IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02202/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th August 2015	**On 18th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MRS BHUBANESWORI SHRESTHA
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jesurum of Counsel
For the Respondent: Mr Tarlow

DECISION AND REASONS

Introduction

1. The Appellant, born on 6th July 1947, is a citizen of Nepal. The Appellant who was present was represented by Mr Jesurum of Counsel. The Respondent was represented by Mr Tarlow, a Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made application for entry clearance to the United Kingdom as an adult dependent relative. That application had been refused by the Respondent on the basis that the Appellant failed to meet the requirements of paragraph EC-DR.1.1(d) of Appendix FM. That decision had been appealed by the Appellant and the appeal was heard by First-tier Tribunal Judge Dean sitting at Taylor House on 20th February 2015. The judge had found that the Appellant failed to meet the requirements of the Immigration Rules but allowed the appeal under Article 8 of the ECHR.

3. The Respondent had made application for permission to appeal that decision. Firstly it was submitted that the judge had failed to provide adequate reasons as to why the Appellant and Sponsor enjoyed family life and secondly that the judge had speculated as to a hypothetical future situation in terms of the Appellant's circumstances in order to conclude that the Respondent's decision disproportionately interfered with Article 8 rights.

4. Permission to appeal was granted by First-tier Tribunal Judge Colyer on 6th May 2015. Directions were issued for the Upper Tribunal firstly to decide whether an error of law had been made by the First-tier Tribunal and the matter comes before me in accordance with those directions.

Submissions on Behalf of the Respondent

5. Mr Tarlow relied upon the Grounds of Appeal submitted and identified what was said to be the two errors of law namely that there had been an inadequate reasoning as to why it was found that family life was engaged between two adults and secondly that essentially the judge had speculated as to a future position that may have disproportionately interfered with any family life rather than looking at the current position.

Submissions on Behalf of the Appellant

6. Mr Jesurum had provided an admirably concise skeleton in support of his submissions. He also provided detailed submissions expanding upon those points. He made reference to a substantial number of both domestic and European case law.

7. In summary he accepted that in terms of finding that family life existed the judge could have given more reasons but his failure to do so did not amount to an error of law. It was further submitted that the test of family life as outlined in the case of **Kugathas** had been found by later case law such as **Ghisling** to be too restricted.

8. In terms of Article 8 it was submitted that the judge was entitled to find that family life existed in terms of telephone and Skype calls made between the parties. It was also submitted there was no requirement to find anything compelling in entry clearance cases. Mr Jesurum invited me to find that **SS Congo** was not binding upon me because that decision had

been made in error. In particular he referred to extracts from **SS Congo** where the Court of Appeal had referred to "margins of appreciation" which he submitted was a misinterpretation of European case law where the term "marginal appreciation" was a reference to the ability of domestic national courts having a margin of appreciation rather than the way that it had been interpreted in **SS Congo**. He relied upon the case of **Huang**. Finally in terms of Section 117B of the 2002 Act although he accepted the judge had not gone through each and every aspect of Section 117B the case of **Dube [2015]** did not suggest such was necessary. He conceded that if I followed **SS Congo** then that did support the Respondent's position.

9. At the conclusion of the hearing I reserved my decision to consider the documents and submissions raised. I now provide that decision with my reasons.

Decision and Reasons

10. The Appellant had made application to come to the UK as an adult dependent relative of her Sponsor son. That application had been refused in January 2014 and as this was an out of country appeal it was the circumstances appertaining at the date of refusal that were relevant. The judge had noted however that the Appellant was in the UK and attended the appeal hearing on 4th February 2015, and gave evidence. Her presence in the UK was a result it appears of her having obtaining a visit visa to see her Sponsor son. It was noted that at the error of law hearing before me on 27th August 2015 the Appellant was also present. It is not clear whether she had returned to Nepal and had then come back to the UK within a very short time or had simply remained and if so, whether that was lawfully or unlawfully.

11. Although the Appellant had made application to enter the UK under Appendix FM paragraph EC-DR.1.1(d), it was conceded by Mr Jesurum at the First-tier Tribunal that the Appellant did not meet the Immigration Rules in particular the basis for refusal namely paragraph E-ECPR.2.4, namely that as a result of her age, illness or disability she required long-term personal care to perform everyday tasks.

12. The judge therefore was essentially being asked to, and did, undertake an examination of this case outside of the Rules under Article 8 of the ECHR. At paragraph 16 the judge referred to the case of **Razgar** in assessing matters. He found (paragraph 16) that stages one to four of **Razgar** could be answered in the affirmative. In terms of finding family life existed between Appellant and son he stated "Looking at the totality of the evidence before me I find that there is both from the Appellant's perspective and from that of her son and daughter-in-law".

