Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers:**
HU/23509/2018

HU/2351
2/2018

HU/2351
8/2018

HU/0289
3/2019

HU/0289
5/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 June 2019	**On 16 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MRS SALEMA BEGUM (FIRST APPELLANT)
MR TAREK AHMED TANVIR (SECOND APPELLANT)
MR TAHER AHMED FAHAD (THIRD APPELLANT)
MISS KOLSUMA BEGUM (FOURTH APPELLANT)
MISS SHAMIMA SULTANA (FIFTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Wilford of Counsel, DJ Webb & Co Solicitors
For the Respondent: Mr C Avery, HOPO

DECISION AND REASONS

1. The appellants have been granted permission to appeal the decision of First-tier Tribunal Judge E B Grant dismissing their appeals against the decision of the respondent to refuse them leave to remain under Appendix FM.

2. The appellants are citizens of Bangladesh. They are a mother and her four adult children. The children are dependent on the first appellant for the outcome of their appeals.

3. The first appellant entered the UK with a spouse visa valid from 9 February 2013 until 9 April 2015. The children came in as dependants on the same visa. On 2 April 2015 the first appellant applied for further leave to remain as a spouse and this was granted until 29 May 2017. She then made a further application for leave to remain but was refused because she did not supply the evidence demonstrating that she has a sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom in accordance with paragraphs 2.2 and 2.3 of Appendix KoLL.

4. The first appellant had requested that she be given exemption from this requirement and had provided a letter from her GP which states that she is suffering from bilateral cataracts and dry eyes. This can be rectified through surgery.

5. It is the respondent's case that the first appellant has not been able to provide sufficient evidence with her application to satisfy an exemption from the KoLL requirement. In reaching this decision the respondent relied upon the UK guidance about knowledge of life and language in the UK. Accordingly, the application for leave was refused along with those of the adult children as her dependants.

6. In addition to all the medical evidence in the appellants' bundle, the first appellant relied on the Killick Street Health Centre letter from Dr Polly Wootton her GP which said as follows:

> *"I am writing as Ms Begum's General Practitioner to confirm that she suffers from significant bilateral cataracts which obscure her vision and significantly reduce her ability to read. She has been referred to the Ophthalmology Outpatients who are not prepared to do an operation until she is able to lie still. Unfortunately, several conditions preclude her from being able to do this including lower back pain and chronic cough (which is under investigation by Respiratory Outpatients). For the medium to long term she is unable*

to have an operation on her cataracts and therefore is unable to read and study. Mrs Begum is dependent on her husband Mr Muhammad Mukhtar Ali for emotional and mental support. Her children support her by taking her to clinical appointments and assisting her with cooking. If Mrs Begum were to be separated from her husband and children, this would cause a drastic deterioration in her mental health as she would not have the emotional and physical support that she requires on a daily basis."

7. It was the appellants' case that the evidence from her GP could not be clearer. She is not able to use the computers during the speaking and listening test because the cataracts in her eyes have impaired her vision. She is also unable to undergo surgery at the present time because of her other ailments in particular, a chronic cough due to asthma. Her poor vision has made it difficult to perform most of the basic chores in the home, such as cooking and cleaning and she can no longer enjoy reading the Quran nor can she sit or stand for any extended periods.

8. She does not wish the family to be divided. They are a close-knit family and the children all help her and her husband. She and her husband are suffering from challenging health issues and are able to maintain themselves financially through her husband's income and their children's contributions from their earnings. Notwithstanding their difficult circumstances, the appellant is happy to be with her husband and children, without which she would not be able to cope. She knows that if they were to be separated this will have a serious adverse effect on both her and her husband's mental and physical health.

9. The appellant's husband gave evidence and confirmed that he had first arrived in the UK in 1999 to build a better life for himself and his family members once he was able to bring them to the UK. Eventually on 2 November 2010 he was granted indefinite leave to remain. His wife Salema and the two eldest children called Kolsuma and Tarek entered the UK on 2 February 2013. The youngest children Taher and Shamima joined the family on 29 March 2014.

10. Mr Ali suffers from bilateral glaucoma, chronic obstructive airways disease, mobility issues, difficulty swallowing and depression. He was also quite forgetful. As a result, he cannot do basic things like changing his clothes, making food or moving around without the assistance of his wife and children.

11. Taher's witness statement states that he received an unconditional offer at Goldsmiths College to study computer science, but he has been unable to take up his place because he does not meet the eligibility criteria for a student loan while his application is pending with the Home Office. His offer of a place has been deferred for one year so he can commence the course in the Autumn of 2019 if he is allowed to remain in the UK.

12. Tarek, in his witness statement, said he has recently started working as a part-time Tandoori chef in a restaurant. The purpose of this employment was to contribute towards the family's living expenses. He works sixteen hours a week so that he can also be available at home to assist his parents with their care.

13. The judge considered the first appellant's explanation in her evidence that she can speak English, but because of her eyesight she is not able to study for any test. Equally, because of her eyesight she is not able to take any test at a computer terminal. The judge observed that she gave her evidence through an interpreter and not in English.

14. The judge noted that the first appellant is supported in her appeal by a letter from her general practitioner who has explained why her eyesight cannot be resolved through a medium to long-term timeframe. This is because she suffers from asthma which causes her to cough and therefore she cannot lie still for the ophthalmologists to carry out the operation. The judge made an observation at this point by saying that the first appellant did not cough at all during the proceedings before the Tribunal. The judge went on to say that cataract surgery does not take a long time. She said there was no evidence provided from the ophthalmologists who are required to treat her to state that she is an unsuitable candidate for the surgery, and if she is unable to have surgery under a local anaesthetic, whether or not some mild sedation could be given to enable her to lie still while the procedure is carried out. Consequently, the judge was not satisfied that the first appellant has shown that she has a physical condition which is permanent which exempts her from taking the test.

15. The judge suggested that even with cataracts, the first appellant can study for the test by having one of her children read out the material to her for her to learn and recite back. The judge said the first appellant could also ask the test centre to make special arrangements for her under the provisions of the Disability Discrimination Act, for her to have special arrangements for the taking of the test which might be someone to read the questions to her for her to reply to and for the person assisting her to type any answers the appellant wishes to give. In the light of these suggestions, the judge was not satisfied, even with bilateral cataracts that there are no special arrangements that can be made. In other words, she found that the appellant has not shown that she is permanently unable to take the test.

16. Consequently, the judge found that the first appellant could not meet the Immigration Rules for the reasons set out by the respondent in the refusal, a decision which she upheld.

17. The judge found that none of the appellants can meet the requirements of paragraph 276ADE because she was satisfied that there are no significant difficulties to relocation back to Bangladesh and to the family home in

which they all resided together prior to their arrival in the UK to join the sponsor.

18. The judge did not accept that the family are required to be separated as suggested in the evidence before the Tribunal. She noted that the sponsor is now in receipt of a pension which will be paid to him whether he is in the UK or Bangladesh. She was therefore satisfied that he could return to Bangladesh to remain with the family who can continue to care for him and the first appellant there just as well they could in the UK. Therefore, she did not accept that any right to respect for family life with the sponsor will be breached by the decision of the respondent to require the first appellant and her four adult children to return to Bangladesh because he can return with his family and there seems no good reason why he should not do so.

19. In terms of Article 8 outside of the Immigration Rules, the judge said that neither Kolsuma or Shamima provided any evidence in support of their appeals as to the private life they enjoy in the UK. She was aware that Taher's immigration status has prevented him commencing a degree course. She was satisfied that he can study computer science in Bangladesh. The judge considered that Tarek works part-time because of the caring requirements for both parents. The judge was satisfied that he can replicate this lifestyle in Bangladesh.

20. The judge accepted that the sponsor has been in the UK a long time and has waited a long time for his family to be able to join him. However, on the evidence there was no good reason why family life could not be enjoyed as a family of six in Bangladesh where there is a home to return to and where the sponsor's pension can continue to be paid and where the children can find work. Save for the sponsor, the appellants have not been in the UK for any significant period of time.

21. The judge held that the right to respect for family life was not engaged in this appeal for the reasons already given. She was satisfied that the right to respect for private life was engaged. She gave little weight to the private life established in the UK by the appellant and her four adult children, because she was satisfied that the private life is of a nature that can be re-established in Bangladesh.

22. The judge took into account the public interest considerations set out in Section 117B of the Nationality, Immigration and Asylum Act 2002. She noted that the four adult children speak English but held that this is a neutral factor. She noted that with the earnings of the four adult children the appellant can meet the financial requirements of the Immigration Rules, but again found that this is a neutral factor. She noted that the first appellant is a burden on the public purse in relation to her NHS treatment and that is likely to continue. She noted that the first appellant has not shown that she can speak English (although she claimed that before the

Tribunal) which is a factor that militates against her. All the appellants have been in the UK with precarious immigration status because they have not had permanent leave to remain, consequently little weight should be given to their private lives established in the UK. The judge gave weight to the public interests in the effective immigration control and the economic wellbeing of the UK.

