Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19848/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd April 2018	**On 17th April 2018**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

AMMNA BEGUM
(ANONYMITY ORDER NOT MADE)
Respondent

Representation:
For the Appellant: Ms N Bustani, of Counsel, instructed by Wimbledon Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Pakistan born on 1st January 1944. She applied on the 14th April 2016 for entry clearance to come to the UK as an adult dependent relative of her son, Mr Muhammad Akbar. On 15th July 2016 the application was refused. Her appeal against the

© CROWN COPYRIGHT 2018

decision was allowed by First-tier Tribunal Judge Hussain in a determination promulgated on the 24th August 2017.

2. Permission to appeal was granted to the Secretary of State by First-tier Tribunal Judge JM Holmes on 20th October 2017 on the basis that it was arguable that the First-tier judge had erred in law in failing to consider the matter as a human rights appeal under Article 8 ECHR rather than an appeal under the Immigration Rules. There was also a failure to look at the prospect of care by her daughter in Pakistan or from the Ahmadi community there in the context of the sponsor and his sister having travelled to Pakistan which undermined any contention of a fear of persecution in that country.

3. The matter came before Dr HH Storey sitting as an Upper Tribunal Judge who decided, in a decision promulgated on 23rd January 2018, that the First-tier Tribunal had erred in law and set aside the decision. He preserved the findings of fact of the First-tier Tribunal Judge. The decision of Dr Storey is appended at Annex A of this decision.

4. The matter came before me pursuant to a transfer order to re-make the appeal. In accordance with the decision of Dr Storey the claimant needs to address compliance with the Immigration Rules under Appendix FM for adult dependents including compliance with Appendix FM-SE. At the beginning of the hearing however Ms Everett stated for the Secretary of State that compliance with Appendix FM-SE was accepted so evidence and submissions on this issue were not required. At the end of hearing I reserved my decision.

Evidence & Submissions – Re-making

5. Mr Muhammad Akbar, sponsor and son of the claimant, attended the Upper Tribunal and adopted his two statements and confirmed that they were true to the best of his knowledge and belief. In summary in his statements and oral evidence Mr Akbar says that he is the claimant’s only son, and is head of the household since his father passed away. He fled to the UK due to problems caused by his Ahmadi faith in 2000 and was granted refugee status in 2005. He obtained British citizenship, and in 2012 he married in Pakistan.

6. From 2012 his wife and sister Nazia Kausar, who was also a widow, cared for his mother as she was too ill to look after herself, until she moved to Germany as a refugee in 2015. He did not feel safe being in Pakistan for more than a short time, but visited 4 or 5 times between 2012 and April 2016 when he applied for entry clearance for his wife and mother to join him in the UK. He kept in almost daily contact with the family by Skype. Initially both applications were refused but then the decision was changed with respect to his wife. He had provided DNA evidence showing he is the son of the claimant. He contends that the claimant needs everyday support of a female family member to care for her. He cannot return to Pakistan as he does not feel safe

there for long periods due to his Ahmadi faith; he has work in the UK as an Uber private hire driver; he and his son are British citizens; his son has started nursery in the UK; and he cannot afford to fly out frequently to see the claimant. The claimant has been cared for by his niece since his wife came to the UK, who is normally resident in Ghana, and who is taking a break from her studies in Ghana but who cannot remained permanently.

7. The sponsor states that he is of the very strong opinion that his mother needs a full time female carer. He has considered old peoples' homes in Islamabad, Karachi and Lahore but the cost is too high and he believes that his mother would be miserable there as she would not be cared for by a relative and would not have access to the Ahmadiyya community. There would also be issues because as an Ahmadi she would not be allowed to share cooking utensils or food with orthodox Muslims and this treatment would be unbearable for his mother. He has tried to find a female carer from within the Ahmadi community in Pakistan but he has only been able to obtain a person who will provide help with cooking, washing clothes and cleaning a few hours a day as very few women are without family in Pakistan and those with family do not want to spend 24 hours away from their family. In any case the claimant would not be happy with intimate things such as bathing, helping to the toilet and medications being given by a non-family member. Even if such a person were found, which has not happened yet, the claimant would not be happy with such a non-family arrangement. He is in touch with the claimant's doctors and is aware that she suffers from depression; high blood pressure; and has a need for a further hernia operation but cannot be persuaded to have this at present as the last one was painful.

8. The entire family bar the claimant have now left Pakistan due to religious persecution. If the claimant is not allowed to come to the UK the only solution is for his wife to return to Pakistan which would mean he was separated from his wife and son which would be very sad for him as he has already sacrificed five years of family life with them staying with the claimant in Pakistan.

9. Kashaf Gull attended the Upper Tribunal and gave evidence, adopted her statement as her evidence and confirming its truthfulness. In her statement and oral evidence she says, in summary, as follows. She married the claimant's son, Mr Muhammad Akbar in April 2012. After their marriage she went to live in the family home in Pakistan with the claimant and her husband's sister Nazia Kausar. The claimant was mostly not able to do household chores so she would help with these. The claimant's health fluctuated: she suffered from high blood pressure, depression and had some operations. When she came to the UK as a spouse her sister-in-law Shabana Kausar went back to be with her mother for a month, and then her husband's niece, who normally lives in Ghana went to look after the claimant. The claimant needs care due to her medical needs from her family, the sponsor and

herself, as she is old and unwell and there is no one left who can remain with her in Pakistan. Her husband's niece cannot postpone her studies and stay with the claimant for ever, and attempts to find someone have been unsuccessful and in any case the claimant would not be comfortable and trust a non-family member. The claimant is becoming very depressed as she dwells on her separation from her son and wants to talk to him; and this also affects her blood pressure.

10. Ms Everett confirmed that whilst compliance with E-ECDR 2.4 of Appendix FM was not in dispute there was a lack of specific medical evidence regarding the claimant. There was not the type of evidence that had been available in the Britcits v SSHD [2017] EWCA Civ 368 case. There was also not the evidence that the claimant could not obtain the relevant care in Pakistan. Some enquiries had been made but it was firmly in the sponsors' minds that they wished to care and that this was the cultural norm. There was not evidence from the claimant, or an issue of dementia which meant that in the end she would not get used to a non-family member carer. It seemed unlikely that no one in Rabwah, which is a city, within the Ahmadi community would be willing to take on this work and provide 24 hour care. Whilst it was the genuine belief of the sponsor and his wife that they would provide the best care the Immigration Rules did not provide a right for this "perfect" solution if a reasonable lesser arrangement was available.

11. Ms Bustani relied upon her skeleton argument. She reminded the Tribunal that the positive credibility findings made by the First-tier Tribunal were preserved, and of the preserved factual findings of the First-tier Tribunal, and that the remaining issue was simply whether the care that the claimant needs is not reasonably available to her in Pakistan because there is no person who can reasonably provide it.

12. Ms Bustani drew attention to the Court of Appeal decision in Britcits and that: "the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. " and further that considerations when looking at reasonableness include "emotional and psychological requirements verified by expert medical evidence". What is reasonable is ultimately an objective test. She also cited Huang v SSHD [2007] 2 AC 167 and Kugathas v SSHD [2003] EWCA Civ 31 which both considered that factors relevant to whether separation of family members was an Article 8 ECHR breach included "the prevailing cultural tradition and conditions in the country of origin".

13. Ms Bustani submitted that it was the evidence of the sponsor that it would be difficult to find a full time Ahmadi carer who could be trusted with the claimant's care, and in any case his belief is that a non-family member would not be acceptable to the claimant and so

there was no option reasonably available in Pakistan. This claimant has been a widow for 20 years and has never lived an independent life away from her children and daughter-in-law and granddaughter. Cultural norms meant that non-family members were not acceptable carers for intimate care matters which were amongst those required by the claimant; and further breaching those cultural norms would exacerbate the claimant's depression. She accepted that the Immigration Rule created a high threshold but said on these particular facts where the family had demonstrated that only their care would do via their behaviour over a long period of time it was met. In all the circumstances it is clear that there is no reasonable care in Pakistan.

Conclusions – Re-making

14. The key parts of the Immigration Rules at Appendix FM are as follows, although it is accepted by the Secretary of State that E-ECDR 2.4 is met:

> E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.
>
> E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because-
>
> (a) it is not available and there is no person in that country who can reasonably provide it; or
>
> (b) it is not affordable.

