



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/04976/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 21<sup>st</sup> April 2016

Decision & Reasons Promulgated  
On 15<sup>th</sup> July 2016

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SM

(ANONYMITY ORDER MADE)

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer  
For the Respondent: Mr M Symes of Counsel

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision by Judge of the First-tier Tribunal Robertson allowing an appeal on human rights grounds by SM (hereinafter referred to as "the Claimant").

2. The Claimant was born on [ ] 1985 and is a national of Pakistan. She came to the UK as a student in September 2009. In February 2011 she applied for indefinite leave to remain outside the Immigration Rules. This application was refused but she was granted leave to remain until 13<sup>th</sup> June 2012. Prior to the expiry of this leave she applied again for leave to remain outside the Rules. Her application was refused and a subsequent appeal was dismissed. In August 2014 she applied again for indefinite leave to remain outside the Immigration Rules and it is the refusal of this application which led to the present appeal.
3. The Claimant suffers from serious health problems. She has cervical cancer which has affected her bladder, rectum, pelvic side wall and ovaries. She has undergone multiple cycles of chemotherapy and surgical procedures, including a stoma and removal of her bladder and rectum. She has regular six monthly reviews with an oncologist and three monthly blood tests. She suffers from depression and has been referred for counselling. As a result of her condition she is unable to have children and would find it difficult to marry within her culture. She is unable to work and relies on others to cook for her, do her laundry and take her shopping. Her mobility is limited.
4. In the UK the Claimant lives in a property owned by her brother, Mr S. She also has a married sister in the UK. Altogether she has four sisters and three brothers, none of whom live in Pakistan. Her remaining sister in Pakistan has recently moved to Dubai. Her parents reside in Ireland, where they have residence cards.
5. In the decision under appeal the judge noted that it was not disputed that the Claimant could not meet the requirements of the Immigration Rules. The judge observed that the starting point for consideration was the determination made in the previous appeal by Judge of the First-tier Tribunal Gillespie in February 2014, in accordance with Devaseelan [2012] UKIAT 00702. Judge Gillespie found that the Claimant could not succeed under Article 3. Under Article 8 he found that her circumstances “did not fall within the small minority of rare and truly exceptional cases in which the imperative of proportionality demands an outcome in the Appellant’s favour”. Judge Gillespie took account of the medical evidence and the evidence regarding the Claimant’s family. At that time the Claimant’s family in the UK had uncertain immigration status. Her parents and two of her siblings were overstayers and Mr S had been refused leave. Judge Gillespie concluded that they were able to return to Pakistan to support the Claimant and that it was their first duty to do so.
6. In the present appeal the Judge of the First-tier Tribunal observed that there was little more medical evidence available than was before Judge Gillespie. The Claimant continued to be monitored and treated and it was likely that this regime would continue for the foreseeable future. There was nothing to indicate that Judge Gillespie’s finding in relation to Article 3 should not still stand.
7. In terms of Article 8, the Judge of the First-tier Tribunal observed that the Secretary of State did not accept that there were exceptional circumstances. The Secretary of

State gave consideration to the Claimant's state of health under Article 8 and concluded that medical care was available in Pakistan and that there was family there to support her. At the time of that decision the Claimant's sister was residing in Pakistan but the evidence at the hearing was that she had moved to Dubai. There was further evidence that the Claimant's parents had moved to Ireland and there was no-one in Pakistan able to care for the Claimant.

8. Under Article 8 the Judge of the First-tier Tribunal found that the Claimant is educated. She came to the UK originally to study and to improve her prospects. She speaks English and is not reliant on public funds. She has developed a private life whilst in the UK lawfully although her immigration status has been precarious. Her status as a student and subsequent leave to remain did not come with a guarantee, or expectation, of settlement. While accepting that there was a public interest in maintaining effective immigration control and acknowledging that medical treatment was available in Pakistan, the judge observed that the Claimant requires a significant amount of care and support on a daily basis with regard to both her physical and mental health. Although difficult, it would be possible for the Claimant to re-integrate into life in Pakistan but only if there was adequate daily physical and emotional support, which was no longer available now that her sister had left Pakistan.
9. Although the Claimant had only been in the UK for a few years her life had changed substantially because of the cancer diagnosis and subsequent invasive treatment. She did not know the cause or extent of her illness when she arrived. She had relied heavily on family support during this ordeal. Her prospects of marriage in Pakistan were reduced as a result of her illness and she would be unable to work and support herself. On the basis of these findings the judge found that the decision to refuse to vary leave and to remove the Claimant was not proportionate.

### **Application for permission to appeal**

10. In the application for permission to appeal, the Secretary of State contended first that the judge had failed to give adequate reasons for findings on material matters. In particular, at paragraph 26 the judge allowed the Claimant's appeal on the basis of her specific needs for care and support. It was not entirely clear from the decision who was providing this care and support. The judge noted that the Claimant's siblings provided her with support, but did not state what the support entailed. The judge stated that the Claimant required a significant amount of care and support on a daily basis, but again it was unclear who was providing this. The judge stated that the Claimant no longer had anyone in Pakistan to provide her with the care and support she required. The judge had not considered that currently the Claimant might be receiving this assistance from an external agency rather than from her family and that even if this was not the case now, this could be an option for the Claimant in Pakistan. The judge erred by not considering this possibility.
11. According to the Secretary of State's grounds, the judge's reasoning was also unclear about the level of dependency the Claimant had on her siblings. Reference was

made to Kugathas [2003] EWCA Civ 31. Where the level of dependency was unclear it was not shown whether this would outweigh the public interest in removal.

12. The second main ground relied upon by the Secretary of State was that the judge had failed to take into account or resolve conflicts of fact or opinion in a material matter. At paragraph 15 the judge found that the Claimant's parents had moved to Ireland and therefore she had no family to support her in Pakistan. The Secretary of State's decision took the view that there were no obstacles to the parents returning to Pakistan. The judge had failed to consider this possibility and to resolve this conflict in opinion.
13. In the grant of permission to appeal it was observed that even if it was open to the Judge of the First-tier Tribunal to accept that every member of the family had indeed left Pakistan by the date of the hearing, it was arguably wrong to start from the premise that none could return to care for the Claimant. The judge had not identified any change to the care provided to the Claimant in the UK since the appeal decision in February 2014. If in February 2014 the Claimant's care needs could properly be expected to be provided by a third party in Pakistan, the key question was whether anything had changed in that respect. It was arguably wrong to start from the premise that such care could only be provided by close family members rather than by extended family members or by a commercial organisation. Arguably the decision identified no such change and failed to identify a proper basis to depart from the analysis of proportionality made by Judge Gillespie.
14. A rule 24 response was provided on behalf of the Claimant, somewhat late, on 19<sup>th</sup> April 2016. Permission was nevertheless sought for admission of the response on the basis that the Claimant was not represented before the First-tier Tribunal but was now represented on a public access basis by Counsel and it had taken some time for preparation of the notice.
15. In the rule 24 response it is stated that the grounds of the application for permission to appeal do not identify any errors of law but were disagreements as to findings of fact. There was no deficiency in the reasoning of the First-tier Tribunal. It was obvious that the Tribunal accepted that the Claimant was heavily dependent upon her parents and siblings in the UK for emotional and physical support following the rapid onset and legacy of a life-altering illness which meant that she was unlikely to find a husband and had no expectation of having her own children.
16. It was within the range of responses to those findings to conclude that they disclosed facts representing a disproportionate interference with the Claimant's private and family life. The threshold for dependency in Kugathas was satisfied. The statutory criteria in section 117B were expressly addressed, as was the policy of the Immigration Rules, and all the relevant evidence was taken into account.
17. It was further submitted in the rule 24 notice that there was nothing irrational in not addressing the likelihood of the Claimant's support network relocating abroad. This was not a case in which a sole carer of a child, or a partner, could relocate abroad

with the person subject to immigration control in order to maintain essentially symmetrical relationships. It was plainly within the range of rational responses for the Tribunal to give short shrift to the notion that the entire family support network in the UK and Ireland could relocate abroad.

18. It was further submitted that there was no failure to follow the Devaseelan principles. In the present appeal Judge Robertson used the findings of Judge Gillespie as a starting point. They were repeatedly referenced and a distinction was drawn between the family's geographical locations at the time of the earlier hearing as opposed to their current locations. The earlier finding had been made that the Claimant's health experiences had left her "maimed physically and psychologically" and this was the starting point which plainly lowered the hurdle for her claimed subsequent success if other factors moved in her direction. Finally it was noted that the Secretary of State was not represented before the First-tier Tribunal and made no attempt to develop any theory about the case.

