IAC-AH-KEW-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15233/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19th February 2015	**On 15th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MS AYSHA BEGUM TAFADER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Khan, Counsel
For the Respondent: Miss K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born on 28th November 1959. The Appellant has an extensive immigration history culminating on 12th December 2013 with her being issued with an IS151A notifying her of her immigration status as an overstayer and her liability to detention and removal from the UK. By letter dated 24th November 2013 along with appropriate attachments and photographs the Appellant's legal representatives asked that the Appellant's case be considered under the

European Convention of Human Rights. That appeal was dismissed by Notice of Refusal of the Secretary of State dated 6th March 2014.

2. The Appellant appealed and the appeal came before Judge R Callender Smith sitting at Taylor House on 28th October 2014. In a determination promulgated on 12th November 2014 the Appellant's appeal was dismissed both under the Immigration Rules and on human rights grounds.

3. On 21st November 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 2nd January 2015 Judge of the First-tier Tribunal Pooler granted permission to appeal. Judge Pooler noted that the application contended that by failing to make findings on family life established between the Appellant and two of her daughters or on whether the Appellant had retained any ties to Bangladesh that the judge had erred in law. He noted that the judge had dismissed the appeal in respect of the Immigration Rules but had arguably failed to direct himself by reference to their terms particularly those at paragraph 276ADE and to make findings of fact on relevant matters including whether the Appellant had retained ties to Bangladesh. Judge Pooler noted that Judge Callender Smith had directed himself by reference to the five-step approach set out in *Razgar v SSHD [2004] UKHL 27* and had accepted that the Appellant's presence had been helpful for her daughters and their children. He noted that the First-tier Tribunal Judge had not made a specific finding as to whether the Appellant had proved the existence of family life but that he clearly accepted that Article 8 was engaged because he went on to consider the proportionality of removal. In any event he considered it made little difference whether her relationships with her daughters and grandchildren were considered as aspects of private or family life and that the judge had concluded that the decision to remove the Appellants was proportionate. Whilst therefore considering it less likely that the ground in respect of the claimed family life disclosed a material error of law since permission was to be granted on all grounds he considered that it may be argued.

4. On 9th January 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24 in some detail. The Rule 24 response stated that it was for the judge having concluded that Article 8 was engaged to carry out the balancing exercise and that the only significant relationship at issue was that the Appellant had with her daughter. It was contended therein that the Appellant clearly could not meet the requirements of paragraph 276ADE of the Immigration Rules and that there was no adequate evidence to demonstrate that, to the balance of probabilities, the Appellant had lost all ties to her home country. It was pointed out that the Appellant retained a land share and accommodation and had a brother remaining in Bangladesh. The Rule 24 response contended that it was clear that the Appellant who lived full-time in Bangladesh until she came to the UK at the age of 45 and who was not credible in her assertion that she did not come to settle and intended to return was not likely to accept that she retained ties to her home country.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel Mr Khan. The Secretary of State appears by her Home Office Presenting Officer Miss Pal.

Submissions/Discussion

6. Mr Khan contends that the First-tier Tribunal Judge made findings in relation to one of the Appellant's daughters who was a witness but made no findings about her other two daughters who were also witnesses. He refers me to the authority of *AK (Turkey) [2004] UKIAT 00230* where the Tribunal reiterated at paragraph 12 and set out "the necessity to make proper findings of fact in relation to all the oral evidence and not merely that given by the Appellant ..." He submits that one of the other daughters not mentioned provides most of the subsistence for the Appellant and that it is important to note that there is a family life and a level of dependency. He submits that the judge has erred in not giving due and proper consideration to these factors.

7. Secondly he considers that there has been no finding made whatsoever as to whether during the nine years that the Appellant has been in the UK she has retained social, cultural or family ties in Bangladesh and therefore there has not been a proper consideration of the Appellant's rights to private life or matters set out in paragraph 276ADE of the Immigration Rules. He reminds me that the Appellant claims that she no longer has any ties with Bangladesh and submits that if this could be demonstrated then the Appellant may have come within the remit of the Immigration Rules. She submits that the Appellant's husband has passed away and whilst previously they held land she no longer knows the situation regarding this land and submits that it is possible that the Appellant's circumstances have changed. Mr Khan submits that the correct approach is to remit the matter back to the First-tier Tribunal for reconsideration.

8. In response Miss Pal acknowledges that whilst the Appellant's daughters did not give evidence at the First Tribunal she submits that even if the evidence of the daughter is taken into account that would not make any difference to the outcome overall of the appeal. She takes me to the witness statement of the said daughter Mrs Farhena Siddiqua at paragraphs 7 onwards in which Mrs Siddiqua contends that it is now the Appellant's daughter's responsibilities to look after her. Miss Pal points out there is nothing in the witness statement to say what level of care is required for the Appellant and submits that if she is so weak at the age of 54 then she hardly would be in a position to look after family members and submits that there is no reason whatsoever why the Appellant should remain in this country.

