**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: VA/16887/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decisions & Reason Promulgated** |
|---|---|
| **On 17th December 2014** | **2nd January 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MISS SHAH AYSHA AKTAR JENY**
**(ANONYMITY DIRECTION NOT GIVEN)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER – DHAKA**

Respondent

**Representation:**

For the Appellant: Mr A Miah (Counsel)
For the Respondent: Mr P Nath (HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Clayton, promulgated on 2nd September 2014, following a hearing at Taylor House on 14th August 2014. In the determination, the judge allowed the appeal of Shah Aysha Aktar Jeny, and her mother, Somarun Nesa Lucky, both of whom had applied together to come to the UK on a visitor's visa. The Respondent Entry Clearance Officer, subsequently applied for,

and was granted, permission to appeal against the allowing of the appeal of Miss Shah Aysha Aktar Jeny, the Appellant, (though the allowing of the appeal of Mrs Somarun Nesa Lucky the mother) was not appealed by the Respondent Entry Clearance Officer. It is in these circumstances, that the appeal comes before me.

**The Appellant**

2. The Appellant is a citizen of Bangladesh who was born on 4th August 1991, and is currently 23 years of age. She applied with her mother, to come to the UK on a family visit. The evidence before the judge was that she had three sisters aged 21, 18 and 13, and a brother of 11. She was the eldest. The evidence was that,

> "Only Miss Jeny had been invited for a holiday because they were very close (i.e. with Miss Salma Miah, the first cousin of the Appellant). The evidence given by Miss Salma Miah, the Appellant's first cousin in the UK, was that, she last saw her three years ago but talked perhaps three or four times per month on the telephone. The application was initially for her aunt and cousin to come to her wedding. She had not invited any family before. Her aunt was still married and the husband worked selling crops. Miss Jeny was not studying or in work" (see paragraph 5).

**The Judge's Findings**

3. The judge considered the close relationship between Miss Salma Miah, the Appellant's first cousin, and the Appellant herself. The Appellant's mother, Mrs Lucky, could appeal under the Immigration Rules, and having done so, the judge allowed her appeal because she was in employment, had a husband back in Bangladesh, and four children, whom she was leaving behind (see paragraph 16). With respect to the Appellant, Miss Jeny, the judge held that,

> "Her appeal is only possible under Article 8. I have heard the evidence of Miss Miah, who has gone to the length of postponing her civil wedding in order that her aunt and cousin might be present. I find the particular circumstances to be wholly exceptional. Miss Miah and Miss Jeny are very close and keep in touch on a frequent basis by telephone. Miss Jeny has never visited her relatives in England, but Miss Miah has made regular visits to Bangladesh. I accept the importance of close family ties, particularly at a joyous occasion such as a wedding" (paragraph 18).

The appeal was allowed on Article 8 grounds.

**Grounds of Application**

4. The grounds of application state that the judge was wrong to have allowed the appeal on Article 8 grounds for the Appellant, Miss Jeny. The reasoning that the judge gave at paragraphs 18 and 19 of the

determination were inadequate. The judge did not make any findings that the Appellant had any family in the UK, which should have been her starting point of any consideration. This is because relationships between adults would not necessarily acquire the protection of Article 8 of the Human Rights Convention (as was well-established in the case law). There was no evidence or finding of any further elements of dependency which might engage Article 8. Moreover, it is clear from **Gulshan [2013] UKUT 00640**, that Article 8 assessment shall only be carried out when there are compelling circumstances not recognised by the Rules. In this case, the Tribunal Judge did not identify any such compelling circumstances and his findings are unsustainable.

5. On 20th October 2014, permission to appeal was granted on the basis that there was an arguable error of law with respect to the judge's consideration of Article 8.

