



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001839

First-tier Tribunal No: HU/55979/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

27th September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANWARA BEGUM
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E Terrell, Senior Home Office Presenting Officer
For the Respondent: Mr M Allison instructed by Londonium Solicitors

Heard at Field House on 6 September 2023

DECISION AND REASONS

Introduction

1. The appellant in this appeal is the Secretary of State. I refer to the parties as they were before the First-tier Tribunal where the appellant was Ms Begum.
2. The Secretary of State appeals against the decision promulgated on 15 March 2023 by First-tier Tribunal Judge Ripley (“the judge”) to allow the appellant’s appeal. The appellant is a national of Bangladesh born on 3 February 1944, who had appealed to the First-tier Tribunal against the Secretary of State’s decision dated 27 August 2022 refusing her human rights application.
3. The appellant had last arrived in the UK on 31 March 2021 with entry clearance as a visitor, such having been sought to be extended pursuant to the Covid

concession with the appellant then making a human rights application on 2 August 2021 in which she argued that her health had deteriorated.

4. The respondent refused the appellant's application on the basis that the respondent was satisfied the appellant would be able to integrate into Bangladesh without facing significant obstacles under 276ADE(1)(vi) and noted she had lived in India until the age of 77 and could continue to be financially supported by her relatives and access health care provision in Bangladesh. It was not accepted by the respondent that the appellant had established family life in the UK and the respondent was satisfied that there was a lack of exceptional compassionate circumstances to support a grant of leave outside of the Rules and Article 3 was not engaged.

Decision of First-tier Tribunal

5. In a careful consideration, the Judge of the First-tier Tribunal was not satisfied that the appellant's case was made out under Article 3 (such is not challenged before me). The judge went on to find that the appellant and her children enjoy family life, and that the appellant has limited private life. The judge considered paragraph 276ADE(1)(vi) and was not satisfied that there was sufficient evidence to show that the appellant met the criteria to demonstrate that she would face very significant obstacles on return to Bangladesh.
6. However, the judge went on to consider the case under Article 8. The judge specifically at [32] found that the appellant would not have met the health criteria of the adult dependent relative (ADR) Rules before she came or as the evidence currently stands if she were to return to Bangladesh at the date of the hearing.
7. The judge took into account and placed weight on the fact that the appellant did not satisfy any of the Immigration Rules and considered **Mostafa [2015] UKUT 00112 (IAC)** as discussed in **Mobeen [2021] EWCA Civ 886**. The judge had also set out earlier in the decision at [14] that both parties relied on **Britcits [2017] EWCA Civ 368** including that the purpose of the ADR Rules was to protect the NHS but that there may be cases that could succeed under Article 8.
8. The judge also considered that unlike in **Ribeli v ECO Pretoria [2018] EWCA Civ 611** it was not appropriate for any of the appellant's adult children to relocate to Bangladesh because they had school age children.
9. The judge set out all the factors, including that pursuant to Section 117B(4) of the Nationality, Immigration and Asylum Act 2002, she must attribute little weight to the appellant's private life as her leave had been precarious, although the judge reminded herself that this was not no weight.
10. The judge also took into account the case of **SL St Lucia [2018] ECWA Civ 994**, that an appellant's health needs, even if insufficiently severe to meet Article 3 may assist in an Article 8 case combined with a very strong private and/or family life.
11. The judge made findings at [34] that this appellant did have a very strong family life with her adult children and grandchildren, such relationships having been established when she lived in Bangladesh. The judge went on to set out the

particularly compelling circumstances that she relied on, involving the cumulative effect of the appellant's dependence on her family in the UK, the strength of their family life together, the frailty and vulnerability of the appellant and the detrimental effect to her wellbeing were she to be separated from her family.

12. Pursuant to **Beoku-Betts [2008] UKHL 39**, the judge was mindful of the family life of the appellant's children and that they felt an obligation to care for their mother. The judge took into account that it was not reasonable to expect the adult children to relocate to Bangladesh and the judge further found that the appellant enjoyed family life with the grandchildren that she lived with and set this out in considerable detail, including that the best interests of the children lay in the appellant remaining in the UK. The judge properly directed herself that this was a primary but not a paramount factor.
13. The judge then went on to carefully consider the availability of domestic help for the appellant, but was satisfied that this did not address the appellant's holistic needs, including for emotional support or the concerns of the sponsor and the appellant's other children in relation to the appellant's emotional welfare.
14. The judge went on to distinguish the appellant's case from **Mobeen** and weighing all the factors including acknowledging the appellant's reliance on NHS treatment the judge was satisfied that the facts of the appellant's case, including the appellant's particular vulnerabilities and the impact of removal on the other family members would be disproportionate.

