



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/38931/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 16 June 2014

Determination Promulgated  
On 3 July 2014

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR RAZA HUSSAIN  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr S Kandola, Presenting Officer.

For the Respondent: None

**DETERMINATION AND REASONS**

**Immigration History**

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing. However, for ease of reference, the Appellant and Respondent are hereafter referred to as they were before the First-tier Tribunal. Therefore Mr Hussain is referred to as the Appellant and the Secretary of State is referred to as the Respondent.
2. The Appellant is a male citizen of Pakistan, whose date of birth is 8 August 1932. His appeal against the decision dated 17 September 2013 of the Respondent, to refuse to

vary his leave to remain and to remove him to Pakistan was allowed by First-tier Tribunal Judge Roopnarine-Davies (the Judge) under Article 8 ECHR in a determination promulgated on 10 March 2014.

3. As to background, the Appellant came on a family visit to the UK to see his son, Mr MH Ravjani, the Sponsor. He has a visit visa which is valid from 12 July 2012 to 12 July 2017. The Sponsor is a national of Pakistan with leave to remain until July 2013 as the spouse of a British citizen. The appeal before the Judge proceeded on the basis that the Appellant could not meet the settlement rules for leave to remain as an adult dependent relative under paragraph EC-DR of Appendix FM and that he could not meet the conditions for family and private life at Appendix FM and paragraph 276ADE of the Immigration Rules [3]. It was also confirmed that Article 3 was not in issue in respect of the Appellant's health, but that the security situation in respect of Shia Muslims in Pakistan should be borne in mind as should the provisions of paragraph 317 of the Immigration Rules in assessing the claim [4].
4. In the grounds of application, the Respondent asserts that the Judge erred because:
  - a. She failed to give adequate reasons for finding that the Appellant's rights under Article 8 would be breached if he is removed to Pakistan when he had evidence before him that he had good neighbours there and that his son visited him often in Pakistan because he has business interests there. The Appellant had a multiple entry visit visa until July 2017 and he could continue to visit the Sponsor in the UK and the Judge had failed to consider whether family life could continue in its current form. There was evidence before the Judge that the Appellant had already sought treatment on the NHS and was likely to continue to require it. He had been to the UK before as a medical visitor and had paid for medical treatment and there was no reason why he could not continue to do this in the future; and
  - b. The Immigration Rules, as clarified by the changes to the Immigration Rules in July 2012, provide that the existence of insurmountable obstacles to family life continuing outside the UK is a key factor in assessing proportionality, even if it is not determinative. The Immigration Rules now provide the relevant factors to be considered which reflect the public interest in the assessment of proportionality. It is submitted in the grounds of application that "The public interest achieved by applying clear rules must be measured by the effect of the rules across the board, not just in relation to an individual case. In this case the Tribunal did not apply this approach and thereby misdirected itself in law."
5. Permission to appeal was granted by Judge Nicholson. He found that: the Judge stated that the Appellant's son's leave to remain had expired in July 2013 and the Judge was not informed about his current immigration status, and the Appellant had incurred an NHS debt of £7,609, which had not been paid despite his finding that the Appellant's family had the resources to settle the debt. The Appellant had claimed that he intended to return to Pakistan at the end of his visit and did not do so because his medical health had deteriorated but the Judge specifically did not accept that at [12]. He allowed the appeal on the basis that the Appellant had a family life with his son and his son's family and the Appellant required long term personal care which

was “reminiscent of the requirement in Appendix FM for adult dependent relatives” and because of this that there were “compelling circumstances”. The Judge did not appear to accept that the Appellant’s health had deteriorated and therefore he must have managed alone in Pakistan in the past. The rules on adult dependent relatives require not only that the person requires long term care but also that the person cannot get it in their home country. The Appellant owed large sums for medical care that he was not entitled to and his son’s immigration status was uncertain. Given these factors, Judge Nicholson concluded, it was arguable that the Judge failed to give adequate reasons for his findings and failed to give sufficient weight to the public interest in refusing the application.

6. The Appellant did not submit a Rule 24 response and did not attend the hearing.
7. I note that notice of hearing was sent to both the Appellant and his representatives before the First-tier Tribunal, no application was made for an adjournment or as to why they had failed to attend and there was no evidence before me to indicate that they would attend if I adjourned the matter. If the Appellant had suffered from ill health, there is no reason why his son could not have notified the Tribunal or attended the hearing on his behalf.
8. I therefore proceeded with the hearing in their absence.

