



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07591/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19th April 2018

Decision & Reasons Promulgated
On 10th May 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

NAJAM [U]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss F Shaw of Counsel, instructed on a direct access basis

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Khan promulgated on 19 December 2016, in which the Appellant's appeal against the decision to refuse her human rights claim dated 22 September 2015 was dismissed.
2. The Appellant is a national of Pakistan, born on [] 1947, who last entered the United Kingdom on 10 November 2014 pursuant to a multiple entry family visit visa. She applied for leave to remain on human rights grounds, primarily relying on ill-health and care given for her by her immediate family.

3. The Respondent refused the application on 22 September 2015 on the basis that she did not meet the requirements for leave to remain within the Immigration Rules and there were no exceptional circumstances which warranted a grant of leave to remain outside of the Immigration Rules. Specifically, the Appellant did not have a partner or any dependent children in the United Kingdom for the purposes of Appendix FM of the Immigration Rules, nor did she meeting the requirements of paragraph 276ADE of the same because she had not been in the United Kingdom for the required period of time and there were no very significant obstacles to her reintegration into Pakistan. The Respondent considered the medical report submitted on behalf of the Appellant which was noted and accepted that it would make travel to Pakistan difficult but not impossible with assistance. Further, medication and treatment for the Appellant's conditions were available in Pakistan.
4. Judge Khan dismissed the appeal in a decision promulgated on 19 December 2016 on all grounds. The Appellant did not attend the hearing before the First-tier Tribunal, nor did she put in any written evidence, which was said to be due to her medical condition, although the sponsor, [MM], her son, did attend and gave evidence. Judge Khan did not find the sponsor to have given credible or consistent evidence, giving examples of contradictory and inconsistent evidence, he gave the view that the sponsor's oral evidence was made up as he went along and that his oral evidence was vague and evasive, failing to answer questions asked of him.
5. Judge Khan considered a medical report from Dr M Mathukia dated 5 November 2016 but which was not signed and contained information predominantly provided by the sponsor. There was no suggestion in the medical report that the Appellant was unfit to give evidence or unable to provide a statement. The Appellant did not rely on Article 3 of the European Convention on Human Rights despite the claim to be suffering from a life-threatening condition, namely a brain tumour, but it was found that there was insufficient evidence to meet the high threshold under Article 3.
6. In relation to Article 8 of the European Convention on Human Rights, medical treatment was available in Pakistan and the Appellant had family there who would be able to assist with her needs and care. The Appellant was financially self-sufficient and the sponsor could continue to provide support from the United Kingdom if needed. Overall it was found that the Appellant's removal from the United Kingdom would not be a disproportionate interference with her right to respect for private and family life in the United Kingdom.

The appeal

7. The Appellant appeals on four grounds, first, that there were a number of factual errors and incorrect references within the decision, such as to the wrong country of origin, wrong duration of residence, references to Immigration Rules relevant to minors, multiple references to Appellants in the plural and oral evidence being given by multiple Appellants. Secondly, the decision contains an inaccurate record of the documentary evidence provided by the Appellant and shows a failure to properly

consider all relevant evidence, in particular, four medical reports were submitted but only one referred to and relied upon in the decision. Thirdly, the First-tier Tribunal erred in its assessment of the medical evidence that was submitted, referring only to some of the conditions suffered by the Appellant and a failure to take into account in that her medical condition was the reason for non-attendance at the hearing. Fourthly, that the First-tier Tribunal should have considered whether the Appellant satisfied the requirements for leave to remain as an adult dependent relative.

8. Permission to appeal was granted by Judge Grant-Hutchinson on 3 July 2017 on all grounds.
9. The appeal first came before the Upper Tribunal on 12 October 2017, at which point I raised concerns about whether the Appellant had capacity for the present appeal in light of the medical evidence in the bundle and because there was no evidence that she had had any direct involvement in the proceedings, or even the original application for leave to remain. She had not signed any of the paperwork and Counsel had not taken any instructions directly from her, only via the sponsor. The hearing was adjourned for the opportunity for evidence to be provided on capacity and to ensure that legal representatives were properly instructed, with use of a Litigation Friend if needed. A doctor's report subsequently received indicated a lack of capacity of the appellant to participate in proceedings at all and the Upper Tribunal appointed the sponsor as her Litigation Friend.
10. At the resumed hearing, Counsel for the Appellant relied primarily on the second and third grounds of appeal, that the First-tier Tribunal failed to take into account all of the medical evidence before it, referring only to some of the medical conditions and one out of the four reports. Those reports showed serious and long-term medical conditions as well as conclusions that the Appellant was not fit to travel and could not safely relocate to Pakistan. Counsel confirmed that the appeal was brought on Article 8 grounds although submitted that Article 3 had been raised and the facts were on the border of meeting the threshold for that as well. It was accepted that the Appellant could not meet the requirements for leave to remain as an adult dependent relative under the Immigration Rules because she had arrived in the United Kingdom as a visitor.
11. The Home Office Presenting Officer relied on the rule 24 notice submitted, although accepted that there was an error of law by the First-tier Tribunal with regards to failure to consider all of the medical evidence before it. It was accepted that the decision should be set aside for that reason and remade.
12. No further submissions for the remaking of the decision were made on behalf of the Appellant, who had already referred in oral submissions to the detail of the four different medical reports available as well as to the recent report on capacity submitted to the Upper Tribunal. On behalf of the Respondent, it was submitted that even though this is not an entry clearance case, it would be right to consider the Appellant's circumstances within the framework of provisions for entry clearance an adult dependent relative and in particular, consider the availability of care for the

Appellant in Pakistan when considering whether removal would be a disproportionate interference with the right to respect for private and family life of the Appellant if removed to Pakistan.

Findings and reasons

13. As has been accepted by the Respondent, I find a material error of law in the decision of Judge Khan in that he failed to take into account the full extent of the medical evidence before him in relation to the Appellant when considering her appeal on Article 8 grounds. There were four different reports before the First-tier Tribunal, the detail of which is set out below, only the last of which was referenced at all by Judge Khan and even then, the reference to it could only be described as a very selective quotation of the most positive aspect only. It is therefore necessary to set aside the decision of the First-tier Tribunal and remake the decision on appeal.
14. For completeness, I also address the first ground of appeal in relation to factual errors in the decision of Judge Khan. As detailed in the grounds of appeal, these are numerous within the decision, relating to the wrong country of origin, wrong number of Appellants, whether the Appellant gave oral evidence and referred to incorrect provisions of the Immigration Rules only applicable to minors as relevant law. Although individually none of these errors disclose a material error of law (in particular as they are largely contained in the early part of the decision rather than the findings where no reliance is placed on any of the inaccurate information), they do, individually as well as cumulatively, show a distinct lack of care and attention in the decision which falls below the standard which is to be expected.
15. I go on to remake the appeal as follows. Although the Appellant has referred to Article 3 of the European Convention on Human Rights, it was not submitted on her behalf that the very high threshold for medical cases had been met in this case. Although Counsel suggested the facts of this case may be on the border of doing so, on analysis, the medical evidence does not establish that the Appellant has a life threatening condition nor that she would meet the very high threshold set out in N v Secretary of State for the Home Department [2005] UKHL 31 or even that set out by the European Court of Human Rights in Paposhvili v Belgium, judgment of 13 December 2016 as considered by the Court of Appeal in AM (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 64. In these circumstances, I remake the appeal on Article 8 grounds only.

Applicable law

16. It is accepted in the present case that the Appellant cannot meet the requirements of the Immigration Rules for a grant of leave to remain, on private or family life grounds, nor as an adult dependent relative under Appendix FM, not least because she is already in the United Kingdom having entered as a visitor in 2014 (so could not meet the requirement of EC-DR.1.1(a) or (b) of Appendix FM) and because financial information has not been submitted to meet the requirements of EC-DR.3.1

or 3.2. However, some of the requirements for entry clearance or leave to remain as an adult dependent relative provide a useful framework to contribute to the assessment of Article 8 grounds in the present appeal, these are:

E-ECDR.2.4 The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.