Grounds of Appeal

15. The Secretary of State appealed on the following grounds:
 - (1) Ground 1 argued that there were a lack of reasons/adequate reasons for finding a material matter/making a material misdirection of law on the basis that despite finding that the appellant could not succeed under the Immigration Rules, nor would she have succeeded under the ADR Rules, the judge had failed to identify what was so exceptional about the appellant's case that it succeeded under Article 8. It was asserted that the judge had failed to engage with the fact that the appellant had not satisfied the required Rules and circumvented the proper application process with evidence at paragraphs [9] and [11], with the appellant's granddaughters stating that it was decided that the appellant should come to the UK after she had been left unattended when she fainted and at paragraph [11] the sponsor was recorded as stating that he could not find anyone to continue looking after her and she could not stay with her brother.
 - (2) The Secretary of State relied on **Agyarko & Ikuga [2017] UKSC 114**: "The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under Article 8. ..."
 - (3) The Secretary of State noted whilst the judge had reminded themselves of the relevance of **Mobeen** the judge had misapplied this jurisprudence including with reference to **Ribeli** which it was submitted was on all fours with the appellant's case with the exception that the appellant in **Ribeli** had

applied legitimately through the entry clearance process and was in a stronger position than Ms Begum. Mr Terrell conceded however at the outset of the hearing, that it was not the case that the appellant's case was on all fours with **Ribeli**.

- (4) It was further argued that the judge did not have in mind the relevant test as set out in **Mobeen** including that it is an objective one. Whilst the appellant may not wish to return to Bangladesh, that does not come close to establishing that the respondent's refusal is a disproportionate interference particularly given the judge had set out at [34] that she was satisfied that the appellant's removal "would comprise a breach to her moral integrity, as this would be particularly distressing and due to her subjective fears about her future in view of her mental and physical frailty."
- (5) It was argued that the judge was mistaken in placing the subjective feelings of the appellant and her family at the heart of the decision without medical evidence to support this.
- (6) Reliance was placed on **Mobeen** at paragraph 70:
- "70. The ADR ECR, reflecting the SSHD's policy as approved by Parliament and upheld as lawful in Britcits, provide the conventional pathway for entry to the UK as an ADR. Whether deliberately or otherwise, the appellant circumvented that route by coming as a visitor to the UK, overstaying and then applying for leave to remain outside the Immigration Rules. She presented the SSHD with the sort of "fait accompli" referred to by Lord Reed in Agyarko at [54]:*
- ".... the Convention is not intended to undermine [a state's right to control the entry of non-nationals into its territory and their residence there] by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-nationals family member by the authorities would be incompatible with article 8 only in exceptional circumstances": Jeunesse, para. 114."*
- (7) It was argued that the First-tier Tribunal had failed to apply the reasoning in **Britcits** which emphasised the need for medical evidence when an appellant was relying on a need for emotional support.
- (8) Ground 2 argued that the judge erred in allowing the appeal under Article 8 whilst also concluding that this was not a case which could succeed under Article 3 and had failed to have regard to the high threshold to be a test on the basis of an appellant's moral and physical integrity with reliance placed on **GS (India) v SSHD [2015] EWCA Civ 40**.
- (9) Ground 3 submitted that the judge erred in failing to have sufficient regard to the factors in Section 117B and the public interest including that it was clear from the evidence as recorded at [9] and [11] of the decision that

the family had no intention that the appellant would return, yet they provided no explanation as to why an application was not made from Bangladesh under the adult dependent relative category and it was arguable that the judge failed to give any weight to this factor and other factors.

Discussion

16. I have reminded myself of the authorities which set out the distinction between errors of fact and errors of law and which emphasise the importance of an appellate tribunal exercising judicial restraint when reviewing findings of fact reached by first instance judges. This was summarised by Lewison LJ in **Volpi & Anor v Volpi [2022] EWCA Civ 464** at [2] as follows:

“i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.”

17. In the earlier case of **Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5** at [114]: the Court of Appeal similarly advised appropriate restraint in the approach to first instance decisions:

“i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii. The trial is not a dress rehearsal. It is the first and last night of the show.

- iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
- iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
- v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
- vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

18. The judge considered the relevant factors in this case including the relevant jurisprudence in **Mobeen**. This had been highlighted before the First-tier Tribunal, including in the appellant's supplementary skeleton argument (dated 6 March 2023). **Mobeen** provided the following additional guidance on the proportionality assessment where Article 8 is engaged:

"49. A central consideration when assessing the proportionality of the removal of non-settled migrants from a contracting state in which they have family life is whether the family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be "precarious". In such cases, it is likely only to be in exceptional circumstances the removal of the non-national family member will constitute a violation of Article 8 (see Agyarko at [49] approving Jeunesse (at [108])).

50. What was meant by "exceptional circumstances" was made clear at [54] to [60] in Agyarko, namely circumstances in which a refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate. This is to be assessed in the context of a proportionality exercise which gives appropriate weight to the policy in the Immigration Rules, considers all factors relevant to the specific case in question, and ultimately assesses whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

19. The judge was fully cognisant therefore, and this is reflected in the judge's findings, that it is likely only to be in exceptional circumstances, a very strong or compelling claim, where the removal of a non-national family member will constitute a violation of Article 8.
20. That does not require something that is 'highly unusual' or a 'unique' factor or feature and the judge was aware that the list of relevant factors to be considered is 'not closed'. (**GM (Sri Lanka) v Secretary of State for the Home Department [2019] Civ EWCA Civ 1630**). Whilst the decision reached by the judge may not have been one that would have been reached by every judge, that is not the test.
21. The judge, including specifically at [37] to [39], sets out the reasons why the judge considered there would be unjustifiably harsh consequences if the

appellant was required to return to Bangladesh. The judge's claimed failure to specifically consider the specific elements of **Mobeen** that the respondent relies in coming to her findings at particular parts of her judgment, cannot be described as an error.

