



IAC-PE-AW-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/39548/2013

THE IMMIGRATION ACTS

Heard at Manchester

On 23rd October 2014

**Determination
Promulgated**

On 13th November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

**MS ABIDA KAUSAR DAR
(ANONYMITY NOT RETAINED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jagadeshan

For the Respondent: Miss Johnstone

DECISION AND REASONS

Introduction

1. The Appellant born on 28th November 1967 is a citizen of Pakistan. The Appellant was represented by Mr Jagadeshan of Counsel. The Respondent was represented by Miss Johnstone, a Home Office Presenting Officer.

Substantive Issues under Appeal

2. The Appellant entered the United Kingdom in 2007 as a visitor and in 2008 had applied for leave to remain outside the Rules on compassionate grounds but that was refused with no right of appeal. On 30th July 2013 she made a further application for leave to remain outside the Rules on human rights grounds which had been refused by the Respondent on 26th September 2013.
3. The Appellant had appealed that decision and her appeal was heard by Judge of the First-tier Tribunal Bruce sitting at Manchester on 19th February 2014. The judge dismissed the Appellant's appeal on all grounds.
4. Application for permission to appeal that decision was made on 3rd April 2014 and permission to appeal was granted by Upper Tribunal Judge Deans on 16th April 2014. It was said that the Grounds of Appeal raised arguable errors of law. The Respondent opposed the application by letter dated 2nd May 2014.
5. The matter comes before me firstly to decide whether an error of law was made.

Submissions on Behalf of the Appellant

6. Mr Jagadeshan summarised his submissions into four matters by reference to the Grounds of Appeal. Firstly he submitted that the judge had erred in law in transposing a test within the Immigration Rules when considering Article 8 of the ECHR.
7. Secondly he submitted that the judge having found that the Appellant's father could not relocate to Pakistan did not weigh that factor in the balance. It was also said that there was no consideration given of the negative effect on the Appellant given that she had demonstrated that she would be distraught in having to leave her father behind and the judge had imposed a subjective view of the case.
8. Thirdly it was said that the judge having criticised the father's paternity then those were matters that should have been put to the witness and alternatively it was not a fair matter to have raised.
9. Finally it was submitted that the judge had proceeded on a mistaken basis in assuming the Appellant would be a financial burden on the State given there was evidence within the Appellant's bundle to show that State care for the father would require expansion which would bring with it financial costs.

Submissions on Behalf of the Respondent

10. Miss Johnstone submitted that the judge had given adequate reasons and had assessed proportionality under Article 8 entirely properly weighing up factors both for and against and had reached conclusions that were open

to her. Specifically in terms of the financial matter it was submitted that the father already had a carer and there was no evidence that the Appellant would continue to provide care particularly if his position worsened and the State would in any event therefore have to take up that greater cost.

11. At the conclusion of the submissions I reserved my decision to consider matters raised. I now provide that decision with my reasons.

Decisions and Reasons

12. The judge had the valuable advantage over myself or any other judge in seeing and hearing the Appellant and family members giving evidence and having that evidence tested by questioning. It is not without significance in a case such as this that is based on an exercise of discretion – proportionality and weighing evidence in the round.
13. The Appellant is 46 years of age and has lived all her life in Pakistan until coming to the UK in 2007 on a two year visit visa. Although arriving on a visit visa she then applied for leave to remain outside of the Rules in April 2009 and that application was refused with no right of appeal. There is no evidence to indicate why the Home Office failed in their duty of removal. The application made by the Appellant in 2013, the subject matter of this case, is therefore her second application to remain outside of the Rules.
14. The judge had correctly identified that the Appellant could not succeed under the Immigration Rules (paragraph 5). She had also noted that for the Appellant to succeed outside of the Rules under Article 8 of the ECHR then the guidance in **Gulshan [2013] UKUT 00640** applies (paragraph 5, footnote 1).
15. The judge had noted at paragraph 17 that:

“Recent jurisprudence has been that I must look carefully at the case before I can even contemplate Article 8 outside of the Rules. That is because the Rules as presently drafted have been found to be a complete code for the consideration of Article 8 of the ECHR approved by Parliament for that purpose **R (Nagre) v SSHD [2013] EWCA Civ 1192**”.
16. There has been a substantial amount of recent case law emanating from the Tribunal and the Superior Courts regarding Article 8 and its relationship with recent legislation. It is difficult to say that those cases present a uniform, simple or cohesive explanation of that relationship. The judge was correct to say that the recent jurisprudence means a judge has to look carefully at a case outside of the Rules under Article 8 of the ECHR, when compared to the earlier approach adopted. It may well be it was an overstatement by the judge to say that “the Rules had been found to be a complete code”. The Rules can be regarded as a complete code if the specified Rules under examination have a built-in discretionary

element, such as in deportation as in the case of **R (Nagre)** referred to by the judge.

17. However if that overstatement amounted to an error of law it was not material because in the next paragraph (18) the judge provided reasons why she decided to look at Article 8 outside of the Rules, having found compelling reasons so to do. She further indicated (paragraph 18) that she looked at Article 8 of the ECHR within the framework of **Razgar [2004] UKHL 27**.
18. The judge had concluded that notwithstanding the Appellant was an adult there was family life existing between her and her parents and accordingly had looked at the fifth stage test of **Razgar** (proportionality) at paragraphs 19 to 32.
19. The judge was criticised for raising doubts concerning the paternity of the Appellant. It is said that she should have raised such matter with the Appellant and witnesses as it was not a matter raised by the Respondent. The judge having heard evidence from the parties had clearly formed views upon that evidence and did not shirk from expressing matters in the determination. She was entitled to form views based upon the evidence from those individuals. She made it clear that the question in her mind about paternity arose from the significantly different way the Appellant had been treated by her father as opposed to her other male and female siblings. Again the judge was entitled to raise such concerns. It could well have been however an error of law for the judge to have proceeded on the basis that the Appellant was not the daughter/sibling of the Sponsors given that the relationship had never been raised by the Respondent or at the hearing. However as a reading of the determination clearly reveals the judge did proceed throughout on the basis the Appellant was the daughter/sibling of the Sponsors. Firstly as noted above at paragraph 19 she had found family life existed between the Appellant and her parents. Secondly the judge specifically noted at paragraph 24 "I am however required to make findings on the evidence before me and the evidence before me is she is the daughter of Mr and Mrs Majeed and I assess proportionality on that basis". It could not have been stated more plainly.
20. The judge was also criticised and it was said to be an error of law for her to import the requirements of E-ECDR.2.4 and 2.5 into her consideration (paragraph 29). The judge needed to assess proportionality or otherwise of removal of the Appellant from the UK and her family members. It was fact specific and required an exercise of discretion and judgment. The judge had noted that whilst the Immigration Rules had provision for a family member to enter the UK to be looked after by a UK based carer (E-ECDR.2.4 and 2.5) the converse (applicable in this case) was not catered for within the Immigration Rules. That was one of the reasons why the judge at paragraph 18 had found reason for examining this case under Article 8 of the ECHR. The judge had looked at the requirements of E-ECDR.2.4 and 2.5 as an instructive and perhaps useful aid for assessing what may be deemed proportionate or not under Article 8 of the ECHR in

the reverse position given the absence of such provisions within the Rules. The judge could perhaps have concluded that the absence of such provisions within the Rules demonstrated that Parliament did not believe the entry and settlement in the UK of a family member solely to be a carer was in any circumstances proportionate within the terms of Article 8 of the ECHR otherwise there may well have been such provision within the Immigration Rules. However she did not so conclude but merely used the guidance within E-ECDR.2.4 and 2.5 as a useful tool to assist in assessing proportionality. That was a reasonable and indeed sensible mechanism adopted. However the judge had at paragraphs 30 to 32 looked at other features when assessing proportionality in the round.

21. The judge contrary to submissions made had not overlooked the Appellant's emotional ties or asserted wishes:

"I am prepared to accept that the bond with her father has since 2008 been cemented by the fact she is now his full-time carer." (paragraph 20)

"I find myself hugely sympathetic towards the Appellant." (paragraph 23)

"I have considered the emotional impact upon the Appellant and the wider family of her return to Pakistan." (paragraph 30)

"As far as the Appellant is concerned she is clearly a devoted carer who sees it as her role to look after her elderly parents". (paragraph 30)

22. However a decision on proportionality under Article 8 of the ECHR cannot be based simply on the wishes of the Appellant alone.
23. The judge had concluded in terms of proportionality that there was no reason for the Appellant to be in the UK other than as a full-time carer for her father. That was a proper finding based on the evidence. She found other family members could assist in care (paragraphs 27 to 28). The father had recourse to social care available within the UK. There was reference at paragraph 31 of the financial cost to the country. That clearly arose from a submission made on the Appellant's behalf that if she was removed paid State care would be required and that would increase the cost to the UK and thereby obviating the economic wellbeing argument. The judge did not necessarily accept that in the long-term that argument was valid. She was entitled to reach that view. Firstly a financial "balance sheet" is speculative but as the judge had pointed out there were other family members who could assist with care. Secondly she noted that long-term the cost to the economy of a new person, unskilled and with little English could well outweigh the short-term gain in her remaining as an unpaid carer. The judge was entitled to reach that conclusion; indeed it is likely to be entirely a correct financial conclusion. It is also noteworthy

that in referencing the Appellant's lack of English the judge was several months in advance, echoing the wording of the Immigration Act 2014.

24. This was a careful, detailed and balanced decision where the judge was exercising a proportionality test based on evidence that she heard from a number of key witnesses additional to the Appellant. It was neither unreasonable, unbalanced or failed to follow the case law and guidance despite the lack of a clear, simple and cohesive pathway in this area of the law.

Notice of Decision

There was no error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

No anonymity order is made.

Signed

Date **12th November 2014**

Deputy Upper Tribunal Judge Lever