E-ECDR.2.5 The applicant or, if the applicant their partner the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help with 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 reasonably provide it; or

(b) it is not affordable.

17. The Court of Appeal considered a challenge to the new rules on adult dependent relatives in R (BritCits) v Secretary of State for the Home Department [2017] EWCA Civ 368, in which the Master of the Rolls emphasise the following at paragraph 59:

"... The focus is on whether the care required by the ADR applicant can be 'reasonably' provided and to 'the required level' in their home country. As Mr Sheldon [counsel for the Secretary of State] confirmed in his oral submissions, the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations, which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course, is to be objectively assessed."

18. In respect of Article 8, the burden of proof of demonstration that the Appellant's removal would breach this country's obligations under the Convention rests upon the Appellant and the standard of proof is the balance of probabilities.
19. When considering an individual's right to respect for private and family life in accordance with Article 8, then the usual step-by-step approach set out in Razgar [2004] UKHL 27, applies as follows:
- (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
 - (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
 - (iii) If so, is such interference in accordance with the law?
 - (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

- (v) If so, is such interference proportionate to the legitimate public ends sought to be achieved?

20. When considering the public interest as part of the assessment of proportionality for the purposes of Article 8 of the European Convention on Human Rights, I am required by section 117A of the Nationality, Immigration and Asylum Act 2002 to have regard in all cases to the considerations listed in section 117B of the same act. Section 117B provides as follows:

- (1) The maintenance of effective immigration control is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to -
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

The sponsor's evidence

21. There is no direct evidence from the Appellant in these proceedings, but I am satisfied that the reason for that is that she does not have sufficient capacity or understanding to enable a written statement to be taken from her or for her to attend to give oral evidence. This conclusion is supported by the assessment of Dr J M R Cockbain dated 21 November 2017 which concluded that the Appellant suffers from a permanent impairment of brain function resulting in severe cognitive impairment (she scored zero on the GP Cognitive Functioning Assessment tool) and that she had no understanding or retention of information required to make decisions.
22. The sponsor's oral evidence before the First-tier Tribunal is set out in the decision of Judge Khan in paragraphs 18 to 23 and refers to the Appellant's pension and income from a benevolent fund, that there were two incidents in Pakistan in which carers

stole from the Appellant, the second of which also involved the Appellant being tied to her bed for two days and ultimately being assisted by a neighbour. In terms of possible family or support in Pakistan, the Appellant had four sisters, one is deceased, one is married with two daughters and the other two are being cared for by former work colleagues; none of whom could support the Appellant on return. The sponsor's evidence was that the Appellant is vulnerable and in need of personal care but there were issues with that which had been arranged in the past meaning that it could not be relied upon for the future even though the finances were available for it.

23. Judge Khan made adverse credibility findings against the sponsor, some of which have been challenged in the course of this further appeal. Specifically, that there was no inconsistency between the written statement and oral evidence as to incidents with carers in Pakistan. I did not hear further evidence from the sponsor and there has been no specific appeal on these points, nor any response to the findings made that his evidence was vague and evasive nor as to the other inconsistencies noted. Ultimately the findings in this appeal turn predominantly on the medical evidence and family relationship, neither of which have been specifically challenged by the Respondent.

The medical evidence

24. The first medical report submitted by the Appellant was from Dr N A Ahmad, Consultant Physician, dated 18 July 2015. It details the Appellant's problems as poor mobility with a history of leg pains and an inability to weight bear such that she has become bed and chair bound; breathlessness on exertion; dementia and urinary incontinence. Her current medication and a plan for future investigation and treatment was set out and advice given that the Appellant was not fit to travel until has several medical problems are assessed and sorted out.
25. The second medical report, also from Dr Ahmad, dated 2 August 2015, refers to the same health problems as before as well as dementia and an MRI scan showing small vessel ischaemia and cerebral atrophy with the further possibility of trigeminal neuroma or meningioma, a spinal wedge fracture and new prescription for antidepressants.
26. The third medical report, also from Dr Ahmad, dated 25 August 2015 refers to previous consultations, limited mobility in that she needs a person to transfer and is not able to walk, diabetic neuropathy, worsening dementia, a new diagnosis of diabetes for which control is poor and incontinence. The conclusion is that the Appellant will not be fit to travel and live alone in the foreseeable future and needs 24-hour supervision and care from her family. There remained a number of undiagnosed issues requiring follow-up once she was physically better.
27. Finally, there is a medical report from Dr Mathukia dated 5 November 2016 following an assessment two days prior to that. It refers to the Appellant having multiple complex medical problems which had worsened significantly in the previous 12 months, including incontinence, type II diabetes, hypertension,