**Submissions**

6. At the hearing before me on 17th December 2014, Mr Nath, appearing on behalf of the Respondent Entry Clearance Officer, submitted that permission to appeal was granted by the Tribunal on the basis of Article 8. Therefore, we should start by looking at Article 8. This is a high threshold with respect to applications from abroad. The case of **Gulshan [2013] UKUT 00640** makes it clear that there is a need to show "compelling circumstances" and the judge had not been able to identify any. The determination is essentially limited to findings at paragraph 18 and these are inadequate. At paragraph 19 the judge then allows the appeal.

7. For his part, Mr Miah submitted that the judge took the view that he did at paragraph 18 in the exercise of his discretion and did conclude that the circumstances here were "wholly exceptional." Another judge may well have taken a different view. However, this judge pointed out what these "exceptional" circumstances were by referring at paragraph 19 to the fact that Miss Miah in the United Kingdom "has gone to the length of postponing her civil wedding in order that her aunt and cousin might be present" (see paragraph 18). Furthermore, the judge gave consideration to the wider family and their Article 8 interests because reference was made to the case of **Beoku-Betts** (at paragraph 13). It was incongruous to allow the appeal of the mother, Lucky, who is the sister of the Sponsor in the UK, but to object to the allowing of the appeal of the daughter, who was a member of the same family, and where both intended to make a family visit together.

8. In reply, Mr Nath drew my attention to the Entry Clearance Manager's review at Section 3 where he had said that the Appellant did not have a "full right of appeal." Mr Miah properly objected to say that this was irrelevant because with respect to appeals based on race discrimation and human rights grounds, there is an out of country right of appeal, which is what was being done here. I accept that there is a valid appeal before this Tribunal.

**Error of Law**

9. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of **TCEA [2007]**) such that I should set aside the decision and re-make the decision (see Section 12(2) of **TCEA [2007]**). My reasons are as follows.

10. With out of country appeals with respect to Article 8, there is a high threshold to be met. The only matters identified by the judge are that the wider interests of the family are at stake, by reference to **Beoku-Betts** (see paragraph 13), and that Miss Miah "has gone to the length of postponing her civil wedding in order that her aunt and cousin might be present" (paragraph 18). These two circumstances do not point to "wholly exceptional" facts.

11. If it is a case that, "Miss Jeny has never visited her relatives in England" (paragraph 18) that too is not an exceptional fact.

12. Such findings could have been made, but only through a proper exercise of the factual matrix, with Lord Bingham's tabulation being followed in **Razgar** (at paragraph 17), involving a five-step approach. The determination, sensitive as it is in other respects, does not display this approach.

13. If the appeal was on Article 8 grounds, as it was, and if what was being considered was not on the basis of a "complete code" then as Lord Justice Aikens has made clear in **MM (Lebanon)** discretion was very much at large, and there had to be consideration of a range of facts and circumstances. In their absence, I conclude that the judge fell into error.

**Re-Making the Decision**

14. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am dismissing this appeal for the reasons given above. This was a case where, as against the Appellant's mother, Lucky, who the judge concluded was "in employment, has a husband and four other children, two of whom are minors" (16); the position of the Appellant is that she is neither in employment, nor in education (see paragraph 5).

15. The only contact with her first cousin, whom she saw three years ago, are conversations by way of telephone, some three or four times a month (see paragraph 5). The fact that the civil wedding has been postponed, in order to allow the Appellant to attend, does not reach the high threshold of Article 8, and neither does the rights and freedoms of family members in the UK (under **Beoku-Betts**) in this case.

16. If the five-step approach in **Razgar** is followed, it is clear that, even if the Appellant satisfies the first two requirements, it cannot be said that the decision is not in accordance with the law, and it cannot be said that it is not necessary in a democratic society, in the interests of the economic

wellbeing of the country, and it certainly is not the case that the interference is disproportionate to the legitimate public end that is sought to be achieved.

17. The maintenance of immigration control is very much in the public interest, and given the extent of "family life" rights put forward by the Appellant, it cannot be said that the balance of considerations falls in her favour and against the state.

## Decision

18. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is dismissed.

19. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 31st December 2014