Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00694/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 April 2014	**On 17th April 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN
IMMIGRATION JUDGE S CHANA
sitting as a DEPUTY JUDGE OF THE UPPER TRIBUNAL

Between

MRS RAZIA BEGUM
(No Anonymity Direction Made)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr S Bhanji of Counsel instructed by Naseem & Co Solicitors
For the Respondent: Mr E Tufan a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 1 January 1960. She has been given permission to appeal the determination of First-Tier Tribunal Judge Burnett ("the FTTJ") who dismissed her appeal against the respondent's decision of 19 December 2012 to refuse her entry clearance to the United Kingdom for settlement as a dependent parent under the provisions of

paragraph 317 of the Immigration Rules. Her sponsor is her son, Mr Abdul Qayoom.

2. The respondent refused the application because the appellant had not shown firstly, that she was related as claimed to her sponsor and therefore that she was related to a person present and settled in the UK (paragraph 317 (i)). Secondly, she had not shown that she was financially dependent on her sponsor (paragraph 317 (iii)).

3. The appellant appealed and the FTTJ heard her appeal on 16 December 2013. The appellant was not represented but the sponsor attended and gave evidence. The respondent was represented by counsel. At the start of the hearing counsel for the respondent raised a new issue; whether the appellant, being under the age of 65, was "living alone outside the United Kingdom in the most exceptional compassionate circumstances" under the provisions of paragraph 317 (i) (d). The judge offered to adjourn to enable the sponsor to obtain further evidence but he elected to continue with the hearing stating that he had said why there were exceptional compassionate circumstances in the letter of application.

4. During the course of the hearing the respondent conceded that the appellant and the sponsor were related as claimed and the FTTJ so found. The FTTJ accepted that the sponsor sent money to the appellant on a regular basis but concluded that she had not established that she was financially dependent on him such that she needed this money. He also found that the appellant had not established that she was living alone in the most exceptional compassionate circumstances. The FTTJ went on to consider the appeal on Article 8 human rights grounds concluding that the interference with her private and family life would not be of sufficient severity to cross the low threshold which would engage Article 8. Even if it had it would not be disproportionate to refuse her leave to settle in the UK. The FTTJ dismissed the appeal under the Immigration Rules and on Article 8 human rights grounds.

5. The FTTJ did not make an anonymity direction. We have not been asked to do so and can see no good reason to make such a direction.

6. The appellant applied for permission to appeal which was refused by a judge in the First-Tier Tribunal but granted on renewal to the Upper Tribunal. The grounds argue that the FTTJ erred in law by failing properly to consider the documentary evidence which showed the appellant's living expenses and established that she was wholly or mainly dependent on the sponsor. It was an error of law to give very little weight to the medical report and on the evidence the FTTJ should not have come to the conclusion that the appellant had failed to establish that she was living alone in the most exceptional compassionate circumstances.

7. We have been provided with the judgement and determination in Azza Mohamed v SSHD [2012] EWCA Civ 331 and RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039 (18 April 2006). The respondent has submitted a Rule 24 response.

8. Mr Bhanji submitted that the respondent must have considered whether the appellant was living in the most exceptional compassionate circumstances and, not having mentioned the point, have accepted that she was. The appellant had submitted all the documents which were needed to establish financial dependency on the sponsor and these were listed in the letter which the sponsor sent to the respondent on 30 July 2012 and his letter to the First-Tier Tribunal of 8 January 2013. The FTTJ had accepted that the sponsor was sending money to the appellant on a regular basis. The only basis for the finding that she was not wholly or mainly dependent on him was the alleged lack of evidence as to her needs. In addressing this the FTTJ failed to consider what she had said in her interview.

