Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/10908/2014**

IA/10913/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons Promulgated**
On 12th April 2017	**On 9th May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR ABU ZAR KHAN
(2) MRS ZARDA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr I Ali (Counsel)
For the Respondent: Mrs H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Hawden-Beal, promulgated on 18th September 2014, following a hearing at Birmingham Sheldon Court on 5th November 2014. In the determination, the judge dismissed the appeals of Mr Abu Zar Khan and his wife, Mrs Zarda Begum. The Appellants subsequently applied for, and were

granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are citizens of Pakistan. They are a husband and wife. They were born on 4th December 1926 and 1st January 1934 respectively. They appealed against the refusal of an application for indefinite leave to remain outside of the Immigration Rules under paragraphs 276ADE, 277C and Appendix FM of HC 395. The decisions appealed against are dated 10th February 2014. The essence of the Appellants' claim is that they are dependent upon their son, Mr Mashkoor Hussain, are in old age, and suffer from a series of medical conditions, such that they cannot return back to Pakistan, having originally arrived in this country as visitors with only temporary leave to remain in this country. The relevant facts and documentary material are set out in the determination under appeal and I need not repeat it here.

The Judge's Findings

3. The judge had regard to a medical report from Dr Qureshi of 18th August 2014, who was of the opinion that both Appellants required the ongoing support of the Sponsor and his family because of their ill-health. The judge concluded, however, that there were no arguable good grounds for granting leave outside the Rules because

> "The Appellants have not been given any firm or definitive diagnosis of their conditions. The first Appellant has symptoms which are suggestive of TIAs but does not suffer from the dizziness, slurred speech, inability to communicate or weakness and numbness on one side of the body as per Dr Qureshi's report. There had been no further investigations to confirm that he had suffered from the TIAs or does have a tachycardia. The second Appellant does have gross cognitive impairment but has not been actually diagnosed with vascular dementia. They are both on inhalers for asthma but they had those when in Pakistan." (paragraph 25)

4. The appeal was dismissed.

Grounds of Application

5. The grounds of application state that the judge should have considered Article 8 exceptionally outside the Immigration Rules and conducted a proportionality balancing exercise. This is because the Appellants are an elderly couple with the second Appellant aged 70 and the first Appellant aged 82. They are the parents of the Sponsor, Mr Mashkoor Hussain and although they have two daughters living in Pakistan, and one daughter living in the United Kingdom, it is their son who is in a position to look after them in their failing health, given their ages. On 3rd November 2014, the First-tier Tribunal determined that this was nothing more than a

disagreement with the findings of the judge. There were no compelling circumstances highlighted in this case.

6. However, on 20th February 2015, permission to appeal was granted on the basis that following **Singh [2015] EWCA Civ 74** and **Ganesbalan [2014] EWHC 2712**, there was an arguable case here. On 4th March 2015, a Rule 24 response was entered to the effect that the grounds amounted to a mere disagreement. The Appellants entered the UK on visit visas. It was perfectly open to them to return and obtain the appropriate entry clearance with required evidence as adult dependent relatives. Moreover, at paragraph 8 of the determination, the judge noted the previous Tribunal's findings, from which it was clear that the judge considered the medical evidence along with the circumstances of this individual appeal, and there was specialist nursing care in Pakistan. The desire not to receive nursing care in one's own country must be for good reason. None had been provided. The judge's determination was sustainable.

Submissions

7. At the hearing before me on 12th April 2017, the Appellant was represented by Mr Ali of Counsel, who handed up a helpful skeleton argument dated 12th April 2017, together with a supplementary witness statement from the Sponsor, Mashkool Hussain. In this supplementary statement, Mr Hussain highlighted the very poor memory and concentration levels of both his parents, the fact that they were on medication, the fact that he was the only son who could take full responsibility for his parents, the fact that his second sister lived 40 miles away from the family home in Pakistan, and the fact that the parents now had a family life in this country with their grandchildren, such that they needed close attention and care which only family could provide.

8. Mr Ali began by submitting that, although it was the case that the Appellants had entered the UK as visitors, the fact was that they had been in this country now for four years. He drew my attention to the history of this case. After the decision of Judge Hawden-Beal, was promulgated on 18th September 2014, there had been a grant of permission to appeal by UTJ Bruce on 20th February 2015, which led to the matter being heard in the Upper Tribunal by DUTJ McCarthy, with the decision being promulgated on 22nd October 2015. Here found there to be an error of law. However, he could not proceed further with the substantive hearing of the appeal because the interpreter could speak neither Urdu nor English, and DUTJ McCarthy himself stated that he could not take matters any further with that interpreter. Before leaving the appeal he made it known that the evidence of the Appellants in relation to their health condition and their age would not be required and they will be excused from giving further evidence.

9. Unfortunately, when this matter went before IJ Andrew at Birmingham Sheldon Court on 17th June 2016, the judge took an unsympathetic view of the fact that the Appellants were not in attendance, but that was only

because DUTJ McCarthy had made it clear that they need not attend. What one was then left with was a letter from Dr Qureshi, the consultant psychiatrist, dated 12th May 2016. But with respect to this, the judge was of the view that Dr Qureshi had not had proper consultations with the Appellants, before giving his opinion. In short, both matters left a negative impression in the mind of IJ Andrew with the result of a refusal in the appeal.

10. However at the hearing itself, the Presenting Officer, Mr Proctor, was clear that the medical evidence could not be challenged. Judge Andrew, nevertheless, criticised Dr Qureshi's report (see paragraphs 14 to 20), in circumstances where Mr Proctor had accepted the report for what it said. Indeed at page 5 of his report, Dr Qureshi discloses the fact that he was in direct communication with the Appellant, "through repeated questioning ...". Insofar as the particular illnesses were concerned, Mr Ali submitted that, given that we were talking here about a 90 year old and a 83 year old, there would be no question of "pulling the wool over the court's eyes" and because there were bound to be age related illnesses with respect to Appellants of this age. Indeed, Judge Andrew accepts this (at paragraph 21 of the determination).

11. That left the question of whether the Appellants could turn to their daughters in Pakistan for assistance, but the judge took no account of the fact that they were in no position to provide the Appellants with the day-to-day care which was available to them in the UK.

12. Finally, there was no reporting of information by the Appellants from the authorities and this was directly relevant to the issue of Article 8. There was a letter from the Dudley Group NHS Foundation Trust dated 20th September 2013 which stated, "you have been identified as possibly being an overseas visitor ...", before going on to state that, "many thanks for providing me with the documents that were promised to me during our telephone communication ...". Mr Ali submitted that what this was in relation to was the Appellants making it quite clear that they were overseas visitors and may have to pay for their own treatment in this country. In these circumstances, the extent of the public interest here was not the same as would be the case in any other removal case. There was no overstaying by them. They came as visitors. They then applied to remain here well within the duration of their existing leave. There had been no illegal offending. There was no criminality. Sufficient weight should now be attached to the fact that they have established themselves in this country with five grandchildren living with them, and being in receipt of gender-related care.

13. For her part, Mrs Aboni relied upon the Rule 24 response. She submitted that adequate reasons were given by the judge for rejecting the medical evidence. This was not from the GP. It was a psychiatrist's report from Dr Qureshi and it did not speak to that which a GP's report would speak to. The judge gave it limited weight as he was entitled to. It was also important to recognise that Dr Qureshi for his part recognised the

limitations that he was under because he asked for further medical enquiries to be undertaken.

14. Finally, whilst it was accepted that the Appellants had not been in the UK unlawfully, they had only managed to come to this country after their visit applications were rejected by Entry Clearance Officers overseas, and then they appealed in this country and succeeded at a hearing, expressly on the basis of the assurances that they had given, namely, to be making only a short family visit, before returning back to their country. However, less than six months into their time here they had applied to remain here permanently. Section 117B was not irrelevant in these circumstances to the proportionality and decision reached by the judge.

