IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11863/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd June 2015	**On 8th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MRS SHAHIDA KAZAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Sharkey (Legal Representative)
For the Respondent: Mr T Melvin (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against decisions to refuse to vary her leave and to remove her from the United Kingdom was dismissed by First-tier Tribunal Judge D Ross ("the judge") in a decision promulgated on 31st October 2014. The appellant arrived in the United Kingdom on 17th February 2013 with a visit visa and applied for indefinite leave to remain, shortly before expiry, on 15th August 2013. Her case was advanced on the basis of ties to the United Kingdom, where three of her children are settled, and her ill-health. The Secretary of State found that the requirements of the

Immigration Rules ("the rules") were not met and that the appellant's removal to Pakistan would not breach her human rights (or those of anyone else). The judge heard evidence from two of the appellant's children and took into account documentary evidence which included a medical report from a consultant neurologist.

2. The judge found that the appellant could not succeed under Appendix FM as she had not applied for entry clearance as a dependent relative and could not succeed under the private life provisions of the rules. He went on to make an Article 8 assessment outside the rules and had regard to section 117A to D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") in so doing. He took into account the presence of family members in the United Kingdom and the extent of the appellant's remaining ties to Pakistan. The judge concluded that the adverse decisions and the appellant's removal amounted to a proportionate response. In relation to the appellant's ill-health, she could not succeed under Article 3 of the Human Rights Convention.

3. An application was made for permission to appeal. In the grounds, it was contended that the judge's Article 8 assessment was flawed. The appellant was an elderly woman in poor health with no family to look after her in Pakistan other than a daughter who planned to move to the United Kingdom. As such, there were arguably good grounds for the grant of leave outside the rules. What was required was that the decision maker should assess whether or not there were compelling circumstances not sufficiently recognised under them. The judge failed to act in accordance with guidance given in Gulshan [2013] UKUT 00640. He identified the need for "exceptional circumstances" to be shown before leave might be granted and this amounted to a higher test than the "compelling circumstances" set out in Gulshan.

4. The judge erred in the proportionality assessment as he weighed the potential cost to the state as paramount, regardless of the fact that, thus far, the appellant had cost the United Kingdom very little. There was no evidence of potential costs in terms of medical care and so the appellant was unable to counteract any suggestion to opposite effect. The judge referred to an apparent failure to sign an undertaking regarding maintenance, but this was unfair as no such requirement existed where a person applied for leave to remain, in contrast to an application for entry clearance.

5. The judge's suggestion that there was no reason why the appellant could not return to Pakistan to apply for entry clearance within the rules was contrary to the "Chikwamba" principle. It would be disproportionate to expect her to return for this purpose.

6. Permission to appeal was initially refused. On renewal, permission was granted on the basis that it was reasonably arguable that the judge misdirected himself when considering Article 8 outside the rules. Although the judge granting permission was less confident that the alleged error

was material, he could not say confidently that the outcome could not be different and so permission to appeal was granted.

7. In a rule 24 response, the Secretary of State opposed the appeal on the basis that the judge directed himself appropriately and the grounds amounted to a disagreement with his findings. The appellant could not bring herself within the substantive requirements of the adult dependent relative rules in Appendix FM and Appendix FM-SE and so Chikwamba had no real application.

8. Mr Melvin provided written submissions in support of the rule 24 response. The judge clearly set out why the requirements of the rules could not be met and also found that, as at the date of hearing, there were family members in Pakistan who could provide or organise care for the appellant on her return. The judge found that there was nothing to show that care would be unavailable in Pakistan and that there was some doubt regarding whether the family could maintain the appellant within the United Kingdom. The judge properly took into account section 117A to D of the 2002 Act and correctly weighed the competing interests. Any error regarding "exceptional circumstances" was plainly not material. Moreover, in the light of the judgment in the Court of Appeal in SS (Congo) [2015] EWCA Civ 387 and the decision of the Upper Tribunal in AM (Malawi) [2015] UKUT 260, it was clear that the appellant's position in the United Kingdom was precarious and thus the higher threshold of "exceptional circumstances" was the correct one.

Submissions on Error of Law

9. Ms Sharkey said that the grounds were relied upon. The judge misunderstood Gulshan. If there were arguably good grounds for granting leave outside the rules, a two-stage assessment was required. Paragraph 17 of the decision contained a material error of law. In that paragraph, the judge referred to "exceptional circumstances" in this context.

10. At paragraph 20, the judge found that the appellant needed care but appeared to disregard this finding in the proportionality assessment. He focused on the cost to the NHS, whereas the evidence before him, which included a letter from St Bartholomew's NHS Trust, (in the appellant's bundle at pages 9 to 11) showed that there were no medicines available that could assist the appellant. Although she needed care, this was provided by the family and from private sources of help and so there was no cost to the NHS. In relation to section 117B of the 2002 Act, the judge misdirected himself at paragraph 21 as he assumed that there would be a cost to the NHS.

11. Mr Melvin said that there was no material error. The judge made findings of fact that were open to him on the evidence. He found that the family appeared to be trying to circumvent the rules and he did not err in considering the long-term impact on the taxpayer, including costs falling on the NHS.

12. The judge made a clear finding that alternative arrangements for the appellant's care could be made in Pakistan, perhaps with funding from the United Kingdom. There were family members in Pakistan at the time of the decision and as at the date of the hearing. So far as the Gulshan point was concerned, guidance from SS (Congo) and AM (Malawi) showed that the appellant's immigration status was precarious. In an Article 8 case, this had the consequence that exceptional circumstances were required to succeed outside the rules. In effect, the Gulshan point fell away. There was no misdirection in law and the decision of the First-tier Judge should be upheld.

13. In response, Ms Sharkey said that in relation to the latter point, AM (Malawi) concerned a family claiming private life ties while their status was precarious.

14. The judge made a clear assumption that a cost would fall on the NHS at paragraph 21 of the decision. At paragraph 18, there was again a circling around the same assumption. This flew in the face of the evidence from St Bartholomew's NHS Trust. Ms Sharkey said that a different outcome might result from a remaking of the decision and if an error of law were found, the venue ought to be the First-tier Tribunal, so that up-to-date medical evidence and evidence regarding the presence of family members in Pakistan might be made available.

Conclusion on Error of Law

15. Dealing first with the contention that the judge erred in relation to Gulshan, particularly at paragraph 17, where he directed himself that exceptional circumstances were required to show success under Article 8 outside the rules, I conclude that the judge did not err in law. Alternatively, the error, if shown, was not material.

16. I accept Mr Melvin's submission that guidance given by the Court of Appeal in SS (Congo) and by the Upper Tribunal in AM (Malawi) (the full citations appear above) falls to be applied in this case. Of course, the judgment and decision were not available to the judge in October 2014, when he heard the case and decided it. Nonetheless, it is now clear that the precariousness of a person's immigration status is a legally relevant factor. In SS (Congo), at paragraphs 40 and 41 of the judgment, the Court of Appeal explains that, in general, those with a non-precarious family life seeking leave to remain may succeed under Article 8 outside the rules, where they cannot rely on particular provisions such as paragraph EX.1, so long as compelling circumstances not sufficiently recognised under the rules are present. By contrast, where relationships are precarious, the test that applies is "the exceptionality" or "very compelling circumstances" test applicable in the special contexts explained in MF (Nigeria) (precariousness of family relationship and deportation of foreign nationals convicted of serious crimes). This formulation is one which the Court of Appeal observes is aligned to that proposed in Nagre [2013] EWHC 720 (Admin). More recently, the Upper Tribunal adopted a similar approach in

AM (Malawi). In that decision, the Upper Tribunal held that those who have been granted a defined period of leave to enter the United Kingdom, or, to remain in the United Kingdom, hold during the currency of that leave, an immigration status that is lawful but "precarious".

17. The appellant is a person who had precarious immigration status when she made her application for indefinite leave in August 2013, being present here at the time with a visit visa, and her status remained precarious, as did any family life claimed to have been established or deepened during her presence here as a visitor, up until the time her appeal was heard and decided by the judge. It follows that the judge did not err in law in directing himself that exceptional circumstances were required to be shown to enable the appellant to succeed under Article 8 outside the rules, on the basis of her relationships with family members and the care they provide in view of her ill-health.

18. In any event, even if the judge did err at paragraph 17, and even if he ought instead to have confined himself there to finding that arguably good grounds were required to be shown for leave to be given outside the rules, before then moving on to make an Article 8 assessment, the error is plainly not material. The decision shows that the judge did indeed move to make an assessment outside the rules and he gave cogent reasons, at paragraphs 19 to 21 in particular, for concluding that the decision to refuse to vary the appellant's leave as a visitor and the decision to remove her to Pakistan amounted to a proportionate response. He had clearly in mind the relationships existing in the United Kingdom between the appellant and her family members and also the extent of the remaining ties to Pakistan, where there was, as at the date of hearing, a daughter present, albeit a daughter who intended to move here to join a spouse. The judge made clear findings of fact that the medical evidence did not show that the appellant was unable to return to Pakistan. He found that there was no evidence showing that care would be unavailable to her there or that the appellant would be unable to afford to purchase care in the country of her nationality. He noted that no explanation had been provided for large amounts of money appearing in a family bank account in September 2014 but this did not displace his findings regarding the support the appellant might expect to receive following her return to Pakistan.

19. So far as mention of the NHS is concerned, there was, again, no error of law. The self-direction at paragraph 18 was an appropriate one and the observation, at paragraph 21, that the Secretary of State is entitled to lay down strict rules to ensure that elderly relatives in the United Kingdom are not a burden on the state, and in particular on the NHS falls very far short of revealing an error of law. The judge did not misunderstand the medical evidence before him, which showed that the appellant's position was unchanged from the state it was in when the neurologist provided a report in January 2014. The letter from St Bartholomew's NHS Trust, to the effect that family members provide care at present and that there are no medicines which can substantially assist the appellant, makes no material

difference. The judge clearly understood that the appellant's case was advanced on the basis that her close family here would provide the care she needs but, as she is a person born in 1949 who has had a number of strokes and is diabetic and who needs help to perform personal functions, he was entitled to have regard to at least the potential cost to the state of her presence here. Similarly, his observation that no undertaking regarding maintenance had been signed was not based on any misunderstanding. The judge correctly noted that such an undertaking would have been required in an application for entry clearance.

20. Overall, the decision shows that the judge had all the salient features of the appellant's case in mind, including the extent of the family relationships and her ill-health. The requirements of the rules were not met. He went on to make an Article 8 assessment outside the rules and my primary finding is that there was no material misdirection on the law. Even if an error does appear in this context, it is not material. The judge carefully weighed the competing interests in the light of his findings of fact and reached a conclusion that was open to him on the evidence.

21. As no material error of law has been shown, the decision of the First-tier Tribunal shall stand.

NOTICE OF DECISION

The decision of the First-tier Tribunal shall stand.

No anonymity direction has been applied for and none is made.

Signed Date

Deputy Upper Tribunal Judge R C Campbell