UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) APPEAL NUMBER: IA/00456/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 23 September 2014	**On: 14 October 2014**
Prepared: 6 October 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MRS SANDHYA MAULIK
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Miss Z Ahmed, counsel (instructed by ICS Legal)
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of India, born on 12th January 1941. She arrived in the UK on 20th June 2012 on a visit visa valid until 20th December 2012. On 6th December 2012, she applied for leave to remain indefinitely outside the immigration rules on the basis of her family and private life in the UK.

2. She was not able to meet the rules under paragraph 276ADE.

3. The respondent also considered her application on the basis of exceptional circumstances which, consistent with her right to respect for

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private and family life within Article 8 of the Human Rights Convention, might warrant consideration by the respondent of a grant of leave to remain in the UK outside the requirements of the rules. It was decided that they did not. The threshold for exceptional circumstances is high and her claims did not meet that threshold.

4. Her appeal before First-tier Tribunal Judge K. St. J. Wiseman was dismissed both under the rules and on Article 8 grounds.

5. The background circumstances are that the appellant was a permanent resident of Kolkata in India. Her sponsor was her son. He has been resident here since 2009 for processional reasons.

6. He contended that his mother had ‘no close ties to take care of her’ or to provide her with emotional support in India and was largely dependent on him for financial support to meet her living and financial expenses. She broke her leg in 2010 and was consequently hospitalised, requiring special treatment to regain mobility. She has not recovered fully and requires assistance for travelling and moving about. He referred to other ailments such as chronic arthritis and high blood pressure.

7. In May 2012 she was granted a visit visa to see him and his wife. She was not in a position to make the trip on her own, so he travelled to India to accompany her here.

8. She was scheduled to travel back to India on 4th December 2012 with her sponsor son. However, on 21st November 2012 their four month old child, Maimik, had a scalding injury. This required hospitalisation and “now requires constant medical attention” and frequent visits to hospital. His treatment is likely to take several months and accordingly it has not been possible for her son to accompany her to India. She cannot make the trip alone.

9. There is no other relative in the UK who can assist her with this. The injury to her grandchild caused her even more emotional distress.

10. The respondent noted that the appellant had not made an application as an adult dependant relative and as such could not be considered under the rules. In any event, such an application would fail on the basis that entry clearance as an adult dependant relative is a mandatory requirement. The respondent thus contended that the particular circumstances did not constitute exceptional circumstances warranting consideration outside of the rules.

11. Judge Wiseman noted [41] that the case put forward on behalf of the appellant had shifted. The application form itself requested temporary leave as well as there being a reference to the rules on dependent

relatives "and was almost implying that the appellant should be allowed to stay here for a further period of time because it was difficult for the sponsor to accompany her back to India in the immediate aftermath of the accident to his son."

12. It seemed to the Judge that as time has gone on, everyone's view has changed to a position where it is now said that it is virtually impossible for the appellant to leave the UK at all, and both she and her family wanted to be able to live the rest of their lives together.

13. He had regard to the substantial changes in the rules together with the mandatory requirements in respect of specified evidence referred to in Appendix FM-SE (although he did not identify the specific paragraphs, it is evident that he was referring to the evidence required in respect of adult dependant relatives set out at paragraphs 33-37. I was informed by the representatives that these were the paragraphs in force at the time of the appellant's application and decision. T

14. The Judge had particular regard to the evidence required to be produced, namely that the appellant would be unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in India where she is living. That evidence should be produced from a central or local health authority; a local authority; or a doctor or other health professional [30].

15. He found that compliance with many of these requirements, and in particular evidence from India itself in this case, would be completely bypassed if appellants are permitted to travel to the UK on a visit visa and then simply "take root here". If appellants were in all but the most exceptional circumstances permitted to remain in the UK the new rules, including the "will of Parliament" might just as well have never been enacted [40].

16. He found that without the appellant making the application from abroad with the appropriate supporting evidence in accordance with the rule, it would be impossible to say whether she would meet the necessary requirements or not. What is required is an assessment of the whole position from the appropriate doctor in the home country, and not simply the recital from a doctor in the UK for what he now sees here "when there is no doubt, inevitably (sic) pressure for supportive comment."

17. He accordingly found that **Chikwamba** was "entirely inappropriate." This was not a question of going back just to seek entry clearance. The return would be to see whether the appellant did or did not actually qualify under the new rules "and I am far from certain that she would."

18. The Judge went on to state that even looking at the matter outside the rules, the requirement for the appellant to return home to make an out of country application in accordance with the rules is wholly proportionate under Article 8(2) [45]. The immediate shock of the accident to the sponsor's son has passed and the return journey can be made under the same "difficulties" as the original trip to the UK. There is suitable finance within the family for the position of the appellant to be stabilised both in terms of medical care and personal care. If the requirements of the rules can be met, she would be permitted to return in due course.

19. This he found would not be a pointless exercise. It is effectively compliant with the rules governing the right to settle in the UK as well as meeting the current requirements of immigration control. It is very much in the best interests of others entitled to access hard pressed NHS facilities in the UK that it should not be possible for individuals "to beat the system" by circumventing the rules entirely simply by bringing an elderly relative to the country and trying to take the matter on from here "without them ever going home" [45].

20. On 11th August 2014, Upper Tribunal Judge Renton granted the appellant permission to appeal. Following the decision in **MM v SSHD [2014] EWCA Civ 985**, it was arguable that the approach provided by the **Gulshan** test might amount to an error of law. The other grounds could also be argued.

21. Miss Ahmed referred to the written argument in response to the respondent's Rule 24 notice. The Judge failed to address the case law referred to in **Shahzad (Article 8: Legitimate aim) Pakistan [2014] UKUT 85 (IAC)**. She submitted that whilst the respondent's contention regarding the maintenance of effective immigration control was not as such a legitimate aim under Article 8(2) of the ECHR, it can normally be assumed to be either an aspect of "prevention of disorder of crime" or an aspect of "the economic well being of the country" or both.

22. She submitted that when 'that authority' is applied to the appellant's case, it is evident that she had not committed any crime; she has lived here as a law abiding citizen; she enjoyed family life with her son and his family and "was unable to relocate."

23. The Judge had not provided any reasoning as to how it would be proportionate for her to be removed from the UK.

24. She submitted that this contradicted what the Judge claimed at paragraph 42 of the determination, namely that the appellant could not succeed under the dependant relative rules under Appendix FM yet claimed at paragraph 45 that it would be proportionate for her to leave the UK and apply for entry clearance.

25. She also submitted that the Judge did not take into consideration the appellant's age and medical documents. They had been presented with evidence that she had no close relatives to provide her with care and support. She contended that the rules did not require her to be assessed by a medical practitioner in her home country. Nor did the Judge consider the strong family ties that existed between the appellant and her son. There was “clear emotional dependency.”

26. The Judge did not use the guidance in **Huang** in assessing proportionality. There is no legal test of “truly exceptional circumstances”.

27. She submitted that the immigration rules themselves always require an assessment of proportionality in accordance with Article 8 of the Human Rights Convention and in accordance with the Strasbourg jurisprudence. The Judge here provided no careful reasoning, even though the appellant suffers from serious medical conditions. She is 73 years old and requires personal care from her sponsor in the UK.

28. The Judge did not consider whether the appellant's removal was proportionate and erred in his findings at paragraphs 44 and 45.

29. The only guidance which was available with regard to Appendix FM, family life (as a partner or parent) and private life: ten year route, was that of July 2014. In accordance with that, exceptional circumstances do not mean unusual or unique circumstances. For example, a case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. The word “exceptional” means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate under Article 8.

30. Cases that raise exceptional circumstances that warrant a grant of leave outside the rules are likely to be rare. In determining whether there are exceptional circumstances, the decision maker must consider all relevant factors raised by the applicant and weigh them against the public interest under Article 8.

31. She submitted that ‘none of these factors’ was considered by the respondent, nor by the Judge. It was a wrong approach by the Judge to state that there are other people in the same position as the appellant. This appeal was about this appellant and not the population of India.

32. Ms Ahmed conceded that the appellant could not succeed under the rules. She referred to the decision in **MM (Lebanon) and others v SSHD [2-14] EWCA Civ 985** and in particular to paragraphs 133 to 135.

33. In summary, she submitted that the Judge failed to provide proper reasoning on the removal of the appellant in line with Article 8 of the Human Rights Convention and failed to consider the appeal in the context of a family group.

34. On behalf of the respondent, Mr Jarvis submitted that it was not simply a single condition that prevented the appellant from meeting the rules. The application was required to be made from abroad. This constitutes a strong declaration in the public interest. It has been introduced in order to impose a prohibition on switching.

35. Appendix FM changed the landscape from paragraph 317 of the rules to the current rules. He submitted that the appellant's submissions failed to have regard or reference to Appendix FM-SE and in particular Rules 33-37. That sets out clearly what evidence is required from abroad.

36. Paragraph 33 to 37 of Appendix FM-SE sets out the evidence required in respect of applications involving adult dependant relatives. It stipulates clearly the evidence required from abroad. Paragraph 34 stipulates evidence required in a case where as a result of age, illness or disability, the applicant requires long term personal care.

37. The First-tier Tribunal Judge properly had regard to those provisions at paragraph 42 of the determination. There had been no evidence in line with Appendix FM-SE.

38. Mr Jarvis submitted that paragraph 3 of the grounds 'is wrong'. The assertion made is that the rules in Appendix FM do not require the applicant to be assessed by a medical practitioner in her home country. However, it is plain from the rules that there are such requirements.

39. The Court of Appeal has accepted that exceptionality amounts to circumstances in which refusal would result in unjustifiably harsh consequences for the applicant or her family, such that it would not be proportionate under Article 8.

40. He submitted that the Judge did consider the matter outside of the rules, finding that the requirement for her to return to make an out of country application was proportionate. He referred to the Court of Appeal decision in **Haleemudeen v SSHD [2014] EWCA Civ 558** and in particular paragraphs 44-47 where Lord Justice Beatson stated [47] that the passages from the judgments in cases of **Nagre** and **MF (Nigeria)** appear to give the rules greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights. He stated that he did not consider that it is necessary to use the term "exceptional" or "compelling" to describe the circumstances, and it would suffice if that can be said to be the substance of the Tribunal's

decision. In that case, the First-tier Tribunal gave no explanation of why that was so.

41. With regard to the application of the Home Office policy, there was nothing to show that the application of that policy had been unlawful.

42. Mr Jarvis had regard to the contention that she had not committed any crime and has lived as a law abiding citizen in the UK enjoying family life with her son and his family. It was asserted that these factors had not been properly assessed by the Judge in relation to how it would be proportionate for her removal from the UK.

43. Mr Jarvis submitted that those claims by the appellant were not relevant. He relied on **Nasim and Others (Article 8) Pakistan [2014] UKUT 25 (IAC)** and in particular paragraph 27 where the Tribunal held that the only significance of not having criminal convictions and not having relied on public funds is to preclude the respondent from pointing to any public interest in respect of the appellant's removal <u>over and above</u> the basic importance of maintaining a firm and coherent system of immigration control.

44. He submitted that from the reasoning of Judge Wiseman, it is clear that he was referring at paragraph 45 to the interests of the respondent in maintaining a firm and coherent system of immigration control.

45. With regard to **MM**, supra, the Tribunal did not hear arguments on whether the new MIR together with the Guidance constituted a "comprehensive code" but whether or not they do, makes no difference on an analysis of the Master of the Rolls in **MF (Nigeria)**. This is because, as he says (at [45]) in any event, it would be necessary to apply a "proportionality test" with regard to the "exceptional circumstances" guidance in order to be compatible with the Convention and in compliance with **Huang** at [20].

