IAC-AH-CJ-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29041/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th January 2016	**On 24th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MEHROOZ SHAFI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Briggs (Counsel)
For the Respondent: Mr E Tufan (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 21st March 1988. The Appellant entered the UK on 31st July 2010 with entry clearance as a Tier 4 (General) Student valid until 4th December 2011. He was then granted further leave on the same basis, but due to non-attendance, the last period was curtailed to 27th April 2014. On 26th April 2014 an application was made on his behalf which was refused on 1st July 2014. That application was for further leave to remain and the Appellant's application was considered under Appendix FM with regard to his private life under paragraph 276ADE(iii) to (vi). Notice of Refusal was issued on 1st July

2014. In that Notice of Refusal letter the Secretary of State acknowledged representations had been made that the Appellant suffered from hepatitis C and Von Willebrand disease.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Oliver sitting at Richmond on 24th June 2015. In a determination promulgated on 27th July 2015 the Appellant's appeal was dismissed under the Immigration Rules and on human rights grounds.

3. The Appellant lodged Grounds of Appeal to the Upper Tribunal on 3rd August 2015. It was contended therein that the First-tier Tribunal had materially erred in failing to consider and apply the relevant legal principles to Article 8 medical claims. It was noted that there was no consideration of *Akhalu (Health claim: ECHR Article 8) Nigeria [2013] UKUT 400 (IAC)*. It was also contended that the First-tier Tribunal Judge's conclusion and application of the exceptionality test when considering Article 8 was erroneous and that the judge had failed to consider the Article 8 step-by-step approach and had not carried out a proportionality assessment. Further it was contended that the Tribunal had erred in failing to consider and apply Rule 276ADE(vi), namely whether there were very significant obstacles to reintegration.

4. On 6th November 2015 Judge of the First-tier Tribunal Hollingworth granted permission to appeal. Judge Hollingworth noted that the First-tier Tribunal Judge had not considered *Akhalu* and that it was arguable that the judge had fallen into error in applying an exceptional circumstances test. Further he acknowledged that an arguable error of law had taken place with regard to the absence of the proportionality exercise in the circumstances and the application of Section 117 of the 2002 Act and that it was arguable that the consideration of paragraph 276ADE was insufficient.

5. In a detailed response to the Grounds of Appeal under Rule 24 the Secretary of State opposes the Appellant's appeal, submitting that the Judge of the First-tier Tribunal directed himself appropriately and made reasonable or sustainable findings that were properly open to him on the evidence. It was submitted that the Appellant's grounds amount to nothing more than an opportunistic claim advanced in mere disagreement with the negative outcome of the appeal. The Rule 24 response notes that the Appellant was granted permission for leave to appeal on the basis that it was arguable that the First-tier Tribunal Judge had materially erred in failing to make reference to the decision in *Akhalu*. The Respondent submits that contrary to the grounds advanced, although the First-tier Tribunal Judge chose not to cite this authority, it is clear from the decision of the First-tier Tribunal Judge, both in terms of structure and reasoning, that he had in mind the key legal principles summarised in this case. The Secretary of State submitted that *Akhalu* was an Appellant whose appeal on Article 8 grounds was successful on a very different factual basis and that the First-tier Tribunal Judge was clearly sympathetic to the Appellant but nevertheless on the basis of the evidence before him he made

reasonable sustainable findings properly open to him on proportionality. As regards the Appellant's ground that the First-tier Tribunal Judge had erred regarding the absence of the proportionality exercise and the application of Section 117, the Secretary of State submits that the judge had made adequate findings and that the grounds do not disclose any arguable legal error of law that would be considered capable of having a material impact upon the outcome of the appeal.

6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the First-tier Tribunal Judge's decision. The Appellant appears by his instructed Counsel Mr Briggs. I note that the Secretary of State was not represented before the First-tier Tribunal Judge. The Secretary of State is now represented by her Home Office Presenting Officer Mr Tufan.

Submissions/Discussion

7. Mr Briggs submits that it is well-settled law that medical treatment can impact upon family life and that the First-tier Tribunal Judge has failed to carry out that analysis or refer to the authorities. He submits that the best the judge does is to consider exceptional circumstances outside the Rules at paragraph 10 of his decision. I note therein that he has made reference to the authority of *GS (India)* but I also note that that reference is to the Upper Tribunal decision and not that within the Court of Appeal. Mr Briggs submits that Article 8 considerations are of course relevant but there must be a pre-existing Article 8 case and the judge has failed to consider this issue. He submits that the focus of the determination is confined to Article 3 overlooking Article 8 and submits that this is a case where the Appellant has a chronic medical condition which impacts on his pre-family life. Secondly he contends that there has been no serious consideration of the Appellant's obstacles in reintegrating into society if he is returned to Pakistan and does not consider that the judge's treatment of the Immigration Rules as set out at paragraph 7 is sufficient and that it was imperative upon the judge to consider and determine this properly in the light of the Appellant's condition and the treatment he receives here and in light of the evidence the Appellant gave about difficulties in accessing treatment.

8. In response Mr Tufan poses the question as to what is the materiality here even if there are any errors of law which he does not concede that there are. He submits that the current guidelines in medical claims are to be found within *GS (India) [2015] EWCA Civ 40* and that the facts of *Akhalu* are very different to this one where the Appellant would have had nobody to live with in Nigeria. However he points out that the test now to be found in *GS (India)* is actually more stringent and that there must be an Article 8 family life in the first case and that it would only be in very exceptional circumstances thereunder that an Appellant could succeed. He takes me to paragraph 7 of the First-tier Tribunal Judge's determination pointing out that the Appellant has not made any claim to family life in the

UK and therefore he has not even reached the starting point by which a claim could be pursued under the guidance of the test in *GS (India)*.

9. He states that the judge has given due and proper consideration to the medical issues taking me to paragraphs 3 to 5 of the decision. He further points out that so far as reintegration is concerned the Appellant has only been in the UK since 2010 and has spent most of his life therefore in Pakistan and that he could hardly therefore contend that he would have difficulty in reintegrating.

10. In brief response Mr Briggs acknowledges that there is no family life but points out the reference to private life as set out in *GS (India)* and that the gist of the case is to be found within paragraphs 4 and 5 of the First-tier Tribunal Judge's decision. Therefore even if looked at with private life he submits it falls within the Article 8 paradigm. He emphasises he is not saying that the case will succeed but he submits that the judge has not looked at this factor.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Case Law

13. Consideration of an Appellant's medical and care needs are material to establishing the existence of exceptional circumstances capable of preventing removal under Article 3. In *N v SSHD [2005] UKHL 31* Lord Hope discussed the threshold of "very exceptional circumstances" for

Article 3 claims based on medical and social facilities. The materiality of an Appellant's medical and care needs considered together is evident by analogy to the exceptional circumstances.

14. Further an Appellant's medical and care needs are highly important to an Article 8 claim. The matter was considered by the Court of Appeal in *GS (India) and Others v SSHD [2015] 1 WLR 3312*. Therein Laws LJ observed that Article 8 has two linked paradigms: the capacity to form and enjoy relationships and the right to privacy. The test to be applied and an analysis of the approach to be adopted by the court was considered in great detail by Laws LJ in particular at paragraphs 85 to 87 of *GS (India)*. Therein Laws LJ affirmed at paragraph 86 that in medical cases if an Article 3 claim fails:–

> "Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with this paradigm."

Findings

15. It is against that background that I have to determine whether or not there has been a material error of law in the decision of the First-tier Tribunal Judge. I am satisfied that there has not been. It is important that I give my reasons. It is submitted by Mr Briggs that the focus of the First-tier Tribunal has been confined to Article 3 overlooking Article 8. It is necessary to look at the way in which the determination is set out. The application in 2014 was for leave to remain outside the Rules because of the medical condition for which the Appellant was receiving treatment in the UK. He had not made any claim to family life and therefore could not satisfy the requirements of Appendix FM. The judge thereafter went on to consider claims pursuant to Article 3 and Article 8. He has given very detailed consideration to the position of the Appellant's medical health at paragraphs 3 to 5 of his decision. The judge has noted that the Appellant has suffered from haemophilia since he was a young child and that after testing in 2012, his health having deteriorated, he was told that he had been previously misdiagnosed and was actually suffering from type 3 Von Willebrand disease. The judge noted that the onus was on the Appellant to prove his case on the balance of probabilities. He had noted that the Appellant had strong ties with his home country and that the only basis for his claim to remain was his assertion that whilst medical treatment for his physical condition was available in Pakistan, he would be unable, for reasons of transport and cost, to access it. Thereafter the judge went on to consider the threshold for the application in medical cases under Article 3 and consider Article 8. The judge's analysis was thorough.

16. I acknowledge that the judge did not make reference to the decision in *GS (India)* in the Court of Appeal albeit that it was published some six months earlier. That however does not constitute a material error of law and indeed, as is submitted by Mr Tufan and endorsed by the reference to the test set out by Laws LJ, the test currently is if anything more stringent than

that that was considered by the First-tier Tribunal. The judge has considered all the evidence and made appropriate findings pursuant to Article 3. As Laws LJ affirms at paragraph 86 (set out above) in *GS (India)* the Article 8 claim could not prosper without some separate or additional factual element which brings the case within the Article 8 paradigm. The judge has given due consideration to these factors and whilst accepting that his analysis under Article 8 is brief at paragraphs 9 and 10, there is nothing within his decision for all the above reasons to show that he has erred in law or certainly that he has made any error in law that is material. The judge has looked at the medical issues, considered the appropriate Articles and has made findings of fact that he was perfectly entitled to.

17. In such circumstances the decision discloses no material error of law and the appeal of the Appellant is dismissed and the decision of the First-tier Tribunal is maintained.

18. No application is made for an anonymity direction and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris