IAC-HX-DML-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11531/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th February 2015	**On 20th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE E B GRANT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS VALBAI KANJI HIRJI PATEL

Respondent

Representation:
For the Appellant: Mr Shilliday, Senior Presenting Officer
For the Respondent: Mr J Dhanji of Counsel

DECISION AND REASONS

The Background to this Appeal

1. On 9th January 2014 Mrs Patel sought leave to remain on the basis of private and family life. The Secretary of State refused that application and Mrs Patel's appeal came before FTTJ Kimnell on 9th October 2014. In a decision promulgated on 11th November 2014 he recorded "It is accepted that the [respondent] cannot meet the requirements of the Immigration Rules as regards dependent relatives and Mr Halligan put his case entirely on classic Article 8 principles outside the Rules" before going on to find at

paragraph 47 that this was a rare, unusual and exceptional case where the respondent's private Article 8 rights outweighed the need to enforce immigration control and the appeal was allowed on Article 8 grounds. There was no consideration of the Immigration Rules.

2. The appellant sought permission to appeal and on 9th January 2015 FTTJ Colyer granted permission in the following terms:-

> "1. The Respondent seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Kimnell) who, in a determination promulgated on 11th November 2014, allowed the Appellant's appeal against the Respondent decision to refuse her application for leave to remain in the United Kingdom on the basis of family and private life here.
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> 2. The Grounds for applying to the upper tribunal submit that the judge has made a material error of law, misdirecting himself with reference to article 8 ECHR. The judge fails to have regard to the substantive requirements of appendix FM and appendix FM-SE in considering the appellant's case. The respondent refers to paragraph 29 of Nagre; and the specific paragraphs of the immigration rules. The respondent then submits.
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> > "From the foregoing it can be seen that if he had directed himself properly the judge would have had to have grappled with the possibility of care being provided to the appellant by the Indian health services or by Private health care arrangements paid for by the UK based relatives and would be a lie to the kind of evidence required to show that such care is unavailable in cases such as these. It is likely that had he done so there could well have been a different outcome."
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> 3. The grounds disclose an arguable error of law."

3. Thus the error of law hearing came before me.

4. It is settled law that the Immigration Rules now require Article 8 claims to be considered under the Immigration Rules. Where the Rules provide a complete code for dealing with the application in question there is no need then for the Secretary of State to go on and consider the application under Article 8 at large. This is an approach which has been reinforced by a decision of the Court of Appeal in **Singh v SSHD [2015] EWCA Civ 74** in particular at paragraphs 63 and 64 which I set out below:-

> "63. The first case is the decision of this Court in MM (Lebanon). The only substantive judgment is that of Aikens LJ (with whom Vice-President, Maurice Kay LJ, and Treacy LJ agreed). Most of the issues with which the case is concerned are wholly remote from those in this appeal, but in one section of his judgment Aikens LJ had to consider Nagre. In para. 129 he refers to Sales J having said that "if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has a arguable case that there may be good grounds for granting leave to remain outside the rules": that is evidently a paraphrase of the second half of para. 29 of Sales J's judgment. He continues:

> "I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rules, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker."

Mr Malik submitted – this being his second ground of appeal in Ms Khalid's case – that this short passage undermined the entirety of Sales J's point about full separate consideration of article 8 not always being necessary.

64. In my view that is a mis-reading of Aikens LJ's observation. He was not questioning the substantial point made by Sales J. He was simply saying that it was unnecessary for the decision-maker, in approaching the "second stage", to have to decide first whether it was arguable that there was a good article 8 claim outside the Rules – that being what he calls "the intermediary test" – and then, if he decided that it was arguable, to go on to assess that claim: he should simply decide whether there was a good claim outside the Rules or not. I am not sure that I would myself have read Sales J as intending to impose any such intermediary requirement though I agree with Aikens LJ that if he was it represents an unnecessary refinement. But what matters is that there is nothing in Aikens LJ's comment which casts doubt on Sales J's basic point that there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

5. Through no fault of his own the FTTJ was not invited by the parties to consider the Immigration Rules and the case was solely put before him on Article 8 grounds. He thus heard no evidence from the appellant or her relatives about the substantive requirements of the Rules for an elderly dependent relative.

6. The key substantive requirements of the Rules are as set out in the grounds at E-ECDR.2.4 and 2.5 and the specified evidence is set out under Appendix FM-SE. None of the specified evidence was placed before the FTTJ and the issues were not addressed regarding care from a central or local health authority, a local authority, a doctor or other health professional in India and if not affordable because of payments previously made the appellant was required to give an explanation of why payment could not continue and if financial support had been provided by the sponsor or other close family in the UK the applicant was required to provide an explanation of why this could not continue in India.

7. The judge was required to consider the possibility of care being provided to the appellant by the Indian health service or by private health care arrangements paid for by the UK based relatives. In addition the financial requirements of the Immigration Rules set out at E-ECDR.3.1 and 3.2 provide that the applicant must provide evidence they can be adequately maintained, accommodated and cared for in the UK by the sponsor without recourse to public funds. The sponsor must confirm the applicant will have no recourse to public funds and that the sponsor will be responsible for their maintenance, accommodation and care for a period of

five years from the date the applicant entered the United Kingdom. Appendix FM-SE sets out how evidence of financial requirements under Appendix FM must be met furthermore in order to assess the cost of the appellant's care evidence of that is also required. However because this evidence was not available before the FTTJ and in the way the appeal proceeded before him it is necessary for the decision to be set aside and for the appeal to be remitted to the First-tier Tribunal for a hearing de novo.

8. Accordingly the appeal will be heard at Taylor House on 13th August 2015 with a time estimate of two hours and a Gujarati interpreter is required.

Summary of Decision

9. The FTTJ did err in law and his decision is set aside and the appeal remitted for a de novo hearing before the First-Tier Tribunal.

Signed Date **20th March 2015**

Deputy Upper Tribunal Judge E B Grant