Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45044/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 June 2014	**On 11 September 2014**

Before

MRS JUSTICE SIMLER
UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FATEMA CHOUDHURY

Respondent

Representation:

For the Appellant: Mr Avery, Senior Home Office Presenting Officer
For the Respondent: Mr Hassan, Kalam Solicitors

DETERMINATION AND REASONS

1. The respondent, Fatema Choudhury, was born on 19 February 1948 and is a citizen of Bangladesh. We shall hereafter in this determination refer to the respondent as

"the appellant" and to the Secretary of State for the Home Department as the "respondent" (as they were respectively before the First-tier Tribunal).

2. The appellant had applied for further leave to remain in the United Kingdom on 31 August 2012, having entered the country on 22 August 2012 with a valid visit visa obtained out of country. Her application to remain was subsequently varied to include an application under Article 8 ECHR. On 15 October 2013, a decision was made to refuse to vary the appellant's leave to remain and also to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed against that decision to the First-tier Tribunal (Judge S Miah) which, in a determination promulgated on 14 March 2014, allowed the appeal on human rights grounds (Article 8 ECHR). The Secretary of State appealed to the Upper Tribunal and was granted permission by Judge Lambert on 23 April 2014.

3. The appellant has six adult children all now living in the United Kingdom. Her husband died in Bangladesh in 2009. The First-tier Tribunal had before it a bundle of documents (indexed on its face) which contained, *inter alia*, the statements of the appellant and also Syeda Jahera Akter, a British citizen and the daughter of the appellant. The appellant's statement indicates that she first visited the United Kingdom in 2007 with her husband and visited again in 2009 after he had died. She had made two further visits in order to spend time with her children here. On each occasion, she returned to live in Bangladesh but, as noted above, when she arrived in August 2012 she decided to apply to remain indefinitely. She states that she had a "minor stroke" after her husband had died and had fallen in her home breaking her ankle. The children have become concerned for her welfare and they support her application to remain in the United Kingdom. In Bangladesh, the appellant had a housemaid who assisted her but this woman, because she was illiterate, had "aggravated my sense of helplessness". In her statement [9], the appellant asserts that she is "neither physically nor mentally fit to travel to Bangladesh" but Mr Hassan, for the appellant, acknowledged that there was no independent medical evidence which supported that assertion.

4. Mrs Akter, in her statement in support, says that the appellant has no access to "the required level of care" in Bangladesh although she was provided for financially by the United Kingdom family whilst living there. Mrs Akter says that the appellant would be adequately maintained and accommodated at her home in Ilford, Essex.

5. The remainder of the documentary evidence before the First-tier Tribunal consisted of receipts for sums paid to the appellant by the United Kingdom family and particulars of Mrs Akter's own financial circumstances. At [14-22] there are a number of items of medical evidence. These include two medical reports written by Dr R K Yadava, a consultant physician. The reports are dated 25 August 2012 and 9 March 2013 and record that the appellant suffers from chronic bilateral hip pains and left ankle pain. Her mobility is described as "poor" and, at the time of the report on 9 March 2013 she required "one person to assist her in walking". She takes regular analgesia for chronic pain but also suffers from tiredness and breathlessness on exertion. A later report also records that the appellant has not suffered from recent

episodes of central chest discomfort (referred to in the earlier report). In March 2013, she had presented as "alert oriented with time and person." She had clinical features of a depressed mood but no visio-sensory inattention or motor sensory deficit in the limbs, her hand coordination was intact. Mr Hassan told us that the appellant's family had paid for the medical services provided by Dr Yadava privately.

6. The reasons for refusal letter of 15 October 2013 explains why the appellant could not succeed in her application to vary her leave as her application was contrary to the provisions of paragraph 44 of HC 395 (as amended):

> **Requirements for an extension of stay as a general visitor**
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> 44. Six months is the maximum permitted leave which may be granted to a general visitor. The requirements for an extension of stay as a general visitor are that the applicant:
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> (i) meets the requirements of paragraph 41 (ii)-(vii) and (ix)-(xii); and
>
> (ii) has not already spent, or would not as a result of an extension of stay spend, more than 6 months in total in the United Kingdom or not more than 12 months in the case of a person accompanying an academic visitor as a general visitor. Any periods spent as a child visitor are to be counted as a period spent as a general visitor; and
>
> (iii) has, or was last granted, entry clearance, leave to enter or leave to remain as a general visitor or as a child visitor; and
>
> (iv) must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded.