9. Mr Bhanji accepted that as the appellant was under 65 years of age she had to show that she was living outside the UK in the most exceptional compassionate circumstances. The Immigration Rules had changed on 9 July 2012. Prior to that date paragraph 317 (i) (e) contained the requirement for a parent or grandparent under the age of 65 that he or she must be "living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom". After that date paragraph 317 (i) (d) set out the requirement for a parent or grandparent under the age of 65 that he or she must be "living alone outside the United Kingdom in the most exceptional compassionate circumstances". Both before and after the change paragraph 317 (iii) contain the requirement that the individual concerned "is financially wholly or mainly dependent on the relative present and settled in the United Kingdom".

10. In relation to the additional grounds relating to the most exceptional compassionate circumstances raised by counsel for the respondent at the hearing Mr Bhanji submitted that the sponsor had appeared without legal representation. Whilst he was offered an adjournment there was no evidence that he was properly advised as to the consequences of the decision he was being asked to make. We were asked to find that there were errors of law and to set aside the decision.

11. Mr Tufan submitted that paragraph 317 had seven requirements in subparagraphs (i) to (vii). These were conjunctive and cumulative; all of them had to be satisfied. The requirements under 317 (i) (a) to (f) were in the alternative subject to the initial requirement that the appellant had to be related to a person present and settled in the United Kingdom. If the respondent was not satisfied that the appellant was related in this way then there was no need to consider the requirements in 317 (i) (a) to (f) one of which was the provision which applied in this case relating to living in the

most exceptional compassionate circumstances. Under Kwok on Tong principles, having accepted that the appellant and the sponsor were related as claimed, the respondent was entitled, indeed required to raise the issue of the most exceptional compassionate circumstances. Mr Tufan submitted that the evidence submitted by the appellant came nowhere near satisfying the high threshold of this test. There was no evidence as to what the FTTJ had said to the sponsor when asking him whether he wanted an adjournment. We were asked to find that the FTTJ reached conclusions open to him on all the evidence and that there was no error of law.

12. In his reply Mr Bhanji submitted that the appeal was not bound to fail if the FTTJ had considered all the evidence particularly that on the visa application form. In reply to our question as to what evidence showed that the appellant was living in the most exceptional compassionate circumstances, he pointed us to the evidence contained in the visa application form and the fact that the appellant was a widowed mother living alone in Pakistan. Whilst her daughters were married and living in Pakistan her three sons were living abroad.

13. We reserved our determination.

14. Paragraph 317 of the Immigration Rules provide;

> "317. The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:
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> (i) is related to a person present and settled in the United Kingdom in one of the following ways:
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> > (a) parent or grandparent who is divorced, widowed, single or separated aged 65 years or over; or
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> > (b) parents or grandparents travelling together of whom at least one is aged 65 or over; or
> >
> > (c) a parent or grandparent aged 65 or over who has entered into a second relationship of marriage or civil partnership but cannot look to the spouse, civil partner or children of that second relationship for financial support; and where the person settled in the United Kingdom is able and willing to maintain the parent or grandparent and any spouse or civil partner or child of the second relationship who would be admissible as a dependant; or

(d) parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances; or

(e) parents or grandparents travelling together who are both under the age of 65 if living in the most exceptional compassionate circumstances; or

(f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances; and

(ii) is joining or accompanying a person who is present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and

(iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and

(iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and

(iv) can, and will, be maintained adequately, together with any dependants, without recourse to public funds; and

(v) has no other close relatives in his own country to whom he could turn for financial support; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not fall for refusal under the general grounds for refusal."

15. We find that it was not necessary for the respondent to consider whether the appellant was a "parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances" because the question did not arise where the respondent was not satisfied that the appellant had not established that she was related to a person present and settled in the United Kingdom. The provisions in the alternative in subparagraphs (a) to (f) of 317 (i) did not fall to be considered if the initial requirement in 317 (i) that the appellant was related to a person present and settled in the United Kingdom was not met. However, after the respondent's representative accepted that the appellant and the sponsor were related as claimed then it became necessary to consider whether one of the provisions of subparagraphs (a) to (f) was satisfied. It is common ground that the relevant provision is that in subparagraph (d) namely whether the appellant had shown that she was a "parent or grandparent under the age of

65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances".

16. We find no merit in the submission that in the absence of any indication that the respondent considered the question of whether the appellant was living alone outside the United Kingdom in the most exceptional compassionate circumstances we should imply that the respondent must have or did in fact consider this and even less whether, having done so, the respondent accepted that the appellant was living in these circumstances.

17. Kwok on Tong makes it clear that a judge cannot allow an appeal unless satisfied that all the requirements of the relevant Immigration Rule are met. The provisions of subparagraph 317 (i) (d) are such a requirement. Had the point not been raised by counsel for the respondent the FTTJ would have been under an obligation to do so.

18. The FTTJ had a duty of fairness to the appellant, represented by the sponsor, to give him a proper opportunity to address a new point such as this. The FTTJ did so, by offering an adjournment, as recorded in paragraph 11. There is no witness statement from the sponsor as to exactly what was said or what explanation he was given. However, we find that there is a sufficient summary in paragraph 11 in which the FTTJ said; "There was no request for an adjournment by either party. I should note though that during the course of the hearing Mr Roberts raised an issue under paragraph 317 (i) of whether the appellant met the rules in respect of "living alone in the most exceptional compassionate circumstances". The sponsor was asked if he wished to continue with the appeal or adjourn to try to obtain any further evidence. He elected to continue with the appeal. He stated that he had written why there were compassionate circumstances in the letter of application." We find that the FTTJ acted properly in all the circumstances. The sponsor chose to proceed with the appeal hearing and even now no evidence has been produced which might have made a difference. We find that there was no unfairness or error of law.

19. We can find no indication that the FTTJ failed to take into account and properly assess the oral and documentary evidence before him. Mr Bhanji submitted that the FTTJ failed to take into account the evidence contained in the appellant's interview record. We conclude that the reference to an interview record was a mistake because we can find no indication that there was an oral interview with the appellant and the paragraph numbers to which Mr Bhanji referred are those in the lengthy application form completed by her. We find that the FTTJ did take this into account the information in the application form. There is reference to this in paragraph 24 and the FTTJ's findings in this paragraph are clearly drawn from the application form including paragraphs 40, 48, 51 and 52 on which Mr Bhanji relied. Whilst the appellant referred to RS 15,000 per month and said that this was spent on "everyday life needs, food, medical" it was open to the FTTJ to conclude that there was no breakdown of her day-to-day living expenses. He was also

entitled to rely on the lack of explanation for continuing cash withdrawals after the appellant had been robbed or how she coped after her husband died and before the sponsor started sending money. The fact that the sponsor had been registered with a money transfer agency since November 2004 did not establish what funds had been sent to his mother and father before his father's death and after his father's death up to 2011. There was no witness statement from the appellant providing this information or other information about her circumstances which might have assisted.

20. The letter submitted from the medical centre stated "not valid for court". In the absence of any explanation for this the FTTJ was entitled to give the letter little weight.

21. In reply to our question as to what evidence established that the appellant was living in the most exceptional compassionate circumstances Mr Bhanji pointed us to the evidence contained in the visa application form, the fact that the appellant was a widowed mother living alone in Pakistan, her daughters were married and living in Pakistan her three sons were living abroad. We find that looking at this evidence with all the other evidence in the round it was open to the FTTJ to conclude that the appellant had not established that she met the difficult but not impossible test of establishing that she was living alone outside the United Kingdom in the most exceptional compassionate circumstances. In our judgement the same conclusion would inevitably have been reached even if full weight had been given to the evidence contained in the medical report.

22. We can find nothing in in the Immigration Rules themselves or in Mohamed to indicate that the different provisions of paragraph 317 which were in force at the time of the application and at the time of the decision should have made any material difference to consideration of the facts in this appeal.

23. We find that there are no errors of law and that the decision does not fall to be set aside. We uphold the determination.

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Signed Date 13 April 2014

Upper Tribunal Judge Moulden