Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20315/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 18 April 2016	**On 20 April 2016**

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

Appellant

And

Sahibzadi Syed
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr Islam, instructed by Kingswood Solicitors
For the respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State has appealed against the decision of First-tier Tribunal Judge Phull promulgated 18.3.15, dismissing on immigration grounds but allowing on human rights grounds the claimant's appeal against the decision of the Secretary of State to refuse her application for leave to remain in the UK on the basis of private and family life outside the Immigration Rules and to remove her from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 13.2.15.

2. First-tier Tribunal Judge Colyer granted permission to appeal on 18.5.15.

3. Thus the matter came before me on 18.4.16 as an appeal in the Upper Tribunal.

Error of Law

4. I announced my error of law decision at the conclusion of the hearing before, reserving my reasons and the remaking of the decision in the appeal. For the reasons set out below I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Phull to be set aside and remade by dismissing the appeal.

5. In doing so, I have carefully taken into account all the evidence placed before me, together with Mr Islam's oral submissions. The claimant did not attend the appeal hearing and no further evidence was adduced before me. However, as requested by Mr Islam, I have carefully considered the skeleton argument of Mr Azmi, who represented the claimant at the First-tier Tribunal, all the documents in the claimant's bundle served under cover of letter dated 23.9.14, and the supplementary bundle served under cover of letter dated 9.2.15. In addition, Mr Islam handed in a letter from Oaks Medical Centre, dated 29.3.16, explaining that the claimant, who is 76 years of age, suffers from hypertension, hypothyrodism and arthritis. The letter asserts that she lives with her daughter and is too frail to travel. It is also stated that in the recent past her memory has been declining and she needs more care from her family in her daily living activities, including taking her medications.

6. I confirm that before making any of my findings of fact in the remaking of the appeal I have considered all the available evidence in the round, as a whole and in the context of the background information, the law and the Immigration Rules.

7. In summary, the claimant came to the UK as a family visitor in 2012. Before her leave expired she made application on 21.9.12 for leave to remain, claiming family life with relatives in the UK. Her application was refused in the decision dated 23.4.14. The Secretary of State considered that the claimant did not qualify for leave to remain under private or family life provisions of the Rules, and that there were no exceptional circumstances insufficiently recognised in the Rules to justify granting leave to remain outside the Rules under article 8 ECHR, on the basis that to remove her would be unjustifiably harsh.

8. As the refusal decision explains, the claimant cannot meet the requirements of the Immigration Rules for leave to remain on the basis of family life under Appendix FM. Having entered as a family visitor, with leave limited to a maximum period of 6 months, the claimant cannot switch to settlement on the basis of family life. The claimant was only granted entry clearance on the assertion that she intended to leave the UK at the completion of her family visit.

9. Neither can the claimant meet the requirements of paragraph 276ADE in respect of private life. She has not been in the UK for a continuous period of at least 20 years. Neither can she demonstrate that she has no ties, including social, cultural or family,

to Pakistan, which was the test applicable at the date of refusal decision. That test has now been replaced with the rather more stringent test requiring the claimant to demonstrate that there are very significant obstacles to her integration in Pakistan. The Secretary of State pointed out that she spent the vast majority of her life in Pakistan and must therefore retain cultural and social ties to Pakistan. Whilst some of her children reside in the UK, she still has children in Pakistan.

10. At §20 of the First-tier Tribunal decision, Judge Phull noted that it was accepted that the claimant could not meet requirements of the Immigration Rules to remain an adult dependent relative. Mr Islam suggested those Rules relate only to entry clearance cases. However, I reject his submission that they are irrelevant to the proper consideration of the claimant's case. Any assessment of article 8 ECHR has to be viewed through the prism of the Immigration Rules, which are the Secretary of State's proportionate response to private and family life rights under article 8.

