Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01848/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 December 2014	**On 7 January 2015**

Before

THE HONOURABLE MRS JUSTICE CARR DBE
UPPER TRIBUNAL JUDGE CONWAY

Between

ANA AL WADI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Moran, Legal Representative
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a 73 year old citizen of Syria, a widow, currently living alone in Turkey, having fled the war in Syria. She appeals the decision of First-tier Tribunal Judge Malik who, in a decision promulgated on 6 August

2014, dismissed her appeal against the Secretary of State's decision to refuse her entry clearance as the dependent relative of her son who has refugee status in the United Kingdom.

2. We summarise the facts so far as material as follows. The appellant has been living as part of her son's household since the death of her husband in 2010. She and her only son had fled to Turkey in 2013 to escape the civil war in Syria. It appears that her five daughters and their families remained in Syria. Her son made his way to the United Kingdom to claim asylum, arriving in the United Kingdom on 1 August 2013. He was granted five years leave to remain here as a refugee on 13 September 2013.

3. The appellant, alongside her daughter-in-law and two grandchildren, applied to the British Consulate in Istanbul on 2 December 2013 for entry clearance to join her son in the United Kingdom as a dependent relative of a person with limited leave to enter and remain in the United Kingdom as a refugee under Section ECDR of Appendix FM of the Immigration Rules. All of the family apart from the appellant were granted United Kingdom visas on 5 December 2013. The appellant's application, however, was refused on 7 January 2014 on the basis that she did not satisfy the requirements of paragraph 319(5) of the Immigration Rules. Those Rules were not in fact in force at the time having then already been replaced by Section ECDR of Appendix FM. But the Entry Clearance Officer went on to reason that the appellant had not provided any evidence to show she was a widow. The Entry Clearance Officer was not satisfied that she was financially dependent on her son and in any event maintenance and accommodation and care requirements were not met. The Entry Clearance Officer was also satisfied that the decision to refuse entry was in the exercise of a firm and fair immigration policy and was not disproportionate.

4. Although as we have recorded, paragraph 319(5) of the Immigration Rules was not in force as the material time, it was conceded in the appellant's application and in her appeal to the First-tier Tribunal that she did not meet the financial accommodation requirements at ECDR3.1 of Appendix FM at the time of application. To this extent therefore the error in application of the Immigration Rules is immaterial.

5. A review of the Entry Clearance Officer's decision took place on 27 July 2014, the Entry Clearance Officer's decision being on that occasion maintained. We note that by the time of the hearing of the appellant's appeal on 22 August 20134 the accommodation requirements were in fact in place but there was still, it is accepted, a shortfall of the minimum requirements as calculated in accordance with the **KA (Adequacy of maintenance) [2006] UKAIT 00065**.

6. The appellant sought to rely on Article 8 of the European Convention on Human Rights to argue that she should nevertheless be granted leave outside the Immigration Rules. The appeal in the First-tier Tribunal was

under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 as amended.

7. The Tribunal Judge heard oral evidence from the appellant's son via an interpreter. In her ruling the judge set out in great detail his evidence as to the appellant's position : in particular as to her poor health, even though she was not in pressing need of medical treatment, her need for help with everyday tasks, his sisters' desperate circumstances in Syria, the fact that he was the only one realistically able to look after the appellant, the appellant's difficult position in Turkey, the fact that he had found a flat in London where the appellant could stay with him and his family, his guilt at leaving the appellant alone and his request for compassionate treatment. He also gave evidence that the Turkish family with whom the appellant was living had asked indirectly for her to leave and that, whilst he would make a fresh application once he had a job, that could take a long time and the appellant's situation was very bad. We have also in the course of this hearing been taken to the witness statement of the appellant's son relied on below as well.

8. The judge was satisfied that the appellant's son was essentially a credible witness. She was satisfied to the required standard that the appellant's son was granted leave to remain in this country as a refugee and that the appellant was a widow. She was satisfied that the appellant had knee and spine problems even though she was not in need of any immediate medical treatment. She could obtain medical treatment in Turkey if she was sent money. The judge accepted that the appellant had lived with her son since her husband's death in 2010. Significantly, given the current conditions in Syria, the judge accepted that it would be unreasonable to expect the appellant to return there. She accepted that the appellant's son was a tenant of property where the appellant could reside. She said and accepted that the son of the appellant was not in work but that he was actively looking for work.

9. At paragraph 38 of her determination the judge said this:

> "**Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** says that 'After applying the requirements of the Rules, only if there may arguably be good ground 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'."

10. She went on at paragraph 39 to 41 to explain her conclusion that in her judgment there were no compelling circumstances not sufficiently recognised under the Rules and so dismissing the appeal on human rights grounds. In reaching that conclusion she referred to the appellant's location in Turkey and to the fact that her son and his family with whom she previously lived are now in the United Kingdom and would naturally wish to be reunited. But she went on to say that whilst the separation would inevitably have an impact on them, there was no reasonable

evidence before her to suggest that the appellant's situation in Turkey was such that there were compelling circumstances not recognised by the Rules. She went on to rehearse the evidence of the sponsor as to the appellant's position in Turkey and in relation to medical evidence and her medical condition. She referred to the fact that the appellant's son could telephone the appellant once or twice a week.

11. In relation to permanency of separation, she referred to the fact that the son was currently looking for a job and that there was nothing to suggest that a fresh application could not be made by the appellant once the son had secured employment or that the delay in doing so would be unduly harsh.

12. The essential ground on this appeal is that the judge misdirected herself in law as to the applicability of **Gulshan** in this case and by failing as a result to conduct a proportionality exercise. This in turn led the judge, it is said, to give insufficient weight to key factors in the appellant's case. Reliance is placed in particular on **R(MM) v Secretary of State for the Home Department [2014] EWCA Civ 985**. The appellant says that **Gulshan**, the guidance of which as we have recorded the judge expressly adopted, was decided in the context of EX.1 of Appendix FM. That constitutes an inbuilt exception to the application of the Immigration Rules with the aim of covering Article 8 considerations within those Rules.

13. In this case, however, there was no such exception within the Immigration Rules analogous to EX.1. Thus it is submitted that the compelling circumstances test in **Gulshan** and also of course **Nagre** which applies to Article 8 claims where an exception is already provided for in the Rules is of no application.

14. If wrong about this, the appellant says that nevertheless there still does have to be a proper consideration of the proportionality test in accordance with **Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27** and **Huang v Secretary of State for the Home Department [2007] UKHL 11**, whether or not the relevant Section of the Immigration Rules constitutes a complete code for Article 8 purposes : see **R(MM) v Secretary of State for the Home Department [2014] EWCA Civ 985**, in particular at paragraph 135

> "Where the relevant groups of IRs upon a proper construction provides a compete code for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of foreign criminals, then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to exceptional circumstances in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such as a complete code then the proportionality test will be more at large albeit guided by the **Huang** tests and UK and Strasbourg case law."

15. The appellant says that the judge failed to carry out such an exercise, simply applying the compelling circumstances test, which is narrower and materially different to a proportionality exercise. And this in turn led her to give insufficient weight to key relevant factors in the appellant's case as follows.

    (a) The appellant had lived as part of the sponsor's household since 2010 so family life was particularly strong.

    (b) She had already been dependent on her sponsor for a considerable period before the application was made.

    (c) The refusal involved the breaking up of an existing family unit rather than the formation of a new one due to changed circumstances.

    (d) The appellant is a refugee living alone in a foreign country where she does not speak the language, has no personal or social ties, extremely limited financial resources, no right of residence and restricted access to essential services with no prospect of being able to return to her home country due to the brutal ongoing civil war, and finally

    (e) The current accommodation and care arrangements in place for her are temporary only in nature and extremely precarious. She is dependent on the charity of strangers for survival.

16. Even if a compelling circumstances test is right, says the appellant, finally there are such compelling circumstances.

