Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/24826/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 July 2014	**On 21 August 2014**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

MRS SALIHA NASIM

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms E King, of Counsel instructed by Messrs Lawrence Lupin Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Thanki who in a determination promulgated on 15 May 2014 allowed the appeal of Mrs Saliha Nasim on human rights grounds against a decision of the Entry Clearance Officer to refuse her leave to enter as the dependant of her son who is a refugee in Britain.

2. Although the Entry Clearance Officer is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent before the First-tier Tribunal. Similarly I will refer to Mrs Saliha Nasim as the appellant as she was the appellant in the First-tier.

3. The appellant is a citizen of Pakistan born on 1 April 1944. She applied on 24 July 2012 for entry clearance for settlement under the family reunion policy as a dependent relative of her son. The application was considered under Appendix FM Section EC-DR.1.1(d) on the basis that she had not produced evidence to show that she was the mother of the refugee sponsor son in Britain and that in any event she had other relatives who could care for her in Pakistan and the care costs could be met by the financial help from the sponsor in Britain.

4. The judge heard evidence from the sponsor and noted that it was conceded that the appellant could not meet the requirements of Appendix FM. She noted that the only arguments being put forward were that the appellant's rights under Article 8 of the ECHR would be infringed by removal.

5. In paragraphs 26 onwards the judge set out her findings. She noted that the appellant lived in Rabwah which she referred to as "a town of sanctuary for those practising the Ahmadi faith". Until recently the appellant had lived with her daughter-in-law, the sponsor's wife and her grandchildren but was now living alone in a house owned by the sponsor son. She was a widow, her husband having died in 2003.

6. The judge noted that the appellant had three sons who had claimed asylum and who lived in Britain but also had a fourth son who moved from place to place in Pakistan. It was claimed that that son was unable to look after his mother. Moreover, the appellant had a daughter and the judge stated that culturally the appellant's daughter would not be able to look after her. She went on to say that the appellant could not live in a care home because of her Ahmadi faith and, having briefly referred to the determination of the Tribunal in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)**, she stated that it was only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary to go on to consider whether or not there were compelling circumstances not sufficiently recognised under the Rules. She indicated that she considered that that was the ratio of the Court of Appeal judgment in **MF (Nigeria)**. She commented that Appendix FM did not cater for compassionate circumstances under the family reunion policy under the Refugee Convention and said that she found that there were exceptional circumstances which required consideration under Article 8 of the Convention.

7. She concluded that there was family life with the sponsor, that there was an infringement of that family life by the decision and went on to conclude

that the infringement was disproportionate. Having noted that the sponsor would not be able to support his mother she stated that she had been told that he had completed a security guard course and was confident of getting a job so that he could financially look after his family. She noted the determination of the judge who had heard the appeal of the sponsor and found that he would be at risk on return. As the appellant had been an integral part of the sponsor's family before he fled Pakistan she concluded that the refusal was a disproportionate interference with the appellant's Article 8 rights.

8. The Entry Clearance Officer appealed stating that the fact that the appellant had been an integral part of the sponsor's family prior to him leaving Pakistan was hardly exceptional circumstances and there was no reason why the appellant should remain such an integral part of the family. The grounds refer to the appellant's fourth son in Pakistan as well as the fact that the appellant would be supported by remittances from Britain. There was nothing exceptional or compelling in her circumstances.

9. Mr Tufan relied on the grounds of appeal. He stated that there was no evidence of what compelling circumstances there might be.

10. Ms King stated that it was not incumbent on the judge to set out in particular detail all relevant factors taken into account but the reality was that the judge had taken into account relevant factors and reached conclusions which were fully open to her on the evidence and it was not for the appellate court, unless a decision was perverse, to set aside a decision by one judge and substitute their own decision when there was nothing irrational or perverse in the first Judges' decision. She argued that the grounds of appeal merely quibbled on the findings of fact and that the judge was correct to place weight on clear compassionate reasons. The fact was that the sponsor had no choice but to leave Pakistan and that had broken up the family unit.

11. She accepted that the appellant would be reliant on public funds but stated that the sponsor hoped to find work. She argued that in any event the reality was that the decision of the judge that the refusal of the application was disproportionate was clearly open to her.

Discussion

12. I consider that there are material errors of law in the determination of the Immigration Judge. I consider that she has not identified any compelling factors which should mean that she could have allowed the appeal on Article 8 grounds. She should have used as her starting point the fact that the appellant could not meet the requirements of the Rules and directed herself that that did not mean that she had merely had to conduct a separate exercise under the Convention but had to go on to consider whether or not there were compelling factors which meant that this should

be one of those exceptional cases where it would be appropriate to allow the appeal on human rights grounds notwithstanding that the appellant could not succeed under the Rules.

13. If that were her conclusion then I consider that she did not give sufficient reasons for so finding. In fact she did not give reasons for her conclusions that the appellant's son in Pakistan could not help his mother given that he considered that the appellant lived in Rabwah which was "a sanctuary for Ahmadis". Moreover, she did not give reasons why the appellant's daughter could not assist or indeed why the sponsor here could not provide funds to ensure that his mother received the domestic support she required. There was nothing to indicate that the appellant herself was in any danger in Pakistan nor indeed was there any indication of how she would be able to integrate into Britain let alone the fact that it was accepted that she would become a charge on public funds here.

14. All these factors are relevant in a proportionality assessment and I consider that the judge erred by ignoring these factors and concluding that it was appropriate that the appellant's appeal should be allowed under Article 8 of the ECHR.

15. I therefore set aside the decision of the First-tier Judge and direct that this appeal proceed to a hearing afresh. The appeal has been set down for a hearing at Hatton Cross on 12 February 2015 with an Urdu interpreter as I consider that the requirements of the Senior President of Tribunals' practice note paragraph 7 are met.

Decision

16. The appeal of the Secretary of State is allowed to the limited extent that the appeal is remitted to be heard in the First-tier Tribunal in a hearing afresh, the date of hearing being 12 February 2015.

Signed Date

Upper Tribunal Judge McGeachy