Upper Tribunal
(Immigration and Asylum Chamber) Appeal
Number: IA/34971/2013

IA/34973/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 29 July 2014	**On 06 Aug 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

TZR
AJ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr B Halligan instructed by Manchester Associates
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellants. This direction applies to both the appellants and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

The Background

2. The first and second appellants are mother and daughter born respectively on 29 December 1981 and 30 December 2003. They are citizens of Bangladesh. On 24 March 2006 they arrived in the UK with entry clearance valid until 31 July 2007 as dependents of MB who is married to the first appellant and is a student in the UK. Their leave was subsequently extended until 30 May 2013. On 25 May 2013, the appellants appealed for an extension of their leave to remain on the basis of their private life in the UK, in particular that the second appellant had been diagnosed with autism and Attention Deficit Hyperactive Disorder (ADHD).

3. On 13 August 2013, the Secretary of State refused each of the appellants' applications under the Immigration Rules and, in respect of each appellant, refused to vary their leave and made a decision to remove them by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

4. The appellants appealed to the First-tier Tribunal. In a determination promulgated on 17 December 2013, Judge Pickup dismissed each of the appellants' appeals. He was not satisfied that either appellant met the requirements of the Immigration Rules, in particular Appendix FM and para 276ADE. He also dismissed the appeal under Article 8 of the ECHR on the basis that there were "not sufficiently compelling circumstances" to justify a grant of leave outside the Immigration Rules.

5. The appellants sought permission to appeal to the Upper Tribunal and on 21 January 2014 the First-tier Tribunal (Judge Davey) granted the appellants permission to appeal. Thus, the appeal came before me.

The Submission

6. Mr Halligan, who represented the appellants, submitted, on the basis of the grounds of appeal that the Judge had erred in law by failing to give adequate reasons for his finding that the appellants' removal would not breach Article 8. He submitted that the Judge had failed properly to consider, and take into account, the evidence concerning the second appellant's autism and ADHD. He submitted that the Judge had failed to take into account the evidence in relation to the effect upon the second appellant of returning to Bangladesh in assessing whether there were "compelling circumstances" such that removal would be disproportionate. He drew my attention to the material set out in the appellants' bundle which runs to 480 pages. In particular, he relied upon the evidence from a number of professionals and others concerning her condition and needs (at Sections III and IV) and the objective evidence in relation to autism, including a letter from the Principal of a special school in Bangladesh (at Section VII). Mr Halligan submitted that the Judge's reasoning at paras 20-21 and 34 was inadequate.

7. On behalf of the Secretary of State, Mr McVeety submitted that the Judge had considered the severity of the second appellant's condition and had accepted that her removal (with her mother and father) would have a significant

impact. The Judge had given sufficient reasons at paras 20-21 and 34 for his conclusion that the appellants could not succeed under Article 8.

Discussion

8. Following the representatives' submissions, I indicated that I was satisfied that the Judge's determination could not stand as he had failed to give adequate reasons for his ultimate finding and had failed properly to take into account the professional and other evidence and background evidence. My reasons for that decision are as follows.

9. In this appeal, Mr Halligan accepts that the appellants cannot succeed under Article 3 of the ECHR. That is, in my judgement, an entirely appropriate concession given the very high threshold required to establish a breach of Article 3 in what is, in effect, a "health" case (see GS and EO (Article 3 – Health Cases) India [2012] UKUT 397 (IAC)). It is, nevertheless, recognised that a claim under Article 8 can succeed in circumstances where a claim under Article 3 could not (see GS and EO at [85(8)] and Akhalu (Health Claims: ECHR Article 8) [2013] UKUT 00400 (IAC)).

10. There is no difference in principle between a pure "health" case and one, such as the present, concerned with an individual who has "social care" or "welfare" needs arising, for example, from autism and ADHD.

11. Equally, it is clear that a claim under Article 8 may have added impetus where the individual concerned is a child who has such needs (see R (SQ) Pakistan v UTIAC [2013] EWCA Civ 1251 and AE (Algeria) v SSHD [2014] EWCA Civ 653).

12. The assessment of whether such an individual's removal would be disproportionate involves, necessarily, a balancing of their individual circumstances both in the UK and abroad against the legitimate aim of the economic well-being of the country. That is a balancing exercise which, even in the case of a child, may prove difficult to strike in favour of the individual. Nevertheless, as was accepted before me, in appropriate circumstances, a claim under Article 8 could succeed in appropriate circumstances in a "health" or "social care/welfare" case.

13. As part of that assessment, the Judge was required to consider the "best interests" of the second appellant as a primary consideration even if sufficiently weighty counter-veiling factors of the public interest could outweigh those best interests (see ZH (Tanzania) v SSHD [2011] UKSC 4 and Zoumbas v SSHD [2013] UKSC 74 at [10]). In doing so, the Judge was required to consider the evidence of the second appellant's needs, how they were met in the UK and what impact removal would have upon the second appellant including the extent to which her needs would be met in Bangladesh.

