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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01279/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 November 2014	**On 26 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAHEED AKHTAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms J Fisher, Counsel
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 10 October 2014 Upper Tribunal Judge Latter set aside the decision of First-tier Tribunal Judge Trevaskis and directed the appeal to be reheard on its merits in the Upper Tribunal preserving, subject to them being supplemented or clarified by any further evidence, Judge Trevaskis's findings of fact found in paragraphs 35 to 39 of his decision.

2. The background to the appeal and the issues arising are clearly set out in Judge Latter's decision, which is annexed to this decision. There is little utility to repeating the information set out in it.

3. I shall continue the practice of referring to the parties as they were before the First-tier Tribunal. I shall refer to Ms Akhtar as "the appellant" and the Secretary of State as "the respondent".

4. I was not asked to make an anonymity direction and saw no reason to make one.

5. I remind myself that the date of decision is 10 December 2013. This being an in-country appeal I may consider evidence about any matter which I think relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.

6. In immigration cases the burden of proof generally lies upon the appellant with respect to any assertions of fact which she makes. The standard of that proof is the balance of probabilities.

7. The representatives agreed that the rules were met with the exception of subparagraph 317(i)(d), which the respondent continues to dispute. This subparagraph reads as follows:

> "317. The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:
>
> (i) is related to a person present and settled in the United Kingdom in one of the following ways:
>
> …
>
> (d) parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances; or …"

8. I kept in mind the following when assessing this case. Where the application has been made in-country, the appellant must show that she would meet the substantive requirements of the rule if she were still in her own country. It is not enough to show the rule is being met in the UK (*MB (para 317: in country applications) Bangladesh* [2006] UKAIT 00091). According to the IDIs referred to in Ms Fisher's skeleton argument, the rule is aimed at situations such as illness, incapacity, isolation and poverty. The wording 'most exceptional compassionate circumstances' shows the very high threshold for dependent relatives. The rule has a humanitarian purpose and requires an assessment of the degree of compassion evoked by the appellant's circumstances (*KC & Ors* [2007] EWCA Civ 327) but the use of the word 'most' is not mere surplusage (*R v IAT, ex parte Joseph*

[1988] Imm AR 329). I have considered the appellant's circumstances cumulatively on the information available to me.

9. I heard brief oral evidence from the appellant in Urdu through an interpreter she confirmed she could understand. I also heard oral evidence from her son, Mr Usman Saleem ("the sponsor") in English. They both adopted the statements they had made for the hearing in the first-tier Tribunal. These are summarised in Judge Griffith's determination. The appellant said there was no-one to look after her in Pakistan. She said her life was short and she wanted to remain with her grandchildren. She said her daughter-in-law looks after her. She bathes her, gives her medicine and feeds her. The appellant said she teaches her grandchildren the Holy Qu'ran and she watches them playing. The sponsor said the appellant's condition was worse than when she arrived. Her house is old and has been unoccupied for five years. It needs money to repair it. It was very important for a son to look after his mother in their culture. The sponsor said his wife does not work so she can look after the appellant. He said the appellant takes the children to the park next to their house.

10. The sponsor was cross-examined. He confirmed his sisters used to obtain antidepressants for the appellant before she came to the UK. They have close family friends who are doctors. One of them could provide what the appellant would need. He agreed that it is possible to hire help in Pakistan but he said this would not be suitable as they would not look after his mother properly.

11. Re-examined the sponsor said he would continue to support his mother if she returned to Pakistan, as he had before she came. However, the problem was not money but she needs someone with her. She is emotionally attached to them.

12. The appellant relied on the same bundle as was shown to Judge Griffith. She summarised the main documents in her determination. Judge Latter gave permission for further evidence to be adduced. The appellant has now provided medical evidence. Dr Maggie Budden, the appellant's family doctor, wrote on 10 November 2014 as follows:

> "This patient has been registered at South Oxford Health Centre since March 2013.
> She has several medical problems:
> In November 2013 she had a cardiovascular risk assessment which showed her to be at risk of a cardiovascular event. This was because she has high lipid levels, is overweight, inactive and is a heavy smoker.
> She was prescribed a statin to reduce her lipid levels and advised about weight loss and to stop smoking.
> She takes an antidepressant for longstanding depression, predating her arrival in the UK.
> She was recently diagnosed with mild to moderate arthritis of the left knee, confirmed by X ray. She has been prescribed painkillers for this and has

> been offered a steroid injection to the knee, but has not yet attended for this. Her X ray showed that her R knee and hip joints were normal.
> She also suffers from a skin rash diagnosed as psoriasis, for which she has been prescribed a range of creams, and an antihistamine to reduce itch."