23. The judge relied on **GS (India) [2015] EWCA Civ 40** which makes it clear that the fact medical treatment might be of a lesser standard in the country of origin is not grounds for allowing an appeal under Article 3 or Article 8 grounds. The judge was satisfied that there are hospitals and doctors in Bangladesh and that the first appellant and her husband, if he chooses to return to Bangladesh with the family can seek appropriate treatment for their various conditions in Bangladesh.

24. Taking account of the factors in favour of appellants and factors in favour of the respondent the judge was satisfied that the balance of proportionality lay in favour of the respondent.

25. In granting permission First-tier Tribunal Judge C J Gumsley held that it is arguable that the judge did "insert" an additional requirement for a person to be able to show that they have permanent condition which prevented them from taking the ELT, which is not contained in the Rules. In addition, and although matters of weight to be attached to evidence produced, and the sufficiency of that evidence, are generally for the judge, Judge Gumsley held that it is arguable that the judge's decision in relation to the Immigration Rules was not sustainable on the evidence before her. Consequently, it is also arguable that the judge's approach to the assessment of any Article 8 claim was also flawed.

26. Mr Wilford submitted that the issue in this case is whether or not the first Appellant is entitled to an exemption to the English language test ("ELT") and to the knowledge about Life in the UK Test.

27. Mr Wilford submitted that the judge applied an elevated threshold by requiring the appellant to show that she has a physical condition which is permanent, and which exempts her from taking the test. Mr Wilford submitted that neither the Secretary of State's policy nor the Immigration Rules, as expressed in paragraph 284, makes reference to the requirement of permanent inability on medical grounds to avail an applicant of the exemption.

28. Mr Wilford relied on paragraph 13 of the grounds where he cites the Respondent's policy as follows:

> *"This exemption would only apply where the applicant has a physical or mental condition which prevents them from learning English or taking an approved English language test at the required CEFR level. This is not a blanket exemption. Some disabled people are capable of*

learning English and taking an approved test at the required level and some will not."

29. Mr Wilford submitted that it is evident from the evidence provided by the appellant's GP that the first appellant falls into the category of those who "will not" be capable of learning English accommodated by the policy.

30. Mr Wilford submitted that the judge made reference to the Disability Act and relied on irrelevant observations that the first appellant was able to take the exam absent the operation. He submitted that the judge's observation that the appellant did not cough was an observation made during the relatively short hearing.

31. Mr Wilford submitted that the judge's suggestion of potential methods the first appellant could take the test were immaterial. There was no suggestion that the judge has any medical expertise on this matter.

32. Mr Wilford submitted that the judge erred in finding that family life was not engaged in this appeal. He submitted that this was not made with reference to **Kugathas v SSHD [2013] EWCA Civ 31** which requires there to be "something more than normal emotional ties", as clarified in **Gurung**. He submitted that the judge failed to take into account that the first appellant's husband is dependent on the support of the children.

33. He submitted that in conducting the proportionality exercise the judge failed to take into account that the first appellant's eyesight had deteriorated since she had initially obtained leave to remain in the UK.

34. Mr Avery submitted that in using the word permanent, the judge was looking at whether or not there was any medium-term solution to the first appellant being able to take the test. There was no evidence from an ophthalmologist and the first appellant had given weak reasons as to why she could not take the test. Consequently, the judge's conclusions on this issue were valid. In the alternative, the judge made suggestions at paragraph 24 as to the first appellant asking the test centre to make special arrangements for her under the provisions of the Disability Discrimination Act.

35. Mr Avery referred to the Knowledge of language and life in the UK Guidance: Exemption because of physical or mental condition. He submitted that this guidance gives instances where the Secretary of State can exercise discretion, where the applicant is suffering from a long-term illness or disability that severely restricts their ability to learn English or prepare for the Life in the UK Test or has a mental condition. The Secretary of State is required to consider how the condition would prevent the applicant from taking the test in instances where an applicant is deaf, without speech or has a speech impediment which limits their ability to communicate in a relevant language. Mr Avery submitted that the judge's suggestion that the appellant could ask the test centre to make special

arrangements for her under the provisions of the Disability Discrimination Act was relevant to the exercise of discretion. He submitted that the burden was on the first appellant and she could not meet this requirement.

36. In respect of the Article 8 issue, Mr Avery submitted that the judge took account of all the evidence. Her Article 8 findings were sound and sustainable.

