Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41027/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 25th July 2014	**On 12th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS BATO BI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M J Aziz (Counsel)
For the Respondent: Mr N Smart (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Obhi promulgated on 23rd April 2014, following a hearing a Birmingham Sheldon Court on 11th April 2014. In the determination, the judge allowed

the appeal of Mrs Bato Bi. The Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a national of Pakistan who was born on 1st January 1932. She is 84 years of age. She appeals against the decision of the Respondent dated 26th September 2013 refusing her application for indefinite leave to remain outside of the Immigration Rules.

The Appellant's Claim

3. The Appellant's claim is that she entered the UK as a visitor on 14th April 2012 and then on 28th September 2012 made an application for leave to remain. The basis of her claim was that she was insecure, vulnerable, and frightened to live a life of solitude in Pakistan at her age. The thought of being separated from her family caused her stress and was aggravating her psychological state.

4. Furthermore, the level of care she would need in Pakistan was very expensive and one that she could not support. The Appellant alleged that she required constant care and attention and that she had eleven relatives in the UK to care for her.

The Judge's Findings

5. The judge considered the evidence before her that the Appellant had osteoarthritis, iron deficient anaemia, and stress related problems (paragraph 10). She alleged that she was alone in Pakistan (paragraph 11). She needed to be cared for and could not cook for herself (paragraph 12).

6. Within a short time of her arrival in the UK "her age related illnesses progressed to the point that she now requires substantially more care and that this was not available to her in Pakistan" (paragraph 18).

7. The judge observed that there had been a contrived effort on the part of her family members in the UK

> "to evade the Immigration Rules, as they could have supported an application by the Appellant to come to the UK as a dependant relative, and in the light of her age, if what they say is true, it is likely to have been a successful application. The fact that they chose not to do that suggest that they are now, or did in the past mislead the Secretary of State, as to her situation in Pakistan" (paragraph 19).

8. Nevertheless, the judge went on to then conclude that, be that as it may, the position that the Secretary of State was now presented with was a fait accompli because the Appellant was living with her family, and had done so for two years and was weak and frail (see paragraph 20).

9. Given this, the appeal would be allowed outside the Immigration Rules on the basis of Article 8 jurisprudence because the Appellant was a frail elderly woman who was in the final stages of her life in Pakistan (paragraph 21).

Grounds of Application

10. The grounds of application state that there had been a failure to consider established case law such as **Gulshan [2013] UKUT 00640** which required a decision maker to show that there was circumstances which were unusual or exceptional before recourse could be had to freestanding Article 8 jurisprudence.

11. On 23rd May 2014, permission to appeal was granted.

Submissions

12. At the hearing before me on 25th July 2014, Mr Smart, appearing on behalf of the Respondent Secretary of State, relied upon the grounds of appeal. In particular reliance was placed on the case of **Nagre** where Sales J had stated that "It will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new Rules …" (paragraph 29).

13. In this case the judge had referred to the Appellant as a "frail elderly woman who is in the final stages of her life" (paragraph 21) but Appendix FM provided a method by which an individual could obtain entry clearance and subsequently indefinite leave to remain as a dependant adult relative and this course had not been adopted by her relatives.

14. Given that the judge had observed that "There is a need for the Immigration Rules to be respected and this is a classic case where they have been deliberately evaded", the judge should have dismissed the appeal.

15. For his part, Mr Aziz submitted that the judge was clear that the Appellant could not succeed under the Immigration Rules. Indeed, at paragraph 19 the judge had made it expressly plain that there had been a deliberate attempt to evade the Immigration Rules. However, the judge had then considered (at paragraph 20) that the Appellant was getting more and more frail with her old age. She then had specific regard to the "public interest".

16. She did not expressly say that the Secretary of State would not remove her given her age. This was not a consideration that she had regard to. Instead, she had specific regard to the Appellant's particular circumstances.

17. On that basis it was decided that if consideration was given to the position as it existed now, the balance of public interest considerations fell in her

favour. As a decision that was made outside the Immigration Rules, this was a decision that was open to the judge.

18. In reply, Mr Smart submitted that the judge was wrong to have referred to the position as one of "fait accompli" and to then add also that it was not in the public interest to remove a frail old woman.

No Error of Law

19. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside this decision and remake the decision. This is because, in what was clearly a difficult case before the judge, consideration was given to all the relevant issues. In particular, it was recognised that there had been a deliberate attempt to evade the Immigration Rules (paragraph 19). This was done not by the Appellant herself but her relatives in the UK. The judge was clear that "They are now, or did in the past mislead the Secretary of State …" (paragraph 19). However, since then the Appellant had been in the UK for two years.

20. In using the word "fait accompli" the judge was simply recognising the position as it existed now. That position had, as the judge explained, the following particular elements to it. First, that the Appellant was living with her family in the United Kingdom. Second, that she had been in the UK for two years. Third, that she was a person of "such an advanced age," that "it is likely that she has become weaker and frailer since she has been in the UK. Fourth, that the Appellant may also have "capacity problems which are likely to make her even more vulnerable .." (paragraph 20).

21. As to the attempt to evade immigration controls, by her family relatives, the judge was aware of the fact that the family members in all probability acted with the best interest at heart of the Appellant and that they are "providing increasing levels of care to her" (paragraph 20).

22. Thereafter, as far as Article 8 ECHR jurisprudence was concerned, proper consideration had to be given by the judge to the balance of public interest considerations. This the judge did do. It was open to her in this respect to conclude that, "It is not in the public interest to return a frail elderly woman, who is in the final stages of her life, to Pakistan to an uncertain situation" (paragraph 21).

23. The challenge to her determination on the basis of what was said by the Upper Tribunal in **Gulshan [2013] UKUT 00640** amounted to nothing more than a disagreement with the judge's findings because the judge does in the next breath then refer specifically to **Gulshan** pointing out that she has taken this decision into account, and observing that "The circumstances of the Appellant's case are unusual and exceptional" under Article 8 the ECHR (see paragraph 21).

24. This is exactly the application of the test propounded in cases such as **Gulshan**. Another judge may well have decided the matter entirely differently. This judge, however, decided it in this way. The question is whether the process of reasoning and the application of the law is wrong. It is not. It is well-established that the requirement of "perversity" is one which "represents a very high hurdle" (see Brooke LJ in **R (Iran) [2005] EWCA Civ 982**).

Decision

25. There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 9th August 2014