Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14742/2019 ('V')**

THE IMMIGRATION ACTS

Heard at Field House
And via Skype for Business
On 6th April 2021

Decision & Reasons Promulgated
On 21st April 2021

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MS BABLY KHANOM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr M Rana, Counsel, instructed by Monk Turner & Co Solicitors
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 6th April 2021.

2. Both representatives and I attended the hearing via Skype, while the hearing was also open to attend at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Hembrough (the 'FtT'), promulgated on 20th November 2020, by which he dismissed her appeal against the respondent's refusal on 16th August 2019 of her application for leave to remain based on right to respect of her family and private life.

4. The appellant's immigration history was that she had entered the UK on 23rd April 2006 with her husband, from whom she is now estranged and a son, on a visit visa; remained in the UK unlawfully; applied in January 2015 as a dependent spouse on an application for leave to remain outside the Immigration Rules, which was refused; and on 8th May 2019 applied for leave to remain based on right to respect for her family and private life which was refused in the impugned decision. In her latest application, the appellant, a Bangladeshi national, referred to living with her daughter and grandchildren, (she had separated from her husband since the 2015 application); was not working and was being maintained by her daughter but in turn provided her daughter with support looking after the grandchildren. The appellant claimed to have separated from her husband because the appellant had become pregnant by a different father and the appellant was unable to return to Bangladesh. She claimed to have a family life with her daughter and grandchildren as well as close ties to her local community in the UK and was estranged or unaware of the whereabouts of her family members in Bangladesh. At the age of 51, she claimed to be 'elderly' and could not work, suffering from diabetes and high cholesterol.

5. In rejecting her application, the respondent did not accept that there would be very significant obstacles to the appellant's integration into Bangladesh, where she lived up to the age of 36. The appellant had entered the UK as a visitor without expectation of being able to remain here and removal would not separate any British children from their parents. Refusal of leave to remain would not, in the respondent's view, result in unjustifiably harsh consequences and there was nothing preventing the appellant's daughter from financially supporting the appellant in Bangladesh. The respondent considered the appellant's diabetes and cholesterol which did not, in her view, risk any breach of article 3 ECHR in the event of the appellant's return to Bangladesh. Neither condition was at the stage or severity preventing the appellant to travel nor had it been shown the appellant would be unable to access treatment in Bangladesh.

6. The appellant appealed against the respondent's decision to the FtT.

The FtT's decision

7. The FtT did not accept that the appellant had had a pregnancy resulting from a relationship outside marriage (§§31 to 37). The FtT further did not accept the appellant would be shunned by her family in Bangladesh (§38) or that she would return there to a state of destitution, noting that the appellant had three sons and a brother and sister in the UK about whom the FtT had been told nothing (§39). The

FtT further considered and rejected a risk of gender-based violence (§42). Whilst the FtT accepted that the appellant had a close relationship with her daughter and her grandchildren (§45), at §47 the FtT was not satisfied that the relationship between the appellant and her daughter and grandchildren constituted one of dependence so as to engage article 8 regarding family life, nor was it argued that it did. Clearly, however, private life was engaged. However, in applying section 117B the Nationality, Immigration and Asylum Act 2002, the FtT concluded that refusal of leave to remain was proportionate (§52).

8. In reaching his decision, at §29, the FtT had noted that after the appellant had given evidence via a solicitor's office, using CVP, the appellant's representative had indicated that the appellant's daughter was also present in the same office and he requested permission to call her to give evidence. The FtT had refused his request, observing that there was no witness statement nor mention of her giving evidence in response to the case management directions given on 29th June and 10th August 2020, which had required the appellant to provide a list of witnesses and to file witness statements. The FtT bore in mind the overriding objective requiring the proceedings to be conducted fairly and the FtT considered that it would be unfair on the respondent to allow the appellant to introduce fresh evidence without notice at the conclusion of the appellant's evidence. There was no application for an adjournment.

The grounds of appeal and grant of permission

9. The appellant lodged grounds of appeal which are essentially on three grounds:

    9.1. Ground (1) - the FtT had erred in failing to draw inferences from the evidence about the detrimental effect that the appellant's removal would have upon qualifying grandchildren, noting that the appellant lived with her grandchildren and dropped off and picked up one of the grandchildren from nursery.

    9.2. Ground (2) – the FtT had erred in refusing to allow the appellant's daughter to give evidence on the basis that no witness statement had been provided, noting that same daughter provided a letter in the bundle before the FtT dated 9th January 2019.

    9.3. Ground (3) - the FtT had erred in finding that there was no family life between the appellant, her daughter and grandchildren based their cohabitation, childcare provided by the appellant and closeness of the relationship.

    9.4. Ground (4) - the FtT had erred in refusing the appeal under article 8, by failing to consider the fact of her separation from her husband, living with her daughter and grandchildren and her close relationship with them. The FtT had failed to give adequate reasons for dismissing the appellant's case on article 8 grounds.

10. First-tier Tribunal Judge Andrew granted permission on 18th December 2020. While referring specifically to the ground relating to the appellant's daughter not being allowed to give evidence, the grant of permission was not limited in its scope.

The hearing before me

The Appellant's submissions

11. The first point was that the FtT had erred in concluding that there was no witness statement from the appellant's daughter before him. In fact, as was referred to expressly at section C of the skeleton argument before the FtT, this had referred at section C2 to a letter dated 19th January 2019 from the appellant's daughter, which confirmed that the appellant's daughter had indefinite leave to remain and also that her mother lived with her. This was at page [9] of the appellant's bundle and I reviewed that letter, which confirmed the same. There was also a reference at section C4 of the skeleton argument to a letter dated 25th January 2019 from Rainbow House which confirmed that the appellant was the person who mostly picked up and dropped off her grandson, at page [6] of the appellant's bundle. In the circumstances, the FtT should have treated both of these letters as amounting to witness statements. The appellant's daughter was able to give evidence and it was quite possible where, as here, the FtT was concerned that there was a lack of evidence and had raised the question as to why the appellant's daughter had not given evidence, that there could have been a substantial examination-in-chief by Mr Rana to adduce additional evidence.

12. In that regard, Mr Rana relied upon and referred to the Court of Appeal authority of AS (Pakistan) v SSHD [2007] EWCA Civ 703, which had stressed the importance of granting an adjournment application in order to call witnesses who could give relevant evidence. He accepted that no adjournment application had been made to the FtT but nevertheless where, as here, the FtT had identified the daughter's evidence as being important and where she had produced a 'witness statement' it was therefore an error of law and a deprival of a fair hearing to prevent her from giving evidence.

13. At this stage, and to give both parties the opportunity to respond, I myself reviewed through the correspondence file for the relevant directions, which I discussed with them. It appeared first of all that the case had initially been listed for 14th January 2020, with standard directions requiring the appellant to provide witness statements of all witnesses who would give evidence at the hearing. The January 2020 hearing had been adjourned because of a concern about the scope of the appeal and subsequently, Acting Resident Judge Woodcraft directed on 27th March 2020 that there be a case management hearing with additional directions. Those directions did not focus on the identity of witnesses or witness statements but dealt, in a number of areas, with the need for an appellant's skeleton argument or 'ASA'. The directions did require that any evidence generally should be disclosed not later than 5 working days before the final hearing.

14. Next, directions were issued by First-tier Tribunal Judge Aldridge on 29th June 2020, which included, at §3b, a direction that by 13th July 2020, in advance of a case management review hearing, the appellant must identify the names of each witness to be called and the issue dealt with by each witness.

15. Dealing next with the Case Management Review hearing conducted by telephone on 10th August 2020 by Judge Karbani, I had regard to the record of proceedings, in which it was recorded:

"*Witnesses: (App + daughter)*"

16. Whilst Judge Hembrough referred to the appellant's daughter not being identified as a witness, in fact, the record of proceedings does refer to both the appellant and the daughter as witnesses whom the appellant wished to call.

17. Therefore, this was the primary basis of the appeal. The remainder of the grounds were nevertheless still relied upon. In particular, the FtT's reasoning at §§44 and 45 of the decision illustrated what was contradictory in the FtT's concerns about the appellant's daughter not giving evidence. At §44, the FtT had referred to an acceptance of the appellant living with her daughter and grandchildren and at §45 to their close relationship. That being so, it was unclear why the FtT should be concerned, or possibly draw adverse inferences, from the lack of evidence from the appellant's daughter, at §29. The flaw in the FtT's analysis was compounded because the FtT had not considered the children's best interests, as required by section 55 of the Borders, Citizenship and Immigration Act 2009.

18. Moreover, whilst the FtT had accepted that there was private life, the FtT's finding that there was no family life was unsustainable. Whilst Mr Rana confirmed that he did not seek to argue family life existed between the appellant and her daughter because he argued that there were more than emotional ties, the same could not be said of the appellant and her grandchildren, who were minor and so different considerations other than 'normal emotional ties' applied. There was no proper assessment of family life in the circumstances and that was unsurprising, given that the appellant's daughter had not been able to give evidence.