13. A letter from the local pharmacy states the sponsor has bought Voltarol tablets/cream, Ibuprofen tablets/gel and Jointcare capsules over the counter for his mother. A letter from a family friend who works as a beautician and massage therapist confirms she used to give the appellant exercise and massage therapies regularly. The massage has stopped due to the appellant's psoriasis.

14. The representatives made submissions, which I have recorded and taken it o account. Ms Fisher provided a skeleton argument. At the end of the hearing I reserved my decision.

15. Having heard the evidence and submissions and having taken into account the fresh evidence, as well as the preserved findings of fact, I find that paragraph 317(i)(d) is not met and I dismiss the appeal under the rules. Whilst there are compassionate circumstances in this case, they do not reach the high threshold of "the most exceptional compassionate circumstances".

16. The appellant is approaching her 65th birthday and she has some health problems. However, I do not accept that these are severe or even moderately severe. Her main problem is depression, which appears to be longstanding and treated with antidepressants. I accept the uncertainty over her immigration status will be contributing to her anxiety. I accept she feels low. However, there is a paucity of medical evidence about this. As a result of the appeal and Judge's Latter's direction, there has been plenty of time to obtain evidence and it is reasonable to infer that everything which could have been obtained has been produced. In the circumstances, I find it significant that Dr Budden does not indicate that the appellant is on a high dose of medication or that she has required referral for therapy or to mental health specialists. I infer from this that the problem is relatively mild.

17. There is no medical support for the notion that the "confusion" observed by Judge Griffith is due to any cognitive deficit. There is no evidential basis for concluding that the appellant's confusion is symptomatic of an underlying medical condition. The fact she was able to given instructions for a detailed witness statement and the fact she teaches her grandchildren the Holy Qu'ran would also indicate she has no significant impairment of mental functioning beyond experiencing low mood.

18. I accept the appellant has mild to moderate arthritis in one knee. However, Dr Budden states that the other knee and her hips are unaffected. Again, treatment has been conservative. It appears the appellant told Judge Griffith that she was prescribed Naproxen for her high cholesterol. In fact, it is an anti-inflammatory used for pain relief. I accept

the appellant needs painkillers but I see no reason why she cannot walk reasonable distances. She has a walking stick. She insisted on showing me the dry skin on one of her shins and she appeared to balance on one leg to do so. I was told she takes the grandchildren to the park, albeit this is only a short walk away. Dr Budden implies in her letter that she has advised the appellant to take more exercise. She makes no reference to neck or back pain and it seems the appellant did not require further sessions with Oxford Sports Physio & Pilates following her assessment. I do not accept the appellant has a reasonable need for assistance with bathing, with taking her medication or with feeding.

19. I accept the appellant has high cholesterol for which she takes statins. I also accept the appellant has psoriasis which can also be alleviated with creams and antihistamines. The cardiovascular risk assessment would be a relatively routine matter undertaken by the appellant's GP. The appellant has been advised about reducing the risk. There is no evidential basis for the claim that the appellant is a “heart patient”.

20. I find the appellant's medical conditions are less severe than presented in the witness evidence. The appellant could receive adequate treatment in Pakistan as she has a close family friend who is a doctor. As before, her daughters could bring her the medication on a monthly basis. As said, I perceive the main issue to be the appellant's low mood for which medication is not going to be a complete answer. She is likely to feel lonely after living for five years in the household of the sponsor. The affidavits made by the sponsor’s sisters, Aneela and Shakeela Khawaja, are in drafted similar terms and lack detail. They simply state that, “unluckily”, they do not really have enough time or resources to look after the appellant. They do not supply their addresses, other than that they live in Lahore. I accept the appellant cannot live with them. However, it has not been clearly explained why they cannot visit the appellant more frequently. I have rejected the notion she needs “24-hour care”. It is unclear why the appellant could not see her grandchildren in Pakistan. I do not accept the appellant’s isolation would be as severe as presented.