15. The First-tier Tribunal found that the claimant's son and sponsor was a witness of truth, and his evidence is that the current non-relative carer could do no more than cook and clean for the appellant in the day. The claimant needed care with everyday tasks such as cooking, washing, cleaning, and sometimes bathing and going to the toilet when she is unwell. The First-tier Tribunal found that she had always been cared for by a close relative: firstly, by her daughter-in-law until she got entry clearance as a spouse; and then her daughter and finally her granddaughter who had to travel to Pakistan for a period of time to do this. The First-tier Tribunal Judge found that the appellant's daughter and the UK sponsor have been recognised refugees from Pakistan due to their Ahmadi faith; and that there is no institutionalised system of care in Pakistan, and things were left to the individual family to provide for elderly relatives.

16. The Court of Appeal in Britcits emphasised that the test at paragraph E-ECDR 2.5 was one which required an objective assessment as to whether the required care can reasonably be provided to the required

level in Pakistan. The provision of care must be reasonable both from the perspective of the provider and the perspective of the claimant. These issues are capable of embracing psychological and emotional requirements verified by appropriate evidence, see paragraph 76 of the decision. In this connection I note that medical evidence from Dr Muhammad Faisal Raja was seen by the entry clearance officer [first paragraph of the second page of the refusal] and that it is not disputed that this supported what was said in the application representations dated 3rd May 2016 from Wimbledon Solicitors that the claimant suffers from hypertension and depressive illness, which is also the credible evidence of the sponsor and his wife.

17. It is accepted by the respondent that the claimant is an elderly unwell widow now aged 74 years who requires long-term personal care to perform everyday tasks. I find on the evidence before me and the medical evidence seen by the entry clearance officer that she has hypertension, depression and hernias requiring repair, and that as a result she needs cooking, cleaning, washing, and fairly regularly also with personal care in terms of bathing, helping to the toilet and help with dressing.

18. I am satisfied that the sponsor and his wife are witnesses of truth, as was the First-tier Tribunal, and that they have sought through word of mouth in the Ahmadi community in Rebwah for a female person willing to live in 24 hours a day with the claimant but not been successful in this quest. I note that the period that such a person has been sought is now a year: this being the period since the sponsor’s wife came to the UK and when it was necessary to prevail on the claimant’s granddaughter to take a “gap year” from her studies in Ghana to provide this care. Whilst it is obviously not impossible that such a person might be found if an indefinite search was conducted there is sense in the sponsor’s evidence that the majority of women likely to take such work in Pakistan also live and provide care for their own family and thus are not able to provide live in 24 hour care to the claimant particularly given that culturally care of the elderly within a family is the norm so demand for such a service is not widespread. In all the circumstances I therefore find that this option has been shown not be reasonably available to the claimant.

19. The sponsor has also investigated old peoples’ care homes in the major cities in Pakistan. I accept his evidence that these are not reasonable options as they are not Ahmadi institutions in Rebwah, in the context of the claimant’s Ahmadi faith and community membership, and the likely antipathy towards her or lack of ability to follow her faith in such an institution. In coming to this conclusion, I have taken note of what is said in the respondent’s public document Country of Origin Information and Guidance Report on Pakistan and Ahmadis dated May 2016 which at paragraph 4.1.2 describes the community as possibly the most persecuted religious group in Pakistan. The city of Rebwah is however a relatively safe space where

adherents identity is not taboo and where Ahmadis have communal facilities such as schools and hospitals, see paragraphs 5.2.4 & 5 and 6.1.4. Ahmadi religion is associated with certain types of dress, see paragraphs 6.2.1 and 6.3.1 making Ahmadi women recognisable once they step outside their home. The country guidance decision in MN and others (Ahmadis – country conditions – risk) Pakistan CG [2012] UKUT 00389 sets out what is termed the anti Ahmadi religious legislation in the Pakistani Criminal Code which prevents various public manifestations of Ahmadi faith, although makes it clear that faith can be conducted privately or with other Ahmadis without infringing the law.

20. I note that following the guidance of the Court of Appeal in Britcits provision of care must be reasonable for the provider as well as the perspective claimant. I do not find that it is reasonable to expect the claimant's granddaughter, Rukhsana, who is studying with her family in Ghana (see documents at pages 83 to 85 of the claimant's bundle) to spend further time in Pakistan away from her studies caring for the claimant; nor for the claimant's two daughters (Shabana and Rehana) who are German citizens or her daughter Nazia who is an asylum seeker in Germany to do this either. They would face at least prejudice and discrimination as Ahmadis in Pakistan and have their own family commitments in other countries. I also do not find it reasonable to expect the sponsor to be separated from his wife and child, as he was for the period of five years from 2012 to 2017, so that his wife can care for the claimant. The thought of this clearly distressed him when he gave oral evidence, and it is in the best interests of his young child to be brought up by both parents. I also accept his evidence that he himself would not feel safe as an Ahmadi being in Pakistan for more than a short period of time, and this is consistent with his history of being granted refugee status prior to holding British citizenship.

21. In these circumstances I find that it is not simply the wish of the sponsor to provide the necessary long term personal care to the claimant but it is also the case that it is not possible for her to obtain this care in Pakistan as it is not available as there is no one who can reasonably provide it given her lack of family in Pakistan due to their migration abroad; the lack of women in her community who are willing to take on this work; and her Ahmadi religious faith.

22. I find the provisions for adult dependent relatives under the Immigration Rules have been met, and that there is therefore no public interest in the applicant being refused entry clearance. I find that the claimant has a family life relationship with her son (the sponsor) and his family in the UK with more than normal emotional and financial dependency between them, and that the interference with this family life relationship, which refusal of entry clearance represents, is a disproportionate interference with the claimant and sponsor's right to respect for their family life.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. The decision of the First-tier Tribunal allowing the appeal was set aside.

3. I re-make the decision in the appeal by allowing it on human rights grounds.

Signed: Fiona Lindsley Date: 9th April 2018

Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

1. The appellant (hereafter the Entry Clearance Officer or ECO) brings a challenge with permission to the decision of Judge Hussain of the First-tier Tribunal (FtT) allowing on Article 8 grounds the appeal of the respondent (hereafter the claimant) against the decision made by the ECO on 15 July 2016 refusing to grant her entry clearance as a dependent relative of her son Muhammad Akbar. The claimant is now aged 73. The ECO's reasons for refusing her application included the following points:

   > "... you have provided no evidence that with the continued financial support of your sponsor that the care you require would be unaffordable in Pakistan. I am not satisfied, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where you are living. I therefore refuse your application under paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules. (E.ECDR.2.5).
   >
   > ... under Article 8 ... no satisfactory reason has been put forward as to why the sponsor in the UK is unable to travel to Pakistan to be with you. I am therefore satisfied the decision is justified by the need to maintain an effective immigration and border control".

2. The judge heard evidence from the sponsor, whom he found to be a "witness of truth" (paragraph 36).

3. The judge referred to the guidance given by the Court of Appeal in **Britcits v SSHD [2017] EWCA Civ 368**, paragraph 15 in particular:

   > "... as is apparent from the Rules and the Guidance, the focus is on whether the care required by the ADR applicant can be 'reasonably' provided and to 'the required level' in their home country. As Mr Sheldon confirmed in his oral submissions, the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course to be objectively assessed".

   Reference was also made to an unreported UT decision (OA/18244/2012) which construed the requirement of paragraph E-ECDR.2.5 to impose "a significant burden of proof upon an individual to show that the required level of care is not available and no-one can reasonably provide it in the individual's country" and went on to accept that in certain circumstances

it might be unreasonable to expect personal care to be provided by non-family members.

4. The judge concluded at paragraphs 33–40:

> “33. In terms of the ‘required level of care’, I find that the appellant requires care in everyday tasks such as cooking, washing cleaning and on some occasions bathing and probably when she is not well with going to the toilet. The question I have to now decide is whether this care is available in her country.
>
> 34. In making that assessment, I take into account the needs of this particular appellant. These are that she appears to have always had the benefit of being cared for by a close relative. This is evident from the fact that since her daughter in law came to this country in April 2017, she has had the benefit of being cared for by her daughter and now her granddaughter. In my view, unless there was a pressing need, whether real or perceived, for the appellant to be cared for by a female family member, it is unlikely that the appellant’s daughter who is recognised refugee in Germany would have taken the risk of travelling to Pakistan.
>
> 35. I give some weight to the appellant’s son’s evidence that as a member of a minority faith (I say minority because whilst the Ahmadi’s claim to be Muslims the laws of Pakistan do not recognise them to be as such), his fear that a carer from the general population would unsuitable for his mother is well-founded. As a judge of this tribunal over many years, I have tried many Ahmadi case where background materials show their risk to false allegations of all sorts of anti-Muslim activity in order to make life uncomfortable for them. Whether that will happen in reality I do not know, but I find that the sponsor’s apprehension that that may happen and as a result being weary of employing anyone other than an Ahmadi, to be real.
>
> 36. I had the benefit of hearing the sponsor give evidence before me. I found him to be a witness of truth. I therefore accept his evidence that the present carer who is an Ahmadi is unable to engage herself on a full time permanent basis. Her support is confined to cleaning and cooking for the appellant during the day.
>
> 37. I find it quite likely that the appellant being a female and within the cultural norms of Pakistani society, to be highly likely to be averse to being cared for by a male carer. On matters of intimate care, such as assisting with going to the toilet and bathing, I find it highly likely that she would not countenance a non-relative’s presence.
>
> 38. The conclusion to which I have come is that in terms of the appellant’s reasonable care needs, when compared to what is available, I am satisfied that such care is not reasonably available in Pakistan.
>
> 39. In reaching that position, I have had regard to some background material provided by the appellant’s counsel for which I am grateful. What is apparent from this material is that there is no institutionalised system of social care of the elderly in Pakistan. Such things are left to the individual’s family to provide for. In the

case of this appellant unfortunately all her immediate relatives have left Pakistan. I find that she has no remaining relatives in Pakistan who are likely to fulfil the needs that she has.

40. For all the reasons given above, I find that the appellant meets the requirements of the Immigration Rules".

5. The ECO's grounds of appeal contended that the FtT Judge erred firstly in his treatment of the appellant's medical care requirements and secondly in failing to consider Section 117B considerations under the NIAA 2002.

6. I am very grateful to both representatives for their targeted submissions. Miss Reid's built on a Rule 24 response which submitted that the ECO's grounds were no more than a disagreement with the judge's findings of fact that the claimant can only be cared for by members of the Ahmadi community and that (in the absence of the daughter-in-law who successfully applied for entry clearance as a spouse at the same time as the claimant – whose application was refused) the shortfall in care was being met by various family members travelling to Pakistan to care for her for a period of time. Paragraph 5(e) of the Rule 24 response also took issue with the ECO's point in the written grounds that the judge had not considered whether there were any insurmountable obstacles to the claimant's family returning to Pakistan to care for her. This, it was said, is not a requirement of the Immigration Rules and it is unclear how the absence of such evidence has impacted upon the judge's decision to the extent that it could be considered a material error of law. As regards the ECO's second ground, the Rule 24 response contends that given the judge's decision that the claimant met the requirements of the Immigration Rules, there was no public interest in refusing to grant her entry clearance on Article 8 grounds.

7. Having considered the respective arguments, I have concluded that the FtT Judge materially erred in law. As emphasised by the Court of Appeal in **Britcits**, the question of whether care required by the adult dependent relative can be "reasonably" provided and "to the required level" is to be "objectively assessed". There is no dispute in this case that the claimant requires care in everyday tasks such as cooking, washing, cleaning and on some occasions bathing and probably going to the toilet (see the judge's finding at paragraph 33). The only issue is whether the requisite care is available to her. The judge's reasoning on this issue is beset by the following difficulties.

8. First of all, the evidence given by the sponsor was not to the effect that the only suitable carers would be a female family relative (as appears to be the judge's logic at paragraph 34), but was only limited to members of the Ahmadi community (indeed his oral evidence appears to leave open that even persons outside the Ahmadi community might be suitable if care is taken as to the person being employed.) At paragraph 8 the judge records the sponsor's evidence as being that:

> "[s]omeone cannot just be paid to help her with these tasks because being a member of a minority community, they cannot allow just anyone in. In addition, the appellant is 73 years old and therefore care has to be taken as to the person being employed. There is no system of checking backgrounds of individuals in Pakistan".