The Respondent's submissions

19. Mr Tufan submitted, considering the procedural history of this case at §29 that there was no indication by way of production of a proper witness statement that the appellant's daughter would be giving witness evidence. It was not appropriate for a party to refer to a brief letter of a couple of sentences, and rely, after the conclusion of the first witness's evidence, to seek to adduce, through extensive oral examination-in-chief, additional oral evidence. The directions had been clear that evidence had to be disclosed before the hearing, which included the witness evidence on which a party intended to rely. It was not unfair to prevent a party from assuming an entitlement to adduce additional oral evidence in that way, and indeed unfair on the other party. Here and critically, the appellant's daughter's statement (if it could be described as such) at page [9] of the appellant's bundle was brief and its contents

were accepted by the FtT, namely the cohabitation of the parties, the existence of a close relationship and the fact that the appellant helped out with childcare, which was not disputed by the respondent. The tendering of her evidence was not prompted by concerns raised by the FtT, but because the presenting officer before the FtT had asked the appellant in cross-examination why her daughter was not giving evidence, and the appellant did not know, which was consistent with the desire to call the daughter being a last-minute decision. In any event, what else, Mr Tufan asked, could the daughter have given evidence in relation to? In the circumstances, even if the appellant's daughter had given evidence, the FtT recorded at §47 that the appellant did not seek to claim that there was a relationship of dependency between the appellant, her daughter and grandchildren.

20. The FtT acknowledged the fact of cohabitation and the family's circumstances but also recognised the comparatively recent cohabitation (which had dated only back to 2019) and the limited role that the appellant played, which in reality was nothing that the childminder could not do, namely the pick-up and drop off at nursery. In essence, if there were an error in relation to that ground, it was simply not material. The remainder of the grounds amounted to no more than a disagreement with the findings.

Discussion and conclusions

21. I deal with ground (2) first and what is said to be the error in the FtT refusing to allow the appellant's daughter to give evidence. In that regard, the FtT had referred to the July directions that the appellant was required to identify the witnesses whose statements were to be relied upon. I am conscious that Judge's Karbani's record of proceedings of the 20th August 2020 clearly indicated that the appellant intended for her daughter to give evidence. I further take into account Mr Rana's submission that albeit put in informal terms, not headed 'witness statement;' not listed in the appellant's bundle as a witness statement, and without a statement of truth (in contrast to the appellant's witness statement, which was headed 'witness statement,' or listed as a witness statement in the index of the appellant's bundle, in contrast to the appellant's statement, which was, there is unquestionably a letter at page [9] of the appellant's bundle which could, just about, be seen as a form of statement, in the format of a letter addressed 'To whom it may concern'. I describe the letter as capable of being described as a statement in the context of a jurisdiction where statements may be adduced, which lack the formality expected in other jurisdictions. It confirms, as both parties accept, that the appellant's daughter is a settled person with indefinite leave to remain; is the daughter of the appellant; and that the appellant lives with her.

22. I also accept that the appellant's daughter may have wished to give oral evidence in circumstances where she was prevented from doing so.

23. However, I am also conscious that the decision of a Judge in relation to case management will always be a nuanced one. The test ultimately always has to be on

whether a party has been deprived of a fair hearing. Effectively, if a party has not been deprived of a fair hearing, then that does not amount to an error of law.

24. On the one hand, the appellant's submission, by reference to AS (Pakistan) is that a party who has been deprived of an ability to call a witness cannot be said to have had a fair hearing.

25. On the other hand, I do note in the particular circumstances of this case three critical points. The first point is that where, as here, the appellant was professionally represented, witnesses should expect to include most, if not all of their evidence-in-chief, in a written witness statement, rather than assume an entitlement to adduce a brief letter, none of which is contentious or likely to be disputed and then expect to be able to give extensive additional oral evidence-in-chief. While the FtT was wrong in his assertion that there was no mention of calling the appellant's daughter previously, the FtT was right to note that an expectation of oral evidence-in-chief is unfair on the other party.

26. Second, on the issue of a fair hearing, this turns on whether a party has been deprived of giving relevant evidence, which could have assisted his or her case. Mr Rana does not identify what that additional evidence may have been. None of the daughter's brief statement was disputed. The FtT accepted everything that was included in the appellant's daughter's statement, namely that the appellant cohabits with her daughter, and lives with her, and the FtT went beyond that to find that there is a close relationship between the appellant, her daughter and her grandchildren.