### **Submissions**

9. Mr Kandola submitted that at [17] the Judge correctly directs himself to **Shahzad (Art 8: legitimate aim) [2014] IKUT 00085 (IAC)**. However, he referred to the medical grounds but the medical evidence did not establish that long term care would not be received in Pakistan. The Appellant could not meet the provisions of Appendix FM at E-ECDR or E-ILRDR. The Immigration Rules not only required the Appellant to establish that personal care was required but that it was unavailable in Pakistan and there was no one there to provide it. The Rules did not allow in-country switching to leave to remain as an elderly dependent relative. The Judge stated that there were compelling circumstances not sufficiently recognised under the Rules but the Rules provided for them in Appendix FM at E-ECDR and E-ILRDR of Appendix FM. The Secretary of State had taken a policy decision to prevent switching by overstayers or those who come to the UK as visitors, to prevent abuse of process. The matters set out by the Judge at [17] did not amount to ‘good grounds’ for granting leave outside the Rules; there was no evidence that medical care was not available in Pakistan, the Appellant had two daughters who lived in Pakistan and had two servants when he lived there who took care of him [8]. Although it was stated that the house that the Appellant had resided in there had been sold, the Appellant’s son had paid the rent for it. At the hearing, it was recorded in the minute taken by the Home Office representative (a copy of which was supplied to me) that the Appellant’s son went to Pakistan every three months for about five days. There were material considerations that weighed against the Appellant in the balancing exercise and the Judge should have had regard to them in the proportionality exercise.

10. Having concluded his submissions, Mr Kandola confirmed that if I find that the Judge materially erred in law, he was content for me to remake the decision on the basis of the papers before me.

### Decision and reasons

11. The Judge directed himself to the provisions of **Gulshan (Article 8 - new Rules - correct approach)** [2013] UKUT 40 (IAC) and **Shahzad** at [3], [11] and [17]. However, when actually conducting the assessment, whilst alluding to the provisions of Appendix FM, she did not clearly identify the factors to be weighed in favour of the Respondent in the proportionality exercise.

12. Mr Kandola was correct to point out that the Secretary of State had made a policy decision to prevent switching by visitors from leave to remain as visitors to leave to remain as elderly dependent relatives, as provided by the provisions of Appendix FM E-ILRDR to prevent an abuse of process. An applicant who applies for leave to remain as an elderly dependent relative must first have made an application for leave to enter in that category and to have supplied evidence that he is 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” (paragraph E-ECDR.2.5 of Appendix FM).

13. The Judge did not accept the Appellant’s submission that he intended to return to Pakistan after his visit and to continue visiting his family on his multi visit visa but that his condition deteriorated [12]. She considered the medical evidence, listed his conditions and symptoms and concluded that given the time frame he is likely to have had these symptoms in Pakistan [13]. She found that his medical conditions were not such as to allow him to remain simply on the basis of his medical conditions [16]. She also found that he had accessed NHS care to which he was not entitled, which was being repaid by “monthly direct debits of the paltry sum of £100” although the family had the funds to settle the debt; and that the Appellant told the GP that he had moved to the UK in the sense that he had permanent status here, which was not true [14]. She also found that there is scant evidence that he will be harmed or persecuted on the basis of his religion or otherwise if he returns [10]. However, she balances his previous good immigration history with these factors and states:

“On the other hand, having regard to all the evidence, I am satisfied that the appellant requires long term care to perform everyday tasks due to a combination of his age and medical conditions, which is reminiscent of the requirement in Appendix FM for adult dependent relatives which taken together with his very strong level of closeness and dependency on the sponsor and his family lead me to conclude that “there are compelling reasons not sufficiently recognised under the Rules and that there are thus “good grounds for granting leave to remain outside them” - **Shahzad**

above. I conclude that the decision is not justified and necessary and is disproportionate to the legitimate aim of effective immigration control under article 8". [17]