At paragraph 9 the sponsor is recorded as adding that:

> "In terms of the efforts he has made to find care for his mother, he has asked around relatives with no luck so far. No one is willing to be with her on a permanent basis. Sometimes those employed do not function properly and other times they demand extra money. ..."

This evidence does not establish that only female members of the family could reasonably be expected to provide care to the appellant. Even read as confining potential carers to those from the Ahmadi community, it would appear that the sponsor's evidence only establishes there have been difficulties in getting someone to care for the claimant on a permanent basis and "with no luck so far". If (as the judge found) relatives were prepared to return to Pakistan for short periods to care for her (with all the expenses that such trips entail), the ability of the family to offer a good wage or payment for the claimant's care could not be a real issue. The judge noted that he has "tried many Ahmadi cases" and on that basis it is hard to understand why he did not take into account from that case experience that the Ahmadi community (especially in Rabwa where the appellant lived) is a highly supportive one when it comes to ensuring the welfare of family members. Given that what the judge had to make was an "objective assessment", it is difficult to follow why he was prepared to accept the sponsor's statement that he had "no luck so far" as determinative of whether carers from within the Ahmadi community could not be found when a good wage or payment arrangement was not a barrier.

9. A second difficulty is that the judge appears to have assumed that the need for care by a female family relative could be inferred from the fact that "it is unlikely that the [claimant's] daughter who is [a] recognised refugee in Germany would have taken the risk of travelling to Pakistan". It is hard to see how the judge arrived at this conclusion. It rests on the assumption that if a recognised refugee returns to their country of origin, that demonstrates there is a risk. That is simply incorrect. Refugee status is acquired on the basis of an ex nunc assessment at the time it is granted. According to the judge's summary of the evidence of the claimant's daughter who had been recognised as a refugee in Germany, "[s]he said that she had lived in Germany for a long time". A return to Pakistan in April 2017 did not necessarily entail anything as regards risk on return. The same can be said for the return of the sponsor who is an Ahmadi and also someone whom (Ms Reid told me on instruction) had been back to Pakistan four times. The judge appears to have assessed matters on the basis that all Ahmadis are at risk on return. That is

contrary to Tribunal country guidance and also the country background evidence.

10. Given the above errors in the judge’s approach, it cannot be said that he approached the issue of where care would be reasonably available to the claimant by taking into account factors that were based solely on evidence rather than also on unwarranted assumptions.

11. In light of my conclusion as regards the respondent’s first ground of challenge, it is not strictly necessary for me to address the second ground save to note that if the judge’s conclusion that the claimant met the requirements of the Immigration Rules was flawed, then his reasoning given for allowing the appeal on Article 8 grounds must also be flawed since at paragraph 41 the only reason given for allowing the appeal under Article 8 was the fact that he was satisfied the claimant met the Rules.

12. Having found a material error of law I turn to consider whether I am in a position to re-make it without further ado. I have concluded I am not. Given, however, that the ECO’s grounds do not challenge the judge’s positive credibility findings, I consider these should be allowed to stand, subject to it being understood that the issue of whether the evidence of the witnesses, objectively considered, establishes that the claimant met the requirements of the relevant Immigration Rules, remains a matter for the judge at the next hearing. In such circumstances it is appropriate that the case be retained in the Upper Tribunal.

13. I add one further observation. In amplifying the written grounds Mr Duffy raised the issue of whether the claimant met the evidential requirements of Appendix FM-SE at paragraph 23. That was not a point taken by the ECO in the refusal decision but does seem to me to be a matter properly engaged by the evidence before the judge. Since the issue of whether the claimant meets the requirements of the Immigration Rules will remain a central one at the next hearing, the claimant’s representatives should consider themselves on notice to offer submissions on this aspect of the Rules as well as the provisions relied on by the ECO.

14. To conclude:

    The decision of the FtT Judge is set aside for material error of law.

    The case is retained in the Upper Tribunal. The judge’s primary findings of fact are preserved.

No anonymity direction is made.

Signed: Date: 21 January 2018