21. I reject the notion that the sponsor would abandon his wife and children in the UK to return to live in Pakistan with his mother. The present circumstances do not make this necessary or even reasonable. I also reject the notion he would have to give up his job with the Royal Mail in order to spend long periods in Pakistan. The appellant's circumstances would not demand that of him.

22. I also reject the claim made in the statements that the appellant will be “destitute” on return. The sponsor made it clear he would continue to support his mother financially. She owns her property. The sponsor acknowledged that the main issue was emotional rather than financial. I find the appellant would be adequately provided for and she would be able to afford the treatment she needs. It is also likely that her problems could

be alleviated to a degree by hiring a home help to assist her with her chores and shopping.

23. As far as the condition of the house is concerned, there is no advance on the evidence as it was before Judge Griffith. Clear photographs have not been provided. I accept the house is old and that, if it has been left unoccupied for five years, it will be in need of repair and decoration. However, the sponsor told me it was the family house and I see no reason why the family could not pay for the necessary works to be done to make it comfortable for the appellant.

24. I accept that cultural expectations are in play and that the appellant would anticipate being looked after by her sons in her old age. However, I also take account of the fact they both decided to emigrate and therefore they must be taken to have given this some consideration. The sponsor is, I accept, taking responsibility for his mother by providing for her support. She has no other means of supporting herself in Pakistan. I accept he has done so since his father died. I also accept the appellant cannot be expected to live with her daughters in Pakistan for the reasons found by Judge Griffith. It is unfortunate there are no sons living in Pakistan with whom the appellant can live. However, the appellant cannot be alone in this predicament, in the sense there must be many thousands of widows living in Pakistan without sons with whom they can reside, and this matter only attracts limited weight in my overall assessment of the compassionate circumstances.

25. Ms Fisher stressed the importance of the position of women in Pakistan and the vulnerability the appellant would face as a lone woman without a male head of household. She drew support from paragraph 20 of *KC & Ors*. I accept that the position of women in general is a relevant matter in the overall assessment of the degree of sympathy evoked in a particular case. However, the appellant has not made any reference to this as a factor which led to her decision to seek leave to remain. She entered as a visitor and changed her mind due to her health problems and fear of isolation in Pakistan. I was not referred to any part of the evidence in which she has said she previously encountered problems living alone as a widow. I therefore regarded this submission as unduly speculative.

26. The impact on the sponsor’s family was a matter rightly considered by Judge Griffith. I accept the sponsor’s wife has responded well to the appellant's needs and wishes and that they will have become attached to one another. Equally the sponsor’s children have had their grandmother living with them for five years, which they must value greatly. The youngest child has only known life with grandmother at home. However, the fact the sponsor’s wife does not work and the claims made about the appellant's incapacity must logically mean the role she plays in the children’s day to day upbringing is limited. She plays with them after school and sometimes takes them to the park. She teaches them about their Pakistani heritage and educates them in their Muslim beliefs. These

matters are important. The appellant's abrupt removal from the household would be keenly felt by the children, the sponsor and the sponsor's wife. However, I do not regard these matters as taking the case to the high threshold required by the rule. The appellant will not entirely disappear from the children's lives. Contact will be maintained through the usual means of visits and telephone calls.

27. The issues considered and discussed above paint a sorry picture of the appellant living alone in Pakistan, in low mood and missing the sponsor and his family. I do not underestimate the importance of the decision or the distress caused to the appellant. However, I must apply the rules, which set a very high threshold. Taken cumulatively, the appellant's circumstances on return do not reach the most exceptional compassionate circumstances.

28. In the event I dismissed the appeal under the rules, Ms Fisher asked me to allow it on article 8 grounds. The rules now provide, in Appendix FM, for the application of article 8 in the admission of dependent relatives. However, Ms Fisher accepted the requisite rules could not be met in this case which, in the light of my finding that the appellant does not currently need care, would appear to be correct.

29. Following *R (on the application of) Nagre v SSHD* [2013] EWHC 720 (Admin) and the Upper Tribunal's decision in *Gulshan (Article 8 – new rules – correct approach)* [2013] UKUT 00640 (IAC), it is sometimes argued that appeals will only have to be considered by reference to domestic and European case law if there are arguably good grounds for granting leave to remain outside the rules because the outcome would have unjustifiably harsh consequences. Given the high test imposed by paragraph 317(i)(d) is not met it is conceptually difficult to see how this additional threshold for the engagement of article 8 can be overcome in this case. I raised this. Mr Jarvis did not pursue the point, perhaps because of the uncertainty over the application of the threshold requirement, and he was content to argue the article 8 case on its merits outside the rules by reference to domestic and Strasbourg jurisprudence. For similar reasons, it is difficult to see how an article 8 proportionality assessment could deliver a different result in a case such as this which does not meet a rule because the compassionate circumstances are not sufficiently severe. However, as I was requested to make a full article 8 assessment outside the rules, I shall do so.

30. Article 8 states as follows,

> 1. Everyone has the right to respect for his private and family life, his home his and correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

31. I approach my evaluation of the appellant's arguments in stages by reference to the five questions to be asked as set out in paragraph 17 of *Razgar* [2004] UKHL 27, an approach confirmed in paragraph 7 of *EB (Kosovo)*[2008] UKHL 41. The appellant must show that she currently enjoys protected rights and that there would be a significant interference with her human rights as a result of the decision. It is for the respondent to show that the interference is in accordance with the law and in pursuit of a legitimate aim. I must then assess whether the decision is necessary in a democratic society, including whether it is disproportionate to the legitimate aim identified. The burden of showing the decision is proportionate is on the respondent.

32. The first question to answer is whether the appellant currently enjoys family life or private life in the UK. The point was not taken against the appellant by Mr Jarvis. The appellant's case rests primarily on her having established that she enjoys family life in the UK which requires respect and which removing her to Pakistan would interfere with. The appellant lives with the sponsor, his wife and his children. She has done so since she arrived in the UK on 18 June 2009. She is genuinely dependent on the sponsor and would be if she were returned to Pakistan. Even though the sponsor has formed his own family unit with his wife and children, there continues to be a close emotional bond between him and his mother and the family currently live together as a single household. I am aware that there is a cultural dimension to this in that the appellant may expect to be looked after by her son in old age.

33. The question of whether family life exists between adult family members was considered in detail in the case of *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 00160 (IAC) (see paragraphs 50 to 62 in particular). The guidance given by the Upper Tribunal was approved by the Court of Appeal in paragraph 46 of *Gurung & Others* [2013] EWCA Civ 8. Most of the case law has been concerned with adult children living with their parents. The thrust of the guidance is that each case depends on its own facts.

34. In the present appeal I find the appellant and the sponsor currently enjoy family life which engages article 8. The key facts are that the appellant is both emotionally and financially dependent on the sponsor. This situation has not been contrived. The household and family unit now contains six people and all of them would be affected by the removal of the appellant at this stage. Although the sponsor is an adult, who has started his own family, it is artificial to separate this point from the overall picture. The particular model for this family is that the there are three generations living together.

35. I have reminded myself that, in *Beoku-Betts* [2008] UKHL 489, the House of Lords upheld an argument that family members enjoy a single family life and whether or not the removal of one would interfere

disproportionately with family life had to be looked at by reference to the family as a whole. The impact on all affected members of the family unit had to be considered. Baroness Hale explained that the alternative argument was to miss the central point about family life which is that the whole is greater than the sum of its individual parts. Ms Fisher also reminded me of the passage on the core values which article 8 protects in paragraph 18 of *Huang and Kashmiri* [2007] UKHL11.

36. It is therefore necessary to consider the remaining steps in the analysis of article 8. Removing the appellant would bring an abrupt end to the relationships she currently enjoys. She would lose day-to-day contact with the sponsor and his family and infrequent visits and contact over the telephone would be little substitute for the kind of quality of family life now enjoyed. Therefore there would a significant interference with the appellant's family life brought about by the decision. I bear in mind this should not be read as meaning the minimal level of severity required is a special or high one (see *AG (Eritrea)* [2007] EWCA Civ 801, paragraph 27).

37. I find that the appellant's removal would be lawful and in pursuit of a legitimate aim. The legitimate aim would be maintaining effective immigration controls. Removal is the usual legal consequence of not having an entitlement to remain. The appellant has not succeeded in showing that she is entitled to remain under the Immigration Rules. Removal is "necessary" because there is no other means of enforcing immigration control in these circumstances.

38. The key issue for determination is whether the decision is proportionate to the need to maintain immigration controls. My approach to this question is guided by the House of Lords decision in *Huang* (paragraph 20). The ultimate question for me is whether the refusal of leave to enter or remain, in circumstances where the life of the family (or private life) cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life (or private life) of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. A fair balance must be struck between the rights of the individual and the interests of the community. However, decisions taken pursuant to the lawful operation of immigration controls will be proportionate except in a small minority of exceptional cases, identifiable on a case by case basis (*Razgar,* paragraph 20). That does not mean there is a legal test of exceptionality or that any formula can be devised to ensure the expectation that only a small minority of cases will succeed in practice (*AG (Eritrea)).*

39. I have assessed the degree of interference in this case and balanced it against the public expectation that the Immigration Rules are applied. However, before conducting the balancing exercise, I must identify the best interests of the children. How this assessment is achieved in practice has been the subject of considerable guidance. In particular, I have kept in mind *ZH (Tanzania)* [2011] UKSC 4 and the summary of the applicable

legal principles set out in paragraph 10 of *Zoumbas v SSHD* [2013] UKSC 74.

40. The issue I was asked to consider is the impact of separation of the appellant from her three grandchildren in the UK, now aged 9, 7 and 5. If they could be consulted I am sure they would not hesitate to confirm that they would like their grandmother to remain living with them. I am equally sure that separating from them now would be very upsetting for the appellant. She became tearful when asked to contemplate this at the hearing.

41. However, on the facts of this case, I do not think it is possible to say that the children's best interests require the appellant to remain living with them in the UK. The children have two capable and loving parents from whom they are not going to be removed. The sponsor's wife does not go out to work so it is not even the case that the appellant's presence is required to provide child care after school. I cannot find that the children would suffer any significant harm or detriment if, like many or most children in the UK, they were to live apart from their grandmother and only saw her occasionally. The children's best interests are a primary consideration. However, in this case their best interests are not a weighty factor in the overall proportionality assessment.

42. The matters weighing in favour of the appellant have already been canvassed above in respect of paragraph 317(i)(d). There are compassionate circumstances, albeit not reaching the high threshold set by the rules. It could be added that the appellant has never overstayed her leave or breached the conditions of her stay. She entered as a visitor but the decision to seek to remain here permanently was only taken after her entry when the sponsor became concerned about her health and ability to live alone. Since September 2009 she has been seeking to establish permission to remain permanently. At least in terms of her maintenance and accommodation, there is no question of her needing recourse to public funds. The sponsor is willing and able to provide for his mother in that sense.

43. However, the fact the appellant does not meet the requirements of the rules, either in the shape of paragraph 317(i)(d) or the more onerous requirements of Appendix FM, has to be the starting-point. There is public interest in the rules being applied consistently in all cases and the House of Lords explained this in paragraph 16 of *Huang.* The public interest in maintaining the economic wellbeing of the UK is an important consideration. The government has decided the current economic conditions justify a tightening of immigration controls so as to reduce net immigration. The threshold for dependent parents has been set very high. I must give that weight even though I have no doubt the appellant would be financially supported and accommodated in the UK without recourse to public funds.

44. Since the coming into force of section 19 of the Immigration Act 2014, the new section 117B of the 2002 Act requires me to take into account the public interest factors set out in that section, which I have done. Subsection (1) speaks for itself and requires no further discussion. Subsections (2) and (3) are concerned with the implications of an appellant becoming a "burden on taxpayers", which is clearly a broader test than the test of whether she will have recourse to public funds, as defined. It is wide enough to cover reliance on public services such as NHS treatment and social services. The appellant registered with a GP practice in November 2013 and has benefited from consultations and prescriptions. She has had an X ray and has been offered a steroid injection for her knee. Ms Fisher sought to argue that her reliance on the NHS has been minimal to date. It does not appear to have been great. However, there is no evidence the appellant has private health insurance and her health problems are such that she is likely to have increased needs as time goes on and that is something I must take into account as indicating the public interest requires a refusal.

45. I recognise there would be significant interruption to the existing family ties in the form in which they have been established since the decision was made for the appellant to seek to remain here. Having to return to Pakistan will be extremely disappointing for the appellant and the sponsor for the reasons explained. AT least in the short term, it may affect the appellant detrimentally in terms of her health, although I see no reason to believe her life expectancy is as short as she implied in her evidence. It will be baffling and upsetting for the children if their grandmother has to leave after so long in the UK. I have sympathy for the parties. However, I am required to make a dispassionate judgment about whether respect for the family's right to family life, which is a qualified right, would be unjustifiably breached by this decision and, after balancing the respective interests of the parties, I am unable to say that the facts of this case show that the decision would amount to a disproportionate breach of fundamental human rights.

46. I dismiss the appeals on article 8 grounds.

NOTICE OF DECISION

The appeal is dismissed under the Immigration Rules.
The appeal is dismissed on human rights grounds.
No anonymity direction.

Signed Date 24 November 2014

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

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

Signed Date 24 November 2014

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal

ANNEX

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by the applicant against a decision made on 03 December 2013 refusing to grant her leave to remain as the dependent relative of her son, who is present and settled in the UK. In this determination I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Pakistan born in 1950. She came to the UK on 18 June 2009 with a visit visa valid from 01 June 2009 to 01 June 2014. On 18 December 2009 she applied for indefinite leave to remain as the dependent relative of her son, her sponsor. Her first application was refused because of formal irregularities and she re-applied on 31 August 2010. This application was refused on 12 September 2011 as invalid but notification of the decision was not sent until 25 July 2012. She made a further application for indefinite leave to remain on 08 May 2013 and it was agreed that it would be considered under para 317 of HC395 as in force before 09 July 2012.

3. However, the respondent was not satisfied that the applicant was able to show that she could meet the requirements of para 317(i) or (v). The respondent went on to consider the position under article 8 taking into account the provisions of para A277C, Appendix FM and para 276ADE. The application was refused on both immigration and human rights grounds.

4. The judge identified the outstanding issues in [5] of his decision as follows:

> "The respondent was not satisfied that the appellant was related to a relative present and settled in the United Kingdom (para 317 (i)); or that she had no other close relatives in her own country to whom she could turn to for financial support (para 317 (v)) or that she would be living alone outside the United kingdom in the most exceptional and compassionate circumstances (para 287 (v))."

However, the reference to para 287 taken from the decision letter was clearly erroneous as that paragraph relates to applications by spouses or civil partners. Further, there appears to be nothing in the decision letter to indicate that the respondent took any issue on the relationship with her sponsor. The two issues on which the application were refused were under para 317(i)(d), whether the applicant as a person under the age of 65 would be living alone outside the United Kingdom in the most exceptional and compassionate circumstances and under para 317 (v) whether she has no other close relatives in his own country to whom she could turn for support, these two issues being correctly identified in [41] of the decision.

5. The judge heard evidence from both the appellant and her sponsor. The documentary evidence included letters from a doctor and a physiotherapist and photographs of the appellant's home in Pakistan.

6. The judge accepted that the appellant was related to her sponsor as his parent and that he was present and settled in the UK although, as I have indicated, this never appears to have been in dispute. He found that the appellant was aged 64 at the date of hearing and had been living alone in Pakistan following the death of her husband and the marriage of her 2 daughters. She had been taking medication for depression and received occasional but irregular visits from her married daughters and financial support from her sponsor in the UK. He said that he had not heard much about her life in Pakistan. The photographs he had been shown were of poor quality and the appellant had had great difficulty in explaining what they depicted. The sponsor had explained that the photographs had been taken recently by his sister. The judge commented that it appeared that the property was suitable for the appellant to live in alone after her younger daughter left because that is what she had done but that it had not been lived in since 2009 when she came to the UK and therefore would have deteriorated. He went on to consider the appellant's medical condition saying that she was clearly in physical discomfort which she said was due to back pain. She appeared to be

confused throughout the hearing and had had difficulty in providing answers relevant to the questions put to her.

7. The judge was satisfied that the appellant suffered from depression and was taking medication for this when living in Pakistan and continued to do so after coming to the UK which explained why she had not seen a doctor until 2013. So far as her other ailments were concerned, he found that these had not been formally diagnosed: she did not have a blood test as advised to diagnose arthritis and had not had any treatment for her back pain apart from one visit to a physiotherapist. He accepted that it was a cultural norm in Pakistan that a married woman lived with her husband's family and would be principally responsible for her husband's parents and that care for a widow would normally be the responsibility of her sons and their families. He said that it was not reasonable to expect that the appellant's daughters would be in a position to support her financially let alone return to live with her to care for her.

8. The judge summarised his findings as follows:

> "39 The appellant has lived in the United Kingdom for 5 years and has formed a close relationship with [the sponsor] and his family, especially his children, I find that their enforced separation would have a significant adverse impact upon them all.
>
> 40 I am satisfied that if the appellant was to turn to Pakistan she would be living in the most exceptional compassionate circumstances, due to a combination of her age, physical and mental problems, lack of support of family and friends in Pakistan and living conditions together with the loss of contact with her family in the United Kingdom."

For these reasons the appeal was allowed under the Rules and the judge did not therefore need to consider article 8.

The Grounds and Submissions

9. In the respondent's grounds it is argued that the judge failed to make adequate findings on material matters and in particular it is argued that the appellant would not be living alone in Pakistan as she had two daughters there who could assist her and it would not be unreasonable for her to move closer to them if not with them. Her sponsor could continue to provide financial support and visit and provide emotional support by keeping in contact with her. It would not be unreasonable for the family to fix any issues with the appellant's accommodation or find new accommodation if it had deteriorated since she left in 2009.

10. The grounds further argue that the appellant would not be living alone in the most exceptional compassionate circumstances and that the Tribunal had failed to give adequate reasons why she could not continue her family life in the UK from Pakistan. Permission to appeal was granted by Designated Judge Coates who summarised the grounds as submitting that the First-tier judge had given inadequate reasons in support of his finding that the appellant would be living alone in the most compelling compassionate circumstances if she were to return and that her circumstances could not properly be regarded as exceptional.

11. In his submissions Mr Tufan adopted these grounds and submitted that the judge had failed properly to consider the high test of "most exceptional compassionate circumstances". In R v IAT ex parte Joseph [1988] Imm AR 329, Kennedy J had made it clear that the word "most" was not mere surplusage but added significantly to the other words appearing in the rule.

12. Mr Nasim submitted that the reasons challenge raised in the grounds was not made out. The judge had given clear reasons in [40] referring to the appellant's age, physical and mental problems, lack of family support and friends in Pakistan and living conditions and the loss of contact with her family in the UK. He had also been entitled to take into account that the appellant was approaching the threshold of 65 where different provisions would apply to her. The judge had made positive findings, so he submitted, which supported the conclusion reached at [40]. He submitted that the test in para 317(i)(d) should not be interpreted in an unrealistically high way and proper regard should be paid as in the IDIs to the cultural issues within Pakistani society about looking after parents.

Consideration of whether there is an error of law

13. The rules in issue in the present appeal are para 317 (i)(d) and (v). These require that the person seeking leave to enter:

> "(i) is related to a person present and settled in the United Kingdom in one of the following ways:
>
> (d) a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances
>
> …and
>
> (v) has no other close relatives in his own country to whom he could turn for financial support…"

14. In ex parte Joseph, Kennedy J said as follows:

> "…In ground 4 it is said:
>
> "The proper approach it is submitted is first to consider whether there are compassionate circumstances. Secondly to consider whether there are any aggravating features such as to make them exceptional. If, then looked at in the round, the position is in truth exceptional, then it is submitted that the word "most" is surplusage
>
> I cannot regard it as surplusage it seems to me to add significantly to the other words which appear in the rule."

