IAC-AH-KEW/SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17094/2013

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham	**Decision & Reasons Promulgated**
On 21st January 2016	**On 19th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR SULTAN ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation:
For the Appellant: Mr T Mahmood (Counsel)
For the Respondent: Mr D Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge H Narayan, promulgated on 14th January 2015, following a hearing at Stoke-on-Trent on 5th January 2015. In the determination, the judge allowed the appeal of Mr Sultan Ali, whereupon the Respondent Entry Clearance Officer, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 1st January 1938. He appealed against the decision of the Respondent dated 30th July 2013, refusing his application for entry clearance as an adult dependent relative under Appendix FM of HC 395.

The Appellant's Claim

3. The Appellant's claim is that he is unable currently to care for himself because of his age. His previous application was refused on 13th October 2004. His current Sponsors are Sadia Khan, who is a British citizen, and his niece. He has his own house in Pakistan. However, he has no close relatives left in Pakistan. He has a brother, who is the Sponsor's father, and the Sponsor supported him on a regular basis. His neighbours also helped him with food and washing, but have now refused to do so. The Sponsor has permanent employment in the UK and full details are given of this and the family is financially sound.

The Judge's Findings

4. At the hearing before Judge Narayan, evidence was heard that the Appellant was not married and he was the Sponsor's father's brother. The only relatives he had were his brother, the Sponsor's father, and the Appellant had a sister who lived in the UK. The Sponsor said that she last visited the Appellant in 2011 on a six week visit. She speaks to the Appellant on a regular basis, however. Her father, the Appellant's brother, visited for three to six months and a neighbour, Mr Younas, would care for the Appellant in his father's absence. However, in December 2013, Mr Younas said he could not care for the Appellant anymore as he had other family commitments. In February 2014 also, the Sponsor's father, having returned from Pakistan to the United Kingdom, suffered a heart attack, and he could not now return back to Pakistan in his current condition.

5. In these circumstances the judge heard submissions that there was no specialist care for the Appellant in Pakistan and a Union Council's letter dated 8th April 2013 from Dhangri Bala confirms that the Appellant cannot live alone and needs looking after.

6. The judge found as a fact that the Appellant did have a family life with his brother, Mr M Khan, "as there is undoubtedly evidence of dependency between the two brothers" and this is demonstrated by "the number of times and the duration of times the Appellant's brother visits and stays with him in Pakistan to care for him" (paragraph 26). The judge went on to hold that the decision of the Respondent was "not proportionate in all the circumstances of this case" (paragraph 29).

7. However, the judge then dealt with the Section 117 public interest consideration by observing that,

> "I come to the conclusion that because although I accept as set out in Section 117 of the new Act, that is relevant to Article 8 and the right to family life, I find that in this particular case, this Appellant's circumstances

> are such that there is no-one who can support him in terms of his physical and mental frailties apart from his family who are all British citizens ..." (paragraph 29).

The appeal was dismissed under the Immigration Rules. However the appeal was allowed under human rights grounds.

Grounds of Application

8. The grounds of application state that the judge failed to give proper consideration to the Section 117A(2) consideration that in any analysis of Article 8 rights, the public interest in favour of immigration control must be fully evaluated. This is because the maintenance of effective immigration controls is a weighty factor even where a person's presence in the United Kingdom causes no immediately ascertainable "micro" detriment, for example where a person is unlikely to claim upon public funds. The judge had only made a cursory reference to the Section 117 consideration. Second, the judge also did not refer to the five step approach in **Razgar**.

9. On 23rd February 2015, permission to appeal was granted. It was observed that although the judge did not consider the five step approach in **Razgar**, it was clear that the considerations therein were applied here. However, the judge did not consider the possibility of care of the Appellant to be undertaken by paid carers within a clinical environment in Pakistan. The judge also failed to consider the public interest in the nature and cost in relation to care provided by the NHS if the Appellant were to come to this country.

