



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

Appeal Number: OA/07591/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 22 December 2014**

**Decision & Reasons
Promulgated
On 31 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPEYARD

Between

**MRS SABRIMA AHMADI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. P. Haywood, Counsel.

For the Respondent: Mr. C. Avery, Home Office Presenting Officer.

DECISION AND REASONS

1. No anonymity order has previously been made in these proceedings and no reason has been put before me today why such an order should be made. I therefore make no such order.
2. The appellant is a citizen of Afghanistan born on 25 March 1988. She applied for settlement in the United Kingdom on 20 November 2012 as the spouse of Mr Ali Ahmadi (the sponsor) who has indefinite leave to remain. A decision was made to refuse to grant the appellant entry clearance

which was subsequently not reviewed following receipt of the grounds of appeal. The reasons for the decision are that the Entry Clearance Officer was not satisfied that the respondent was able to meet the financial requirements set out in Appendix FM of the Immigration Rules.

3. The appellant appealed and following a hearing at Taylor House Judge of the First-tier Tribunal Tiffen, in a determination promulgated on 26 February 2014, dismissed the appellant's appeal.

4. She did so under the Immigration Rules and also relying on the authority of **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)**. She found at paragraph 24 of her determination that:-

"I have considered the circumstances in which the appellant and the sponsor now find themselves and reach the conclusion that there are not arguably good grounds which were not considered by the respondent such that I am required to consider the appeal under Article 8."

5. Permission to appeal was sought but refused in both the First-tier and Upper Tribunal. Thereafter the appellant applied for judicial review to the High Court. Following consideration of the documents lodged by her and the acknowledgment of the respondent in these proceedings the Honourable Mr Justice Supperstone granted permission. He observed that the appellant's appeal is arguable "applying *Cart* principles".

6. Thus the matter came before me today.

7. Mr. Haywood expanded on a skeleton argument prepared by the Kent Law Clinic, the appellant's representatives, and dated 10 December 2014. The nub of his submission is that the legal position has now become even clearer since the grant of permission by the High Court in this appeal following **R (on the application of Ganesabala) [2014] EWHC 2712 (Admin)**, **R (on the application of Adiya & Ors) [2014] EWHC 3919 (Admin)**, **R (on the application of Oludoyi & Ors) (Article 8 - MM) (Lebanon) and Nagre (IJR [2014] UKUT 00539** and **R (on the application of MM Lebanon), AM Pakistan and SJ Pakistan [2014] EWCA Civ 985**. In short, that where the Immigration Rules themselves provide for the consideration of exceptional circumstances, then any further consideration of Article 8 may well be limited to those cases exhibiting exceptional circumstances over and above those already considered under the Immigration Rules. However, where the Immigration Rules do not so provide, then decision makers must consider whether Article 8 is engaged, and whether in all the circumstances a refusal is proportionate. That proportionality consideration can only be the same as applied before the introduction of the new family migration Rules in 2012, namely applying the step-by-step approach contained within the guidance given by Lord Bingham in **R (on the application of Razgar) v SSHD [2004] UKHL 27**. The entry clearance Rules currently do not admit of any exceptions, nor allow for any discretion and in this appeal there was

no reference whatsoever to Article 8 of the European Convention on Human Rights and not even any evidence that the Entry Clearance Officer has considered any guidance.

8. Mr. Avery emphasised that the appellant could not meet the financial requirements contained with the Immigration Rules and that inevitably the appeal under the Rules must be dismissed. Contrary to the submissions of Mr. Haywood he urged me to accept that no proportionality assessment is now required.
9. I am satisfied that the Immigration Rules applicable here, unlike those relating to deportation, are not a complete code. That being the position, as stated in **MM** above, the proportionality test is more at large, albeit guided by case law.
10. For all the reasons set out in the appellant's representative's skeleton argument I find that the First-tier Tribunal materially erred. I invited the representatives to address me as to how this appeal should now proceed. Contrary to the submissions within the skeleton argument Mr. Haywood invited me to remit the appeal back to the First-tier Tribunal on the basis that no fact-finding has taken place in relation to the appellant's Article 8 claim. This course was not resisted by Mr. Avery. Where the First-tier Tribunal decision is set aside the Upper Tribunal has power to remit the appeal to the First-tier Tribunal with directions for reconsideration of the appeal. I take account of the practice statements where there is contemplation that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for a party's case to be put to and considered by the First-tier Tribunal. This was the nub of Mr. Haywood's argument for remittal. Both representatives agreed that the matter should therefore be returned to the First-tier Tribunal where the issue of Article 8 is to be heard de novo.

Signed

Date 31 December 2014.

Deputy Upper Tribunal Judge Appleyard

DIRECTIONS

1. The substantive hearing of this appeal will take place at the Taylor House Hearing Centre on 4 June 2015 at 10 a.m. before any judge other than Judge of the First-tier Tribunal Tiffen.
2. The Tribunal will provide an Afghan Dari interpreter.
3. The time estimate is three hours.
4. Any further documentary evidence relied upon by either party is to be filed with the Tribunal and served upon the other party no later than 4 p.m. five working days prior to the substantive hearing.

Signed

Date 31 December 2014.

Deputy Upper Tribunal Judge Appleyard