Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14372/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 7th October 2014	**On 16th October 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAIRA BI

Respondent

Representation:

For the Appellant: Mrs R Pettersen, Home Office Presenting Officer
For the Respondent: Mr T Hussain, Counsel instructed by RKS Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Henderson made following a hearing at Bradford on 25th June 2014.

Background

2. The claimant is a citizen of Pakistan born on 1st January 1942. She entered the UK as a visitor on 25th September 2011 and purported to make an in time application for indefinite leave to remain on 22nd March 2012, which was rejected and followed by a series of further rejections on the basis that the applications were made on the incorrect form and without a fee.

3. The claimant then made an application for indefinite leave to remain out of time outside the Immigration Rules which was ultimately refused on 26th February 2014 by reference to paragraph 322(1), A277C, Appendix FM and paragraph 276ADE of the Immigration Rules.

4. The claimant is aged 72 and in very poor health. Her husband died in 2009 and all of her children and grandchildren, siblings, nieces and nephews are in the UK. She has a stepson in Pakistan but no immediate biological family there.

5. The judge accepted that the evidence given of her situation in Pakistan was broadly consistent. She lived alone in the family home prior to living here and was having increasing difficulty in managing to look after herself. She has two children resident in the UK and five sisters and one brother here. The judge accepted that it was not implausible that the stepson and his wife would conclude that the claimant was not their responsibility and that they were not a long-term solution for her care needs.

6. The judge also accepted that the claimant wished to live out her old age in Pakistan but now realised that she needed the care and support of her immediate family. Her health had deteriorated since her arrival in 2011 but that before that date she wished to remain in Pakistan.

7. The judge recorded the claimant's health difficulties. She has serious mobility problems which affect her ability to wash, go to the bathroom, cook for herself, dress in the morning and get ready for bed.

8. The judge recorded that the claimant did not qualify for leave under the Immigration Rules. The application was made out of time following a catalogue of invalid applications and made after her children had persuaded her that she could not return. She clearly had not severed all cultural and social ties with Pakistan and had not been in the UK for the relevant period so as to qualify for leave to remain here on private life grounds.

9. There were very strong emotional bonds between the claimant and her children here and further elements of dependency going beyond normal emotional ties between adults as defined in Kugathas v SSHD [2003] EWCA Civ 31. However the claimant's removal would be in accordance with the law and in pursuit of a legitimate aim.

10. The judge then considered proportionality. She said that the facts of the case were not in themselves unusual but social and cultural ties to Pakistan were of less importance to the claimant than the continuing

emotional bonds with close family members. It would not be practical for the claimant's son or daughter-in-law or daughter to relocate to Pakistan in order to provide care there.

11. She concluded as follows:

> "I have taken into account that the Appellant is an overstayer and she had no expectation that she should be allowed to remain here. However she is an elderly and vulnerable woman who seeks to remain here not for any economic advantage but to enjoy the remainder of her life surrounded by close family who are settled here and can support her. The lack of close family in Pakistan is not contrived by her or her family to avoid her return. All six of her surviving siblings are in this country and all of her children and grandchildren. She should have made an application to enter in using the correct procedures from outside the country but I accept that her family considered that she could soldier on in Pakistan since as she stated this would be her preference. I accept that there are compelling circumstances in her appeal not simply on the basis of her physical needs but because of the lack of family resident in Pakistan who are willing to help her and the circumstances of family members here. Any decision to force her removal would not only be unjustifiably harsh for her but also her immediate family who wish to make sure that she is adequately cared for and who have responsibilities to their own families in this country."

The Grounds of Application

12. The Secretary of State sought permission to appeal on the grounds that the claimant was in effect seeking leave to remain as an adult dependent relative. The entry clearance provisions require that an applicant be unable to obtain the required level of care in the country where they are living and further imposes a requirement that an applicant be accommodated and maintained adequately without recourse to public funds. The judge decided the application under Article 8 by way of a "freewheeling analysis unencumbered by the Rules", an approach deprecated by the Upper Tribunal in Gulshan [2013] UKUT 640.

13. Second the judge erred in law by misdirecting herself as to the burden and standard of proof in referring to implausibility rather than the civil standard, namely the balance of probabilities.

14. Permission to appeal was granted by Judge Omotosho for the reasons stated in the grounds on 1st September 2014.

Submissions

15. Mrs Pettersen relied on her grounds and submitted that any consideration of the facts of this case should have been made through the prism of the relevant entry clearance application. The claimant was in a similar position to many others, her circumstances were not exceptional in any way, and the appeal should have been dismissed.

16. Mr Hussain submitted that this was an experienced Immigration Judge who plainly understood the correct standard of proof which was set out correctly in the determination.

17. With respect to the Rules he said that it was not open to the Secretary of State to transpose the Rules for out of country dependent relative applications to cases involving in country applications under Article 8. The judge had taken full account of the guiding case law relating to Appendix FM and reached a decision open to her. The Rules were a starting point for the evaluation of Article 8 and not a trump card. The question of proportionality was entirely a matter for the judge.

18. So far as the Gulshan point was concerned he relied on the case of MM (Lebanon) & Ors, R (On the Application Of) v Secretary of State for the Home Department [2014] EWCA Civ 985 which has cast doubt on the necessity for an intermediate test. In his submission the Secretary of State was simply attempting to reargue the case.

Findings and Conclusions

19. There is no basis for setting this decision aside because there was a misapplication of the standard of proof. The correct standard, namely the balance of probabilities, was properly set out in the determination and references to implausibility do not establish that the wrong standard was applied.

20. The starting point for the consideration in this appeal is that an Appellate Tribunal will not likely interfere with the findings of a First-tier Tribunal which has heard the evidence.

21. The main argument in favour of the Secretary of State is that the judge erred in failing to take into account what she says is a relevant Immigration Rule, namely the Rule which sets out the requirements to be met when making an application for entry clearance as a dependent relative.

22. First, there is no evidence at all that the Secretary of State relied on that argument at any stage in these proceedings. The reasons for refusal letter considers the application in line with paragraph 276ADE. There is no reference in it to the present argument that, since the claimant does not meet the requirements of E-ECDR.2.5, leave to remain should not be granted.

23. Furthermore no reference was made to the entry clearance provisions in the Presenting Officer's submissions which are set out in the determination. In particular no mention at all was made of any requirements to satisfy maintenance and accommodation provisions until the present challenge to this determination. It cannot be an error of law for the judge to fail to deal with an argument which was not made.

24. Second it is by no means clear that, even if the judge had referred to the entry clearance provisions, that the out of country rule was not met. On

the accepted evidence the claimant is a person who cannot dress herself properly, wash, cook, wash her clothing or walk up and down stairs unaided. She has severely restricted mobility. There is no challenge in the grounds to the judge's findings of fact that the claimant has no biological relatives in Pakistan who are able to care for her and that her stepson and his wife are not a long-term solution for her care needs. Moreover the judge recorded that whilst physical care could be provided by paid care and nursing, this was a situation where the claimant was emotionally dependent upon family in this country.

25. The Secretary of State has therefore not shown that even if the rules were a relevant consideration for the judge, that her decision would have been any different.

26. So far as Gulshan is concerned, reference was made to the relevant case law at paragraph 39 of the determination where the judge states that:

> "If after fully considering family or private life under the Rules and finding that a claim fails, then it would be sufficient to say that and it would not be necessary to have to go on and consider the case separately from the Rules."

27. The Secretary of State has not established that the judge erred in law.

Decision

28. The judge did not err in law and her decision stands. The claimant's appeal is allowed.

Signed Date

Upper Tribunal Judge Taylor