Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37769/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14th January 2015	**On 28th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS KAMRUN NAHAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. A. Muzira, Solicitor
For the Respondent: Mr. T. Melvin, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Bangladesh born on 26 March 1968. She appeals against the decision of Judge of the First-tier Tribunal Boyd sitting at Hatton Cross on 26th August 2014 who dismissed the Appellant's appeal against decisions of the Respondent dated 27th August 2013. Those

decisions were to refuse the Appellant's application for variation of leave to enter the United Kingdom and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant's case was that her presence in the United Kingdom was required because she was caring for her sister, Ms Shamsun Nehar ("the sister"), who was suffering from a number of medical conditions including stage 4 chronic kidney disease and type 2 diabetes. The Appellant accepted at first instance that she could not meet the requirements of the Immigration Rules for a variation of leave including the requirements of Appendix FM and paragraph 276ADE. Her claim was based on a consideration of Article 8 outside of the Immigration Rules.

3. On 2nd January 2012 the Appellant was granted leave to enter the United Kingdom as a family visitor valid for six months until 2nd July 2012. She entered the United Kingdom on 17th January 2012 and applied on 26th June 2012 shortly before her leave was due to expire for variation. This was refused by the Respondent on 27th August 2013, the appeal against which has given rise to the present proceedings.

The Proceedings at First Instance

4. The Judge noted the medical evidence that was submitted to him, in particular a letter from Addenbrooke's Hospital dated 14th February 2013 that the Appellant's sister was able to perform all activities of daily living. The Judge considered that if the Appellant's sister was unable to walk without support she would be receiving disability living allowance with a mobility component, but she did not receive this. Nor had she received a blue badge. The sister's chronic kidney disease was under review and at no point in the GP's letter before the Judge was it suggested that the sister was unable to care for herself.

5. The Appellant told the Judge that her sister's condition had not improved or worsened since February 2013. The Judge was not satisfied that the sister needed the level of care and attention from the Appellant that was claimed. In any event, the sister lived with her husband and a daughter aged 18. The medical evidence did not suggest the sister could not be left alone. The sister carried out activities of self-care and would be able to look after herself during the day. The sister had two other daughters who, although married with children, lived five and ten minutes walk away respectively. There was no reason in the Judge's view why those daughters could not arrange to call in from time-to-time to check that their mother the Appellant's sister was well (there appears to be a typographical error at paragraph 24 of the determination where the Judge has used the word "Appellant").

6. The issue before the Judge turned on the Respondent's carer's policy, a copy of which was produced in the Appellant's bundle. Chapter 17 Section 2 – "Carers" states that leave should only be granted where it is warranted by particularly compelling and compassionate circumstances. The Judge's

view was that this imposed a slightly higher test than that imposed on considering an Article 8 claim outside the Immigration Rules.

7. It had not been established that the Appellant's sister was frail and required the type of constant care and attention which had been put forward to him in evidence. It was much more likely that the sister was able to self-care with the assistance where necessary of her husband and children. She could also use the facilities of the NHS as she was a UK citizen. It was not necessary for the Appellant to be in the United Kingdom to look after her sister. It would be possible for the Appellant to come over to help with her sister's post-operative care in the event of a kidney transplant. The circumstances did not come within the definition of compelling, compassionate or exceptional circumstances such as to allow the appeal outside the Rules under Article 8.

8. Insofar as the Appellant's private life claim was concerned, she could not speak English and her private life had been established at a time when her immigration status was precarious. The Appellant had a husband, children and other extended family members back in Bangladesh. She was born and brought up there and had only been in the United Kingdom since January 2012. The Appellant was now 46 and had thus spent almost 42 years of her life growing up and living in Bangladesh. It would cause her no difficulty to return to Bangladesh and resume her married and family life there. The relationship of the Appellant and her sister was that of adults. The Judge dismissed the appeal.

The Onward Appeal

9. The grounds of onward appeal argued that the Respondent had failed to consider the carer's policy and the decision ought to have been to have allowed the Appellant's appeal on the grounds that the Respondent's decision was not in accordance with the law and thus remained outstanding before the Respondent to take a valid decision. The grounds of appeal argued that the Judge should not have reached a conclusion on the carer's policy without setting out the relevant criteria of the policy in the determination. It was argued that the policy set out a two stage process. First of all there would be an initial grant of leave of three months so that an applicant could establish the type of illness or condition. That would be supported by, for example, a consultant's letter and evidence of the type of care required. It was only at extension stage when there was a request for further leave to remain for up to twelve months that further detailed enquiries should be made to establish the full facts of the case.

10. I note here that Chapter 17.3.1 of the policy as enclosed in the Appellant's bundle states that where an application is to care for a sick or disabled relative it will normally be appropriate to grant leave to remain for three months outside the Rules. The applicant however must be informed that leave has been granted on the strict understanding that during that three months period arrangements will be made for the future care of the

patient by a person who is not subject to the Immigration Rules (my emphasis).

11. The second ground of onward appeal was an argument that the Judge had not given adequate reasons for rejecting the claim under Article 8. It was argued that there had been evidence before the Judge that stage 4 kidney disease was where severe kidney damage had happened and the Judge was wrong to conclude that the Appellant's sister was not on haemodialysis. There was medical evidence more recent than the February 2013 evidence quoted in the determination which had been before the Judge. That evidence was summarised in the grounds. It included a letter from the sister's consultant stating that the sister had opted for haemodialysis which would involve her attending hospital as an outpatient for four hours three times per week. A letter from the sister's GP stated that the sister needed assistance with daily household tasks. Another consultant wrote that it was clear that the sister's kidney function was still declining progressively.

12. It was argued that the Judge had erred in his assessment of the level of care and attention from the Appellant which the sister would need. The Judge's conclusion that the Appellant's sister could self-care was wrong.

13. The application for permission to appeal came on the papers before First-tier Tribunal Judge Shimmin on 24th November 2014. In granting permission to appeal he wrote that it was arguable that the Judge had given inadequate consideration to the criteria of the Respondent's carer's policy and also arguable that the Judge had not taken adequate account of the up-to-date medical evidence relating to the Appellant.

14. The Respondent replied to the grant of permission on 10th December 2014 stating that the Judge had directed himself appropriately. Paragraphs 23 and 24 of the determination were fatal to the appeal on the basis of the carer's policy. In Paragraph 23 of the determination the Judge was satisfied that the Appellant's sister was able to perform all the activities of daily living and that she would have been able to walk. It was to be expected that having stage 4 disease she might suffer a degree of tiredness, but she would be able to self-care and to walk and she was not on haemodialysis. I have summarised Paragraph 24 above at paragraph 7 of this determination. The Judge had applied the policy to the findings of fact made and concluded that the appeal had failed. Even if there was an error in the assessment of Article 8 it was unclear how it might be material.

The Hearing Before Me

15. In her oral submissions Counsel relied on the grounds for permission to appeal. The Judge had ignored the medical evidence dated 24th July 2014 (the letter from Dr Birch, the sister's GP) which confirmed that the sister needed assistance with day-to-day tasks. There were exceptional circumstances in this case that brought the appeal within Article 8.

16. In reply the Presenting Officer argued that the Appellant's original application had been made on two bases. One was to spend time with her sister after a benign brain tumour had been extracted, and secondly it was for the Appellant to see grandchildren. Although there was no specific reference in terms to the carer's policy in the refusal notice, the Respondent had stated that her policy was to consider granting leave outside the Immigration Rules where particularly compelling circumstances existed. Grants of such leave were rare and given only for genuinely compassionate reasons. The Respondent had carefully considered the claim to remain in the United Kingdom for an extra six months "in respect of your family's circumstances". As the Appellant had requested six months' further leave to be allowed to remain in the United Kingdom until February 2013 the Respondent was not satisfied that the Appellant's circumstances were such that discretion should be exercised outside the Immigration Rules.

17. The first ground of appeal (failure to apply the carer's policy) had no merit as the Respondent's decision was a valid response to the application made. Under Article 8 the Judge had dealt with the medical evidence adequately and had referred to the fact that the evidence as at the time of the hearing showed that the Appellant's sister was not currently having dialysis. Even if the Appellant's sister had ongoing long-term medical difficulties she had family members who could care for her. In his statement the husband of the Appellant's sister had said it was cheaper for him to have the Appellant living in the United Kingdom. Even if the extra help which the Appellant could provide to her sister would be beneficial to the sister, that would not produce a dependency such as to bring the claim within Article 8. In truth all the Appellant's grounds were, was an attempt to reargue the case.

18. The argument that the carer's policy should be applied in two stages related to the circumstances of the initial application. In this case the initial application by the Appellant was for entry clearance as a visitor. Thus entry clearance was not granted under the carer's policy. The application was made on a different basis to that which was being claimed at the hearing. When the Appellant had been questioned during the hearing she had said there was no difference in her sister's condition.

19. In response the Appellant's counsel argued that the carer's policy contemplated that family visitors could make an application under the policy to remain. The written evidence included declarations from two witnesses who said that the basis of the Appellant's application to come to the United Kingdom was to spend more time with her sister. That brought the carer's policy to the Respondent's notice and it should have been applied in the refusal letter. The Appellant's answer in oral testimony about the improvement in her sister's health arose from the fact that she did not know what was being argued. The Judge's findings should be set aside. There was an emotional dependency by the Appellant on her sister because if the Appellant had to leave she would leave her sister without

proper day-to-day care. Only the Appellant could provide that. She had been in the United Kingdom for three years.

Findings

20. There are two inter-connected issues raised in this appeal. The first is whether the carer's policy applied in this case and if so whether the Respondent correctly applied it. If the Respondent had a relevant policy but it was not applied the decision would not be in accordance with the law and should remain outstanding for the Respondent to take a lawful decision. The second point, if the Appellant cannot succeed under the policy argument is whether, in the light of all the circumstances, this appeal should have been allowed outside the Immigration Rules under Article 8.