14. However, it is clear that the Immigration Rules provide for entry clearance as a dependent relative and that under the Rules not only must it be established that long term care is required but that it is not available pursuant to E-ECDR.2.5 or it is not affordable. The Judge found that the requirement for long term care is reminiscent of the provisions of Appendix FM without considering if they are in fact met. This is to treat those who have gained admission as visitors and then switched more favourably than those who have taken the correct route and obtained entry clearance and enables them to circumvent the provisions of the Immigration Rules.
15. This is not a case where the only issue weighing in favour of the Respondent is the policy requiring an applicant to make an out of country application (see **Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 000444 (IAC)**); there are legitimate enquiries that need to be made. No finding was made by the Judge that evidence was provided to established that the Appellant was not able to return to Pakistan and make an out of country application for leave to enter as a dependent relative at which point the relevant assessment will be made as to the immigration status of the Sponsor as well as the care that can be provided in Pakistan. This is particularly relevant in the Appellant's case as he has two daughters in Pakistan who, it is said lived in Karachi, where the Appellant's former home was located, and had two servants there to tend to his needs.
16. Furthermore, where specific provision has not been made to consider an Article 8 application under the Immigration Rules it is not simply the case that the direct application of Article 8 ECHR frees a judge from considering the Article 8 provisions of the Immigration Rules. Such assessments must be viewed through the substantive provisions of the Immigration Rules which provide a guide to the factors which are to be given weight in assessing the public interest in the Respondent's side of the proportionality exercise under Article 8(2). Therefore, in the current case, it was necessary to consider the provisions of the Immigrations Rules, even if it is considered early on that the inability to switch prevents the application succeeding under the Rules. In the Appellant's case, it was necessary to consider paragraphs E-ECDR. 1.1 - 3.2, E-ECDR.1.1 - 1.3 and R-ILRDR.1.1 and E-ILRDR.1.1 - 1.5 and D-ILRDR1.1 - 1.4, which provide the starting point for weighing the public interest in the proportionality exercise. Findings of fact were not made on these factors.
17. I find that although the findings of fact which were made by the Judge were open to her on the evidence before her, and therefore are preserved, insufficient findings of fact were made on material matters and therefore adequate reasons were not given by the Judge for finding that there were compelling circumstances not sufficiently recognised by the Rules for a grant of leave applying Article 8 ECHR directly. By failing to consider whether an out of country application could be made and failing to consider the provisions of the Immigration Rules in determining proportionality, the Judge circumvented the Immigration Rules by allowing the appeal under Article 8. I therefore set aside the decision.

## Remaking the decision

18. The parties were notified by directions to prepare for the hearing on the basis that if an error of law were found, I may proceed to determine the appeal and therefore any additional evidence must be submitted for the purposes of this hearing. No additional evidence was submitted and I therefore make my findings of fact on the evidence before me.
19. As the Immigration Rules at Appendix FM set out the factors which should be considered when deciding Article 8 claims, I will first consider those factors first, as follows:
  - a. Pursuant to paragraph E-ECDR, The Appellant is a parent of the Sponsor, and the latter is over 18 years of age. As to the immigration status of the Sponsor, pursuant to paragraph E-ECDR.2.3 (b), the Sponsor stated in his witness statement that he was currently in the UK as the spouse of a British citizen, and that his original passport was with the Home Office due to an application for indefinite leave to remain and the copies of his passport were provided which indicated that he had leave to remain until 7 July 2013 (pp 147 and 151 of the Appellant's bundle). On the balance of probabilities, it is reasonably likely that his Sponsor is settled in the UK.
  - b. It is reasonably likely that the Appellant, due to his age and illness, requires some long-term personal care to perform everyday tasks pursuant to paragraph E-ECDR.2.4. However, it is not established that such care is not available and there is no-one in Pakistan who can reasonably provide it or that it is not affordable pursuant to E-ECDR.2.5.
  - c. Pursuant to R-ILRDR1.1, the Appellant is in the UK, he has made an application for leave to remain as an adult dependant relative. However, he fails to meet the suitability criteria (paragraph S-ILR.2.3) because he has incurred NHS charges, and the relevant NHS body has informed the Secretary of State that Appellant has failed to pay charges in accordance with the relevant regulations on charges to overseas visitors; there is an e-mail from the Milton Keynes Hospital that the Applicant had incurred a total of £7,609.72. The Judge specifically notes that only the paltry sum of £100 a month is being paid to discharge this debt when the family have sufficient funds to discharge it in full. S-ILR.2.1 provides that failure to meet this particular suitability criterion will result in the application 'normally being refused on grounds of suitability'. This provision is to safeguard the economic wellbeing of the UK and therefore adds weight to the public interest in the proportionality exercise.
  - d. The Immigration Rules prevent switching from the category of visitor to that of leave to remain as an elderly dependent relative (paragraph E-ILRDR.1.2 of Appendix FM). This is to prevent abuse of the system by such relatives entering as visitors with a view to not returning. In the Appellant's case, the Judge did not accept that he was unable to return due to deterioration in his condition [12]. This is a case in which the policy decision to prevent

switching clearly bites and adds weight to the public interest in the proportionality exercise.