27. Third, on the same issue of a fair hearing, at §47, the FtT found, when considering the existence of family life, the following:

> *"Looking outside the Rules I have not been satisfied that the relationship between the appellant and her daughter and grandchildren constitutes one of dependence so as to engage article 8 as regards family life, nor was it argued that it did [my emphasis]. Clearly however private life is engaged."*

28. While Mr Rana expressly stated that he did not seek to assert that there were more than emotional ties between the appellant and her daughter, but wider considerations applied to the grandchildren, what was critical was the wider acceptance that no dependency, so as to engage Article 8 ECHR as regards family life, was being pursued before him. What the FtT was left considering, in the absence of dependency, was precisely the set of circumstances which he accepted, namely the fact of cohabitation, the appellant's close relations with her grandchildren and her role in dropping off and picking one of them up regularly from nursery. In the circumstances, I accept the force of Mr Tufan's submission that there was no more specific relevant evidence for the appellant's daughter to give, which the FtT had not considered, beyond generalised assertions in the grounds on evidence about the effect of the appellant's removal on the grandchildren, which the FtT recognised at §46 would cause understandable upset. In summary, the appellant was not prevented from adducing relevant evidence; the nature of any further evidence

beyond understandable upset has never been identified; and dependency was specifically not relied on between the appellant and her grandchildren. The FtT's error in failing to spot, in the record of proceeding in an earlier case management review, the appellant's wish to call her daughter to give evidence, did not prevent the appellant having a fair hearing. In the circumstances, I do not regard there as having been a procedural unfairness in respect of ground (2).

29. Dealing with the remainder of grounds (1), (3) and (4), first, in relation to ground (1) and the ground that the FtT had failed to draw inferences from the evidence about the detrimental effect of the appellant's removal upon qualifying children, noting the factual findings that had already been made, the FtT clearly referred at §46 to the best interests of the children as a primary consideration, but what the FtT was also entitled to do was to take into account the limited duration of cohabitation; the focus of the children being on their mother, rather than the appellant; and the absence of any claimed dependency, as exemplified by the evidence of one child having speech and language delay, for which he was receiving NHS and nursery support, without evidence of input from the appellant (§45). The FtT specifically considered the likely short-term upset of the appellant's removal, but without significant effect on their welfare or development (§46). Therefore, whilst brief, the FtT's analysis was to the point, adequately and clearly reasoned. Ground (1) discloses no error of law.

30. Dealing with ground (3) and the failure to give adequate reasons that there was no family life, bearing in mind the findings made by the FtT (cohabitation, help with childcare, a close relationship between all family members and estrangement from the appellant's husband), once again, I refer back to the reasons and analysis discernible from §§44 to 47 of the decision, which I regard as adequate. The FtT was entitled to consider the brevity of cohabitation; the likely focus of the children on their mother; and the lack of any claimed dependency. Ground (3) discloses no error of law.

31. Finally, in relation to ground (4) and a contention that the FtT had failed to consider for the purposes of Article 8 ECHR the appellant's circumstances in the round, namely the separation of the appellant from her husband; living with her daughter and grandchildren; their close relationship; and the appellant's health issues, what is clear is that between §§47 to 55, the FtT had made a whole series of findings, weighing up a variety of factors. He specifically rejected that the appellant would return to Bangladesh to a state of destitution or that she had lost her cultural connections to Bangladesh. The FtT also specifically found that the appellant had not been what was referred to as an "adulteress;" nor would she be perceived as such or face risk on that basis. What the FtT was unarguably entitled to do, applying the factors set out at section 117B of the 2002 Act at §§49 to 55, was to note the public interest in the maintenance of effective immigration control; the fact that the appellant had been accessing free treatment via the NHS to which she was not entitled; that little weight should be attached to private life which she had established when she was in the UK unlawfully; and the limited evidence of integration. The FtT also considered the appellant's medical conditions both

individually and cumulatively. As an aside, Mr Rana confirmed that no appeal was being pursued before me in respect of Article 3 ECHR.

32. The FtT unarguably considered all of the evidence in the round, for the purposes of Article 8 ECHR, considering that evidence and applying section 117B of the 2002 Act. Ground (4) discloses no error of law.

Decision on error of law

33. I conclude that there are no errors of law in the FtT's decision. Therefore, the appellant's challenge fails, and the decision of the First-tier Tribunal shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed J Keith

Upper Tribunal Judge Keith Date: 12th April 2021