17. For the respondent, Mr Kandola frankly accepts that while there may have been an error in applying the **Gulshan** test in the way it was, in the light of superseding case law, such an error was not material. If one reads through the judgment it is not possible to identify any feature that is not adequately considered which could lead to an Article 8 claim succeeding. Reliance is placed in particular on paragraph 20 of **The Queen on the application of Oludoyi and others v Secretary of State for the Home Department** [2014] UKUT 00539 (IAC). Everything, so it is submitted, for the defendant was considered, what more was there to be done? Thus any error there may have been was not a material one.

18. The law has been clarified since the decision below. We refer in particular to **R(Oludoyi) v Secretary of State for the Home Department** [2014] UKUT 00539 (IAC) considering **R(MM and others v Secretary of State for the Home Department**. At paragraph 20 of **Oludoyi** the court said this:

> "There is nothing in **Nagre**, **Gulshan** or **Shahzad** that suggested that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there is anything which has not already been adequately considered in the context of the IRs and which could lead to a successful Article 8 claim.

> If, for example, there is some feature which has not been adequately considered under the IRs but which cannot on any view lead to the Article 8 claim succeeding, when the individual's circumstances are considered cumulatively, there is no need to go any further. This does not mean that a threshold or intermediate test is being applied, these authorities must not be read as seeking to qualify or fetter the assessment of Article 8. The guidance must he read in context and not construed as if the judgments are pieces of legislation."

19. In our judgment, and understandably given the absence of guidance as set out in **Oludoyi** the judge erred in applying a threshold test in reliance on **Gulshan** as she did and erred in failing to carrying out a proportionality assessment by reference to standard features. The application of a compelling circumstances test without more was insufficient.

20. The real question is whether or not this was a material error and whether on carrying out a full proportionality assessment there would have been a different result.

21. In our judgment, it was a material error. Consideration of all the material information might have led to a different result. We are particularly struck by the fact that the appellant is a refugee living alone in a foreign country where she does not speak the language, has no personal or social ties, extremely limited financial resources, no right of residence and restricted access to essential services with no prospect of being able to return to her home country.

22. We reject the submission for the respondent that the judge below considered everything for the purpose of a proportionality assessment. This was a factor in particular which the judge did not appear to take into account, at least not expressly.

23. We therefore set aside the decision on human rights grounds.

24. At the invitation of the appellant we proceed immediately to remake it. We are invited to do so on the basis of the submissions now made for the appellant by reference to the findings of fact made by the First-tier Tribunal Judge by reference to the witness statement of the sponsor which was essentially accepted as credible and we consider so far as necessary the five stage test in **Razgar [2004] UKHL 27**. We are satisfied on the facts of this case that there is sufficient family life such as to engage Article 8. the second, third and fourth questions in **Razgar**, likewise fall to be answered in the affirmative.

25. The real question is whether or not the lack of respect for family life that the refusal would represent would amount to a disproportionate interference and would be disproportionate to the legitimate public end sought to be achieved. In considering this question we take into account the considerations set out in paragraph 5A of the Nationality, Immigration and Asylum Act 2002 as amended with effect from 28 July 2014.

26. As we have now indicated in clear terms, we are influenced by the appellant's position in Turkey and her status there. Additionally, we consider the factors identified in the appellant's grounds of appeal, namely the strength of the family life and the fact that she had been dependent on her son for a considerable period of time before the application was made. We also take into account the fact that the refusal involved the breaking up of an existing family unit and we take into account the precarious nature of the appellant's current accommodation position.

27. On remaking the decision we therefore reach the conclusion that the refusal would amount to a lack of respect for family life that would be disproportionate to the legitimate public end. We would therefore allow the appeal.

28. We therefore set aside the decision on human rights grounds and we remake it so as to allow the appeal against the Entry Clearance Officer's decision to refuse entry clearance on human rights grounds.

29. The First-tier Tribunal Judge did not make an anonymity direction. We have not been asked to and in the absence of any explanation as to what good reasons there might be we do not make such a direction.

Signed Date

The Honourable Mrs Justice Carr