22. I have taken into account including what was said in **HA (Iraq) v SSHD [2022] UKSC 22** including at paragraph 72, that judicial restraint is required and that when it comes to reasons given by the Tribunal a court should not assume that the Tribunal had misdirected itself.
23. Whilst the judge's findings might have been better expressed including that it lacks a specific reference to **R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11**, the judge at [14] identified that she was relying on the appellant's updated skeleton argument in relation to Article 8 where he had set out the relevant considerations and the possible approaches, with regard to the relevant jurisprudence, including **Agyarko**.
24. It is evident that the judge was aware that where family life is established when a person has precarious immigration status 'it is likely only to be in exceptional circumstances the removal of the non-national family member will constitute a violation of Article 8.'
25. The judge, at [34] placed reliance on **SL St Lucia [2018] EWCA Civ 994** finding that this was a case where the appellant's health needs, although insufficiently severe to meet the Article 3 threshold, were sufficient in combination with her strong family life, to outweigh the strong public interest in removal, under Article 8. The judge had regard to the statutory consideration under section 117B. These were findings that were open to the judge.
26. The judge at [38] referred to **Mobeen** and considered the position in **Ribeli** where the Court of Appeal had found that in the context of the ADR Rules that it was reasonable to expect that sponsor to return to South Africa. The judge gave adequate reasons, including at [36] for being satisfied that it would not be reasonable to expect the appellant's adult children to relocate to Bangladesh as they all have school aged children. That finding has not been challenged. The judge was satisfied that this was a distinguishing feature in the appellant's case and that was a factor that was open to the judge to take into consideration in her proportionality assessment.
27. At paragraph 67 of **Ribeli**, Lord Justice Singh considered the subjective feelings of the sponsor. Whilst the Secretary of State sought to criticise the judge's findings, the judge was addressing a different situation and it was not a question of the judge allowing the appeal because of a subjective wish to stay in the UK, but the cumulative combination of factors, including the effect on the appellant and that of her particular vulnerability (which the judge had found resulted in financial and physical dependence on her UK sponsor whom she lived with) and the impact of removal on her and the sponsor and the sponsor's family and the appellant's other adult children and grandchildren.
28. In relation to the argument that the judge failed to take into account paragraph 59 in **Britcits**, the judge made sustainable findings that the appeal could not

succeed under the ADR Rules. It was acknowledged in **Britcits** that there are cases that can succeed outside of the Immigration Rules.

29. What the respondent is asking the Upper Tribunal to do is to island hop, whereas the judge had regard to the whole sea of evidence presented to her. The judge's holistic decision is neither perverse nor inadequately reasoned.
30. Equally whilst under ground 2 it was argued that that the appellant would have the benefit of her remaining relatives in Bangladesh, the judge considered this, including at [38] where it was accepted that the appellant's brother, who had not supported her in the past, spends much of his time abroad and this evidence was not challenged.
31. The judge found these to be distinguishing factors from **Mobeen** including that the appellant needed constant supervision and was unable to live independently and was significantly more vulnerable and experiencing fainting and mild cognitive decline.
32. Ground 3 is no more than a disagreement with the judge's adequately reasoned proportionality assessment. The judge set out, at [17] that the factors relevant to the Article 8 proportionality balance were set out at section 117B. The judge then directed herself appropriately to the balance sheet approach recommended in **Hesham Ali [2016] UKSC 60 at [33]** and set out the factors in the public interest, including the appellant's failure to satisfy any of the immigration rules and at [32] the judge again specifically referenced **Mobeen** with the judge placing weight on that failure to meet any of the immigration rules 'as held in **Mostafa [2015] UKUT 00112 (IAC)** and as discussed in **Mobeen**' .
33. Whilst the judge may not have specifically inserted the paragraphs from **Mobeen** which discuss (including what Lord Reid said in **Agyarko**) that the ECHR convention is not intended for the purpose of enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a *fait accompli*, considered in its entirety, the judge's decision discloses that she considered all the relevant factors, including that she was aware that the appellant had 'circumvented' the immigration rules and applied the correct approach to the proportionality balance. In disputing those findings, the Secretary of State is, in effect, requiring the judge to give 'reasons for her reasons'.
34. The judge, having applied **Akhalu [2013] UKUT 0400 (IAC)**, also weighed in the public interest (contrary to the submissions on behalf of the appellant) that the appellant would have recourse to the NHS and attributed little weight to the appellant's private life.
35. Whilst the central issue is whether the judge correctly applied the appropriate legal tests, a fair and holistic consideration of the decision discloses that she did.

Decision

36. The decision of the First-tier Tribunal allowing the appellant's appeal under Article 8 does not disclose an error of law and shall stand. The Secretary of State's appeal is dismissed.

M M Hutchinson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 September 2023