Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19589/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th June 2015	**On 14th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS ANNE RENEE VALERY LE MEME
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Wilford, Counsel
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of South Africa born on 25th September 1933. The Appellant first arrived in the United Kingdom on 9th September 2012 in possession of a visa conferring leave to enter until 8th March 2013 subject to a condition prohibiting employment and recourse to public funds. On 7th March 2013 application was made on her behalf for leave to remain in the UK on the basis of her private life. That application was refused by the Secretary of State by Notice of Refusal dated 14th May 2013.

2. The Appellant appealed and the appeal came before First-tier Tribunal Judge Hindson sitting at Richmond on 26th August 2014. In a determination promulgated

on 16th September 2014 the Appellant's appeal was dismissed both under the Immigration Rules and on human rights grounds.

3. On 24th September 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 4th November 2014 First-tier Tribunal Judge Foudy refused permission to appeal. On 25th November 2014 renewed grounds of permission to appeal were made to the Upper Tribunal. On 27th February 2015 Upper Tribunal Judge Rintoul granted permission to appeal. In granting permission Judge Rintoul considered that it was arguable that the judge had misdirected himself as to the approach to Article 8 and given his findings with respect to the evidence of the Appellant and her Sponsors it was arguable that this error may have been material given that the Appellant would arguably appear to meet the requirements of the Immigration Rules but for the requirement of prior entry clearance.

4. On 10th March 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. That response submits that the judge provided cogent reasons to support the conclusion that there were no arguably good grounds for considering the Appellant's appeal outside the Immigration Rules and it was submitted that the Appellant had a remedy available to her to make the relevant entry clearance application and that therefore there was no arguable basis to depart from the requirements of the Rules.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law. The Appellant appears by her instructed Counsel Mr Wilford. The Secretary of State appears by her Home Office Presenting Officer Mr Walker.

Submissions/Discussion

6. Mr Wilford submits that the Immigration Judge failed to make relevant findings pursuant to Article 8 having found all who gave evidence before him had provided truthful accounts and that the facts of the case are as claimed. However he considered the Rules prohibited so-called switching and that it was clear that the Appellant could not succeed under the Rules as they related to an adult dependent relative. At paragraph 18 Mr Wilford points out that the judge expressed a great deal of sympathy for the predicament of the Appellant and that the correct approach the judge had adopted was that the Appellant should return to South Africa and make an out of country appeal.

7. Mr Wilford notes that the judge had given due consideration to the authority of *Gulshan* but had not gone any further. He had not applied *Razgar;* had not given due consideration as to whether it was proportionate in the current circumstances to expect an 81-year-old to return to South Africa where there was no family upon which she could rely. He acknowledged that the Immigration Rules might not contain within them an exception for Article 8 compliance for adult dependent relatives but that the judge had properly gone on to consider the position outside the Rules and that there are compelling circumstances for allowing this appeal.

8. Mr Walker says no more than merely relying on the Grounds of Appeal and indicates that he agrees that the grounds do have force and that compelling circumstances should have been considered.

The Law

9. 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.

10. 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

11. I am greatly assisted by the approach adopted by Mr Walker on behalf of the Secretary of State. He has indicated to me that he is not in a position to make any concessions but is not raising any further grounds nor objections in opposition to this appeal and his comments that the grounds have force are ones with which I concur.

12. So far as the prospective error of law is concerned I agree that there is a material error of law. The First-tier Tribunal Judge has gone on very briefly to consider the authority within *Gulshan* at paragraph 19 of his determination. He has not gone on to consider general principles nor other case law. He has certainly failed to go on to consider the issue of compelling circumstances for this Appellant. In such circumstances I find there is a material error of law and I set aside the decision of the First-tier Tribunal.

Remaking of the Decision

13. Paragraphs 26 to 29 of the First-tier Tribunal Judge's determination are accepted and unchallenged by the Secretary of State. I adopt them within this determination. They show that the Appellant is aged 81 and unfortunately not in the best of health. She was previously living alone in South Africa whilst two of her children are now

British citizens and her grandchildren all reside in the UK. She had previously visited the UK regularly and now wished to remain in the UK with her children and grandchildren. She gave up her accommodation in South Africa before coming to the UK on the basis that it was her intention to apply to stay here permanently believing that it was a requirement of the Rules that she be in the UK to make that application. As set out at paragraph 15 she notes the change in the Rules that would now require her to make such an application from overseas.

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:

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

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

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

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

    (v) 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. It is of course, well-established that, where the Appellant is in the UK and removal will interfere with the family life /private life that he or she already enjoys in the UK, then Article 8 can be engaged.

17. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph 31:

    > *"Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin)

([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) *should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."*

18. 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."*

19. 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*".

20. 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.

21. I acknowledge that the guidance given in the *Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387* was not available before the First-tier Tribunal Judge. That case gave definitive guidance for the consideration of leave to remain outside the Immigration Rules. I follow the approach adopted by the Court of Appeal. Firstly it is necessary to consider the individual interests of the Appellant and her family's Article 8 rights and balance them against the public interest in order to make an assessment whether the refusal to grant leave to remain is disproportionate and hence unlawful by virtue of Section 6(1) of the Human Rights Act read with Article 8. As I have indicated above these are exceptional circumstances of an elderly lady entitled to make her application should she return to South Africa but came to this country with it very much in mind that she would be making her application here. I do not find bearing in mind the findings of fact that are preserved and the approach adopted very helpfully by Mr Walker that such considerations are disproportionate.

22. At paragraph 49 of *SS (Congo)* the Court of Appeal gives guidance with regard to the approach to be adopted for granting leave outside the Rules with reference to the

phrase "exceptional circumstances". The Court of Appeal indicated that the text of the instruction makes it clear that the term "exceptional circumstances" is given a wide meaning in the context of the instructions covering any case in which on proper analysis under Article 8 at the second stage it would be disproportionate to refuse leave.

23. It is factually accepted in this matter that whilst the Appellant cannot meet the requirement of paragraph 317 of HC 395 (read with Appendix FM), by virtue of the fact that such application cannot be made whilst the Appellant is in the UK it is accepted on her behalf that but for her presence in the UK she would otherwise meet the requirements of paragraph 317 and Appendix FM. It is common ground that she cannot succeed under paragraph 276ADE of the Rules.

24. Consequently this is an Appellant who if she were to return to South Africa and make the appropriate application would, it is acknowledged by Mr Walker, succeed. In *Zhang v SSSHD [2013] EWHC 891 (Admin)* the court endorsed the view adopted by the House of Lords in *Chikwamba [2008] UKHL 40* that it will not normally be appropriate to require a person to leave the United Kingdom in order to fulfil the procedural requirement of entry clearance. That case I acknowledge dealt with the issue of children but authorities thereafter show that the situation does not only apply to cases involving children and certainly in this instant case it could easily be applicable to a case involving an elderly relative.

25. For all the above reasons I am satisfied that it would not be proportionate nor in the public interest to return the Appellant bearing in mind her age and circumstances to South Africa to make a fresh application and that this is an Appellant who has compelling circumstances which are supported by relevant case law for the appeal to be allowed outside the Immigration Rules. In such circumstances I remake the decision allowing the Appellant's appeal pursuant to Article 8 of the European Convention of Human Rights.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside. The decision is remade allowing the Appellant's appeal pursuant to Article 8 of the European Convention of Human Rights.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris