Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00249/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 7 October 2014	**on 10 October 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

Md ISLAM UDDIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A J Bradley, of P G Farrell, Solicitors

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1. The appellant appeals against a determination by First-tier Tribunal Judge L K Gibbs, dismissing his appeal against refusal of an application made on 20 March 2012 under Article 8 of the ECHR, on the basis of his marriage to a UK citizen on 10 January 2012.

2. Ground 1 of appeal to the UT relies upon *EB (Kosovo) v SSHD* [2008] UKHL 4 at ¶12, *Amrohalli v Denmark*, Application 56811/00, ECtHR, and *AB (Jamaica) v SSHD* [2007] EWCA Civ 1302 to argue that the appellant's spouse could not reasonably be expected to relocate with him in Bangladesh. It further submits that the judge erred by finding no arguably good grounds for granting leave outside the rules

and by not considering Article 8 "on a freestanding basis", and in reason could only have concluded that there are exceptional circumstances rendering the refusal unduly harsh.

3. Ground 2 alleges an error of fact resulting in unfairness. The judge at ¶14 said that only limited weight could be given to the spouse's family ties in the UK because no family members attended court or provided statements, but her bundle contained a letter of support from her sister. It is also said the Judge "ignored the undisputed fact that [the appellant's wife] is being tested for cancer".

4. On 17 July 2014 permission was granted:

> It is arguable that the judge concluded that family ties were limited because of an incorrect understanding of the evidence. It is debatable whether that made a material difference … but … arguable that it did … I do not refuse permission on the remaining grounds although they have less merit.

5. Mr Bradley submitted thus. He firstly sought to rely upon a point which is not in the grounds but which he said was obvious. The application was made on 20 March 2012 and so should have been decided by reference to the Rules as they stood up to 8 July 2012 ("the old Rules"). Mr Bradley referred to *Edgehill v SSHD* [2014] EWCA Civ 402. Judge Gibbs had raised that point at the hearing. The solicitor then acting for the appellant (who only recently instructed Mr Bradley's firm) said it was irrelevant, because the outcome would not be materially different (¶6 of the determination). In spite of that, the Judge should have remitted the case to the respondent for a fresh decision. In a determination promulgated on 31 May 2011 in an earlier appeal by the appellant (IA/38183/2010) Judge Boyd held at ¶34 that it was likely the appellant had been in the UK since around 2000. He might thus have qualified for leave on the basis of 14 years residence under the former Rule 276B [which was based on 14 years residence, whereas the amended Rules require 20 years]. The Upper Tribunal should correct that error by remitting the case to the respondent now. Alternatively, the Upper Tribunal should find that the First-tier Tribunal erred as asserted in the grounds. She appeared to have looked for something exceptional to justify going outside the Rules, but the test was only that of a good arguable case. The appellant's spouse has lived in the Inverness and Black Isle area all her life, where she has all her family and is fully established. She has been undergoing tests for cancer. The cases cited in ground 1 showed that she could not be expected to relocate with her husband. The Judge had overlooked the letter of support from her sister. If the original grounds were upheld, the UT should substitute a decision in favour of the appellant.

6. Mrs O'Brien responded as follows. The appellant had not given any prior notice that he sought to add to his grounds. Amendment should not be permitted at this very late stage. The point in any event was not obvious. The appellant Edgehill argued against rejection of his Article 8 application made before 9 July

2012 due to failure to meet the 20 year requirement in the "new Rules". This appellant applied on the basis of his recent marriage, not his length of residence under Rule 276B. His appeal IA/38180/2010 was an unsuccessful challenge to a refusal under Rule 276B. He made no fresh application under that Rule for the respondent to consider. The finding at ¶34 of the previous determination was made loosely and in passing. Those circumstances fell far short of an obvious case which should have led the Judge to look behind the appellant's express choice not to seek remittal for further decision under the "old Rules" but to ask for his case to be considered under Article 8. Even if the case did require consideration under the "old Rules" the appropriate course would be for the appellant to make his case to the tribunal, not to remit, and the Presenting Officer in the First-tier Tribunal had been wrong to suggest to the contrary. Turning to the original grounds, as the First-tier Tribunal hearing was in England it was not surprising that the Judge cited and followed *Nagre v SSHD* [2013] EWHC 720 (Admin) and *Gulshan v SSHD* [2013] UKUT 00540 rather than *MS v SSHD* [2013] CSIH 52, from which Mr Bradley took the distinction between exceptionality and a good arguable case. In any event, the cases disclose no material difference as to the correct approach to Article 8 outside the Rules. The Court in *MS* considered and did not disagree with *Nagre*. *Gulshan* requires consideration of whether there is a good arguable case prior to consideration of whether there are compelling circumstances not recognised under the Rules. Judge Gibbs applied that first test, not an excessive criterion of exceptionality. All the circumstances, including the important circumstances of the appellant's wife, were taken into account. It was misleading to draw attention to the fact that she had been tested for cancer, when the most recent evidence was a letter to her from NHS Highland dated 19 February 2014 advising her in capital letters that the results of her tests "… do NOT show any cancer." There was no medical reason why she might not relocate. The Judge did not have to mention every item of evidence, but even if she overlooked the sister's letter, it was in fairly bland terms. It does not suggest that the sister provides any more support than would be normally expected between adult siblings. It was not unusual for adult siblings to live in different countries. There would be nothing to stop them keeping in touch. This fell far short of being an item of evidence which might have led to another outcome. There was no error in any respect to require the determination to be set aside.

7. In reply, Mr Bradley said that the Judge, having referred parties to *Edgehill*, erred by accepting mistaken submissions and failing to see that the case required decision under the "old Rules".

8. I reserved my determination.

9. The Judge determined precisely the issues put to her by the appellant in a skeleton argument and in submissions. The UT will not be quick to criticise her for that.

10. The attempt to rely on a further ground of appeal is very late, and in any event the point could not help the appellant.

11. In relation to his marriage, the appellant has not tried to show that he might meet the Rules before or after amendment. It has always been common ground that he cannot.

12. The application leading to these proceedings was specifically based on the marriage, not on 14 years residence. There was no obvious case based on length of residence either before the respondent or once the Judge raised the effect of *Edgehill*. The finding on which Mr Bradley relied is that it is likely the appellant came to the UK around 2000, but the determination as a whole is far from conspicuously favourable to a renewed case under Rule 276B. Judge Boyd held that the appellant had to show residence from 8 July 1994 to 7 July 2009 (¶27) and that his evidence fell well short. Further passage of time makes no difference, so the matter stands as conclusively determined against the appellant.

13. Ground 1, although it recites case law, and alleges irrationality, is essentially only an insistence upon the case based on the difficulty of relocating for the appellant's wife, and disagreement with Judge Gibbs' ultimate fact-sensitive assessment. There is no error of legal approach in the determination. Reading the treatment at ¶12 – 18 fairly and as a whole, no incorrect or unduly stringent concept of exceptionality was applied. The terms "insurmountable obstacles" and "exceptional circumstances" are correctly interpreted at ¶13 and 17. The conclusion at ¶18 that there are no arguably good grounds for a grant of leave outside the Rules is reached precisely in the terms which Mr Bradley said should have been applied.

14. On ground 2, the submissions did not trouble to mention the terms of the sister's letter. It is supportive, but it shows no more than would be expected between adult siblings who are in regular touch and on good terms, a circumstance not capable of leading to another outcome. The associated point about cancer tests at least borders on the disingenuous. The Presenting Officer in the UT was readily able to show that the outcome of those tests was negative.

15. The determination of the First-tier Tribunal does not err on any point of law which requires it to be set aside, so that determination shall stand.

Hugh Macleman

8 October 2014
Judge of the Upper Tribunal