Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41734/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 28th January 2015	**On 9th February 2015**

Before

UPPER TRIBUNAL JUDGE POOLE

Between

MRS NADERA JIRJEES DAWOOD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Louise Dickinson, Solicitor
For the Respondent: Mr Irwin Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a female citizen of Iraq, born 24 December 1943.

2. The appellant arrived in the United Kingdom on 18 July 2013, with entry clearance as family visitor. This visa expired on 24 August 2013. Some days prior to that date the appellant applied for leave to remain upon the basis of her family and private life. She had a son, daughter-in-law and

grandchildren living in the United Kingdom, and she suffered with medical problems.

3. By a letter dated 25 September 2013 the respondent refused the appellant's application. The appellant appealed that decision.

4. The appeal came before Judge of the First-Tier Tribunal Holder sitting at Newport on 23 June 2014. An oral hearing was held and both parties were represented. Judge Holder heard evidence and in a decision dated 3 July 2014 he dismissed the appellant's appeal both "on immigration grounds" and on human rights grounds.

5. The appellant then sought leave to appeal. There are seven grounds alleging error which can be summarised as follows. The judge had failed to consider the appropriate paragraph of the Immigration Rules (as had the respondent). The correct outcome was to find that the decision was "not in accordance with the law". The judge was thus unable to rectify the respondent's error. The judge had adopted the wrong test with regard to the appellant's illness and had failed to properly take into account Country of Origin Guidance. The judge had failed to deal adequately with "proportionality", additionally by considering the wrong Immigration Rule.

6. This application came before another judge of the First-Tier Tribunal who refused the application for reasons set out in a decision notice dated 29 August 2014. Although containing what might be a simple typographic error, the judge was of the view that if the proper paragraph of the Immigration Rules had been considered the application would still have failed because the appellant had entered the United Kingdom as a visitor will leave for only 6 months. It was then noted that Judge Holder had proceeded to consider the matter "under Article 8" which would have been the same area of consideration of whatever rule was considered and that accordingly there was no arguable error of law.

7. The appellant renewed the application before the Upper Tribunal. In the main the grounds were a repetition of the original application, although a number of grounds had been amplified, although additional criticism is levelled at the decision of the judge who refused leave to appeal in the First-Tier.

8. In granting leave to appeal Upper Tribunal Judge Kebede found that there was arguable merit in the argument that the wrong Immigration Rule had been considered and this had an impact on Article 8 consideration.

9. The respondent (by a letter dated 27 October 2014) lodged a response under Rule 24 as follows:

"1. The respondent to this appeal is the Secretary of State for the Home Department. Documents relating to this appeal should be sent to the Secretary of State for the Home Department, at the above address.

2. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-Tier Tribunal directed himself appropriately.

3. The grounds complain that the judge did not consider the dependent relative part of Appendix FM, EC-DR/E-ILRDR. The ground is misconceived as an application under this part of the rules requires that the initial application be made from abroad.

4. The respondent requests an oral hearing".

10. Thus the matter came before me in the Upper Tribunal.

11. Miss Dickinson in her submission said that the decision of Judge Holder should be set aside and re-made allowing the appeal. An incorrect paragraph of the rules had been applied and she referred me to paragraph 18 of the determination. Miss Dickinson said that it was clear that neither rule applied at the time of application and that therefore the judge could not adequately deal with the balancing act, and the effect of having to apply again from Iraq had not been properly considered. The judge should have allowed the appeal in that it was not in accordance with the law. Miss Dickinson also referred to paragraph 30(c) in that the judge had applied the wrong test and should also have taken into account the Country of Origin report on Iraq and the situation that existed in that country at the time of the hearing.

12. Miss Dickinson referred to paragraph 30(e) and the difficulties that the appellant's son would have in accompanying his mother back to Iraq, which should be added the fact that his wife would have to give up work to look after the children and the effect of Section 55 should be taken into account. There was also a risk to the appellant on return because she is a Christian.

13. Mr Richards in reply indicated that the decision of the respondent had been clearly made outside the Rules and had been treated as such both by the Home Office and by the Immigration Judge. There could be no argument with regard to which rule as neither rule could have applied. The judge had very fairly (paragraph 23) considered the matter outside the rules and had carried out a balancing exercise. Any medical evidence was very brief indeed and certainly not sufficient to support an Article 8 appeal on medical grounds. In conclusion Mr Richards indicated the grounds amounted to nothing more than a disagreement with the findings of the judge.

14. Miss Dickinson had no further comment to make in response.

15. At the end of the hearing I indicated that I found no material error of law and the appeal of the appellant would be dismissed. I now set out my reasons for reaching this conclusion.

16. It may well be the case that error has been made with regard to the appropriate Immigration Rule to be considered. There appears to have been confusion between an application under Section R-LTRPT and Section EC-DR/E-ILRDR. Each relate to matters for consideration under Appendix FM to the Immigration Rules.

17. It does appear from the refusal letter that the respondent dealt with the application under R-LTRPT, whilst there is nothing in the letter of application submitted by the appellant's solicitors to suggest that this was the appropriate section. The appellant's son was over 18 years of age and that section was clearly inappropriate, and the application was doomed to failure.

18. Turning now to the determination of Judge Holder, he quite accurately noted the proper application in paragraph 3 of his determination and whilst not making specific reference to it, he has not fallen into error in the same way as the respondent in the decision notice under appeal. Miss Dickinson refers me to paragraph 18 of the determination, but in fact the judge here is merely saying that the appellant did not meet the requirements of R-LTRPT.

19. Whilst there is some suggestion that the appropriate section for consideration would be Section EC-DR (Adult Dependent Relative) the respondent now clearly makes the point that an application under that section would again fail because it must be made outside the UK (EC-DR.1.1.(a)). However Miss Dickinson in her submission to me indicates that it is clear that neither "rule" would apply at the time of the application.

20. I therefore take the view that even if there were to be an error in the determination of Judge Holder with regard to the precise section to be considered, that error would not be material as the same conclusion must be reached. Quite simply the appellant did not meet the requirements of either section.

21. Judge Holder conducted an exercise in examining the evidence necessary to consider the appeal under what can be described as the Article 8 Provisions of Appendix FM and he quite properly reached the conclusion that the appellant did not succeed under such provisions. Such provisions would be the same whichever substantive section had been considered.

22. Having reached a conclusion thus far, Judge Holder then (paragraph 22 onwards) considered whether or not he could proceed to consider a stand alone appeal under Article 8. Paragraph 23 of the determination shows

that after directing himself at paragraph 22 on the law, he then found good grounds for considering there were exceptional or compelling circumstances to be looked at outside the rules. Having reached this conclusion he then went on (paragraph 24) to consider the five step approach of **Razgar** and paragraphs 25 to 32 set out his reasons for finding that the respondent's decision was proportionate in maintaining effective immigration control.

23. Judge Holder noted in particular the case of **Chikwamba v SSHD [2008] UKHL 40**. He also expressed a view on the medical evidence which he considered to be "insufficient" in explaining the appellant's medical condition.

24. The challenge raised to the judge's findings do amount to mere disagreement with those findings. The judge was entitled to reach his conclusions based upon the evidence that was placed before him. In particular he has given adequate consideration and reasons for concluding that the respondent's decision was proportionate.

25. For these reasons I find no material error of law. The appeal is dismissed and the decision of Judge Holder must stand.

Signed Date 06/02/2015

Upper Tribunal Judge Poole