



**Upper Tribunal
(Immigration and Asylum Chamber)**
OA/14356/2013

Appeal Numbers:

THE IMMIGRATION ACTS

Heard at Field House

On 9th July 2014

**Determination
Promulgated**

On 14th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE FRANCES

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARFOZ HASAN

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Ms N Hashmi, instructed by IEC Solicitors

DETERMINATION AND REASONS

1. I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Pakistan born on 10th March 1940. Her appeal against the refusal of entry clearance was allowed, on Article 8 grounds, by the First-tier Tribunal in a determination dated 17th April 2014. The Secretary of State applied for permission to appeal.

2. Permission to appeal was granted by First-tier Tribunal Judge McDade on 19th May 2014 on the grounds that it was arguable that First-tier Tribunal Judge Wellesley-Cole had erred in law in finding that there were compelling circumstances in the Appellant's appeal outside the criteria laid down in Appendix FM.
3. Mr Duffy relied on the grounds of appeal and submitted that on the facts of the case, the appeal should have been dismissed. The Appellant could not succeed under the Immigration Rules and there were no additional factors to take into account. The Judge failed to identify anything exceptional in this case and therefore Article 8 was not engaged. The Immigration Rules would be otiose if the appeal was allowed. The matters referred to at paragraph 18 did not amount to compelling or compassionate circumstances not recognised by the Immigration Rules. There was no evidence before the Judge to show that the Appellant could not get medical treatment and assistance with her daily needs in Pakistan.
4. Ms Hashmi submitted that the Rules were quite prescriptive and Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) acknowledged the existence of compelling circumstances for a matter to be considered outside the Rules. The Judge had considered all relevant factors including the Appellant's ill health and the fact that the Appellant's daughter was unable to assist her. The Respondent had failed to follow her own Immigration Directorate Instructions and the Judge thoroughly analysed all the individual circumstances. The Judge's finding that those circumstances were compelling was open to her on the evidence. The Judge had considered the medical evidence and the evidence that the Appellant's maid had stole from her. She had looked at matters outside the Rules, e.g. the Appellant could not leave the house unaided. These factors were sufficient to render the refusal of entry clearance disproportionate.

Findings and conclusions

5. At paragraph 11 of the determination, the Judge found that looking at matters in the round, the Appellant did not satisfy the requirements of the Immigration Rules because she could manage some everyday chores, although she had some difficulty cooking meals; she did not have a maid because the last one stole from her.
6. At paragraph 12, the Judge found that "even on the most liberal interpretation of the Rules, the Appellant does not appear to meet them because her daughter in the past did help her and is not in a position to do so now and she has failed to make out her case that she has a disability requiring long-term care to perform everyday tasks, although

she has some age related illnesses as a 73 years old.” The Judge concluded that the Appellant had not fulfilled the requirements of the Immigration Rules.

7. At paragraph 17, the Judge found that the medical report, which was not before the Respondent, showed that the Appellant’s medical problems were present at the date of decision. This coupled with her son’s oral testimony of her worsening health and the effect on other family members of being apart from the Appellant, shifted the balance in the Appellant’s favour because all of the difficulties set out in the grounds of appeal rebutted the Respondent’s concerns.
8. At paragraph 18, the Judge found “I have accorded considerable weight to the public interest, but find that this is outweighed by the compassionate, compelling circumstances of this 73 years old lady, living alone in a country where she is afraid to leave the house unaided, who effectively has sight in one eye, walking with a stick who needed a wheelchair when she travelled to England where she lived for two years and is totally financially dependant and emotionally [sic] I find on her sponsoring son. It follows from everything I have said that having regard to the case of Huang [2005] EWCA Civ 105 I allow this matter under Article 8 of the European Convention of Human rights.”
9. The Judge appears to have allowed the appeal on the basis that there was additional evidence which was not before the Respondent. Unfortunately, this evidence did not show that the Appellant could satisfy the Immigration Rules and did not amount to compelling circumstances. It was open to the Appellant to make a fresh application and submit further evidence.
10. I find that the Judge failed to identify compelling circumstances not recognised by the Rules in allowing the appeal under Article 8. The Judge’s findings at paragraphs 17 and 18 were not substantially different from her findings at paragraph 11 and 12. None of the factors relied on at paragraphs 17 or 18 were not already provided for in the Immigration Rules. In allowing the appeal under Article 8, the Judge materially erred in law.
11. The Appellant had failed to provide sufficient evidence to satisfy the Immigration Rules. The medical evidence did not show that the Appellant’s physical or mental condition meant that she could not perform everyday tasks and there was insufficient evidence to show that she was unable to obtain the required level of care in Pakistan (E-ECDR 2.4 and 2.5 of Appendix FM and paragraphs 34 and 35 of Appendix FM-SE).
12. There were no compelling circumstances not sufficiently recognised under the Immigration Rules. The refusal of entry clearance did not

breach Article 8 of the European Convention of Human Rights. The Respondent's appeal to the Upper Tribunal is allowed.

13. I find that the Judge erred in law in allowing the appeal under Article 8 and I set the decision, dated 17th April 2014, to allow the appeal on human rights grounds aside and remake it as follows: The Appellant's appeal against the refusal of entry clearance is dismissed on human rights grounds.

Deputy Upper Tribunal Judge Frances
11th July 2014