



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

Appeal Number: IA/40420/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 September 2015**

**Decision & Reasons Promulgated  
On 14 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**QAZI NAVEED AHMED  
(NO ANONYMITY DIRECTION)**

Respondent

**Representation**

For the Appellant: Ms A. Fijiwala, Senior Home Office Presenting Officer  
For the Respondent: Mrs J. Smeaton, Counsel instructed by Marks & Marks Solicitors

**DECISION AND REASONS**

1. In this decision I will refer to the appellant as “the Secretary of State” and to the respondent as “the claimant”.
2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal promulgated on 24 February 2015 allowing the claimant’s appeal against the decision of the Secretary of State, dated 26 September 2014, to refuse his application for leave to remain on human rights grounds.

3. I have not been asked to and see no reason to make a direction with respect to anonymity.
4. The claimant is a citizen of Pakistan born on 1 March 1943.
5. He entered the UK on 5 April 2011 as a visitor along with his wife to visit his two daughters and grandchildren living in the UK. Whilst in the UK his wife became ill and sought medical treatment. An application for further leave to remain was made but during the application process, on 28 November 2012, his wife died.
6. On 12 April 2013 the claimant applied for leave to remain on human rights grounds. On 26 September 2014 this application was refused on the basis that he could not fulfil the requirements under Paragraph 276ADE of the Immigration Rules and that there were no exceptional circumstances which warranted consideration of leave outside the Rules.

#### First-tier Tribunal Decision

7. The appellant appealed and his appeal was determined by First-tier Tribunal Judge Edwards (“the judge”) on the papers. The judge allowed the appeal for the following reasons:

“The evidence now before the Tribunal shows that the appellant is a sick man, who is neither able to travel to his homeland, or to live independently. That is, in my view an exceptional circumstance that would justify a grant of leave outside the Rules, at least until a further assessment is completed into the appellant’s health. ...the decision to remove the appellant is not a proportionate decision, in compliance with Article 8.”
8. The evidence relating to the claimant’s health, to which the judge refers in the above cited paragraph, is explained by the judge as follows:

“There is in the appellant’s bundle a letter dated 3 February 2015 from a Dr S. Ather, who is an associate to a consultant psychiatrist employed by the Leicester Partnership NHS Trust. He has examined the appellant and finds that he is suffering from Alzheimer’s Dementia. He has prescribed Glantamine XL 8mg and various other strategies. He opines that the appellant is not able to travel to Pakistan independently or to live independently. He advises a further assessment by a Dementia Care Advisor.”
9. The grounds of appeal submit that the judge erred by failing to have regard to Sections 117A-117B of the Nationality and Asylum Act 2002 (“the 2002 Act”) in his proportionality assessment including that little weight should be given to a private life established when an immigration status is precarious. The grounds also submit that the judge failed to indicate why further assessment of the claimant’s medical condition would not be possible in Pakistan following return chaperoned by family members, particularly given there were family members who remain in Pakistan. It is also submitted that the appellant could have applied under an appropriate category in the Immigration Rules if he was unable to return to Pakistan due to his condition.

## Submissions

10. Ms Fijiwala, for the Secretary of State, submitted that the judge erred both by failing to explain how he reached the view Article 8 was engaged and, in considering proportionality, not giving any consideration to the public interest or to the factors specified in Sections 117A-B of the 2002 Act. Moreover, the judge had not identified the relevant Immigration Rules: the only Rules to which he referred were Sections E-LTRP 2.1 and EX1 of Appendix FM which are plainly irrelevant.
11. Mrs Smeaton, for the claimant, submitted that the judge did not err by dealing only with Article 8 rather than the Rules as the claimant had conceded he could not satisfy the requirements of the Rules. She argued that Article 8 was clearly engaged such that if the judge erred by moving straight to the issue of proportionality such error was not material.
12. She highlighted that the judge had directed that leave be granted for a period of twelve months only in order that further assessment as to the claimant's health could be carried out. This, she argued, meant that the judge did not find removal in the future would be contrary to Article 8 but rather that at the date of his decision, based on the medical position at that specific time, removal would be disproportionate. In these particular circumstances, because the decision related to exceptional circumstances arising in a period of uncertainty, failure to address Section 117A-B of 2002 Act was not material as it would not have affected the outcome.

## Findings

13. Ill health alone is not a sufficient basis for Article 8 to be engaged and is only a factor to be considered in a proportionality assessment. As stated in **GS (India)** [2015] EWCA Civ 40 at [111]:

"First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging Article 8: if that is all there is, the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the "no obligation to treat" principle."
14. The judge's approach to Article 8 was not consistent with **GS (India)** and, for the reasons set out below, involved the making of errors of law.
15. Firstly, the judge did not undertake any analysis as to whether, or consider any evidence with respect to, the question of whether Article 8 was engaged. At paragraph [19] he stated that, in considering Article 8, he would "proceed directly to the issue of proportionality." **GS (India)** makes it clear that the claimant's medical situation, of itself, is not a sufficient basis to find Article 8 is engaged but the decision by the judge, in which he states at [15] that "the sole point of issue here seems to be the appellant's state of health", appears to assume Article 8 is engaged only

because of the claimant's health. It may be that there are other factors relevant to Article 8 discernible from the claimant's family and private circumstances such that Article 8 should be engaged, but the judge has made no findings to support such a conclusion and it was not open to him to find Article 8 was engaged solely on the basis of the claimant's health needs.

16. Secondly, the judge's proportionality assessment is plainly inadequate. The only information taken into consideration is that weighing in favour of the claimant being permitted to stay in the UK. The judge made, in this regard, the following findings:
  - a. the appellant was a sick man,
  - b. he was unable to travel to his homeland,
  - c. he was unable live independently.
  - d. he was not able to travel to Pakistan independently
  - e. his doctor had advised a further assessment by a Dementia Care Advisor.
17. A proportionality assessment under Article 8, however, requires these interests to be balanced against the public interest. As stated in **SS (Congo)** [2015] EWCA Civ 386 at [44]:

"If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf **Nagre**, para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8."
18. No such balancing exercise has been undertaken and no consideration was given to the public interest. This is a clear error of law.
19. Both parties agreed that if I found there to be an error of law there should be an opportunity for there to be a full oral hearing. Having regard to the President's Practice Statement 7.2(b), I have decided to remit the case to the First Tier Tribunal.

## **NOTICE OF DECISION**

The appeal is allowed.

The decision of the First-tier Tribunal involved the making of an error on a point of law such that it should be set aside in its entirety and the appeal heard afresh.

The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than First-tier Tribunal Judge J. D. L. Edwards.

No anonymity order is made.

Signed

Deputy Upper Tribunal Judge Sheridan

Dated