



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

Appeal Number: IA/12691/2014

THE IMMIGRATION ACTS

Heard at Field House

On 27th January 2015

**Decision & Reasons
Promulgated**

On 5th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MS GA BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mrs BIBI ASMAHAM NASEEM AUNOWAR

(NO ANONYMITY ORDER MADE)

Claimant

Representation:

For the Appellant: Mr E Tufan (Senior Home Officer Presenting Officer)

For the Respondent: Mr S Gokhool (Solicitor)

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision by the First-tier Tribunal (Judge Metzger) who in a decision promulgated on 31st October 2014 allowed the appeal on human rights grounds under Article 8 ECHR. For ease of reference I shall refer to the parties as the Secretary of State who is the appellant in this matter and to the Claimant.

Background

2. The Claimant is a citizen of Mauritius and her date of birth is 13.10.1954. She entered the UK as student in May 2005 and was granted further leave to remain until 2013. Her application for indefinite leave to remain as an adult dependent relative under paragraph 371 was refused on 19th February 2014.
3. I observe that paragraph 371 is no longer open to application having been replaced by provisions in the new rules ECDR. Yet in the reasons for refusal letter the Secretary of State considered that the Claimant had applied for a purpose not covered by the Rules. She considered the matter outside of the rules with reference to Article 3 on medical grounds, Appendix FM and paragraph 276ADE. Article 8 was not considered as the Secretary of State found no exceptional or compelling circumstances.

First-tier Tribunal findings and decision

4. In a decision and reasons the Tribunal found that the Claimant lived in the UK for over 9 years, all of her family were living in the UK, she suffered from various medical problems including psoriasis, angina, diabetes, osteoarthritis, facial neuralgia and a recently diagnosed lipoma (sic). She was financially dependent on her sons in the UK. There was no one in Mauritius who could look after her, there were no family members living there and the Claimant had severed all ties in Mauritius.
5. The Tribunal considered freestanding Article 8 ECHR finding that there was private and a strong family life. The Tribunal took into account paragraph 276ADE [10] but made no findings or conclusion. Reliance was placed on **Ogundimu [2013] UKUT 00060** as to the meaning of “ties” as involving a rounded assessment of relevant considerations. At [13] the Tribunal referred to the “**Gulshan**” test, the 5 stage test in “**Razgar**”, Appendix FM and Paragraph 276 ADE for the purposes of self direction. At [15] the Tribunal concluded that in all the circumstances it was not “desirable” to expect the Claimant to return to Mauritius to apply for entry clearance following (**Zhang V. SSHD [2013] EWHC 891**) and that there would be a disproportionate interference with the Claimant’s family and private life if returned to Mauritius.

Grounds

6. (i) The Secretary of State argued that the Tribunal’s approach to Article 8 was flawed. He failed to make findings as to the lack of social, cultural and linguistic ties in Mauritius, which was perverse given that Claimant had lived for 50 years in that country.
 - ii) There was no consideration of private and family life under the new Immigration Rules. The Tribunal had not first considered paragraph 276ADE .
 - iii) There was no consideration of the **Gulshan** test re “arguably good grounds “.

iv) The findings were inadequate as to adult dependent relative.

Permission to appeal

7. Permission was granted by FTJ JM Holmes on 12th December 2014. He stated that it was common ground that the Claimant could not meet the rules and that the appeal was pursued on Article 8 outside of the Rules only.
8. It was arguable that the Tribunal should have considered Article 8 in the context of the Claimant having failed to meet the Rules. The Tribunal failed to have regard to section 117A and section 117B. It was arguable that there was no evidential basis for finding that the Claimant had no ties in Mauritius. She could return there safely, had lived there for 50 years and the evidence did not show severance from her country of birth. The Tribunal gave no adequate reasons for the findings.

Hearing

9. At the error of law hearing Mr Tufan relied on the grounds. He submitted that the decision was short and failed properly to deal with the evidence and law re private and family life. The Tribunal had neither followed the two stage approach to Article 8 nor the 5 **Razgar** questions, made no proper findings re family life between adults (**Kugathas**) [10] and had not considered the new rules for dependent relatives. The Tribunal was unclear as to whether or not it found that the Claimant met paragraph 276ADE. The evidence failed to show that all ties with Mauritius were severed. He submitted that the entire decision was flawed. He relied on the recent IJR judgment of **Oludoyi [2014] ULUT 539(IAC)** and **Bailey[2014]EWHC 1078 (Admin)** to clarify the current position re **Gulshan**.
10. Mr Gokhool responded that the Tribunal's findings and decision were in accordance with **Ogundimu** and sustainable on the evidence before it. Reference was made to section 117A and 117B at paragraph 3 of the decision. However, such provisions were not applicable to the Claimant whose immigration history was good and she had no convictions. The Tribunal's approach to the need to return in order to make an application for entry clearance was sound. The Claimant was fully dependent on her family in the UK and had established strong family ties. Article 8 was engaged and the interference to family life was disproportionate and which amounted to unjustifiably harsh consequences.

Discussion and decision

11. I am entirely satisfied that the Tribunal's approach to legal principles amounted to an error of law. I indicated as much to the representatives at the end of the hearing. There was no proper consideration of the either Appendix FM or Paragraph 276ADE. It was unclear whether the Tribunal had in fact reached a decision under the Rules or not, contrary to what the

Judge who granted permission has stated. There was no appearance by the Respondent at the hearing.

12. Although reference was made to **Ogundimu** as to the meaning of “ties” the Tribunal made no findings as to social or cultural ties in Mauritius having regard to the fact that the Claimant lived there for 50 years before moving to the UK.
13. In dealing with Article 8 ECHR the Tribunal failed to demonstrate that it adopted a two stage approach to family and private life. Although no longer a necessary stage the Tribunal ought to have considered if there were “arguably good grounds”, having cited **Gulshan**. Furthermore there was no adequate consideration of Article 8 ECHR, relevant legal principles or public interest factors [9]. The Tribunal failed to follow the staged process in accordance with **Razgar** and there were no proper findings of fact made as to family life between adults, the Claimants’ health and need for care and the circumstances in Mauritius. Finally, the Tribunal focused solely on the Claimant’s interests without proper regard to public interest factors in general or in recent legislation as required in section 117A and 117B of the Immigration Act 2014.
14. At the initial hearing I formed a preliminary view that the errors were capable of correction by the Upper Tribunal having regard to the evidence and findings before the First-tier Tribunal. However I now consider that the findings made were very limited and not sufficient to enable me to remake the decision. A decision is needed under the Immigration rules and proper consideration of Article 8. The Tribunal failed to engage with the totality of the evidence and any findings are inadequate. In particular there is no finding as to ties in Mauritius. I have decided to remit the matter for fresh hearing at Taylor House (excluding Judge Metzger)

Decision

15. I find material errors of law and I set aside the decision.
16. The appeal is to be reheard at Taylor House on a date to be arranged, with an interpreter and a time estimate of one hour. Not before Judge Metzger.

No anonymity direction is made.

Signed

Date 30.1.2015

Judge GA Black

Deputy Judge of the Upper Tribunal

TO THE RESPONDENT **FEE AWARD**

No fee award.

Signed

Date 30.1.2015

Judge GA Black
Deputy Judge of the Upper Tribunal