- e. As to the provisions of E-ILRDR, the Appellant is not in the UK with valid leave as an elderly dependent relative, it is not established that he would have satisfied the provisions of paragraph E-ECDR.2.5 but it is reasonably likely that his Sponsor is settled in the UK and that he can maintain and accommodate him.

20. In considering whether there are arguably good grounds for directly applying Article 8, I note that the Immigration Rules consider the relationship between the Appellant and the Sponsor but this is only a factual finding as to whether a relationship exists: there is no assessment of the quality of the relationship or the strength of ties. On the basis of the findings of the Judge as to the quality of the relationship between the Appellant and his Sponsor's family, there are arguably good grounds for applying Article 8 ECHR directly, as to which, I find as follows:

- a. Taking the five step approach set out in Razgar v SSHD [2004] UKHL 27), removal will result in interference with the private and family life of the Appellant and, on the findings of the Judge, it is likely to have consequences of such gravity as to potentially engage the operation of Article 8. The decision is in accordance with the law because he cannot satisfy the provisions of the Immigration Rules, and the legitimate aims under Article 8 (2) are the maintenance of the economic well-being of the country through the maintenance of immigration control. This takes me to proportionality.
- b. The preserved findings are that there is a 'very strong level of closeness and dependency on the sponsor and his family' [17], that generally the family have a good immigration history [15] and that the Sponsor supported the Appellant financially. The Judge does not accept that the Appellant did not have pre-existing care needs. However, she states that she will give '...the family the benefit of the doubt that they realised the extent of the impact of his age and medical conditions only when the Appellant began to live with them here...'. However, findings of fact have to be made on the evidence before her, not on giving an applicant the 'benefit of the doubt'. It is clear that the Sponsor visited and stayed with the Appellant regularly and that the Appellant had two servants caring for him in Pakistan. The Sponsor would have been aware of the Appellant's needs when he stayed with him in Pakistan and it is not possible to state that he only became aware of them when the Appellant stayed with him in the UK, simply because the Sponsor had in fact stayed with him many times in Pakistan.
- c. The Appellant has two daughters in Karachi, where his former home was and his medical and care needs were being met in Pakistan. Although he had a property in Pakistan, he sold it and the Sponsor paid the rent on his rented property. There is no reason why this arrangement could not continue. There is no evidence before me that the Appellant is not fit to fly or indeed, that he cannot return to Pakistan with his son on his son's next business trip there and no evidence that his son could not settle him down in Pakistan and submit an out of country application. I find that the Appellant's lack of

honesty in relation to his immigration status when he saw the GP, his use of the NHS service to which he was not entitled, and the failure by his family to discharge the NHS debt even though his family had the means to discharge it [14], must be weighed against the Appellant's previous good immigration history [15].

- d. Balancing these facts against the findings which establish the public interest in the maintenance of immigration control, I find that there is a strong public interest in maintaining immigration control. There is no reliable evidence before me that an out of country application cannot be made, or that the care and medical needs of the Appellant cannot be met in Pakistan. On the evidence in the round, whilst I accept that the Appellant has strong bonds with his son and his family, as evidenced in the Appellant's bundle, and there will be interference with family life if he is required to leave, this does not outweigh the public interest in the protection of the economic well-being of the country through firm and fair immigration control.

21. I find that refusal of the Appellant's application is not disproportionate when the interference with his private and family life is balanced against the legitimate public interest.

### **Decision**

22. The decision of Judge Roopnarine-Davies discloses a material error of law as set out above. I set aside her decision. I remake the decision to dismiss the appeal under Article 8.
23. The appeal of the Respondent is allowed.

### **Anonymity**

24. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No request has been made for an anonymity order and pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I find no reason to make an order.

Signed

Date

M Robertson  
Sitting as Deputy Judge of the Upper Tribunal



TO THE RESPONDENT  
FEE AWARD

In light of my decision, I have considered whether to make a fee award under Rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Respondent's appeal has been allowed, I make no fee award.

Signed

Dated

M Robertson  
Sitting as Deputy Judge of the Upper Tribunal