### **Submissions**

19. At the hearing before me, Mr Wilding for the Secretary of State relied on the grounds of the application for permission to appeal. He submitted that Judge Robertson had failed to give proper consideration to the previous appeal and failed to give reasons for departing from it. The judge had not shown how the Claimant's circumstances had manifestly changed. Mr Wilding queried what had changed in the one and a half years since the previous appeal. In terms of Devaseelan the subsequent appeal was not an opportunity to re-litigate. There had been no engagement in the more recent appeal with the key question of what had changed.
20. Mr Wilding continued that at page 23 of the decision Judge Robertson had said the Claimant needed a significant amount of care and support but he did not explain what this was. This was important to the question of return to Pakistan and the possibility of care there. The Article 8 analysis was incomplete and affected by material error.
21. Mr Wilding continued that Judge Robertson did not consider at all the question of whether the Claimant's parents could return to Pakistan to care for her. There was nothing to prevent support for the Claimant being provided in this way. The Claimant's parents were not permanent residents of Ireland. Only eighteen months previously Judge Gillespie had found there would be no disproportionate interference with the Claimant's right to respect for private or family life by her removal to Pakistan. The status of the Claimant's parents in Ireland was not known.
22. For the Claimant, Mr Symes referred to the Claimant's life changing health problems. This had required major surgery. The Claimant was unable to bear children and this would affect her social status in Pakistan. Judge Gillespie's decision had been taken as a starting point, together with the findings made about the Claimant's physical and psychological condition. The reason the appeal before Judge Gillespie failed was because at that time the Claimant still had one sibling in Pakistan. On the evidence before Judge Robertson on the balance of probabilities all the Claimant's family

members had left Pakistan. The Claimant's remaining sister in Pakistan had moved to Dubai.

23. Mr Symes observed that the Secretary of State did not attend the most recent appeal hearing before the First-tier Tribunal. The judge was entitled to find the Kugathas threshold was satisfied. It was not difficult to show a woman in the Claimant's position exceeded this. The judge referred to Section 117B and the precariousness of the Claimant's family life. The judge also considered the possibility of integration into Pakistan. There was an issue though of the complete lack of emotional support the applicant would have in Pakistan. There was no error of law in the decision.
24. Mr Wilding responded in relation to the findings made by Judge Gillespie. These concerned the precarious nature of the position of several family members. Judge Gillespie found the position in 2014 was broadly the same as it was at present. Mr Wilding reiterated that the status of the Claimant's parents in Ireland was not known. He further submitted that it was not right to say Judge Gillespie's decision depended on one sister being in Pakistan. The decision was about the family in the UK. The question Judge Robertson had to assess in the more recent appeal was the actual situation. The Claimant required the support of family members who were not lawfully in Ireland.
25. It was pointed out at this stage that according to paragraph 17 of the decision by Judge Robertson all the Claimant's family had now settled outside Pakistan. Mr Wilding responded that Judge Robertson did not refer to Judge Gillespie's findings in terms of Devaseelan and asked what had changed.

## Discussion

26. I do not agree with the submission on behalf of the Secretary of State that Judge Robertson did not follow the Devaseelan guidelines and did not identify a material change in circumstances since the previous decision by Judge Gillespie in February 2014. At paragraph 10 of the decision Judge Robertson made direct reference to Judge Gillespie's findings as the starting point for consideration in the later appeal, in accordance with Devaseelan. At paragraph 24 the judge said that he accepted the Claimant's evidence regarding the difficulties she had on a day-to-day basis and with mobility. The judge concluded that although difficult it would be possible for the Claimant to reintegrate into life in Pakistan. This would only be possible, however, if there was adequate physical and emotional support on a daily basis. This was no longer available in Pakistan as the Claimant's sister had now settled in Dubai.
27. It is significant here that the judge refers both to physical and emotional support, based on the medical evidence and the evidence of the Claimant and of her brother, both of whom gave evidence before the First-tier Tribunal. The Secretary of State's proposal that the Claimant could rely on care from a commercial organisation in Pakistan provides no answer to her need for emotional support, given the difficulties she has gone through.