9. So far as the challenge under paragraph 276ADE of the Grounds of Appeal she submits that the judge has addressed issues of family and private life at paragraphs 30 to 41 of his determination especially at paragraphs 31

and 32 and made a finding therein that he was not satisfied there was nowhere suitable for the Appellant to return to and no proof that she had ever lost control of the property in which she lived when she was there even though her husband was no longer alive. She asked me to find no material errors of law and to dismiss the appeal.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

12. The Grounds of Appeal concentrate on two specific areas. Firstly on the contention that there was no finding on the family life established between the Appellant and her other two daughters who were also witnesses. Whilst acknowledging that one of the daughters who had made a witness statement did not give evidence before the First-tier Tribunal it is clear from examination of the determination that the judge has given a full and thorough consideration of the evidence of the daughters. This is set out at paragraphs 12 to 24 of the determination. In paragraph 14 the judge notes that the Appellant had three daughters and the personal circumstances of the Appellant and a visit made in 2005. The fact that the Appellant has resided in the UK for over nine years was noted as were the health problems of the Appellant's daughter Moriom. The judge has fully analysed all the evidence that was before him and made findings of fact at paragraphs 26 onwards. He has acknowledged that since 2006 the Appellant has had no lawful basis for staying in the UK and it is clear from the evidence given that it was being asserted that the Appellant's

presence was helpful to her daughters which in fact is contradictory to the evidence at paragraph 7 onwards of Mrs Siddiqua's witness statement suggesting that the Appellant is old and frail and needs the daughter's support. I am satisfied that the First-tier Tribunal Judge has made findings which he was entitled to and has on the evidence shown therein considered all documentary evidence that was submitted before him. Submissions on this area merely amount to disagreement and the determination discloses no material error of law.

13. It is briefly appropriate to consider the position as a matter of law under Article 8. This is a claim where it is submitted that the judge has accepted that Article 8 is engaged because the judge went on to consider the proportionality of removal. What is submitted is that the judge has failed to make findings of fact on relevant matters including whether the Appellant has retained ties to Bangladesh. The Appellant could not meet the requirements of paragraph 276ADE of the Immigration Rules. The judge has consequently gone on to consider the Appellant's claim pursuant to Article 8 of the European Convention of Human Rights.

14. In any consideration of an Article 8 claim the starting point is the law itself. Article 8 states:

    (a) everyone has the right to respect for his private and family life, his home and his correspondence;

    (b) there should be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

15. The general approach to Article 8 cases is that in *Nhundu and Chiwera (01/TH/00613)*. In those cases the Tribunal said that, in deciding claims under Article 8, there is a five stage test which must be applied in order to determine whether a breach has occurred:

    (1) does family life, private life, home or correspondence exist within the meaning of Article 8;

    (2) if so, has the right to respect for this been interfered with;

    (3) if so, was the interference in accordance with the law;

    (4) if so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

    (5) if so, is the interference proportionate to the pursuit of the legitimate aim?

Those were essentially the five questions endorsed by the House of Lords in *Razgar [2004] UKHL 27*.

16. The law has somewhat crystallised as to the approach to be adopted. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:

> "Nagre does not add anything to the debate save for the statement 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 an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker."

In *Haleemudeen v the Secretary of State for the Home Department [2014] EWCA Civ 558* Beatson LJ held at paragraph 17 that where the Article 8 ECHR element of the Immigration Rules is not met, refusal would normally be appropriate, "*but that leave can be granted where exceptional circumstances, in the result of 'unjustifiably harsh consequences' for the individual, would result*".

17. There is a requirement to look at the evidence to see if there is anything which has not already been adequately considered within the context of the Rules which could lead to a successful Article 8 claim. The further intermediary test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion based Rules is now no longer appropriate and in *Ganesabalan, R (on the application of) v SSHD [2014] EWHC 2712 (Admin)*, there was no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which were called for were informed by threshold considerations.

18. It was also necessary for the judge to consider Section 117B of the 2002 Immigration Act which was brought into force by the 2014 Immigration Act. Section 117B makes public interest considerations applicable to all cases. I am satisfied that the judge has carried out a full and proper consideration of paragraph 117B as specifically specified at paragraph 33 of his determination and thereafter considered in the subsequent paragraphs and in addition has considered the Section 55 considerations pursuant to the 2009 Act in some detail particularly at paragraph 39 of his determination. Consequently I am satisfied that the judge has given due and proper consideration to the necessary factors that he needs to look at pursuant to Article 8 and that the judge has particularly at paragraphs 31, 32 and 40 given full and proper consideration with regard to the Appellant's ties to Bangladesh and has made findings that there was no evidence to demonstrate a wholesale loss of ties noting for example that the Appellant retained a land share and accommodation and had a brother remaining in Bangladesh.

19. It is the role of the Upper Tribunal merely to consider whether there is an error of law. It is not the role of the Upper Tribunal Judge to look at the evidence and come to conclusions that might be different from the First-tier Tribunal unless such findings of the First-tier Tribunal are clearly perverse and unsustainable. That threshold is nowhere near approached in this matter. In fact the judge has given full and detailed consideration to all the relevant factors. In such circumstances the submissions on behalf of the Appellant are unsustainable and amount to little more than mere disagreement. This is a decision that discloses no material error of law and the Appellant's appeal is consequently therefore dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and is dismissed. The decision of the First-tier Tribunal is maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris