



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/43654/2014

THE IMMIGRATION ACTS

**Heard at Glasgow
on 5 January 2016**

**Decision & Reasons Promulgated
On 14 January 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJA KARAMAT ULLAH

Respondent

Representation:

For the Appellant: Mr Matthews, Senior Home Office Presenting Officer

For the Respondent: Mr Dewar, Advocate, instructed by Burnley Legal,
Solicitors, Woodford Green

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.
2. The appellant is a citizen of Pakistan, born on 25 April 1932. He has not requested an anonymity direction and none has been made.
3. The appellant entered the UK as a visitor. On 28 April 2014 he sought leave to remain outwith the Immigration Rules, on the basis of family and

private life under Article 8 of the ECHR, and on compassionate and compelling grounds.

4. The respondent refused that application for reasons explained in a letter dated 3 September 2014: the requirements of the Immigration Rules were not met; the appellant would not be deprived of care if he returned to Pakistan; 4 of his 6 children live in Pakistan, not in the UK where the other 2 live; his health would not be adversely affected by removal; there was no truly exceptional case; and there were no sufficiently compelling or compassionate circumstances to merit granting settlement outwith the Rules.
5. First-tier Tribunal Judge Lea allowed the appellant's appeal for reasons explained in her determination promulgated on 15 July 2015.
6. The SSHD's grounds of appeal may be summarised as follows:
 - 1 The appellant having arrived as a visitor was precluded from making an in-country application as a dependant relative.
 - 2 The judge erred in finding that the appellant enjoyed family life with his adult children in the UK. Notwithstanding his medical conditions, there was no dependency over and above normal and emotional ties.
 - 3 In finding that the appellant would now qualify if he applied from outside the UK, the judge entered into impermissible speculation. The judge relied on evidence that the 4 children in Pakistan were not in a position to care for the appellant and that the children in the UK were not aware of a care home for him in his home area in Pakistan, but the refusal letter had gone into considerable detail about medical treatment available in Pakistan. The judge had based her decision on family preferences not inability to obtain care and treatment in Pakistan.
 - 4 Although the judge had evidence that the appellant was "unfit currently to travel" ... this is an irrelevant consideration in assessing whether the appellant could obtain care abroad.
7. Mr Matthews did not seek to advance ground 2. He accepted that the existence of family life was a question of fact for the Tribunal to resolve. He said that the substance of the respondent's criticism was in paragraph 3. There were detailed requirements to apply from abroad as an adult dependant relative, including specific evidential requirements. The judge referred to that route a number of times and to the "*Chikwamba*" principle, but did not address the matter correctly. *Chen* (Appendix FM – Chikwamba – Temporary separation – proportionality) IJR [2015] UKUT189 establishes that the onus is on the appellant to show that entry clearance requirements would be met. The appellant did not produce such evidence. Separately, and although not mentioned in the grounds, there was an error of approach in light of Part 5A of the 2002 Act. The determination should be set aside and either a rehearing should be ordered in the First-tier Tribunal, or the appeal should be dismissed on the basis that the

appellant, if in a position to do so, was entitled to make a fresh application backed up by the necessary supporting evidence.

8. Mr Dewar submitted that although the SSHD said that it was speculative for the judge to have thought that the appellant would be likely to succeed under the Rules, that was rather based on common sense. In any event, whether the judge thought the appellant would succeed under the Rules was neither here nor there. The references to *Chikwamba* were incidental, and not determinative of the proportionality issue. The judge reached the same conclusion whether or not the appellant was likely to meet the terms of the Immigration Rules. She held that the appellant was an elderly man so ill as to be unable to travel, a conclusion properly open to her, having heard the evidence, and which was not criticised in the grounds of appeal. The grounds said that the judge had no regard to evidence of availability of care in Pakistan, but that overlooked the evidence from the appellant's 2 daughters in the UK who were in a position to speak to that matter. The judge said at paragraph 12 that she accepted the evidence of the sponsors, which included their evidence regarding the attitude of the siblings in Pakistan and the availability of care. The respondent's strongest point of criticism was based on the misapplication of *Chikwamba*, but that misunderstood the eventual outcome.
9. Mr Matthews in response submitted that the *Chikwamba* issue was not collateral, having been referred to in the determination 3 times, not only once or in passing. The judge plainly thought that the principle had a significant bearing on the outcome.
10. I reserved my determination.
11. This is the concluding paragraph of the determination:

"The facts ... are somewhat unusual. I find that family life between the appellant and the sponsors is clearly established in the UK. I consider that it would not be possible for family life to continue ... by way of visits and accordingly there would be an interference ... I also find that interference ... would be disproportionate. The appellant may well have been able to meet the requirements of the elderly dependent relative rule if he had made an application from Pakistan. It is clearly not possible or proportionate for him to return to make such an application. Even if he did not qualify under this Rule, given his medical conditions and dependence on his daughters in the UK and his inability to travel, I would allow the appeal in any event under Article 8."
12. The final sentence is crucial. The determination at earlier stages perhaps does skirt with a misapplication of *Chikwamba*, particularly when read in the light of its application in *Chen*. However, there was a critical finding that the appellant is now an elderly man, too ill to travel. Given his age and the progressive nature of his conditions, the finding is not one of a temporary inability to travel but of a situation unlikely ever to be reversed. I see no sense in the SSHD's grounds at paragraph 4, stating that unfitness to travel is irrelevant. Mr Matthews made no submission to that effect. The facts found by the judge were very different from the facts as

they appeared to the respondent's decision maker. On that earlier basis of fact the appellant had perhaps no hope of another outcome, but the basis on which the judge came to assess proportionality was radically different.

13. The judge's final assessment is not based on any error of fact-finding, or on any material misdirection of law. It was an assessment reasonably open to her. Her determination shall therefore stand.

A handwritten signature in black ink, appearing to read 'Hugh Macleman'. The signature is written in a cursive, flowing style with a large, stylized initial 'H'.

Upper Tribunal Judge Macleman

13 January 2016.