dementia, depression, osteoporosis and a spinal which fracture. The report continues that the Appellant has extremely poor mobility, spending time largely in bed and is unable to walk without some support, using a frame and being aided by family member when attempting to stand. The Appellant's memory has deteriorated in the last year, particularly for short-term events, she gets confused, has visual hallucinations and only recognises her son and daughter-in-law. The Appellant was found to get very distressed in the presence of new people and lacks awareness of time. The Appellant has complications of diabetes including diabetic neuropathy which contributes to her poor mobility, leaving her at risk of falls and is not fit to travel. At the time of assessment the Appellant's main carers were her son and daughter-in-law who she lives with together with her two grandchildren but the family when the process of finding a full-time carer as the Appellants daughter-in-law was finding it hard to cope with the Appellant's needs as well as those of her two very young children on her own.

28. The following summary was given by Dr Mathukia:

"In summary, this is a 69 year old lady with severe dementia, depression and multiple significant physical co-morbidities. She has very poor mobility due to her physical conditions. Her health has deteriorated significantly in the last 12 months and is likely to decline over time.

She is unable to complete any activities of daily living for herself. She needs full-time carer support, and her physical and mental health is likely to deteriorate further if she does not receive this.

Her son has informed me that she has no other family in Pakistan and she's not going to get the support she needs in Pakistan as there is no setup of such facilities in the healthcare system. This presents a significant risk to the well-being of this patient.

I am of the opinion, she is not fit to travel and it would not be medically safe for her to relocate to Pakistan, based on my assessment and information that has been presented to me at this time."

29. In addition, although not before the First-tier Tribunal, there is a report from Dr Cockbain dated 17 November 2012 in relation to the Appellant's capacity which also provides useful up-to-date information as to her current mental state and almost complete lack of cognitive ability.

Findings and reasons

30. The Appellant is currently living in the United Kingdom with her son, daughter-in-law and two grandchildren. The medical evidence is that she is emotionally and physically dependent upon her family and although there is some evidence of her being in receipt of a pension and income from a benevolent fund in Pakistan, it seems likely that she is also financially supported in the United Kingdom by her family. In these circumstances the Appellant has established family life for the purposes of Article 8 in the United Kingdom. There is nothing in the previous adverse credibility findings in relation to the sponsor that detract from that. As to private life, although the Appellant has been in the United Kingdom since 2014 and had previously visited

a number of times since 2011, her claim is that she is not only housebound but also mainly bedbound and there is nothing to suggest that she has established any significant private life in the United Kingdom beyond involvement with her immediate family in the years that she has been here.

