Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37950/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 12th August 2014	**On 20th August 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SAIDA RIFFAT MUNIR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mohammed of Oakes Solicitors, Huddersfield
For the Respondent: Mr McVeetie, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Grimshaw made following a hearing at Bradford on 27th January 2014.

Background

2. The Appellant, born on 20th June 1929, is a national of the USA. She made an application, on 22nd August 2012, for indefinite leave to remain in the UK on humanitarian grounds outside the Immigration Rules.

3. Her application was refused on 13th September 2013. The Secretary of State considered the facts of the Appellant's case. If she had wished to be considered as a dependent relative of her son, Dr Malik, she would need to make an application outside the UK for entry clearance as a dependent relative under paragraph 317 of the Immigration Rules.

4. The Appellant did not qualify for leave under paragraph 276ADE, which deals with private life, and neither does she have any basis for a grant of leave on family life grounds. Her case was also considered on an exceptional basis outside the Immigration Rules but as she had failed to raise sufficient compelling or compassionate issues the Secretary of State was not prepared to exercise discretion in her favour.

5. The judge, in a careful determination, considered all of the relevant evidence including new evidence, not before the Secretary of State that the Sponsor had been diagnosed with prostate cancer. However, taking into account all of the evidence, including the fact that the Appellant would be well supported by other adult children in the USA, and that the outlook for the Sponsor in terms of his health and ability to continue to work appeared relatively optimistic, she declined to consider that the Appellant's removal would be a breach of Article 8 of the ECHR and she dismissed the appeal.

The Grounds of Application

6. The grounds argue that the evidence relating to the Sponsor's illness was not before the Secretary of State when the refusal decision was made, and accordingly it was not open to the judge to consider that evidence for herself. The correct approach would have been to remit the matter back to the Secretary of State so that she could consider the evidence since in cases of executive discretion outside the Rules, the judge cannot make a decision on behalf of or in place of the Secretary of State herself.

7. Second, the judge erred insofar as she purported to apply an exceptionality test. The Tribunal was required to make a careful assessment of all of the factors including the interests of everyone involved and not simply the Appellant.

8. Permission to appeal was initially refused but upon renewal to the Upper Tribunal granted by Upper Tribunal Judge Goldstein on 9th June 2014.

9. On 2nd July 2014 the Respondent served a reply defending the decision.

Submissions

10. Mr Mohamed relied on his grounds and submitted that the judge should have refrained from making findings in order to avoid prejudicing the Secretary of State who had an unfettered discretion in an application outside the Immigration Rules. He relied on AG and Others (Polices - executive discretion - Tribunal powers) Kosovo [2007] UKAIT 00082 and argued that the Tribunal had no power to exercise a discretion which had not previously been exercised and no power to substitute its own decision for that of the decision maker.

11. Mr McVeetie submitted that the judge was duty bound to consider all of the evidence put before her and if the Appellant had not wished that evidence to be taken into account, and considered in a separate application, she could have withdrawn the appeal.

Findings and Conclusions

12. The Appellant made an in time application outside the Immigration Rules, on humanitarian grounds, for indefinite leave to remain. As the Secretary of State explained in the refusal letter, in country applications for leave as a dependent relative are no longer permitted under the Rules.

13. Since 9th July 2012 the Immigration Rules were amended to unify consideration under the Immigration Rules and Article 8 of the ECHR. The Appellant plainly does not meet the requirements of the Rules with respect to Article 8, and it does not appear to have been argued at the hearing that she did.

14. It was argued that her removal would breach Article 8 outside the Immigration Rules, and the Secretary of State accepts that where consideration of the new Rules does not fully dispose of a claim based on Article 8, she will be obliged to consider granting leave to remain outside the Rules.

15. In Nagre (R on the application of) v SSHD [2013] EWHC 720 Sales J stated that :

> "If after the process of applying the new Rules and finding that the claim for leave to remain under them fails, the relevant official or Tribunal Judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on the application of the Rules."

16. In this case the judge did clearly consider that there may be compelling circumstances not sufficiently recognised under the Rules and embarked on a consideration of the facts in order to establish whether refusal would result in unjustifiably harsh consequences for the individual and their family.

17. The Appellant put before the judge evidence relating to the Sponsor's illness. If she had not wanted that evidence to be considered she should not have done so. The judge was obliged to consider all of the evidence adduced.

18. There is absolutely nothing in the Article 8 case law to support the Appellant's present submission that the judge was obliged not to make her own decision upon the evidence, but to remit the matter back to the Secretary of State for further consideration, thereby causing a further procedural delay. She relied on evidence which she hoped would establish her case and cannot now complain when the judge, having considered it, finds that it does not. The Appellant had the alternative option of withdrawing this appeal and making a fresh application based on the fresh evidence, which she chose not to exercise.

19. The cases relied upon in the grounds relate to decisions made by the Secretary of State in reliance to her guidance and policies and not to cases where the Appellant argues that her removal would breach her Article 8 rights.

20. As the judge who refused permission in the First-tier stated, this is a very careful and detailed determination where the judge has given cogent and sustainable reasons which were fully open to her on the evidence.

Decision

21. The judge's decision stands. The Appellant's appeal is dismissed.

Signed Date

Upper Tribunal Judge Taylor