Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08795/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 10th September 2014	**On 8th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS NOORIA HAMEEDI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Jaffergi, Counsel
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Afghanistan born on 1st January 1946. The Appellant applied for entry clearance as an adult dependent relative under Appendix FM of the

Immigration Rules. The Appellant's application was refused by the Entry Clearance Officer on 8th March 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal O R Williams on 21st February at Manchester. In a determination promulgated on 11th March 2014 the appeal was dismissed both under the Immigration Rules and on human rights grounds.

3. On 9th April 2014 Grounds of Appeal were lodged to the Upper Tribunal. On 12th May 2014 First-tier Tribunal Judge Astle granted permission to appeal. Judge Astle noted that the grounds asserted that the First-tier Tribunal Judge had erred in assuming that the Respondent dismissed the application under both E-ECDR.2.4 and 2.5 in the absence of the second page of the refusal. The grounds claim that the judge gave unnecessary weight to trivial and irrelevant issues at the expense of cogent ones and that the determination did not reflect what transpired at the hearing. Further it was argued that the judge did not provide adequate reasons for a number of findings and that the determination lacked clarity and an incorrect standard of proof was applied. The grounds contended that the judge failed to take into account the security situation.

4. Judge Astle considered that it was arguable that the judge had erred in finding that a page of the decision was missing and that the Respondent also refused the application under E-ECDR.2.5. He noted that there was no indication in the copy decision provided that there was such a missing page.

5. On 10th June 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response contends that the Grounds of Appeal have no merit and seek nothing further than disagreement with the cogent findings of the judge. They state that the judge considered all the evidence that was available to him and came to a conclusion open to him based on that evidence, the Rules and relevant case law on the balance of probability and that the determination does not disclose any error. At paragraph 6(b) the Rule 24 reply states that it is clear that the basis for the conclusion by the judge is based on the Appellant's Grounds of Appeal which dealt with both 2.4 and 2.5 and that this was confirmed by the Home Office Presenting Officer.

6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel Mr Jaffergi. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

Submissions/Discussions

7. Mr Jaffergi submits that the primary Grounds of Appeal relate to the refusal under E-ECDR.2.5 to be found at paragraph 20 and 21 of the determination and as to the finding at paragraph 6 with regard to the purported second page of the refusal letter. He acknowledges that the original copy has come from the Respondent's bundle but

submits that there was nothing to suggest that any part of the refusal letter was missing.

8. Mr Harrison takes me to the Notice of Refusal and confirms that the appeal was refused under E-ECDR.2.4 and whilst acknowledging that there is at the end of that sentence an or points out that there is nothing seemingly missing from the Notice of Refusal and suggests that that is a typographical error. In any event he points out that the refusal is under 2.4 and that the Grounds of Appeal raise 2.5. He further points out that the Home Office did give due consideration to 2.5 at the hearing and that the First-tier Tribunal Judge mentioned it in his determination. If there is an error so far as a reference to a missing page is concerned, Mr Harrison suggests that it is immaterial, but in any event the judge has made it clear at paragraph 6 in his final three lines therein and that in any event it makes no difference if 2.5 is imported as the Judge has at paragraph 13 onwards of his determination dealt with the appeal under 2.4.

9. Mr Jaffergi acknowledges that the manner in which the judge has addressed the issue does not render the decision flawed because he accepts that the judge has addressed E-ECDR.2.4, but submits the judge would have been entitled to consider 2.5 if the judge had considered that an issue arose and that this is not what has happened here and that he has not given the Appellant an opportunity to address it. He submits that this is relevant so far as it goes to the attitude that the judge has taken towards the appeal.

10. Mr Jaffergi goes on to suggest that the judge has applied the wrong test under 2.4 and that the requirement is that the Appellant needs long-term personal care to perform everyday tasks but that paragraph 13 of the determination sets out that the test is that the Appellant is unable to perform everyday tasks and he submits that there is a difference between these sentences and that it infects the overall assessment. He submits that the judge is equating ability to survive with not requiring long-term care and has therefore failed to carry out a proper assessment under Article 8.

11. Mr Jaffergi acknowledges that the judge has been satisfied with the evidence and that the question is whether or not the circumstances amount to what the Rules require but submits that the judge has failed to take into account the mental health of the Appellant and her depression and loneliness since her husband has died. He submits that I should find a material error of law and set aside the decision and submits that the judge did not appreciate the case that was being put to him and did not give due and proper consideration to the Appellant's mental health. He does not consider this is a case that should be remitted for rehearing but that it should just be remade allowing the appeal.

12. So far as Article 8 is concerned he submits that this is inadequately dealt with in the findings at paragraph 31, that there are serious issues to be balanced outside the Rules and that there is therefore a material error of law.

13. Mr Harrison starts by relying on the Rule 24 response, pointing out that the determination makes an assumption that there is something missing from the decision letter. If there is, then he submits that that is immaterial but his main stance is that there is actually nothing missing. He points out that the determination gives due consideration to E-ECDR.2.4 and gives five or six reasons for his conclusions at paragraphs 14 to 19 of his determination. He submits that he has addressed the Appellant's mental health at paragraph 18 and that the arguments of the Appellant's legal representatives amount to no more than mere disagreement.