37. Having considered the arguments by both parties, I accept Mr Wilford's submission that the judge applied an erroneous test by requiring the first appellant to satisfy her that she has a physical condition which is "permanent" and exempts her from taking the English language and Life in the UK Test. The word "permanent" does not appear in the policy that was cited by Mr Wilford or in the Rules as expressed in paragraph 284. As a consequence, I find that the judge erred in law by applying an elevated threshold requiring the appellant to satisfy that she had a permanent inability to take that test.

38. I further find that the judge took into account irrelevant considerations in determining the exemption issue. The judge's observation that the appellant did not cough at all during the proceedings before her, should have included the fact that the hearing was of short duration. I find that the judge also speculated as to the potential methods for operating on the first appellant and the other ways she could improve her English or facilitate her ability to undertake the test.

39. I also find that the judge's conclusion that family life did not exist between the appellants and their father was unsustainable. This finding was made without relevance to the test in **Kugathas**; and the fact that the first appellant's eyesight had deteriorated since she was granted leave to remain in the UK.

40. For these reasons I find that the judge's decision cannot stand. I set it aside and remake it.

41. I find that the respondent's exemption applies to the first appellant. The letter from her GP indicates that she has a physical condition which prevents her from taking the English language test. The letter from the GP is cited at paragraph 9 of the judge's decision. The pertinent extract states as follows:

> *"I am writing at Ms Begum's General Practitioner to confirm that she suffers from significant bilateral cataracts which obscure her vision and significantly reduce her ability to read. She has been referred to the Ophthalmology Outpatients who are not prepared to do an operation until she is able to lie still. Unfortunately, several conditions preclude her from being able to do this including lower back pain and a chronic cough (which is under investigation by*

Respiratory Outpatients). For the medium to long term she is unable to have an operation on her cataracts and is therefore unable to read and study."

42. In the light of this evidence, I find that the appellant was not required to produce a further letter from an Ophthalmologist. I find that the GP was relying on what the Ophthalmologist had told her. I find that this was sufficient to enable the first appellant to discharge the burden upon her to show that she is not able to take the test for the reasons given by her GP for the medium to long-term.

43. Consequently, I find that the first appellant satisfies the Immigration Rule on this matter.

44. With respect to Article 8, I find on the evidence before me that the appellant and her children have established a family life with their sponsor. The GP in her letter said that the first appellant is dependent on her husband, Mr Mukhtar Ali, for emotional and mental support. Her children support her by taking her to clinical appointments and assisting her with cooking. The GP said if the first applicant were to be separated from her husband and children, this would cause a drastic deterioration in her mental health as she would not have the emotional and physical support that she requires on a daily basis.

45. The evidence before the judge was that Mr Ali suffers from bilateral glaucoma, chronic obstructive airways disease, mobility issues, difficulty swallowing and depression. He is also quite forgetful. As a result, he cannot do basic things like changing his clothes, making food or moving around without the assistance of his wife and children.

46. I find that this evidence goes beyond the normal emotional ties between adults and satisfies the **Kugathas** test.

47. I take into account the public interest considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002. I accept that because the appellant and her children do not have permanent leave to remain in the UK, their immigration status is precarious. Nevertheless, there are public consideration factors that lie in their favour. The judge accepted that the four adult children speak English. Although the first appellant said she could speak English, she gave her evidence through an interpreter. I have found however that the first appellant satisfies the exemption to provide evidence of her ability to speak English. The judge accepted that with the earnings of the four adult children, the appellant can meet the financial requirement. They are therefore financially independent.

48. I find that there are exceptional circumstances in this case which would render the respondent's decision in breach of Article 8 of the ECHR. Their father and sponsor has been in the UK since 1999. He was granted

indefinite leave to remain in November 2010. He now suffers from various ailments and as a result requires assistance from his wife and children to do basic things for himself. The first appellant herself also suffers from various ailments and also requires the assistance of the children to do basic things for herself. This is a family which is dependent on each other and are not reliant on welfare benefits in the UK. They are financially self-sufficient.

49. While the first appellant and the children were separated from their husband and father for many years, they were given a chance to join him in the UK and live together as a family. I find that it would be unjustifiably harsh to require their husband and father, who has spent a substantial part of his life in the UK, worked and earned a pension, to now leave the UK and re-establish life with them in Bangladesh, a country which he has been away from for about twenty years.

Notice of Decision

50. On the evidence before me I find that it would be disproportionate to require this family to leave the UK.

51. Accordingly, their appeals are allowed.

52. No anonymity direction is made.

Signed Date: 10 July 2019

Deputy Upper Tribunal Judge Eshun