



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26569/2015

THE IMMIGRATION ACTS

Heard at Field House
On 17 September 2015

Decision Promulgated
On 25 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mrs SAEEDA NASREEN

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: In Person (assisted by the sponsor, Mr S Ahmed)

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Adio, promulgated on 15th December 2015. Which allowed the Appellant's appeal and held that it was disproportionate and unlawful under Article 8 of the European Convention on Human Rights to remove her to Pakistan.

Background

3 The appellant was born on 23 March 1939 and is a national of Pakistan. On 18 June 2014, the respondent refused the appellant's application for leave to remain in the UK out-with the Immigration Rules and decided to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The respondent rejected the appellant's claim that her case had compelling and compassionate features and took the view that the appellant's application was really an expression of her desire to live with her adult son in the UK.

The Judge's Decision

4 The appellant appealed to the First Tier Tribunal successfully. First Tier Tribunal Judge Adio ("the judge") allowed the appeal against the respondent's decision. The judge found that the appellant is a vulnerable person with mobility difficulties who now has no accommodation in Pakistan and as a result, he found the respondent's decision was a disproportionate breach of the appellant's Article 8 rights.

5 Grounds of appeal were lodged and, on 12 February 2015, Judge Hollingworth gave permission to appeal, stating:

"An arguable error of law has arisen in relation to the extent of the fact finding exercise conducted by the judge as the foundation for the application for Section 117".

6 In a determination promulgated on 20 May 2015, Upper Tribunal Judge Latta and I set aside the judge's decision, finding that a material error of law had been made and stating at [12]:

"We therefore reach the conclusion that the failure of the First Tier Tribunal to address the Immigration Rules, then consider whether there are any good grounds for considering the case outside the Rules and then set out clearly defined compelling circumstances constitutes an error of law. This error we consider to be material since had the Tribunal conducted this exercise, the outcome could have been different. That, in our view, is the correct test to apply."

It was directed that the decision be remade by the Upper Tribunal.

The Hearing

7 The appellant was present and although she did not give evidence, the proceedings were translated for her by an interpreter. The appellant was assisted by her son, Mr Ahmed, who is the appellant's sponsor. On 8 June 2015, Mr Ahmed sent the following documents to the Tribunal:

- (i) Copy savings certificates from 2008 to 2014;
- (ii) Medical test report from Aga Khan University Hospital,

- Karachi;
- (iii) The appellant's son's (the sponsor's brother) passport showing a visa permitting entry to Saudi Arabia and a residence permit there; and
 - (iv) Three months' payslips for the sponsor.

8 To complete the necessary fact finding exercise, I asked the sponsor questions. He then answered a number of questions in cross examination from Mr Jarvis. I then heard submissions from Mr Jarvis and assisted Mr Ahmed in making submissions before reserving my decision.

Findings of Fact

9 The appellant is the mother of the sponsor. The sponsor is a British citizen who has lived in the UK since 1997.

10 The sponsor is married and has two children, a son aged 14 and a daughter aged 9 years. The sponsor is employed as the financial director of a software company. He works from home. The sponsor owns the house that he lives in, which is a three bedroomed house, occupied by the sponsor, his wife, his two children and the appellant.

11 The appellant's husband died in 2009. In or about 2012, the former family home, the title to which had been in the appellant's late husband's name, was sold. The money realised from that sale was invested in Pakistan in the appellant's name. The appellant has approximately £28,000 in savings in Pakistan. Between 2009 and 2013, the appellant lived in Pakistan with her other son (the sponsor's brother) in his house.

12. The appellant has visited the UK on five or six previous occasions. On 13 May 2009, the appellant was granted a multi-entry visit visa, valid until 13 May 2014. The last time the appellant entered the UK was on 25 February 2014. She has remained in the UK, living with the sponsor, since then. The appellant has a third son who lives in Bradford.

13. The son with whom the appellant lived in Pakistan had been applying for jobs in Saudi Arabia throughout 2013. In March 2014, he secured an offer of employment in Saudi Arabia and, almost immediately, moved there. He now has a residence permit permitting him to live in Saudi Arabia. He still owns the house (in Pakistan) in which he lived with the appellant. That property has now been rented to others.

14. The appellant was born in March 1939. She is now 76 years old. The appellant suffers from high blood pressure. Since about 2008, she has had some restriction in her mobility but she is able to walk short distances unaided. The appellant does not use a walking aid. She is able to mobilise around a two storey home without difficulty. She is able to wash and dress herself and is able to pursue the ordinary activities of daily living independently.

15. Neither the appellant nor the sponsor nor any other member of the appellant's family has made enquiry about the availability of home help, a carer or a domestic servant for the appellant in Pakistan. Neither the appellant nor any member of her family have made enquiry about the health services or the care and support available to the appellant in Pakistan.

16. The appellant has savings of more than the equivalent of £28,000 invested in Pakistan. From that investment, she earns approximately 60,000 rupees per month.

The Immigration Rules

17. The appellant's application was an application for leave to remain in the UK outside the Rules on compassionate grounds. It is not an application to remain on the basis that the Immigration Rules are met. In any event, I heard submissions from Mr Jarvis concerning the Immigration Rules. He told me that the appellant cannot satisfy either the requirements of Appendix FM or those of Appendix FM-SE because there are fundamental failings in the documents produced by the appellant.

18. In order to succeed under Appendix FM, the appellant would have to be eligible for entry clearance as an adult dependent relative. It is Section E-ECDR of Appendix FM which governs such applications. E-ECDR2.4 requires that the appellant "*...as a result of age, illness or disability (2) require long term personal care to perform everyday tasks*".

19. Mr Ahmed was asked specifically about the limitations of his mother's ability and he stated, in clear and unambiguous terms, that his mother can wash and dress himself, and can mobilise around a two storey house; that she can walk short distances outdoors and that she can pursue the ordinary activities of daily living. There is no reliable evidence before me to indicate that the appellant requires "*...long term personal care to perform everyday tasks*". There is, in fact, reliable evidence before me to indicate that the appellant does not require personal care to perform everyday tasks.

20. E-ECDR2.5 (of appendix FM) requires an examination of the availability of the required level of care in Pakistan. The problem for the appellant is that there is a dearth of evidence of the available support and care in Pakistan.

21. Taken at its highest, the evidence pled on behalf of the appellant amounts to a statement of a fear that there is no one who can be trusted in Pakistan. There is no support for those assertions and I find that I cannot place reliance on those assertions. The appellant cannot fulfil the requirements of Appendix FM of the Immigration Rules.

22. Because of the length of time that the appellant has been in the UK and because she entered as a visitor, the appellant cannot fulfil the requirements of Paragraph 276ADE of the Immigration Rules.

Human Rights

23 In R (on the application of Esther Ebun Oludoyi & Ors) v SSHD (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) in which it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

24 In SS(Congo) and Others [2015] EWCA Civ 387 Richards LJ Lord Justice Richards said at paragraph 33 *"In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ"*.

25. In SS(Congo) and Others [2015] EWCA Civ 387 Richards LJ drew a distinction in entry clearance cases, on the one hand, involving someone outside the United Kingdom who applies to come here to take up or resume family life when family life was originally established in ordinary and legitimate circumstances at some time in the past, rather than in the knowledge of its precariousness in terms of United Kingdom immigration controls and cases, on the other, where someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a right to come here. In the latter cases, the relationship will have been formed under conditions of known precariousness and it will be appropriate to apply a similar test of exceptional circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant Leave to Remain outside the Rules.

26 Section 117 of the Nationality, Immigration and Asylum Act 2002 is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing

case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

27 In Kugathas v SSHD (2003) INLR 170 the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough.

28. There are clearly the normal emotional ties between the appellant and sponsor. In the application, the sponsor expresses his desire to look after his mother, but when I take an holistic view of each strand of evidence, there is an absence of evidence of anything more than just emotional ties. There is no evidence of financial dependency. The appellant has funds invested in Pakistan which are available to her, and which provide her with an income. The argument in this case proceeds on the question of dependency for personal care, but my findings of fact indicate that the appellant is able to pursue the ordinary activities of daily living independently.

29. In the absence of evidence of anything more than the normal emotional ties between the appellant and the sponsor, I find that family life within the meaning of article 8 ECHR does not exist between the sponsor and the appellant.

30. Mr Jarvis conceded that family life exists between the appellant and her grandchildren, with whom she has been living since February 2014. The respondent's decision, if implemented, would separate the appellant from her grandchildren. They would no longer live under the same roof.

31 The effect of the respondent's decision would be that the appellant would have to return to Pakistan. She would return to Pakistan without the support of other family members and might have to live alone. The weight of evidence produced indicates that healthcare facilities are available to the appellant. The evidence produced indicates that the appellant has savings and an independent income.

32. No reliable evidence of the impact of the appellant's return to Pakistan on her grandchildren is placed before me. I have no doubt that there is significant affection between the appellant and her grandchildren - but that relationship is a relationship which had been pursued from a distance until February 2014. On the sponsor's evidence, it was intended that the appellant would return to Pakistan and it was only one month after she arrived in the UK that it was discovered that the son with whom she had lived had left Pakistan for Saudi Arabia, and the home that she had lived in had been rented out to others.

33. Taking the evidence at its highest, it is the appellant's son's removal to Saudi Arabia which has caused this family to rethink their future plans for the appellant. None of those considerations point to such a strong bond between the appellant and

her grandchildren that the previous arrangement of contact through visits and electronic communication should not be re-established.

34 There is a lack of evidence of the appellant's own health difficulties. The only medical evidence placed before me comes from the Aga Khan University Hospital, Karachi, and appears to relate to negative blood tests for hepatitis and HIV. There is a lack of evidence of significant disability. Indeed, the oral evidence is that the appellant can pursue the ordinary activities of daily living independently.

35 The harsh truth is that if the appellant returns to Pakistan, she will return to the country where she has pursued practically all of her life. She will return to the routines that she had established throughout her life, until February 2014. She will have to find accommodation but she has the wherewithal to find accommodation. Healthcare is available to the appellant in Pakistan and return to Pakistan will not deprive the appellant of contact to her children and grandchildren.

36. I consider s. 117B of the 2002 Act. The maintenance of immigration control is in the public interest. Only s.117B (2) & (3) are relevant to this appeal. My findings of fact indicate that the appellant is financially independent. I have no reliable evidence of the appellant's ability in the English language. In the circumstances of this case, I cannot find that consideration of s.117B of the 2002 Act is determinative of this appeal.

37. No argument is advanced in relation to private life, but, on the facts as I find them to be, the appellant has not established private life within the meaning of article 8 ECHR in the UK.

38. I therefore conclude that there are no reasons to consider this case outside the Immigration Rules and that the SSHD's decision is not a disproportionate breach of the Article 8 rights of the Appellant or the Appellant's grandchildren.

Decision

I dismiss the appeal under Article 8 ECHR.

I dismiss the appeal under the Immigration Rules

Signed:

Deputy Upper Tribunal Judge Doyle
Date: 23 September 2015