14. In my judgement, the Judge failed to provide an adequate substratum of reasons underpinning his findings in relation to the second appellant's needs and how they would be met, if at all, in Bangladesh. In particular, he failed to give proper consideration to the professional and other evidence concerning

the second appellant's needs and how they are, and would be, met. At paras 20-21 of his determination, albeit in the context of Article 3, the Judge said this:

> "20. I have taken account of the evidence as to the second appellant's needs, including the developmental needs chart handed in at the hearing and the evidence as to treatment available in Bangladesh. I am not impressed by the fact that the first appellant has not looked into the availability of treatment herself since 2010. Pgs 431-471 of the appellant's bundle sets out some objective evidence suggesting that there is limited availability of treatment and support for autism and/or ADHD children. The respondent also submitted objective evidence. This includes material about the Autistic Children's Welfare Foundation in Bangladesh, and an article about Special Educational Needs in Bangladesh.
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> 21. Without detailing all her needs, treatment and the various pieces of evidence, it is perfectly obvious that there is provision for treatment for autism and ADHD in Bangladesh, but the extent and quality of medical and other professional support available to the second appellant in Bangladesh would undoubtedly come as a poor second to that she is currently receiving in the UK. However, that is not the relevant test for entitlement to remain in the UK. In all the circumstances of this case, notwithstanding the sympathy any impartial observer would have for the second appellant, I find that it would not be a breach of article 3 ECHR to require the second appellant with all her needs to return to Bangladesh. The second appellant's condition and the treatment she can access in the UK and would have challenges in accessing in Bangladesh does not begin to meet the article 3 threshold."

15. It was not, in my judgement, sufficient for the Judge to say that he had considered the evidence at pages 434-471 of the appellant's bundle and that relied upon by the respondent. At no point does he spell out what were, in fact, the appellant's needs based upon the professional and other evidence set out at pages 60-256 (Sections III and IV) of the appellant's bundle. It is wholly unclear on reading the determination what are the second appellant's needs and what will be the impact upon her of removal other than for the Judge to state that the support will be a "poor second" to that which she receives in the UK.

16. The Judge returned to these issues at para 34 of his determination now in the context of Article 8. As regards the second appellant's needs and impact upon her of removal as a result of her autism the Judge said this at para 34(VII-X):

> "VII. …That the second appellant has significant needs relating to her autistic spectrum disorder and ADHD, which have been identified and currently being treated in the UK;
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> VIII. The whilst there is some treatment available in Bangladesh, it will undoubtedly not be of the same level and quality as that available in the UK and this should not be underestimated;
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> IX. That the welfare of the second appellant is required to be a primary consideration and that her treatment needs are highly relevant to that consideration;

X. That not withstanding her significant treatment needs, the best interests of the child are to be with both parents and as present that can only be in Bangladesh;…"

17. Those findings build upon, but in truth go no further than, the Judge's conclusions expressed at paragraphs 20-21 of his determination in the context of Article 3. Like those earlier conclusions, they do no more than repeat the rubric that the appellant has needs and, although some treatment is available in Bangladesh, it will not be at the same level as that in the UK. In my judgement, those reasons are wholly inadequate to sustain the Judge's ultimate finding that there were no "compelling circumstances" so that the second appellant's removal would be proportionate. The Judge has failed properly to grapple with the considerable body of professional and other evidence including the background evidence concerning available care in Bangladesh in reaching his adverse finding.

18. For those reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal under Article 8 involved the making of an error of law. Its decision cannot stand and is set aside.

Decision and Directions

19. At the conclusion of their submissions on error of law, both representatives accepted that the decision under Article 8 could not be remade at the hearing before me. Mr Halligan acknowledged that Mr McVeety was, through no fault of his own, disadvantaged by the fact that he had not been provided with the appellant's 480 page bundle containing the relevant evidence which needed to be considered. It was clear to me that the justice of the case required a full consideration of the evidence in relation to the appellants' (in particular the second appellant's) Article 8 claims. That could only be done at a future hearing.

20. Both representatives indicated that they were content if the appeals were remitted to the First-tier Tribunal or if it was retained in the Upper Tribunal. However, Mr Halligan invited me to transfer the case to the Manchester Hearing Centre given that the appellant lived in North Wales and the original hearing had taken place in Manchester.

21. On consideration, I have concluded that the appeals should be retained in the Upper Tribunal in order for the decision under Article 8 to be remade. The appeal will be transferred to the Manchester Hearing Centre (subject to the agreement of the Principal Resident Judge) in order to remake the decision under Article 8.

22. I make the following directions:

(i) The appeal will be relisted for a resumed hearing before the Upper Tribunal at the Manchester Hearing Centre.

(ii) The Judge's decision to dismiss the appeal under the Immigration Rules stands.

(iii) The resumed hearing before the Upper Tribunal will be restricted to re-making the decision in respect of Art 8. None of the findings are preserved.

(iv) Any application to admit fresh evidence should be made under 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 not later than 7 days before the resumed hearing.

Signed

A Grubb
Judge of the Upper Tribunal