46. Mr Jarvis submitted that the Judge paid particular regard to the evidence available, including the evidence from the doctor in the UK. He had regard at paragraph 31 to the significant medical assistance required for the appellant were she to be required to have heart surgery or anything similar. That would be extremely expensive and there was no indication given to the Judge that the associated costs could be met if the appellant were to require it in due course. Accordingly, Mr Jarvis submitted that it was not entirely evident that reliance would not be had on public funds.

47. Finally, he submitted that ground 5 was wrong insofar as it submits that the Judge provided no careful reasoning with regard to the appellant suffering from a serious medical condition.

Assessment

48. The parties both agreed that the First-tier Tribunal Judge has accurately and properly set out the development of the law as referred to from paragraphs 35-40 of the determination.

49. He has also had regard to the submissions on behalf of the appellant during the hearing as to the scope and consideration of Article 8 cases outside Appendix FM and paragraph 276 ADE.

50. It had been conceded at the hearing [28] that the appellant could not meet the requirements of paragraph 276ADE but the contention was that the case had to be looked at outside the rules on the basis of exceptional circumstances, particularly in relation to her present state of health. Her medical problems were set out and identified at paragraph 28. It was also accepted by the appellant that if removed to India, adequate treatment might be available, however the issues would be around accessibility and the fact that she had no other close relatives to take her to the doctor or hospital. Hired help was not an alternative.

51. The Judge had proper regard to the current regime relating to applications made by a dependant parent. The evidence required to be produced is set out in Appendix FM-SE (paragraphs 34 onwards). He also had regard to the fact that there had been no evidence produced in line with FM-SE [42]. The contention that this is not a requirement under the rules is incorrect.

52. He found after considering the evidence as a whole that there were not exceptional circumstances in this case.

53. In the grounds of appeal, it is asserted that the Judge did not properly identify the legitimate interests of the respondent. However, he found [45] that it would not be a pointless exercise to require the appellant to apply from abroad. It is effectively compliant with immigration rules as well as meeting the current requirements of immigration control. It is very much in the best interests of others entitled to access hard pressed NHS facilities in the country that the rules should not be “circumvented” in a case such as this.

54. The fact that she had not committed any crime and has lived as a law abiding citizen in the UK enjoying family life with her son and his family are not matters relevant to the assessment of the proportionality of her removal from the UK.

55. Although as submitted, Judge Wiseman did not set out the step by step approach required in **Razgar**, and although his consideration might have been more detailed, he has nevertheless balanced the competing factors

in the proportionality assessment. That included the fact that the accident suffered by her grandson had long passed. A return journey, as originally contemplated, could thus be made on the same basis as the original trip to the UK. He had regard to the fact that there is suitable finance in the family for the position of the appellant to be stabilised both in terms of medical and personal care.

56. He also had regard to the original application which requested temporary leave implying that the appellant should be allowed to stay here for a further period as it was difficult for her son to accompany her back to India in the aftermath of her grandson's accident.

57. Finally, the Judge noted the reliance on **Chikwamba** and found for reasons given [43] that it was inappropriate in the circumstances; there has been no challenge to that finding.

58. He also stated that it would not simply be an empty, formalistic exercise to require her to apply from abroad, as it was by no means certain that the requirements would be met [43]. Further, the Judge also found that there would be no difficulty in maintaining the appellant on an indefinite basis, save with regard to significant medical assistance which may be required for her, which would be extremely expensive. There had been no indication given that the costs of that kind could be met if she were to require it in the due passage of time [31].

59. Although as contended, the Judge might have adopted a more detailed and structured approach, he has in fact given sustainable reasons for his findings when dismissing the appeal under Article 8. Those findings were available to him on the basis of the evidence produced.

Decision

The decision of the First-tier Tribunal did not involve the making of any material error of law and shall accordingly stand.

No anonymity direction made.

Signed Date 6/10/2014

C R Mailer
Deputy Upper Tribunal Judge