11. As the grounds point out, there are very stringent requirements in the Immigration Rules for entry clearance as an adult dependent relative, under sections E-ECDR and E-ILRDR of Appendix FM. This claimant could not meet those requirements, not least because they apply only to entry clearance and those in the UK with existing valid leave to remain as an adult dependent relative, and not to other applications for leave to remain. However, the high threshold set out in those provisions, together with the specified evidence required under Appendix FM-SE are highly relevant to the assessment of what might be considered as compelling compassionate circumstances outside the Rules. The Rules are, of course, the Secretary of State's balanced response between private and family life claims and the public interest in immigration control. Those provisions require an applicant to demonstrate that as a result of age, illness or disability he or she requires long-term personal care to perform everyday tasks and that they are unable, even with the practical and financial help of the sponsor, to obtain the required level of care in their home country because either it is not available and there is no person in that country who can reasonably provide it, or it is not affordable. The specified evidence required to justify such a claim is also quite comprehensive including professional evidence.

12. It is clear on the facts of this case even if this claimant had existing leave to remain, she would not have met the adult dependent relative requirements on the limited evidence before the tribunal. For example, it was not demonstrated that she would be unable, with practical and financial help of other family members, both in the UK and in Pakistan, to obtain the required level of assistance. There was insufficient evidence to demonstrate that help was not available or not affordable.

13. It must be highly relevant to any article 8 proportionality assessment that the claimant could not have met such requirements either for leave to remain, or for entry clearance from Pakistan. However, the First-tier Tribunal Judge failed to take this very important factor into account.

14. I also observe that, as now emphasised in SS (Congo) [2015] EWCA Civ 387, Judge Phull should not have gone on to consider article 8 ECHR outside the Rules without first identifying compelling circumstances insufficiently recognised in the law or

Immigration Rules, which is the test endorsed in Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin), to justify granting leave to remain on the basis of private and/or family life under article 8 ECHR, on the basis that refusal to do so would be unjustifiably harsh. These are the same considerations the Secretary of State referred to in the refusal decision as 'exceptional circumstances.'

15. The Secretary of State found no such compelling circumstances, the First-tier Tribunal Judge did not identify any such, and I am satisfied on an assessment of all the evidence in the round that whilst one might well have sympathy with the claimant and her family members as to her ill-health, advancing age, and limited personal resources, her circumstances cannot properly be described as compelling and insufficiently recognised in the Immigration Rules. If the claimant is in such difficult circumstances as would entitle her to entry clearance as an adult dependent relative, she could return to Pakistan to make such an application. As stated above, the evidence to justify granting such an application is not present, even though there is medical evidence including a rather brief psychiatric report suggesting that Mrs Syed has moderate to severe vascular dementia and secondary depressive illness, with a poor prognosis. It is not really relevant that her medical treatment has been privately funded in the UK, as such financial support can be provided to her in Pakistan. There is no evidence that appropriate medical treatment and care support is not available in Pakistan, as the Secretary of State has pointed out, referring to the country of origin report for Pakistan, which states that adequate basic non-emergency medical care is available in major Pakistani cities and thus she can access treatment in her home country.

16. I find that the First-tier Tribunal Judge has confused the level of care and treatment the claimant is receiving in the UK with what she is entitled to expect if returned to Pakistan. Such statements as the judge made at §36, "I find that even if practical care could be purchased, the appellant would not receive the same level of emotional support from the carers as she does from Mrs Shah," are unsustainable as they misunderstand or misconstrue article 8 private or family life rights. The conclusion in that paragraph that removing the claimant from the "stable practical care and emotional support she receives in the UK would result in a breach of her article 8 rights," is also unsustainable and an error of law. The claimant is not entitled to remain in the UK because that level of care or treatment is said to be not available in Pakistan. She has two daughters still living in Pakistan; that they have their own families and that there may be cultural norms requiring them to put their own families before the claimant's welfare does not render the claimant entitled to remain in the UK at the economic burden of the state.

17. In Razgar, R (on the Application of) v SSHD [2004] UKHL 27, Baroness Hale said:

> "Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under Article 3 but succeed under Article 8. There clearly must be a strong case before the Article is even engaged and then a fair balance must be struck under Article 8(2). In striking that balance, only the most compelling humanitarian considerations are likely to prevail over the legitimate aims of

immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacy of the health care available in the two countries. The question is whether removal to the foreign country will have a sufficiently adverse effect upon the applicant. Nor can the expelling state be required to assume a more favourable status in its own territory than the applicant is currently entitled to. The applicant remains to be treated as someone who is liable to expulsion, not as someone who is entitled to remain."

18. Similarly, in N v SSHD [2005] UKHL 31, Lord Hope stated, "… aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional."

1.1 More recently, In Akhalu (health claim: ECHR Article 8) Nigeria [2013] UKUT 00400 (IAC) the Upper Tribunal held:

"(1) MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 does not establish that a claimant is disqualified from accessing the protection of article 8 where an aspect of her claim is a difficulty or inability to access health care in her country of nationality unless, possibly, her private or family life has a bearing upon her prognosis. The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases.

(2) The consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal."

19. In GS (India) and Others v SSHD [2015] EWCA Civ 40 the Court of Appeal, upholding the Upper Tribunal, has held that foreign nationals may be removed from the United Kingdom even where, by reason of a lack of adequate healthcare in the destination state, their lives will be drastically shortened. Such action does not, save in the most exceptional case, infringe Article 3 or 8 ECHR. Laws LJ emphasised that the paradigm case of a breach of Article 3 is "an intentional act which constitutes torture or inhuman or degrading treatment or punishment". Where in any given case there is a risk of death caused by a naturally occurring illness combined with a

lack of sufficient resources to treat this adequately or effectively in the destination state, the paradigm is not satisfied.

20. In the circumstances, it is clear that the First-tier Tribunal applied the wrong test when considering the emotional and medical needs and circumstances of the claimant and for that reason, independent of other errors, the decision is flawed and cannot stand. It cannot be said, whatever sympathy one might have for the claimant, that her medical, care and emotional needs amount to the most exceptional or compelling circumstances.

21. I am not satisfied that there are any sufficiently compelling circumstances on the facts of this case to entertain article 8 ECHR at all. However, even if an article 8 ECHR proportionality assessment was justified, the decision was flawed for the reasons set out above, by failing to bring into the assessment the equivalent requirements for leave to remain or entry clearance as an adult dependent relative, and that the claimant cannot meet paragraph 276ADE of the Immigration Rules.

22. The decision is also flawed for failure to adequately address section 117B of the 2002 Act. I accept that the judge has referenced that section and that immigration is in the public interest. However, in error the judge appears to have given credit to the claimant for not being a burden on the state. No such credit is available, even though it is in the public interest that a person seeking leave to remain is financially independent. Neither is the claimant entitled to credit against the public interest for not overstaying when she made her application for leave to remain. There is no credit available for complying with the law; doing no more than complying with the law does not strengthen the claimant's case or reduce the public interest in her removal. Further, the judge appears to have ignored the fact that under section 117B little weight is to be given to a person whose immigration status is precarious, as was that of this claimant.

23. In remaking the decision in the appeal I find that even if any article 8 Razgar stepped proportionality assessment was justified, which I do not accept, on the facts of this case the public interest in removal of the claimant is not outweighed by the claimant's circumstances, including all those matters set out in the claimant's documentary evidence, Mr Islam's submissions, and the skeleton argument urged upon me. On the facts of this case little weight can attach to the claimant's private life in the UK and whilst she may have a degree of family life with relatives in the UK, she also had family life with relatives in Pakistan. It is highly relevant that she cannot meet any of the requirements of the Immigration Rules, or even the standard of needs set out in the Rules for admitting or allowing to stay an adult dependent relative. The claimant is not entitled to settle in the UK. She came to the UK as a family visitor with the avowed intention to leave after a short family visit. That her health has deteriorated through old age and related ailments does not render her removal disproportionate when care is available for her in Pakistan, even if it is at a lower or less adequate level than she is presently receiving in the UK. Article 8 does not guarantee a level of personal care.

24. In all the circumstances, taking all of the evidence together as a whole, in the round, and bearing in mind that it is for the Secretary of State to demonstrate that the decision is proportionate, I find that the decision was entirely justified and proportionate and not disproportionate to the claimant's article 8 ECHR rights. It follows that the decision of the First-tier Tribunal must be set aside for error of law and remade by dismissing the appeal.

Conclusions:

25. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on immigration and human rights grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated