Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03718/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 January 2018	**On 16 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

ASIA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kannangara, Counsel instructed by Malik Law Chambers
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Brewer who, in a determination promulgated on 19 September 2017, dismissed the appellant's appeal against a decision of the Secretary of State to refuse her leave to remain both on immigration grounds and under the provisions of Article 8 of the ECHR.

2. The appellant is a citizen of Pakistan, born on 21 January 1950. She entered Britain as a visitor in 2005 and I understand then made an application for leave to remain which was refused. That decision was not

appealed and therefore the appellant overstayed after the beginning of 2006.

3. In 2013 she made an application for leave to remain on human rights grounds. That was refused and the appeal against that decision was allowed. The Secretary of State then appealed to the Upper Tribunal and in February 2017 Deputy Upper Tribunal Judge Shaerf set aside the decision of the First-tier judge and remitted the appeal for a hearing afresh in the First-tier Tribunal. In these circumstances the appeal came before Judge of the First-tier Tribunal Brewer on 15 September 2017.

4. Judge Brewer set out the decision of the respondent in paragraphs 3 through to 9 of his determination. It was pointed out that the appellant did not meet the requirements of Section R-LTRP.1.1(a) or (d) of Appendix FM as she had no partner or dependent children in Britain and moreover she did not qualify under paragraph 276ADE(1) of the Rules in that she had not lived in Britain continuously for twenty years, was over the age of 25 and there were no very significant obstacles to her returning to Pakistan. With regard to the appellant's rights under Article 8 of the ECHR it was noted that she claimed that she had family life with her children and grandchildren, her medical conditions were noted and it was noted that she received care and support from her family in Britain. The respondent, however, did not consider that there were any exceptional circumstances in her case and the relationship between the appellant and her grandchildren was not strong enough to amount to such exceptional circumstances. It was pointed out that medical treatment would be available in Pakistan and whilst not equivalent to that available in Britain there was not sufficient difference to engage Article 3 of the ECHR. Moreover, the family support she received was not sufficient to warrant a grant of leave outside the Rules. The judge considered the terms of the Rule relating to entry clearance as an adult or dependent relative but found that the appellant could not comply with those requirements. He then went on to set out Sections 117A, 117B and 117D of the Nationality, Immigration and Asylum Act 2002.

5. He referred to the decision of the Supreme Court in **Agyarko v SSHD [2017] UKSC 11** which indicted that the term "exceptional circumstances" would mean circumstances in which the Secretary of State's decision to refuse leave to remain would result in unjustifiably harsh consequences for the appellant and that that would lead to a decision not being proportionate. He then went on to refer to the judgments in **Beoku-Betts [2008] UKHL 39**, **Hesham Ali [2016] UKSC 60**, **MM (Lebanon) [2017] UKSC 11** and **Razgar**. He also referred to the judgment of the European Court of Human Rights in **Jeunesse (application no. 12738/10)**. He noted the basis of the appeal was that the appellant would be unable to live a normal life in Pakistan because of her care needs and that family life existed and it was not proportionate for that to be interfered with.

6. He set out the evidence, accepting that the appellant suffered from Type 2 Diabetes, Parkinsons disease, generalised osteoarthritis, lumbar

spondylosis with joint pain and vitamin D deficiency and that she had restricted mobility and required "close personal support". She had, before coming to Britain lived in her parents' house which had now been inherited by her two brothers both of whom were in Britain. She did not know if the house remained in the family. She has seven children (four sons and three daughters) in Britain all of whom, apart from her younger son, were in Britain prior to her arrival in 2005. She has lived with one or other of her sons, receiving personalised care from the family, although he said there is precious little evidence given about that. He found that the support given was with standing and movement and said that, although there was a reference to her inability to manage her "daily life", it was unclear what that meant and there was no medical evidence to support that broad assertion, although her GP had referred to her needing assistance to get to the bathroom.

7. In paragraphs 29 onwards the judge first considered the appellant's claim under the Immigration Rules pointing out that she did not meet the requirements of either R-LTRP1.1(a) or (d) and that the application was, he considered properly refused under the rules. Turning to the issue of private life he stated that it was not contended that any part of the Rules other than 276ADE(1)(vi) was applicable and he said that the key was that it had been argued before him that there would be significant obstacles to the appellant returning to Pakistan whereas the respondent took the opposite view. He stated that the appellant said that if she returned to Pakistan she could not live a normal life although it was accepted that the threshold was a high one.

8. The judge first dealt with the issue of the medical support the appellant had been receiving in Britain, citing a number of relevant cases. He found that the appellant's illness did not fall "within the paradigm of Article 3". He stated that in **GS (India)** it was made clear that if an Article 3 claim failed Article 8 could not succeed without a separate or additional factual element which brought the case within the Article 8 paradigm. He noted that it was not suggested that no, or no adequate, medical care would be available in Pakistan for the appellant and that she was relying on the personal care provided by the family. Having referred again to relevant case law he then went on to say there was no obligation on the UK to provide care in these circumstances. He referred to the cost of medical care and said that it was clear that Article 3 did not impose a medical care obligation on the contracting state with the clear result of allowing the claimant to remain in Britain would be to impose such an obligation on the United Kingdom. He said that he could not conclude that no or no adequate medical care was available to the appellant in Pakistan nor that there was not a place there in the system for caring for the elderly and infirm patient and therefore he found that the appellant did not meet the standard of exceptionality required by 276ADE(1)(vi).

9. He went on to consider the appellant's claim outside the Rules. He accepted that the appellant was exercising family life with her family in Britain and that therefore the first question in **Razgar** was answered in the affirmative. In paragraphs 46 he considered whether or not any

interference was in accordance with the law – he found that it was. When he then considered proportionality he took into account the need to maintain effective immigration control. In paragraph 50 he wrote:-

> "I have on the one hand considered the Appellant's support from her family and the way she is, as it was put to me, part and parcel, of her grandchildren's lives. My view on the evidence was that this must be somewhat overstated given her lack of mobility and apparent communication difficulties, for example she spoke no English whereas all her grandchildren were born and brought up in the UK. I also note again that all her family, save for her youngest son, left her in Pakistan when they came to the UK. I note the need to maintain immigration control and that the Appellant deliberately overstayed, in my judgment, to gain access to care under the NHS."

Clearly, having weighed up all factors, he found that the decision was proportionate and therefore he went on to dismiss the appeal.

11. The grounds of appeal argue that the judge had failed to consider and deal with significant obstacles for the purposes of paragraph 276ADE of the Immigration Rules and that he had given inadequate consideration of the Article 8 proportionality issue and finally that inadequate reasons were given for the conclusion and the decisions reached.

12. Mr Sharma relied on those grounds. He argued that, when considering the provisions of Rule 276ADE, the judge had erred when considering the ability of the appellant to integrate on return to Pakistan. He emphasised that this case was not founded on a claim for protection under Article 3 of the ECHR. What was being said was that she needed help with her daily life and that there were very significant obstacles for her to overcome should she attempt to reintegrate into life in Pakistan. Mr Sharma stated that it was not the issue of money or the availability of medicines or medical care which was in issue, it was the fact that her disability made it difficult for her to get around and that she had no family to look after her in Pakistan. He emphasised all her children had settled status in Britain and that her ancestral home was no longer available for her. He argued that the decision given for refusing the claim under Rule 276ADE was not adequate.

13. He argued that the judge had erred by not taking into account the unavailability of personal care. The appellant had always lived with children who looked after her daily needs. I was referred to the emotional ties between the appellant and her children and Mr Sharma asserted that the judge had erred in the balancing exercise when considering the proportionality of removal, given the life which the appellant was living here.

14. In reply Mr Tufan noted that the grant of permission, although lengthy, did not appear to point out an arguable error of law – the judge granting permission had stated merely that:-

> "It is arguable that the judge's findings at paragraph 50 of the decision as to lack of mobility and apparent communication difficulties does not lead to a conclusion that the evidence must be somewhat overstated."

15. In any event he argued that the findings of the judge were reasonable and were not irrational in any way, although he accepted that the judge had been wrong in his reference to the issue of exceptionality. The relevant issue was that the judge had not found that there were any significant obstacles to the appellant returning. The reference in paragraph 12 of the determination to Section EC-DR of the Rules was relevant insofar as it must be taken in conjunction with the terms of paragraph E-ECDR.2.5 which made it clear that:-

> "The applicant or, if the applicant and their partner are the sponsor's parents or grandparents… must be 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 reasonable provide it; or
>
> (b) it is not affordable."

Clearly, those requirements were not met.

16. He also referred to the fact that the appellant was resorting to care from the NHS to which she was not entitled – there was no indication that any payment had been made for payment for the treatment which she had received. He stated that the judge had fully settled out all his reasons for his decision and reached a conclusion which was fully open to him and in no way perverse.

17. In reply Mr Sharma emphasised that the judge had erred in the reference to exceptionality and said that was a material error and the relevance was significant obstacles – there was no one to provide long-term personal care for the appellant in Pakistan and there was no finding why the judge had come to the conclusion that the appellant could not succeed in that regard. The only such long-term personal care that was available in Britain. He argued that the issue of overstaying should not be weighed in the balance of the proportionality in the decision.

18. I consider that there was no material error of law in the determination of the Immigration Judge. Not only did the judge set out in full the relevant statute law and the relevant Rules but he also set out in some detail the relevant case law. It was not argued that the appellant would not be able to afford the medical treatment which would be required, in Pakistan, nor indeed that it would have been impossible to find anyone who could care for her. What was argued was that she had lived for many years with a family here who were caring for her and that that is what the situation that she and the family wished to continue.

19. The judge did properly consider the terms of the Rules and he was entitled to point out that the appellant could not succeed under paragraph 276 of the Rules because the appellant could not show that she could meet the requirements of E-ECDR.2.5 at (b). Although it is the case that the judge preferred the issue of exceptionality, he clearly bore in mind the terms of the judgment in **Agyarko** where the term 'exceptionality' and 'very significant obstacles' are elided in paragraph 45 where it was stated that:-

> "45. By virtue of paragraph EX.1(b), 'insurmountable obstacles' are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in 'exceptional circumstances', in accordance with the instructions: that is to say, in 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate'. Is that situation compatible with article 8?"

20. The reality is here that the judge did weigh up all relevant factors. He found that the appellant could not succeed under the Rules. When considering the additional factors he was fully aware of the appellant's needs and her attachment to her family here and conversely her lack of relatives in Pakistan but he was fully entitled to take into account the fact that this appellant was an overstayer and, without authority had accessed the national health service here – she had used the resources in this country to which she was not entitled. I consider that the judge did properly take into account all relevant factors and therefore reached a conclusion which was fully open to him thereon. It cannot be said that his decision was perverse let alone in any way unreasoned.

Notice of Decision

21. For these reasons I find that there is no material error of law in the determination of the Judge of the First-tier Tribunal and I dismiss this appeal.

No anonymity direction is made.

Signed  Date: 12 February 2018

Deputy Upper Tribunal Judge McGeachy