred to above. The decision maker considered whether there were exceptional circumstances shown, and concluded that they were not. It was noted that "exceptional" meant circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family life such that refusal of the application would not be proportionate. Reference was made to the fact that the applicant, together with her sister, lived with their aunt, and taking into account the circumstances in which that came about. It was also noted that Masuda had been granted leave to remain in the United Kingdom outside the Rules, on compassionate grounds.

14. It was concluded, however, that a grant of leave outside the Rules was not appropriate in the case of the appellant. It was said that although her mother could not be contacted, her aunt had spoken to the applicant's father in Bangladesh, hence she could be reunited with him there. She could maintain contact with her relatives in the United Kingdom. Although there might be a degree of hardship for her in that she would be away from her aunt, sister and extended family if she were to return to Bangladesh, she could still keep in contact with them. There was no evidence to indicate that the ties she had with her aunt, grandmother and extended family exceeded the normal ties beyond adults nor indeed that she had custody of Masuda.

15. It was said that the circumstances which led to a grant of leave to Masuda were not directly applicable to the applicant. She was a healthy young woman who had benefited from an English state education and who could reasonably be expected to resume her life in Bangladesh where she had lived until the age of 13. It was said that as she had left Bangladesh as teenager she would have knowledge of the customs and dialects of the country. Both her father and mother were nationals of Bangladesh and the location of at least her father was known.

16. As regards the other issue, reference was again made to the decision in Daley-Murdock. The criteria which would lead the respondent to make a removal decision where there was a request to do so were not met.

17. I have had the benefit of oral submissions from Mr Collins and Ms Olley and also a skeleton argument from each of them and I am grateful to both for their considerable assistance.

18. Mr Collins argued that both decision letters were deficient. He argued that there was no real addressing of the applicant's six years in the United Kingdom as an adolescent, having been abandoned by her family in the United Kingdom. There was a failure to engage with the evidence, and in this regard he referred to the statements that had been made, which were indicative of the life that the applicant enjoyed in the United Kingdom and the fact that efforts to contact both her mother and father had been unsuccessful as long ago as 2011. It was clear that there had been no communication with either parent for quite some time.

19. He also argued that it was wrong to conclude that Article 8 was not engaged, bearing in mind the decisions in Ghising [2012] UKUT 00160 and in Gurung [2013] EWCA Civ 8. It was true that cases were fact-sensitive, but the fact that the applicant had attained her majority did not mean that family life disappeared. She had family life with her relatives in the United Kingdom, in particular with her sister. There had been no engagement in either decision with the effect on both sisters of separation.

20. There was no reference to the Section 55 duty incumbent on the Secretary of State. It was clear from paragraph 24 of ZH (Tanzania) [2011] UKSC 4 a decision would not be in accordance with the law if regard was not had to

the need to safeguard and promote the welfare of any children involved. There had been no attempt to identify Masuda's wishes.

21. In addition Mr Collins argued that, in line with what had been said in SK (Zimbabwe) [2011] UKSC 23 and also Khan [2012] EWHC 707, the respondent was required to follow her own policies and that had not been done in this case. It could not properly be said that the applicant would want to leave the United Kingdom, and indeed a recent letter of 3 July 2014 from her solicitors to the respondent was produced in which it was made clear that she had no intention of leaving the United Kingdom of her own volition.

22. In her submissions Ms Olley referred to the recent decision of the Court of Appeal in MM [2014] EWCA Civ 985, in particular at paragraphs 129 to 131, especially with regard to what the Court of Appeal said about the decision of Mr Justice Sales in Nagre. If there were weaknesses in the earlier decision letter they had been made good in the second letter. The private life of the applicant had been considered. She did not qualify under the Rules and exceptional circumstances had nevertheless been considered.

23. It was a question of whether there was an error of law in applying the residual discretion, and whether the decision was not impossible for a reasonable decision maker to come to. Each case had to be determined on its own facts. The reference to the contact with the applicant's father was made on the basis of the GCID, which had been appended to Ms Olley's skeleton. It could be seen from page 205 of the final paragraph at tab B that there had been contact, so there was no inaccuracy. In any event, the applicant was an adult and her position was therefore very different from that of her sister. She had done very well educationally and was well placed to avoid destitution. In contrast to her sister, she had spent her formative years in Bangladesh. It had not been shown that it was impossible to contact her father or other family members in Bangladesh. There was no need to refer expressly to section 55 and clearly the relationship had been dealt with in the letter. The relevant consideration had been provided and there was no need for a separate reference. As regards the Daley-Murdock point, the matter did not fall within the respondent's policy since the application did not include a dependent child and there were no exceptional, compelling reasons to make a removal decision.

Discussion

24. It is clear that the application could not succeed under the Immigration Rules and they have been considered adequately in a combination of the two decision letters, as regards family life under the Rules and private life under the Rules. The first letter did not address private life but that deficiency was addressed in the second letter. In the first letter it was concluded that there were no exceptional circumstances which might warrant consideration of a grant of leave outside the Rules. More detailed consideration was given to exceptional circumstances in the second

decision, and the approach there accords with the guidance in authorities such as MF (Nigeria) and Nagre.

25. The first of the three essential matters raised by Mr Collins concerns what he says is an error in the assumption that the applicant could be reunited with her father in Bangladesh. The evidence in this regard, as set out in statements by the applicant, her aunt and her grandmother, is to the effect that although there was initially contact with the applicant's mother on a number of occasions, and the applicant's aunts spoke to the applicant's father, it seems in 2011, about the situation, eventually she lost contact with the parents and they moved out of the house they were living in in Bangladesh.

26. The GCID attached to Ms Olley's skeleton argument does not I think take matters any further. It is the basis for the remark in the second decision letter, but it is taken from the evidence to which I have referred above.

27. The letter is worded quite carefully. It says "Although her mother cannot be contacted, your client's aunt has spoken to your client's father in Bangladesh, hence your client could be reunited with her father in that country." That, I think, is an accurate statement. Although efforts to contact the father have, it is said, been unsuccessful, certainly the possibility is not ruled out, and to that is added Ms Olley's point that the applicant is now an adult and better equipped to cope with life than she would have been as a child. In that regard it is relevant to bear in mind Mr Collins' point in that attaining the age of 18 is not a bright line departure from childhood and family links, and certainly the evidence put to the Secretary of State about the family does indicate that they are close.

28. The conclusion in the first decision letter was that there were not exceptional circumstances shown warranting a grant of leave outside the Rules in respect of private and family life, although this was addressed it seems particularly in the context of the decision that under the Immigration Rules the applicant could not succeed on the basis of family life. To that also has to be added the point made in the second letter that no evidence had been provided to indicate that the ties the applicant has with her relatives exceed the normal ties beyond [sic] adults and it is also noted that the applicant does not have custody of Masuda.

29. Again I think this was a conclusion to which the respondent was entitled to come on the evidence, and I bear in mind Ms Olley's reminder that this is not an issue of agreement or disagreement with the conclusions of the respondent but rather an assessment of whether any public law challenge to her reasoning and conclusions is made out. I consider that the decision letters taken together do adequately address the issues that were put to the respondent and accordingly the first ground is not made out.

30. Mr Collins' next main point is the section 55 point. It is the case that section 55 was not referred to in either decision letter. However the second letter displays a clear awareness of the situation of the applicant and her sister, including the reasons why Masuda was granted leave to

remain in the United Kingdom, and noting that she does not have custody of Masuda. Again I consider it was open to the respondent to find that there were not exceptional circumstances in this case that would justify a grant of leave, and the absence of any specific reference to Masuda's interests, bearing in mind the quite full analysis of the family situation, does not seem to me to preclude that conclusion having been properly reached.

31. As regards the third main point, what might be called the Daley-Murdock point, I consider that again the challenge is not made out. The respondent's policy is set out towards the end of the second decision letter, and, bearing in mind my above findings, it is the case that no exceptional and compelling reason to make a removal decision had been made out, and it is the case that the application does not include a dependent child under 18 since Masuda was not of course part of the application. Accordingly I consider that the respondent was entitled to decide not to make a removal decision in this case and that ground therefore also falls away.

32. For all these reasons, therefore, the application is dismissed.

33. I will deal with costs and any other issues when the judgment is handed down on 30 July 2014.

Signed Date

Upper Tribunal Judge Allen