31. It is well established that if a person fails to meet the threshold for Article 3 on medical grounds, that is not necessarily fatal to their Article 8 claim, however, there must be something more than the medical grounds to engage Article 8. In this case, I have found that family life has been established between the Appellant and her son and his family due to the dependence upon them which goes beyond that which would be normally expected between adult relations, but there is no established private life beyond the medical treatment being received in the United Kingdom, which can be considered together with the established family life. The Appellant's removal to Pakistan would be an interference with her right to respect for private and family life established in the United Kingdom. The removal would however be in accordance with the law as the Appellant has failed to meet the requirements of the Immigration Rules for a grant of leave to remain and would be pursuant to the legitimate aim of the economic well-being of the United Kingdom through the maintenance of immigration control.
32. The issue in this appeal is therefore whether the Appellant's removal would be proportionate to the pursuit of that legitimate aim. As above, I am obliged to take into account the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002 when undertaking the balancing exercise, to the effect that the maintenance of immigration control is in the public interest; that is also in the public interest for a person to speak English; that is in the public interest for a person to be self-sufficient and that little weight should be given to private and family life established at a time that a person is in the United Kingdom unlawfully.
33. In the present case, there is nothing to suggest that the Appellant is able to speak English, the only reference to language ability is in the medical evidence that an assessment was unable to be carried out on a particular occasion due to the language barrier. There is also no specific evidence that the Appellant is financially independent and self-sufficient, although there is some reference to a pension and income from a benevolent fund in Pakistan and it is reasonable to infer that she is being financially supported as well in the United Kingdom by family members. There is at least some evidence of her paying for her own NHS treatment in the United Kingdom.
34. Finally, in terms of the factors in section 117B, the Appellant entered the United Kingdom last in 2014 pursuant to a multi-entry family visit visa which expired in 2017 and in any event, this was for the purpose of a visit for a limited period or periods. The Appellant's continued presence in the United Kingdom has become unlawful as she has not been granted any further periods of leave to remain here. As such little weight is to be attached to private and family life established here.

35. It is also relevant to the weight to be attached to the public interest that the Appellant does not meet the requirements of the Immigration Rules for a grant of either entry clearance or leave to remain as an adult dependent relative, not least because of her entry to the United Kingdom as a visitor and the lack of evidence that the financial requirements are met. Further, although the medical evidence establishes that she requires long-term personal care to perform everyday tasks such that she could satisfy paragraph E-ECDR.2.4 of Appendix FM of the Immigration Rules, I do not find on the evidence before me that the Appellant would have been able to meet the requirements in paragraph E-ECDR.2.5 of Appendix FM of the Immigration Rules. The sponsor's own evidence is that care is affordable in Pakistan and there is insufficient evidence to show that the Applicant is unable to obtain the required level of care in Pakistan, because it is not available or there is no person in the country you can reasonably provide it. Although there have been difficulties with care provided by a particular organisation in the past, there is lack of any evidence to show that there is lack of adequate treatment or care available in Pakistan, let alone that it would not be reasonable for the Appellant or provider in all of the circumstances.
36. The only part of the evidence which could support a suggestion that care could not be reasonably provided in Pakistan (even if available) is the medical evidence that the Appellant's dementia is advanced to the stage that she only recognises her son and daughter-in-law and is distressed by new people. However, that is undermined by reference in the same report and the sponsor's written statement that the Appellant's family are seeking to employ a full-time carer for her because her daughter-in-law is unable to cope with what is needed for the Appellant as well as looking after her two young children. The Appellant's son is in full-time employment. Given the apparent likelihood of care being provided by a third party in the United Kingdom, I do not find that the Appellant has established that care by a family member personally is required, necessary, nor likely in any event to be provided and the situation would not therefore be significantly different in Pakistan as it would be in the United Kingdom in terms of direct care. The only difference being that the Appellant would not be living within a family home and receiving the additional support that that is likely to provide, but that does not of itself establish that care could not reasonably be provided in Pakistan to the high threshold required in the Immigration Rules and confirmed in cases such as BritCits and Ribeli v Entry Clearance Officer, Pretoria [2018] EWCA Civ 611.
37. In the Appellant's favour in the balancing exercise, I take into account her age, the strong family life she has established with her son and his family which includes a very high degree of dependence on them and her multiple complex medical conditions, in particular, advancing dementia, lack of capacity, lack of cognitive function and lack of insight into her own condition, as well as the confirmed medical opinion that she is unfit to travel. Although for multiple reasons already set out there is significant public interest in the Appellant's removal in this case, I find that the combination of her circumstances and strong family life are such that her removal would be a disproportionate interference with her right to respect for family life in particular and I therefore allow her appeal under Article 8.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remake it as follows.

The Appellant's appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed



Date

4th May 2018

Upper Tribunal Judge Jackson