28. The Secretary of State sought to argue that Judge Robertson had not made adequate findings about the care required by the Claimant. I consider that adequate findings were made. The judge accepted the Claimant's evidence that she relies on others to cook for her and do her laundry and her shopping. The Claimant has limited mobility and she suffers from depression. On the basis of this evidence, together with the medical evidence relating to the Claimant's physical condition, the judge was entirely justified in finding that the Claimant requires physical and emotional support on a daily basis. As Mr Symes submitted, this finding was also the basis on which the judge was entitled to find that the Claimant satisfied the Kugathas threshold for dependency upon her siblings in the UK.
29. Mr Wilding appeared to suggest that some of the family members upon whom the Claimant is dependent in the UK had themselves a precarious immigration status. The evidence does not appear to support this assertion. The unchallenged evidence before Judge Robertson was that the Claimant's brother, Mr S, in whose house she lives, is a British citizen. The Claimant's sister, Mrs A, who lives with her husband in the UK, is also a British citizen, as is her husband. The Claimant's third sister, Mrs M, is also a British citizen living in the UK. Although Mr Wilding referred to the Claimant's parents as having no status in Ireland, the evidence before Judge Robertson was that they had residence cards. This may not mean that they are permanently settled but it does indicate that they are lawfully present in the Republic of Ireland.
30. The further suggestion made on behalf of the Secretary of State was that either the Claimant's parents or her sister in Dubai, or perhaps some other sibling, could return to Pakistan to look after her. This suggestion requires some further analysis. Judge Robertson did not find that the Claimant's dependency in the Kugathas sense was upon her parents or upon her sister in Dubai. This dependency was upon the Claimant's brother and sisters in the UK. This is where the Claimant's private and family life has its existence. This is where the interference in the Claimant's private and family life arising from the Secretary of State's decision would have its impact. The finding made by Judge Robertson was that there was no family member in Pakistan in a position to care for the Claimant were she to return there. This is a finding based on the evidence as it was presented at the hearing before the First-tier Tribunal in August 2015. There was no evidence from the Claimant's parents or from her sister in Dubai to say that they were in a position to return to Pakistan to look after her or were indeed willing to do so. The Claimant's care and support is provided by her siblings in the UK. Judge Robertson was correct in looking at the interference which would arise were the Claimant to be removed from the UK and comparing this with the situation she would face at the date of the hearing were she to return to Pakistan, where there was no-one to provide her with the physical and emotional support she required.
31. It was simply wrong, and contrary to the findings made by Judge Robertson, to suppose that the complex physical and emotional requirements of the Claimant which are met by her siblings in the UK could be provided for in Pakistan either by a returning family member or by a commercial organisation. The question should be

framed in terms of the proportionality of the interference with the Claimant's private and family life in the UK and only when the severity of this interference has been assessed can a comparison be made with the circumstances in which the Claimant would find herself in her country of origin. Judge Robertson was entitled to find severe interference with the Claimant's private and family life in the UK and an absence of not only physical but also emotional support in Pakistan. On this basis the judge was entitled to resolve the balancing exercise in favour of the Claimant.

32. Finally, to address Mr Wilding's point about the difference between the circumstances at the time of Judge Gillespie's decision and the hearing before Judge Robertson, I would emphasise the following findings made by Judge Gillespie. At paragraph 28 Judge Gillespie found that at that time the Claimant's parents were living in Manchester some 200 miles away from the Claimant. They were overstayers, as were their two youngest children. It seems that in 2011 the Claimant's brother, Mr S had been refused leave to remain and one of her sisters, AM, had returned to Pakistan. Although in his findings Judge Gillespie referred to Mr S as having been refused leave in 2011, he also noted in his record of the evidence that Mr S had become a naturalised British citizen in 2013. It appears from the evidence before Judge Gillespie that the sister in Pakistan was married and had a family. This raises a further issue in relation to the Secretary of State's suggestion that the Claimant's sister in Dubai would be able to return to Pakistan to look after her. At paragraph 12 of his decision Judge Robertson referred to the immigration status of the Claimant's family as found by Judge Gillespie and, at paragraph 15, Judge Robertson referred to the changed circumstances of the family since the hearing in February 2014 and the fact that there was no longer anyone in Pakistan able to care for the Claimant should she be forced to return there.
33. I am satisfied that the findings made by Judge Robertson in relation to both the evidence and the proportionality of the Secretary of State's decision were properly based upon the evidence and supported by adequate and valid reasons. The judge was entitled to find that there had been changes in the circumstances of the Claimant's family since the hearing before Judge Gillespie. On this basis, and for the reasons given, Judge Robertson was entitled to come to a different conclusion under Article 8 in the current appeal from that reached by Judge Gillespie in the previous appeal.

### **Conclusions**

34. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
35. I do not set aside the decision.

### **Anonymity**

36. The First-tier Tribunal did not make an order for anonymity and I have not been asked to make such an order. However, in view of the medical evidence of a very personal nature I consider that in this appeal it would be appropriate for an order to



be made. Accordingly pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Claimant. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Signed

Date: 15 July 2016

Upper Tribunal Judge Deans