21. Dealing with the specific issue of the policy, the Respondent could only deal with the application which was before her. This application, which was made shortly before the six month visit visa was due to expire, referred to the deterioration in her sister's kidney condition and that she intended to stay with her sister during these difficult times. The letter set out some information about her sister's medical condition and tasks which the Appellant assisted her sister with. The carer's policy was not specifically referred to in the Appellant's application, nor was it specifically referred to in the refusal letter.

22. The application made on form FLR(O) had said "I am applying for an extension of stay in the UK as a family visitor". There was thus no specific reference made to the carer's policy, although the evidence of the two witnesses did indicate that the idea was for the Appellant to spend more time with her sister because of the medical treatment that the sister was receiving, specifically treatment for a brain tumour operation at Addenbrooke's Hospital, Cambridge. It is clear that both parties had the circumstances of the case in their minds when, on the Appellant's part, she made the application, and on the Respondent's part, when she refused that application by reference to the Appellant's family situation which included the sister.

23. I reject the argument that the Respondent failed to consider the carer's policy and/or failed to apply it. There was no error of law for the Judge to find that the Appellant could not bring herself within the policy by reason of the sister's condition. As the Respondent's decision involved the exercise of her discretion (whether to apply the policy) it was open to the Judge to consider the Respondent's decision and to make his own decision in the matter, which he did. The Judge found as a fact that the sister's condition was not such as to trigger the exercise of the policy. That was a conclusion which was open to the Judge on the evidence before him. I deal with that point in more detail below since as I explain at paragraph 20 the conditions which might give rise to the application of the policy apply to the case under Article 8.

24. That there is family life between the Appellant and her sister is not in dispute, however it is a relationship between adults and the issue is whether that relationship goes beyond normal emotional ties. The Appellant's case under Article 8 is that there is a dependency by the sister on the Appellant because of the sister's medical condition. The Judge did not accept that argument, particularly in the light of his findings regarding the sister's condition. The onward appeal argues that evidence which was before the Judge suggested that the sister's condition was worse than the Judge found it to be, partly because the Judge was relying on out-of-date medical evidence.

25. In fact the Judge was well-aware of the up-to-date medical evidence before him that was contained in the Appellant's bundle. At paragraph 25 of his determination for example he referred to the letter from Dr Jeevaratnam which was dated 8th August 2014. This letter stated that the Appellant's sister had opted for haemodialysis and that the best outcome was for a kidney transplant and the sister was on the waiting list. The Judge noted that the letter only confirmed that the sister had opted for haemodialysis, not that it had yet commenced. His comment on this evidence was that if the sister were to undergo haemodialysis she would still be able to live a relatively normal life. The Judge noted the medical evidence (at page 174 of the Appellant's bundle) that kidney transplants have become a routine procedure with a high success rate and that a patient with a successful transplant would be able to return to a more independent lifestyle with a quick recovery.

26. It was not necessary for the Judge to set out in detail all of the medical evidence he received. He had before him the up-to-date evidence and he had read it and he referred to some of it in his determination. In any event the medical evidence did not deal with the issue raised by him that there were other people who were in just as good if not better position to care for the sister as the Appellant was. The sister would continue to be able to access NHS treatment and the sister's husband appeared to be motivated more by a desire to save money in seeking to have the Appellant remain in the United Kingdom. Be that as it may, even under the carer's policy as I have indicated above, it would still have been necessary for the Appellant's sister to indicate someone who was not subject to the Immigration Rules who would be able to be a carer should there be a need for care.

27. In assessing the Article 8 claim therefore the Judge had to factor in as he did at paragraph 27 that the Appellant could not bring herself within the Immigration Rules. Although not mentioning the case of **Gulshan** by name he was aware that for a case to be allowed outside the Immigration Rules compelling and/or compassionate circumstances had to be shown.

28. By the time that the Judge heard the appeal the Nationality, Immigration and Asylum Act 2002 had been amended by the Immigration Act 2014 and at paragraph 28 he reminded himself of the relevant factors contained in Section 117B. He found at paragraph 29 that the Appellant had no family

life which would engage the Convention as he did not accept the dependency argument for the reasons he had set out at some length regarding the sister's medical condition. The Appellant had a degree of private life in the United Kingdom, but it was not disproportionate to interfere with any private life she might have in this country by removing her to Bangladesh. The Judge gave cogent reasons for this finding. The Appellant could not speak English, she was not financially independent, being supported by the sister's daughters and such private life as she had had was established while her immigration status was precarious and/or unlawful. Furthermore she had her own family still in Bangladesh.

29. The appeal in relation to Article 8 thus failed on both family and private life grounds. In light of the Judge's findings as to the medical position which were open to him on the evidence the family relationship between the Appellant and her sister could not be said to go beyond normal emotional ties and the private life claim failed, not least because of the little weight that was to be afforded to that private life by operation of the statute. I find therefore that the judge did not make any error in dismissing the Appellant's appeal and I uphold his decision to do so.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. I uphold the First-tier Tribunal decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed.

No anonymity direction is made there being no public policy reason for so doing.

Signed this 27th day of January 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 27th day of January 2015

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Deputy Upper Tribunal Judge Woodcraft