15. I was referred in submissions to Macdonald 6th ed. para 11.140 which says that this provision is undoubtedly a high one but it must not be interpreted in an unrealistically high way. On the issue of having no close relatives to turn to I was referred to para 11.138 which refers to the IDIs and the Entry Clearance Guidance indicating that the ability of home based relatives to support is partly cultural and that a married daughter is unlikely to be able to provide support.

16. The primary challenge is whether the judge has provided adequate reasons for his finding that the appellant was able to meet the most exceptional compassionate circumstances test. In determining whether reasons are adequate, two questions can usefully be posed: do the alleged defects in the reasons create a genuine as opposed to a forensic doubt that significant issues in dispute may not have been properly addressed and secondly, even if they do, is there any real doubt whether the decision would have been the same if the reasons had been adequate: see Elias J in Atputharajah [2001] [Imm AR 566].

17. The judge has summarised his reasons in [40] where he sets out the factors which taken together satisfied him that the appellant would be living in the most exceptional compassionate circumstances. He took into account her age, 64 at the date of hearing but without more this is not a factor which meets the criterion. He referred to her physical and mental problems but this finding must be read in the light of the findings in [37] where he accepted that the appellant was in physical discomfort, suffering from depression and had been taking medication whilst living in Pakistan. However, she did not see a doctor in the UK until 2013 and relation to her other ailments these had not been formally diagnosed.

18. The judge then took into account the lack of support of family and friends in Pakistan and her living conditions. It was accepted that the sponsor is a British citizen with children aged nine, seven and five but there is no reason to believe that the sponsor's financial support would not be continued if the appellant returned to Pakistan. He accepted that the appellant would be living alone there but she received occasional, irregular visits from her married daughters. Although there was evidence that the appellant looked neglected when she came to the UK in 2009 and could not stand or cook properly [21], the judge made no findings on that aspect of the evidence. So far as the living conditions were concerned, photographs were produced of the appellant's home in Pakistan said to be taken two weeks prior to the hearing by the

elder sister but the judge commented in [36] that the photographs were of very poor quality and the appellant had great difficulty in explaining what they depicted.

19. The judge simply accepted that it had not been lived in since 2009 and would have deteriorated but that it would not be unreasonable for any problems to be fixed. Finally, the judge referred to loss of contact with family in the UK. Clearly returning to Pakistan would have this effect but it would be mitigated by the ability to maintain contact as would have been the position before 2009.

20. Looking at [40] in the context of the findings at [35]-[38], the judge was without doubt entitled to find that there were compassionate circumstances. However, it is much more doubtful whether those compassionate circumstances could be described as exceptional still less that they were the most exceptional. For this reason I am satisfied that the judge failed to give adequate reasons for his findings such as to raise a genuine doubt as to whether a significant issue in dispute, whether the appellant's circumstances could be categorized as the most exceptional compassionate circumstances has been properly considered.

21. I am not satisfied in the light of the judge's findings of fact that it can be said with any degree of confidence that if the right test had been applied that the decision would have been the same. I therefore find that the judge erred in law such that the decision should be set aside. During submissions Mr Tufan indicated that if I reached this decision the matter should remain in the Upper Tribunal for the decision to be re-made whereas Mr Nasim argued that the better course would be for it to be sent back to the First-tier Tribunal to be heard afresh. He indicated that he would be seeking to adduce further medical evidence.

22. I am not satisfied that there is any proper justification for the matter being remitted for a rehearing to the First-tier Tribunal. It will be retained in the Upper Tribunal where the decision will be re-made. The judge's findings in [35]-[39] should stand subject to them being supplemented or clarified by any further evidence.

23. I give permission for further evidence to be adduced under rule 15(2A). Any further witness statements or documentary evidence relating to the circumstances of the appellant and in particular her medical condition must be filed with the Tribunal no later than 14 days before the date of the resumed hearing, copies being served on the respondent. The appeal will be listed for a resumed hearing on the first available date 28 days after the date on which this decision is issued.

Signed Date 10 October 2014

Upper Tribunal Judge Latter