15. In reply, Mr Ali submitted that none of Dr Qureshi's reports indicate that he was working on the basis of inaccurate information. He is clear that the second Appellant, Mrs Begum, has "cognitive impairment". He also states that her condition is likely to deteriorate further in the next five years. He is clear that the first Appellant, Mr Khan, has clear signs of dementia. In these circumstances, if one has regard to paragraph 276ADE, it is clear that there are "very significant difficulties" in the Appellants returning back to Pakistan given their ill-health, and the chances of that worsening over the next five years. They had spent four years now in the bosom of their family and if they were uprooted now, this would have serious consequences for them.

No Error of Law

16. I am satisfied that the making of the decision by the judge did not involve 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, the judge has taken into account the "various reports of Dr Qureshi contained both within the Respondent's bundle, the Appellants' bundle and sent under cover of correspondence" (paragraph 14).

18. Second, the critical analysis that the judge undertakes of Dr Qureshi's reports is entirely well-founded. She states that there is no mention of whether or not Dr Qureshi and the Appellants speak the same language (paragraph 15); that Dr Qureshi did not have before him the benefit of any reports from the Appellants' GP (paragraph 16); and that Dr Qureshi himself is quite clear that "further investigations [are] to be made. There is nothing before me to indicate that any such investigations have been carried out" (paragraph 17).

19. Third, the judge does not reject out of hand Dr Qureshi's report at all but states that for the reasons that she has given "less weight" is to be placed upon this report. This is notwithstanding the judge accepting that "the Appellants are suffering from some age related problems". What the judge concludes, however, is that, "I am unable to accept they are as grave as has been suggested or that they require the amount of assistance suggested by the Sponsor" (paragraph 21).

20. Fourth, the judge was not satisfied that nursing or care home provisions to an acceptable paid assistance standard are not available in Pakistan (see paragraph 23). Finally, the judge did not ignore the "cultural aspects", but rather found that they should be taken into account and drew attention to **Dasgupta [2016] UKUT 00028** (see paragraph 26). She noted however the Appellants had lived in Pakistan for all their lives apart from a relatively short period of time spent in the UK and that they had daughters there (paragraph 25).

21. I am, of course, aware that Mr Ali has argued strenuously and most effectively on behalf of the Appellants. I also have the assistance of his well compiled skeleton argument. He draws attention to recent authorities on Article 8. These, however, do not assist the Appellants. In fact, they point the other way. He draws attention to how the recent case of **Treebhawon (NIAA 2002 Part 5A – compelling circumstances test) [2107] UKUT 00013 (IAC)**, saw a presidential panel explain (at paragraph 45) that:

> "Certain observations are a posit. First, (and importantly in the present context), Parliament has chosen to devise distinct regimes for foreign offenders (on the one hand) and illegal entrants and unlawful overstayers (on the other). Moreover, the public interest engaged in the deportation of foreign national offenders is a variable, depending upon the individual case. Second, the recently promulgated decision of this Chamber in **Kaur (children's best interests/public interest interfaces) [2017] UKUT 00014 (IAC)** contains, at [22]–[24], a thesis on the words 'little weight' and the notional sliding scale which they entail. Core reasons that this produces the result that in some cases a private life developed during a period of unlawful or precarious leave in the United Kingdom may qualify for virtually no weight, whereas in others the quantity of weight to the attributed may verge on the notionally moderate where the assessment is that of a particular case, with its individual traits and circumstances, belongs to the upper end of the 'little weight' spectrum. Reconsidered this complementary to, and not in conflict with, the 'little weight flexibility' approach as passed in **Rhuppiah**."

22. Given that there is sliding scale, however, the proper distinction here is not between a lawful entrant and an unlawful entrant, but between a person who entered on a visitor's visa, with the express intention of remaining only for a temporary period, having first satisfied the Immigration Tribunal that that was indeed the true intention, and then seeking to remain here within the six months of arrival in this country, on the basis of ill-health, on which they had given assurances prior to coming to this country. That must shift the balance of considerations against the Appellant in favour of immigration control, which is the public interest specified in Section 117B. For these reasons, the Appellants cannot succeed under Article 8 notwithstanding the four years of family life that they have developed with their son and five grandchildren. The appropriate course of action is for them to return back to Pakistan and to

make an application to re-enter as dependent relatives, for which express provision is made under the Immigration Rules.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity direction is made.

This appeal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Juss 8th May 2017