Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38627/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th April 2015	**On 27th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS SUFIA KHATUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Khan (Counsel)
For the Respondent: Ms L Kenny (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Kanagaratnam, promulgated on 19th September 2014, following a hearing at Hatton Cross on 22nd August 2014. In the determination, the judge dismissed the appeal of Ms Sufia Khatun. The Appellant subsequently

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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 female citizen of Bangladesh who was born on 5th April 1943, and is currently 72 years of age, and she appealed against the decision of the Secretary of State dated 2nd September 2013, to refuse to vary her leave to remain in the UK on the basis that she is dependent on her son, Mr Jamal Razaque, who is settled in the UK.

The Appellant's Claim

3. The Appellant's claim was summarised by the judge (at paragraph 4) on the basis that she wished to join her only son, who worked as a chef, and supported his aged mother in Bangladesh, up until her arrival in the UK as a visitor on 26th August 2012, in what was her second visit to the UK. During the currency of her leave, she had applied on 27th November 2012 for indefinite leave to remain on the basis of her exceptional circumstances.

4. The judge described how her claim was that she suffered from diabetes, high blood pressure and arthritis and had to depend on medication for her normal life. Although she had a sister in Bangladesh, the fact was that

> "most of the time she felt lonely. Her son in England too missed her and she had grandchildren and stepchildren in the United Kingdom. Her health deteriorated when she was in Bangladesh and she felt better while in the United Kingdom".

It was said that if she returned to Bangladesh she could not access medical care on her own "and as her sister was ailing too she could not go live with her". She was without support in that country (see paragraph 4).

The Judge's Findings

5. The judge found that the Appellant could not succeed under the Immigration Rules because she had not spent a period of twenty years in this country or half her life and had only been here for thirteen months. The judge held that,

> "while the Appellant claims that she is financially and emotionally dependent on her son, the Appellant conceded that she had relatives in Bangladesh at the hearing and at the time of her entry clearance application she had also returned to Bangladesh after having visited the United Kingdom in 2011 ..." (paragraph 9).

6. The judge also held that there was material available from the World Health Organisation which set up the country's profile and this showed that "there has been a significant improvement in the service delivery of the health secretary in Bangladesh".

7. The judge then went on to recount that, "the Appellant self-concedes that she can access drugs in her covering letter dated 22nd November 2012. She has a house in which she can live indefinitely and a sister in Bangladesh" (paragraph 9). It was on the basis of these facts that the judge then went on to consider proportionality and held that, even with regard to the principles in **Gulshan [2013] UKUT 00640**, she could not succeed under Article 8. Finally, regard was given to Section 117 of the 2014 Act and it was held that the public interest did not weigh in the Appellant's favour (paragraph 10).

Grounds of Application

8. The grounds of application state that, although the judge purports to have regard to the public interest considerations, he failed to consider that the Appellant was lawfully in the UK at the time of making the application and that she was not a burden on the taxpayer or the NHS because she was being supported by her son, who had given a five year undertaking that he would continue to support her for medical care in this country. Second, in considering the "**Gulshan** principles" the judge had erred because there was no reference here to whether there were

   (a) arguable grounds of compelling circumstances not recognised under the Rules; and

   (b) whether there were particular features in the Appellant's case which would render removal to be unjustifiably harsh.

   Third, the objective evidence showed that the Appellant's home country was poorly resourced for independent living of elderly and physically vulnerable individuals (and this was set out at pages 40 to 56 of the Appellant's bundle). Furthermore, the Appellant's own sister gave a statement from Bangladesh that she was not in a position to take care of the Appellant if she returned to Bangladesh (see pages 32 to 34 of the Appellant's bundle). But most importantly, there was a change of circumstances in that since the Appellant's arrival in the UK her health had deteriorated and this was set out in the Appellant's own witness statement (paragraphs 8 to 11), and in the witness statement of her son, Jamal Razaque, at pages 26 and 27 of the bundle. The judge did not have regard to this.

9. On 11th February 2015, the Upper Tribunal granted permission to the application.

10. On 25th January 2015, a Rule 24 response was entered by the Respondent on the grounds that it was open to the judge to conclude as he did.

Submissions

11. At the hearing before me on 17th April 2015, I had the benefit of Mr Khan's well compiled and helpfully clear skeleton argument. In this, he made the point that there was essentially one argument only, namely, whether the

First-tier Tribunal considered the special features in this case. Mr Khan submitted that the judge had made factual errors in this regard. First, the judge referred to the fact that "the Appellant herself concedes that she can access drugs in her covering letter dated 22nd November 2012 (see paragraph 9). However, there was no covering letter of 22nd November 2012. There was a letter of 27th November 2012 and this emanated from the solicitors making the application (see B1), but this in no way implied that the Appellant could access drugs on her own. Therefore, the very basis of the factual considerations by the judge was wrong.

12. Second, the judge referred to the fact that "the Appellant conceded that she had relatives in Bangladesh at the hearing" (paragraph 9). Again, the Appellant conceded no such thing. There was only sister that the Appellant conceded having, and even there, she made it clear that the sister was in no position to provide her with care, and the sister herself had submitted a statement to this effect.

13. Third, the hearing bundle from J. Stifford Law Solicitors, dated 20th August 2014, which was before the judge contained a "personal health report" (see pages 12 to 24). This was completely overlooked by the judge. Yet, it could have been relevant. This was because at page 20 there is a suggestion that, "your lung age is greater than your actual age. This was due to your smoking and I strongly advise you to stop". Mr Islam also suggested that at page 21 there was a reference to the Appellant having a possible problem with her kidneys. This is, however, not correct because at page 22 there is a clear statement that "your kidney function tests are within acceptable limits".

14. Fourth, Mr Islam argued that the Section 117 "public interest" considerations have not been properly weighed in the balance because this was an Appellant who did not have a "precarious" existence in the UK when she made her application, because she had valid leave, and she would not have been a burden on the taxpayer. She was also over 65 years of age, so that she would not have to meet with the English language requirement test.

15. For her part, Ms Kenny submitted that the judge's determination was well balanced and this amounted to nothing more than a disagreement with the conclusions. There were no particular features here whatsoever. The fact that the Appellant did not have an English language test could not be waived in her favour. She did not apply as a dependant relative from overseas in the first place. Her essential complaint had been that she felt lonely in Bangladesh at her age as did her son and this was recounted at paragraph 4 of the determination itself. The judge did not find her to be dependent. It is true that there is a letter of 27th November 2012 but that this does not say that she cannot access drugs in Bangladesh. She did have a sister in Bangladesh. She did have a home there. Therefore, the judge was right in concluding that she could return there.

16. In reply, Mr Islam emphasised that the Appellant did not have a "precarious" immigration history and there were significant obstacles to her being able to return to her country at the age of 72.

Error of Law

17. I am satisfied that the making of the decision by the judge involved 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. My reasons are as follows. First, the judge has erred in stating that the Appellant "concedes that she can access drugs in her covering letter dated 22nd November 2012" (paragraph 9). There is no covering letter of 22nd November 2012. There is no concession to this effect by the Appellant. The relevant letter is dated 27th November 2012 and this does not say that the Appellant can access drugs herself.

18. Second, the Appellant's case, as put by her solicitors in the covering letter of 27th November 2012, is that she is "old and fragile and suffers from diabetes and arthritis" and that she lives alone in Bangladesh and needs "constant help in reminding me to take my medication, help with washing, cooking and personal care". She has a house but states that it has "no electricity or running water" and that the water has to be collected from a well a long way away from the house. She emphasises the fact that, "because of my old age, I am unable to do my shopping and have to ask my neighbours to do my shopping which I cannot rely on" (see P2). The judge does not refer to any of these facts at all in his assessment of "findings of fact and credibility" at paragraph 9.

19. Third, the judge refers to the Appellant having relatives in Bangladesh. The Appellant's evidence, however, was that she had a sister in Bangladesh. The sister was unable to look after the Appellant because she was also in ill-health.

20. Fourth, there is no proper assessment of the Article 8 jurisprudence, and his application outside the Rules, even though the case of **Gulshan [2013] UKUT 00640** is referred to. But there is equally no proper consideration of the Section 117B "public interest" considerations.

21. Finally, although my attention was drawn to the personal health report there is nothing in this whatsoever that assists the Appellant as far as I can see. The report is unsigned and it is unclear how it has been commissioned. Moreover, there is no evidence whatsoever that it was specifically brought to the attention of the judge. It is not enough to say that it is in the Appellant's bundle. It is incumbent upon the representative in question to put his or her best points before the judge during submissions. There is no evidence that this was done.

Notice of Decision

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 remake the decision as follows. This appeal is referred back to the First-tier Tribunal, to be heard by a judge other than Judge Kanagaratnam, under Practice Statement 7.2, because the effect of the errors outlined above have been such as to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put and considered by the First-tier Tribunal. No previous findings are preserved. It is open to the Appellant to put further evidence before the judge. Accordingly, this appeal is remitted to the First-tier Tribunal.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 25th April 2015