7. The refusal letter recorded that,

> You entered the United Kingdom on 22 August 2012. Your period permitted at the time of entry was six months therefore on 22 February 2013 you will have had the maximum time permitted to a visitor. Therefore the Secretary of State is not satisfied that if you were granted [leave to remain] you would not spend more than six months in the UK as a visitor and your application is refused under the requirement for 44(ii).

8. The application was considered also under R-LTRPT of Appendix FM and paragraph 276ADE;

Requirements to be met by an applicant for leave to remain on the grounds of private life

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

9. The appellant had not been living continuously in the United Kingdom for the period of time required by the Rules. As regards Article 8 ECHR outside the Rules, the letter records:

> I have also considered whether your application raises or contains any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State of a grant of leave to remain in the United

> Kingdom outside the requirements of the Immigration Rules. I have decided that it does not. Your application for leave to remain in the United Kingdom is therefore refused.

10. The Secretary of State's grounds of appeal are brief:

> The IJ (*sic*) has not considered the guidance in the case of *Gulshan* (*Article 8 – new Rules – correct approach)* [2013] UKUT 640 (IAC) namely if there are good grounds regarding leave to remain outside the Immigration Rules it is necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules ... The *Gulshan* determination has further been endorsed by the Upper Tribunal in *Shahzad (Art. 8: legitimate aim)* [2014] UKUT 85 (IAC) per head note (iv). It is submitted this is a relevant omission as the IJ had not given any consideration as to whether there are good grounds for granting leave outside the Rules in compelling circumstances not recognised under the Rules. Permission is sought on the basis that the IJ has not considered the case specific guidance on departing from the Immigration Rules when further considering Article 8.

11. The determination of Judge Miah is equally brief, running to sixteen paragraphs. In our view, that determination contains errors of law such that it falls to be set aside. We have reached that conclusion for the following reasons. First, at [a], the judge has set out the citations of a number of cases (including *MF (Nigeria)* [2013] EWCA Civ 1192 but not *Gulshan* - see above) and states that he has considered the cases. He has made no attempt whatsoever to identify the principles of law within those cases which he considers relevant to the instant appellant's circumstances nor, so far as we can see, has he attempted to apply those principles. The judge's failure to refer to *Gulshan* is not, in itself, an error of law but his failure to apply the principles set out in that determination constitutes a legal error on his part. The head note of *Gulshan* reads as follows

> *On the current state of the authorities:*
>
> *(a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;*
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> *(b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);*
>
> *(c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.*

The Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

12. The judge at [11] briefly records that the appellant did not meet the requirements of the Immigration Rules. He then went on to find that the appellant and her daughter (who both gave oral testimony) were "entirely credible witnesses. None of the cogent testimony they provided was undermined during their cross-examination." The credibility of the testimony given by the witnesses does not appear to have been at issue. The judge continued at [14] to state that "the evidence supports the contention that all of the appellant's children are very close to her. They support her emotionally and financially." He notes that the appellant is receiving private medical treatment for her "medical ailments" but he does not particularise those ailments and made no attempt to explain why they may amount to compelling circumstances. At [15], the judge found that,

> the essential care and support being provided primarily by the appellant's daughter who gave evidence, alongside the other five children in the UK, amounts to significant family-life [sic] under Article 8. Following the well-established five stage test set out in *Razgar*, I find that the decision is in accordance with the law and that it is to the legitimate aim of maintaining effective immigration control. However, that said I find that in the particular circumstances of the appellant's case, namely her mature age, medical symptoms and wider circumstances, the fact that she has no-one to turn to [in] Bangladesh for any kind of financial emotional support swings the Article 8 proportionality assessment in balance in her favour.

13. We find that analysis to be wholly inadequate. The judge fails to appreciate that the complete code now provided in relation to Article 8 by the Immigration Rules sets out in detail provisions, consistent with both United Kingdom and Strasbourg jurisprudence, which must be satisfied in order for an applicant to achieve a grant of leave to remain. By definition, where an applicant fails to satisfy those provisions, the public interest as defined by the Rules will outweigh and render proportionate any interference which the immigration decision will cause to the private and/or family life of the applicant. Only appeals with unusual or compelling facts (that is, facts which have not been anticipated in the complete code provided by the Rules) require consideration outside those Rules. The decision-maker, therefore, must not only make a judgment as to whether the facts in a given case are sufficiently compelling to require consideration of Article 8 outside the Rules but also, importantly, will be aware that his or her analysis should be informed by the fact the requirements of the Rules had not be met. As the Tribunal in *Gulshan* noted at [27]:

> The judge then embarked on a free-wheeling Article 8 analysis, unencumbered by the rules. That is not the correct approach. The Secretary of State had addressed the Article

> 8 family aspects of the respondent's position through the rules, in particular EX.1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of family life outside the United Kingdom. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the rules (see paragraph 24(b) above).

14. A "freewheeling Article 8 analysis, unencumbered by the Rules" is exactly what Judge Miah embarked upon in his determination. He approached the Article 8 analysis outside the Rules as if it were a *tabula rasa* on which Appendix FM had no bearing whatever. The appellant's "mature age and medical symptoms" were not circumstances to which Appendix FM gave any weight and they are hardly unusual in cases of this kind involving elderly individuals. Further, we have no proper idea of the "wider circumstances" which the judge clearly did believe had some bearing on the outcome of his analysis. Whilst the judge makes the assertion at [16] that the "connection that exists between the appellant and her children in the UK can reasonably be said to go beyond normal emotional ties than might usually be expected between adult relations (*Kugathas* [2003] EWCA Civ 31)" that assertion is not supported by any reasoning. We observe, on the contrary, that the "emotional ties" existing between this aging appellant and her close family members in the United Kingdom are entirely "normal".

15. The judge goes on to find that "the legitimate aim the respondent seeks to achieve by requiring this appellant to leave the UK is abated, to a large extent, as a result of the appellant's current cumulative circumstances." Presumably, the judge is here referring to question (4) of the "well-established five stage test" contained at [17] of *Razgar* [2004] UKHL 27:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
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> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
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> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

16. We cannot see how the "legitimate aim" or public interest concerned with the appellant's removal (that is, the economic wellbeing of the country of which effective control of immigration forms part) can be "abated" by the appellant's circumstances. Presumably, the judge had intended here to refer to proportionality, but he does not say so. Indeed, the judge goes on at [16] to find that "it [presumably 'the appellant's current cumulative circumstances'] outweighs any public interest argument the respondent might have argued in favour of requiring this appellant to leave the UK now (*sic*)." The judge has made no attempt to define what might be the public interest arguments in this particular case. The public interest is never a fixity and should be examined and defined on a case by case basis. We find that the public interest concerned with the removal of an appellant who has made an application to remain permanently in the United Kingdom having arrived with a visit visa (which she would only have obtained by persuading the Entry Clearance Officer that she intended to return to Bangladesh at the conclusion of her visit) is a strong one. Not only has the judge failed to describe the "wider circumstances" in favour of the appellant remaining, he has also completely failed to define the public interest.

17. In the light of these observations and findings, we set aside the First-tier Tribunal determination. The representatives of both parties agreed it was not necessary for the Tribunal to hear any further oral evidence and that we should remake the decision on the evidence which was before the First-tier Tribunal.

18. As we have noted above, our first task is to consider whether, having failed to meet the requirements of the Immigration Rules, there are compelling or unusual circumstances in this case which require us to consider Article 8 ECHR outside the Immigration Rules. As we have noted above, there is nothing particularly unusual about the circumstances in which this appellant finds herself. We have no doubt that she would prefer to be in the company of and be cared for by her United Kingdom family members and also that they would wish to have her living with them. We have described the appellant's medical symptoms above and, whilst we find that her medical conditions may limit her mobility to some extent, they are not, as at the date of the Upper Tribunal hearing, so serious as to require her to receive care from third parties. Significantly, the appellant's United Kingdom family members have indicated that they are prepared to support her financially wherever she may be living. The appellant previously had the assistance of a maid in Bangladesh. We see no reason why she should not do so in the future. The private medical treatment for which the family currently pay here in the United Kingdom can as easily be purchased for the appellant if she were living in Bangladesh. We are aware that the appellant has not been living in the United Kingdom illegally at any time but, equally, there must be some doubt as to the *bona fides* of her representations to the ECO concerning her application for a visit visa. Further, we find that, in deciding whether or not a consideration of Article 8 ECHR outside the Rules is required, we should have regard also to the public interest concerned with the appellant's removal which, for the reasons we have given above, is a strong one in this instance. We have concluded that, applying the principles of *Gulshan,* the circumstances of the appellant are not unusual or compelling to the extent that a consideration of Article 8 outside the Rules is required.

DECISION

19. The determination of the First-tier Tribunal which was promulgated on 14 March 2014 is set aside. We have remade the decision. The appeal against the Secretary of State's refusal to vary leave to remain is dismissed.

Signed Date 25 June 2014

Upper Tribunal Judge Clive Lane