IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48124/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6 January 2016

Decision & Reasons Promulgated
On 21 January 2016

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ASAR ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs, SEB Solicitors
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of Asar Ali, a national of Bangladesh, born on 10 January 1970. He appeals against the decision of Judge of the First-tier Tribunal Devittie who, in a decision promulgated on 17 September 2014, dismissed the appellant's appeal against a decision by the respondent refusing him leave to remain in the United Kingdom on human rights grounds.

Background

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2. The appellant first entered the United Kingdom on a six month visit visa on 28 July 2006. He subsequently overstayed. He has a daughter, Sultana Aktar, born on 17 January 1989. She entered the United Kingdom on 5 September 2012 pursuant to a spousal entry clearance. She, in turn, gave birth to a son born in the United Kingdom on 4 July 2013.

3. As a result of domestic violence the appellant's daughter was granted leave to remain on 21 November 2013 under the domestic violence concession. This was for a period of three months, valid until 20 February 2014. Her current immigration status, and that of her son, is unknown. Neither of the representatives was able to assist as to whether she made an application for further leave to remain on the same or similar basis. Nor is it clear that the First-tier Tribunal Judge was aware of the uncertainty surrounding the immigration status of the appellant's daughter.

4. The appellant applied for indefinite leave to remain (ILR) on 26 October 2012. This was stated to be an application outside of the Rules. It was made on the basis of compassionate circumstances. The application was refused on 22 October 2013. The appellant appealed to the First-tier Tribunal and his appeal was heard on 23 August 2014.

The First-tier Tribunal decision

5. The First-tier Tribunal Judge heard oral evidence both from the appellant and from his daughter. It was submitted on behalf of the appellant that he had established a very close relationship with his daughter and his grandson. There were said to be strong emotional bonds and the family operated as a single unit.

6. It was common ground that the appellant did not meet the requirements of Appendix FM to the immigration rules. The judge therefore went on to consider Article 8 outside of the immigration rules. In paragraph 6 of his decision the judge stated:

> "The Tribunal has held in several recent cases, that where an applicant fails to meet the Article 8 requirements under the Immigration Rules, he has to show arguably good grounds before the Tribunal can proceed to consider his Article 8 appeal outside the Immigration Rules. I accept that the appellant has a genuine relationship with his daughter and grandchild. I also accept that he has a played a supportive role during the difficulties she experience in her marriage. I accept that she was the victim of domestic violence. I do not however consider that these features are sufficiently strong to justify a consideration of this appellant's claim outside the Immigration Rules."

7. The judge nevertheless proceeded to set out the requirements of Article 8 and give it consideration. In paragraph 9 the judge found that the relationship between the appellant and his daughter did not go beyond the normal emotional ties that exist between adult relatives. The judge said there was no suggestion that the daughter was not capable of caring for herself and her child in the appellant's absence. In respect of the appellant's private life claim the judge said this:

> "The appellant claimed that his family in Bangladesh, which included a wife and three adult children, have ostracised him because he has not been

providing financial support over the years. Even if that be so, it does not show that he does not retain social, cultural and family ties in Bangladesh. He arrived in the United Kingdom as an adult, and clearly he would have no difficulty at all in re-establishing his private life in Bangladesh and in reconciling with his children."

8. The judge did not find that there was an interference with the private or family life of the appellant which would have consequences for him, his daughter and grandchild of such severity as to outweigh the strong public interest considerations that had been identified by the respondent. The judge dismissed the appeal.

Grounds of appeal

9. The grounds of appeal contend that the judge adopted an incorrect approach to Article 8. Reliance was place on the case of **MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985**, and in particular Lord Justice Aikens' comments on the approached identified by Judge Sales (as he then was) in the case of **R (on the application of Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin)** to considerations of Article 8 outside the immigration rules. The grounds contend that the judge failed to engage in a full second stage assessment outside of the immigration rules and that he fell into error by stopping at a preliminary stage.

10. The grounds further contend that the judge erred in law in his failure to recognise family life between the appellant and his adult daughter. It was claimed that the term used by the judge, - "*normal emotional ties between adult relatives*" - was language used in the case of **Kugathas [2003] EWCA Civ 31**, but this restrictive approach was no longer to be regarded as good law. Support for this proposition came from the cases of **Ghissing [2012] UKUT 00161 (IAC)** and **Gurung v Secretary of State for the Home Department [2013] EWCA Civ 8**.

The hearing before the Upper Tribunal

11. Mr Biggs built upon his written grounds. He submitted firstly that there had been no adequate consideration of Article 8 outside the immigration rules. The judge was wrong to have said that there was no need to consider Article 8. Mr Biggs accepted that the judge did go on to consider Article 8, albeit briefly. Mr Biggs submitted, secondly, that the judge's approach to the existence of family life between the appellant and his daughter was unduly restrictive. The Court of Appeal case of **Gurung** required a very careful consideration of all the evidence. The judge's brief rejection of the existence of family life did not, it was submitted, disclose the required level of careful consideration.

12. Mr Biggs submitted that the Court of Appeal authority of **Singh [2015] EWCA Civ 630** could not be considered inconsistently with that of the **Gurung** approach. **Singh** could not be read as to cast doubt on the need for a carefully considered approach to the relevant relationships. Mr Biggs further submitted that where an individual goes through emotional trauma, such as being a victim of domestic violence, there is a heightened

need for a careful consideration of the evidence. Mr Biggs finally submitted that the bold assertion at paragraph 9 of the determination that the appellant would be able to reconcile with his family had no support at all and it was not clear how the judge had arrived at this conclusion.

13. In reply Mr Kandola submitted that even if the judge erred in requiring an intermediate test he still went on to consider Article 8 substantively. With reference to paragraph 9 of the decision Mr Kandola submitted that the finding in respect of the absence of more than the normal emotional ties had to be considered in the context of the earlier acceptance by the judge, in paragraph 6, that the appellant was the victim of domestic violence and had received support provided by her father. Mr Kandola submitted that it was clear, having holistic regard to the decision, that the judge had taken into account all relevant circumstances and had conducted a careful analysis.

Discussion

14. In the case of **Singh and Khalid** **[2015] EWCA Civ 74** the Court of Appeal considered the comments by Lord Justice Aikens in **MM (Lebanon)** relating, in turn, to comments by Judge Sales (as he then was) in **Nagre**. Sales J considered the interplay between the changes in the immigration rules brought about by HC 194 and Article 8. At paragraph 29 Sales J stated,

> "Nonetheless, the new rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave."

15. In **MM (Lebanon)** Mr Justice Aiken commented, in respect of the above quote,

> “I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the Rule then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker.”

16. In **Singh and Khalid** Lord Justice Underhill at paragraph 64 stated:

> “In my view that is a misreading of Lord Justice Aiken's observation. He was not questioning the short point made by Judge Sales. He was simply saying that it was unnecessary for the decision maker in approaching the second stage to have to decide first whether it was arguable that there was a good Article 8 claim outside the Rules, that being what he called the intermediary test, and then, if he decided that it was arguable, to go on to assess that claim. He should simply decide whether there was a good claim outside the Rules or not. I am not sure that I would myself have read Judge Sales as intending to impose any such intermediary requirement although I agree with Lord Justice Aikens that if he was it represented an unnecessary

> refinement. But what matters is that there is nothing in Lord Justice Aiken's comments which cast doubt on Judge Sales's basic point that there is no need to conduct a full separate examination of Article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

17. The First-tier Tribunal judge states at the end of paragraph 6:

> "I do not however consider that these features are sufficiently strong to justify a consideration of this appellant's claim outside the Immigration Rules."

18. In light of the above authorities I accept that this is an error of approach. I must however then consider whether this error is material. The judge does proceed, as was accepted by Mr Biggs, to then consider Article 8 despite what he said in paragraph 6. At paragraph 7 he laid out the requirements of Article 8 and then gave it substantive consideration in paragraph 8 and, in particular, paragraph 9.

19. The judge's consideration of Article 8 outside the immigration rules is brief. The question is whether it is impermissibly brief by reason of a failure to properly consider all of the available evidence, as indicated by the Court of Appeal in **Gurung**. The determination has to be read holistically. At the end of paragraph 6 the judge accepts that the appellant has played a supportive role during the difficulties that his daughter experienced in her marriage. He accepts that she was the victim of domestic violence. It is abundantly clear that the judge was aware of the existence of domestic violence and that support had been provided by the appellant to his daughter. In paragraph 9 the judge states this:

> "The appellant's daughter is an adult. The evidence does not establish that the relationship between the appellant and his daughter goes beyond the normal emotional ties between adult relatives. There is no suggestion that his daughter is not capable to care for herself or for her child in the absence of the appellant."

20. It is clear to me that the judge has considered the material aspects of both the oral and documentary evidence that was before him. Having considered the bundle of documents provided to the First-tier Tribunal and the record of the proceedings it is apparent that there was a lack of independent or detailed evidence going to the strength and nature of the relationship between the appellant and his daughter and, indeed, grandson. Other than assertions that they enjoyed a close relationship and had strong bonds, there was no reliable or independent evidence of anything, using the words of Sir Stanley Burnton in **Singh**, "*beyond the normal bonds of affection*". There were, for example, no medical reports or any psychological or psychiatric reports detailing the daughter's strong emotional reliance on her father. There was no independent evidence describing the likely impact on the daughter if the appellant were removed. There was no letter from any GP to that effect and no details of any treatment that the daughter was receiving for what was claimed to be emotional trauma. There was nothing in the evidence before the First-tier Tribunal to indicate that the daughter was incapable of functioning without the appellant's presence. There was no evidence that the daughter would

be unable to access support provided to victims of domestic violence or child care support offered by local authorities or social services. There was no evidence from any friends of the appellant or his daughter commenting on the strength and nature of their relationship. The daughter clearly had accommodation by reference to the various letters contained in the appellant's bundle.

21. In **Singh** the Court of Appeal stated (at paragraph 24), "*The love and affection between an adult and his parents will not of itself justify a finding of a family life. There has to be something more.*" I am not satisfied that this comment is in any way inconsistent with the approach identified in **Gurung**. There is always a requirement for careful consideration of all material evidence. In the present appeal there is however little in the way of reliable or independent evidence going to the nature of the relationship between the appellant and his daughter other than their own unparticularised assertions.

22. Having considered the evidence that was presented to the First-tier Tribunal I am not therefore satisfied that there "*something more*" in terms of the relationship between the appellant and his daughter such as to generate family life sufficient to attract the operation of Article 8. In these circumstances I am satisfied that the judge's brief assessment was legally adequate.

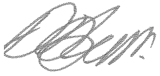
23. The judge then went on to consider the private life aspect of the appellant's appeal. At paragraph 9, after noting the appellant's claim to have been ostracised by his family in Bangladesh, the judge stated, "*Even if that be so, it does not show that he does not retain social, cultural and family ties in Bangladesh*."

24. The appellant was a 44 year old man at the date of the hearing before the First-tier Tribunal. He entered the United Kingdom in 2006. There is nothing to indicate that he would have lost his cultural, linguistic or social ties with a country in which he spent most of his life, including his formative years. Although he was diagnosed with Type 2 diabetes a letter from the East London NHS Trust of 07 April 2014 indicated the appellant was not on any medication. Paragraph 11 of the appellant's statement suggested he was fully capable of seeking employment. There was little in the way of background evidence, other than a few brief character references, describing the extent and nature of any roots the appellant may have established in the United Kingdom. In these circumstances, and despite the lack of support for his finding that the appellant could reconcile with his children, the judge was fully entitled to conclude, as he did in paragraph 9, that the appellant's removal would not breach his private life rights. I am not therefore satisfied that the judge's assessment disclosed any material error of law.

Notice of Decision

I dismiss the appeal.

No anonymity direction is made.



Signed

21 January 2016
Date

Upper Tribunal Judge Blum

TO THE RESPONDENT
FEE AWARD

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

Signed	21 January 2016 Date

Upper Tribunal Judge Blum