13. There is of course a biological connection between Appellant and Sponsor as mother and son that remains unchanged throughout their lives. However to discover whether there is family life within the terms of Article

8 of the ECHR and to then discover whether a proposed interference would interfere with that family life to the appropriate level referred to in **Razgar**, requires an analysis of the evidence. It is not necessary incumbent upon a judge to go into lengthy details to sustain a finding. It depends on the specific facts of the case. For example family life between a parent and young child is almost self-explanatory and would require little or no reasons. In this case however the issue of family life had been raised by the ECO. The facts of this case demonstrated that the Sponsor son was an adult. He had not only left the family home but his home country of Nepal in 2001. He had relinquished his Nepalese citizenship and was now a British citizen. There was no evidence he had returned to Nepal to visit his mother, she making visits to the UK. There was no financial or other asset support provided by the Sponsor to his mother. The contact between them amounted to telephone and Skype calls. In those circumstances it was incumbent upon the judge to provide some reasons for finding family life existed even if such a test is not necessarily strict. It could also be said that the judge's finding that family life existed from the perspective of Appellant and Sponsor was not the correct approach in determining such a matter.

14. There was therefore an inadequacy of findings and potentially an incorrect approach to such assessment that amounted to an error of law. It was material in the sense that if properly and adequately reasoned it could have been concluded that one or two of the earlier stage tests of **Razgar** had not been met and therefore the final stage test of proportionality not reached.

15. Secondly in any event the Respondent argues that there was no compelling circumstances requiring an examination outside of the Rules as the circumstances considered by the judge were hypothetical or speculative rather than current.

16. Mr Jesurum submitted that **SS Congo** was wrong in law and I should courageously state as such and not follow that case. A Junior Tribunal Judge ordinarily would not seek to suggest a Court of Appeal decision was wrong in law and perhaps more importantly even if believing it was would still be bound to follow the precedent of a superior court.

17. The application of Article 8 of the ECHR and its relation with the Immigration Rules and indeed other statutes is a fraught area of law. Whilst there is no shortage of case law from both the superior courts and Europe it remains difficult to discern a clear, simple and consistent approach readily understood by all, that lasts for any length of time. However as a matter of good sense and reason, and in keeping with the original concept of Article 8(2) of the ECHR it follows that there must be a strong case for a court to allow the wishes of an individual or individual family to overcome legitimate public interest which serves society as a whole. Where society has set out a series of Rules that seek to reflect a proper and realistic balance between countervailing claims then it further seems both rational and good sense to require something "compelling" or

even higher to shift the balance. **SS Congo** is neither inconsistent with previous case law, the original concept within Article 8(2) nor perhaps most importantly in this day and age a realistic and sensible approach to this vexed area of law.

18. In this case the judge had in one sense based any findings of "arguably good grounds to look outside of the Rules", on a speculative basis. The best evidence available to the judge on the Appellant's condition which was the thrust of the case was referred to by him at paragraph 9. That was a letter from the doctor that whilst confirming the Appellant had osteoarthritis she could carry out regular daily activities, had a maid to assist her and as the evidence indicated was able either on her own or with a friend's help to make the lengthy journey to the UK as and when it pleased her to visit the Sponsor. It had already been accepted she did not fall within the Immigration Rules. The judge concluded entirely logically that as she got older her condition was likely to deteriorate. He essentially based his decision under Article 8 of the ECHR on the future position rather than the current. That was a material error. Perhaps taking an extreme example most middle aged or elderly people could raise the same argument that in time their health and mobility would deteriorate to the extent that their individual needs raised an arguably good case or indeed compelling case such that they should overcome in proportionate terms the interests of society as a whole. That is neither a practical or indeed lawful basis for considering Article 8 cases.

19. It could also be said that whilst the judge refers at paragraph 17 to having regard to Section 117B of the 2002 Act there is no attempt to analyse or consider those factors. To the extent that it could be said they were considered as referred to by Mr Jesurum, in the judge's conclusion at paragraph 11 that the Appellant would not be a burden on public funds because the Sponsor and wife had a decent income; that is potentially a flawed approach. He took no account of the potential cost to the NHS in respect of medical treatment that would potentially flow for an unspecified number of years as one example of public cost.

20. In summary the approach taken by the judge to Article 8 of the ECHR was in error. He failed to identify compelling reasons why this case should be examined or allowed outside of the Rules, and based any examination and findings upon a speculative future position whilst potentially even in that respect making flawed or inadequate findings in terms of the wider public interest. Those factors in addition to the inadequate reasoning in respect of family life means there were material errors of law in this case.

Decision

21. A material error of law was made by the judge in this case and I set aside the decision of the First-tier Tribunal.

22. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Lever