Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/00574/2015**

THE IMMIGRATION ACTS

Heard at Field House
On 22 September 2017

Decision & Reasons Promulgated
On 29 September 2017

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

SANA IFTIKHAR
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahmed, Counsel, instructed by DV Solicitors
For the Respondent: Mr S Staunton, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Pakistani national born on 15 February 1996. She challenges the determination of First-tier Tribunal Judge O'Hagan, promulgated on 3 January 2017, dismissing her appeal for entry clearance to join her father, the sponsor, for settlement. The appellant sought entry with her mother and two younger siblings. Their appeals were allowed but the appeal of the appellant, who was 18 when the application for settlement was made in 2014, was dismissed. The appeals were jointly heard in Birmingham on 4 November 2016.

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2. The appellant sought permission to appeal. Issue was taken with the judge's approach to proportionality, it being argued that he misdirected himself when requiring the appellant to show compelling/exceptional circumstances in order to succeed under article 8. It was also argued that the public interest considerations were not considered and that these were capable of tipping the scales in favour of the appellant. Permission was granted by First-tier Tribunal Judge Martins on 10 August 2017.

The Hearing

3. At the hearing before me on 25 September 2017, I heard submissions from the parties. There was no attendance by the sponsor.

4. Mr Ahmed relied on the grounds which he said he had prepared. He argued that the judge had applied a narrow and restrictive approach to article 8 and had only considered whether exceptional or compassionate circumstances applied. He argued that the judge found there was family life between the appellant and the sponsor but that did not accord with his finding that the appellant was transitioning to independence. He submitted that the sponsor had been a student in the UK and was granted indefinite leave to remain in 2013. He then had to find employment and had to wait six months in order to be able to meet the maintenance requirements for a wife and three children. Mr Ahmed submitted that it had always been his intention to call his family to the UK when he obtained indefinite leave to remain. These were matters the judge had failed to consider.

5. Mr Ahmed submitted that this was not a 'near miss' argument but a situation where the appellant had only just turned 18. She would be the only member of the family left behind and although there would be financial support, there would be nothing else. The cultural issues had not been considered. Whilst it was not argued that she was at risk of persecution, her position as a lone female in Pakistan was a relevant matter in the proportionality assessment. Whilst the public interest considerations were neutral matters they should have been taken into account and were not. Whilst they were referred to at paragraph 23, they did not factor in the proportionality assessment. In the circumstances of the appellant's case, the inability to meet the requirements of the rules was not fatal to the article 8 application. The appellant has always been a member of the family. It was therefore reasonable to assume that her separation from the family unit would impact upon the other members of the family. Reliance was placed on Dasgupta (error of law- proportionality – correct approach) [2016] UKUT 00028. The decision should be set aside and remitted to the First-tier Tribunal for a fresh hearing.

6. In response, Mr Staunton relied on the Rule 24 response. He submitted that the grounds were a disagreement with the decision. The judge had considered all the evidence and the facts. The appeal was limited to article 8. The judge looked

at the appellant's life in Pakistan and the time spent with her family. He noted that the majority of her time was spent away from the family home whilst she lived at her college. She was rightly found to be transitioning to an independent life. She could continue to contact her family in the same way as she did when at college. The grounds were a disagreement with the proportionality exercise. There was no error of law. If there was, it was not material but if it were found to be material, the matters should be kept in the Upper Tribunal as no further evidence was required and the issue was only a matter of how the law should be applied.

7. Mr Ahmed had nothing further to add.

8. At the conclusion of the hearing, I reserved my determination which I now give.

Findings and conclusions

9. The facts are largely agreed. The sponsor came to the UK as a student in August 2002 and was subsequently granted indefinite leave to remain on 30 April 2013. He is now a British citizen. It appears from the visa application form of the appellant that an earlier application to join the sponsor was made but that this was refused in 2005. No details as to the nature of the application or the refusal are apparent. The appellant made the present application along with her mother and her two siblings who were aged 17 and 13 at the date of the application in August 2014. She was 18 ½ at the time. She is a student at medical college (studying to be a dentist) some 3-4 hours' travel from the family home so she lives in a hostel away from home during term time but returns for holidays. She is financially dependent upon her father.

10. It was conceded for the appellant at the hearing before the First-tier Tribunal that the requirements of the rules could not be met (at 17). The judge, therefore, proceeded to consider whether she qualified for a grant of discretionary leave outside the rules. Applying the five-stage Razgar approach, he found that there was family life between the appellant, her mothers and siblings. He found the case was less clear cut between the appellant and her father as he lived in another country but due to evidence of continued contact and financial dependency he accepted that on balance there was sufficient family life to engage article 8 (at 21). He found that the decision to refuse entry clearance did interfered with the appellant's family life. He found that the decision was in accordance with the law and that it was pursuant to a legitimate aim. He then proceeded to undertake a proportionality balancing exercise. He properly directed himself as to the law (at 18-20 and 24), noting that article 8 did not exist to provide a remedy for every misfortune or vicissitude of life and was not an exercise in sympathy. He referred to the expectation in the judgement of Huang [2007] UKHL 11 that only a minority of cases would succeed under article 8. He considered the policy intention behind the rules and had regard to the fact that

article 8 was not a means of circumventing the rules nor to create a 'near-miss' loophole for those who fail to meet them by a small margin (at 27).

11. The judge confirmed that he had considered all the circumstances, had regard to all the matters and considered the cumulative impact of all of them (at 25). He makes the following findings: (i) that the appellant had attained adulthood in February 2014 and had not long been an adult at the date of the application; (ii) that the sponsor had come to the UK, chosen to remain and accepted British citizenship in the knowledge that the appellant (and the rest of the family) had not been granted entry clearance and were required to satisfy the rules if they were to join him; (iii) that the family home was a base where she spent holidays but that she lived away from home during term time; (iv) that her place of study was some 3-4 hours' travel time away from the family home; (v) that whilst the departure of her mother and brothers would not be easy for her, the fact that she had been living away from home would make the transition easier that it might otherwise be; (vi) that she would be able to maintain contact with her family by telephone or other means as she presumably already did; (vii) that her family would be able to visit her and she could visit them; (viii) that the situation in respect of her father remained the same since 2002 and (ix) that the appellant's position as a single woman would not be unduly difficult as she was educated, not estranged from her family and was supported by them. These are all findings that were open to him on the evidence.

12. I have carefully considered Mr Ahmed's submissions criticising the judge's conclusions to see whether there was any error in approach or whether any factors were disregarded. Contrary to what Mr Ahmed submitted, the judge *did* have regard to the appellant's cultural background (at 29). It would seem to me, however, that the appellant, in living away from home and studying to be a dentist, has shown that she does not conform to the perceived cultural norms. Once qualified, she would be in a good position to support herself. If cultural practices are to be considered, then one can only assume that her father would arrange for her to be married in the near future.

13. The judge also had regard to the impact of the decision on the appellant and the sponsor and the children (at 19). Whilst Mr Ahmed complained that this had not been properly considered, no specific evidence was put before the judge as to the adverse impact separation from the family would have upon the appellant or vice versa. The judge acknowledged separation would not be easy and in the absence of any evidence it is difficult to see how he could have gone any further than that. The judge was aware that the family had made joint applications for entry clearance as this is referred to throughout the determination. He was aware that the appellant was financially dependent upon the sponsor and was still studying (at 21). He was aware that she was single (at 29). There are, therefore, no factors which the judge overlooked.

14. Whilst it is maintained that the sponsor has no relatives in Pakistan who could look after the appellant, the evidence is silent on the presence of his wife's family members. Certainly, there is no claim that they are all outside Pakistan. Additionally, I note that in a Whatsapp message there is reference to an uncle.

15. I do not accept that the judge misdirected himself as was argued. It is plain that he undertook a full and thorough balancing exercise. As I have stated, all the factors Mr Ahmed referred to were considered. That is confirmed by the judge's findings (summarised above).

16. Mr Ahmed placed reliance on Dasgupta; in particular at paragraph 26 (not 25 as cited at (c) of the grounds). In that judgment, the Tribunal found that the fact that the public interests enshrined in s.117B were not engaged, tipped the balance in favour of the factors on the appellant's side of the equation. I do not consider that this argument assists the appellant. The facts in that case were very different to those in the present case. The appellant was an elderly widower whose health was deteriorating and who had a close bond with his daughter and her young children. Here we have an appellant who is a healthy and educated young woman at the start of her adult life. Mr Ahmed argued that factors such as her fluency in English and hence her ability to integrate were not taken into account by the judge but I have seen no evidence of her language proficiency; indeed, in her application form she seeks exemption from that requirement on the grounds that she is a dependant. Nor was there any evidence called on her ability to integrate. In any event, these are neutral matters and would not have led to a different outcome, even if specifically considered.

17. Mr Ahmed argued that the judge should also have considered that the sponsor had to look for employment after he obtained indefinite leave to remain and that he then had to wait six months in order to meet the requirements of the specified documentary evidence for maintenance before the family could make an application. However, there is no evidence that this was an argument made to the judge and such a claim is not made in the sponsor's witness statement. The judge cannot be expected to take account of arguments which were not made and which have only been put forward after the determination was promulgated.

18. Mr Ahmed also took issue with the provision of the rules on adult relatives and argued that it was ultra vires. The judge properly addressed this submission at paragraph 17 of the determination.

19. Mr Ahmed argued in his grounds that the judge should have had regard to the fact that the appellant had no possibility of meeting the provisions of Appendix FM in relation to adult relatives. This, again, was not a factor argued before the judge.

20. The judge was required to consider whether family life could reasonably be expected to be enjoyed outside the UK. Certainly, as far as family life between the sponsor and the appellant was concerned, the refusal simply maintained the status quo. Family life could continue as it had done by way of modern means of communication and visits. No evidence was called as to the maintenance of family life between the appellant and the rest of the family but it is plain from the determination that the judge had in mind the need to assess the impact of the decision on all family members.

21. All too often, in this jurisdiction, judges are criticised for failing to make findings on or to consider matters on which no arguments were made and on which no evidence was presented. Whilst it may be that another judge would have reached a different conclusion, that is not the test I must consider. I am satisfied that the judge reached sustainable conclusions after a full balancing exercise of all the factors that were put to him and that there was no misdirection in his approach. It follows that I conclude that there were no errors of law in his decision making.

Decision

22. The appeal is dismissed.

Anonymity order

23. I was not asked to make an anonymity order and I see no reason to do so.

Signed

Upper Tribunal Judge

Date: 28 September 2017