The Hearing

10. At the hearing before me Mr Mills, appearing on behalf of the Respondent Entry Clearance Officer, submitted that the judge had dismissed the appeal under the Immigration Rules (see paragraphs 24 to 25) because the Appellant had a relative looking after him. However, the judge then went on to allow the appeal under Article 8 and this was wrong for the following three reasons.

11. First, the judge did not consider the human rights position under Article 8 as at the date of the decision, but went on to consider it as at the date of the hearing, by which time the relative, Mr M Khan, who had been looking after the Appellant in Pakistan, had left, and returned to England, and was unlikely to return because of a heart attack that he suffered here. However, the case law now made it clear that as with the Immigration Rules, so also with human rights agreements, both need to be considered as at the date of the decision, rather than at the date of the hearing. This was therefore an error of law.

12. Second, under Article 8, the judge was bound to consider Section 117B, the full structure of the public interest consideration and the judge here has simply made a passing reference to that provision without having done so. This is clear from what the judge said at paragraph 29. The

reality is that the case of **FK and OK (Botswana) [2013] EWCA 328** makes it quite clear that proper consideration is required.

13. Third, it is a feature of this appeal that the Appellant is indeed of medical care. In fact, the judge observes that the evidence is that there is no specialist medical care in Pakistan (see paragraph 14). If that is the case, then the question is bound to arise about the Appellant's recourse to medical health facilities in the UK. The judge has not engaged with this question. The case of **FK and OK (Botswana) [2013] EWCA 328** directly addresses this point. As a matter of a public interest consideration this feature has to be considered by the judge. Mr Mills submitted that I should set aside the decision and reconsider either remaking it or remitting it back to the First-tier Tribunal.

14. For his part, Mr Mahmood submitted that there was no material error of law. The judge had not allowed the appeal under the Immigration Rules. He had done so under Article 8. He had referred at paragraph 29 to the Section 117 provision of the new Act. It is not as if he was oblivious to it. He was fully aware of it and took it into account. The Appellant's brother, M Khan, was now no longer providing care for the Appellant. In these circumstances, the judge was right to hold that the claim was made out under Article 8. The Appellant's brother was now in the UK. That is where their family life would be enjoyed. The judge was clear that, "I find that in all the circumstances of this case, that this Appellant does have a family life with at the very least his brother" (paragraph 26).

15. In reply, Mr Mills submitted that the Section 117B consideration requires the judge to have regard to the recourse to public funds by way of seeking medical treatment on the NHS in this country. The judge had not done so.

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

17. First, and most importantly, Section 117A(2) requires that in considering the public interest question the court or Tribunal must have regard to what is set out in Section 117B. This principally includes, not just the maintenance of effective immigration controls, but also the burden on taxpayers, the ability to integrate into society in circumstances where this Appellant does not speak English, and the interests of the economic wellbeing of the United Kingdom. In **Dube [2015] UKUT 90**, the Tribunal made it clear that this required a structured approach to the question, whereas it was unnecessary to expressly draw attention to Section 117 itself, nevertheless the substance of the considerations must be addressed. The judge has not done so here. There is, for example, evidence that the Appellant, who states that there is no specialist care for him in Pakistan, has the support of his brother, M Khan, and his Sponsor, Sadia Khan and his niece. They, however, have given no evidence, and

have provided no proof, of their ability to provide paid for care for the Appellant on the National Health Service.

18. Second, the judge has indeed considered the human rights situation as at the date of the hearing, rather than date of the decision. This, too, needs revisiting.

Remaking the Decision

19. I remake the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. Under Practice Statement 7.2(b), the nature or extent of any judicial fact-finding may be such that it is necessary, having regard to the overriding objective, to remit the case to the First-tier Tribunal. I so hold in this case.

Notice of Decision

20. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge H Narayan, under Practice Statement 7.2(b) so that proper findings can be made, on the evidence brought before the Tribunal, in relation to the extent to which the Appellant needs medical treatment, and the extent to which he is likely to be a burden on the state were that to be the case. This will enable a decision to be made under Section 117B in the manner that it presently cannot be.

21. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 13th February 2016