14. Mr Harrison submits that Judge Williams has given due consideration as to whether the Appellant is in need of assistance and has set out detailed factors at paragraph 15 of his determination regarding this, based on the Sponsor's description and the judge has come to a conclusion, which he was entitled to, that the Appellant was capable of looking after herself. He asked me to consider the wording of 2.4 and the requirement for long-term personal care and that this was not found by the Entry Clearance Officer and this factor was not found to have been made out by the judge. He submits that the decision was open to the judge on the evidence that was before him and that he was entitled to draw the conclusions that the Appellant could look after herself as set out at paragraph 13.

15. So far as Article 8 is concerned Mr Harrison submits it is only necessary for the judge to go on to consider if there are compelling circumstances outside the Rules and that the judge carried out an Article 8 assessment and made findings that are open to him. He contends that there is no material error of law and asks me to uphold the decision of the First-tier Tribunal Judge.

16. Mr Jaffergi in response accepts that if read in isolation the determination makes sense but that on the actual evidence before the judge he contends that Judge Williams has not considered the case properly and that it is appropriate to read paragraph 13 of the determination alongside paragraph 3 of the Appellant's witness statement. He submits that the Appellant's depression (to use his own words) *"pushes her over the edge."* He submits that the state of mind of the Appellant is such that she is not eating properly and taking care of herself and therefore that she can meet the Immigration Rules and if she cannot he submits that there are compelling circumstances to allow the appeal outside the Rules. He asks me to set aside the decision of the First-tier Tribunal Judge and to remake the decision allowing the appeal.

The Law

17. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

18. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law

for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

The Immigration Rules

19. *E-ECDR.2.4 The applicant or, if the applicant and their partner are the Sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.*

E-ECDR.2.5 The applicant or, if the applicant and their partner are the Sponsor's parents or grandparents, the applicant's partner must be unable, even with the practical and financial help of the Sponsor, to obtain the required level of care in the country where they are living, because

(a) it is not available and there is no person in that country who can reasonably provide it; or

(b) it is not affordable.

Findings

20. It is contended in the Grounds of Appeal that the judge erred in assuming that the Respondent dismissed the application under both E-ECDR.2.4 and 2.5 in the absence of the second page of the refusal. The judge has done a thorough job. He has looked at both paragraphs particularly bearing in mind that the Home Office Presenting Officer at the First-tier Tribunal hearing indicated he relied on both grounds. It is accepted that the word or to be found at the end of the Entry Clearance Officer's reasons for refusal cannot be right. Either there should be more inserted or it should not be there at all. However there is nothing to suggest that there should be an additional page and whilst the First-tier Tribunal Judge considered the second page of the refusal letter was missing, it is my view that in fact it was not. In any event I agree with the contention made by Mr Harrison if 2.5 is imported, because the judge has very thoroughly addressed the issues under 2.4. I agree with that and indeed even Mr Jaffergi agrees in his submissions that it would not render the decision to be flawed. I am consequently satisfied that the argument therefore with regard to a purported missing page does not add anything to the Appellant's case and that there is no material error of law on that point for the reasons given.

21. The issue thereafter moves on to an argument when considering the Appellant's appeal under E-ECDR.2.4 of Appendix FM the judge has applied the wrong test. That is not the case. The judge has carried out a very detailed and thorough analysis under 2.4 which are set out at paragraphs 14 to 19 of the determination. The judge has given due and proper consideration to the Appellant's mental health, noting that the Appellant has been able to attend Kabul Medical University, consult with a psychiatrist and that the Appellant has not received any medication for some three years which the judge was perfectly entitled to conclude undermined the claimed chronicity of her symptoms. In addition the Appellant has in the alternative gone on to consider 2.5. The findings of the judge reflect that he has correctly considered the law. Mr Jaffergi is wrong in his assertion that the judge has failed to give due and proper consideration to the Appellant's mental health and he has applied the correct test. The judge was entitled to make the findings that he did at paragraph 13 and there is no material error of law in the decision under the Immigration Rules.

22. Finally it is necessary to address the issue under Article 8. It is wrong to try and suggest, as is put to me, that all that is addressed is at paragraph 31 of the determination. The judge has looked at Article 8 in considerable detail under paragraphs 22 to 31. The law is now to be found so far as claim for Article 8 outside the Immigration Rules is concerned in *Gulshan* and decisions that postdate it. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph (31):

> *"Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."*

23. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:

> *"Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. 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."*

24. I am satisfied that the judge has given due and proper consideration to all the appropriate factors relating to a claim under Article 8 outside the Immigration Rules and no material error of law is disclosed. I acknowledge that the overall affect of this determination will be one of disappointment to both the Appellant and her Sponsor. I accept that the Appellant is elderly and that her son lives in the UK but it is appropriate for the Upper Tribunal to consider the issue as a matter of law and not as

a court of sympathy. For all the above reasons the determination of the First-tier Tribunal is shown to be well reasoned and discloses no material errors of law and the appeal is dismissed and the decision of the First-tier Tribunal is maintained.

Decision

The decision of the First-tier Tribunal does not disclose a material error of law and the appeal is dismissed and the decision of the First-tier Tribunal is maintained.

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris