Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33998/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 4 June 2014	**On 3 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

MS KARAM BI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Martin, Counsel, instructed by Marks & Marks, Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

Claim History

1. The Appellant appeals against the decision of First-tier Tribunal Judge Birk (the Judge) promulgated on 1 February 2014, dismissing the Appellant's appeal on all grounds against the Respondent's refusal to grant leave to remain under paragraphs 317 and 276ADE of the Immigration Rules. Before the Judge it was submitted that the appeal was based on paragraph 317 of

the Immigration Rules because the Appellant was over the age of 65 and was the aunt of the Sponsor who was present and settled in the UK; and on Article 8 ECHR.

2. The application was refused by the Respondent for the reasons set out in the letter to the Appellant dated 18 July 2013 (the RL). Under paragraph 317, the Respondent did not accept that: :
    a. the Appellant was over 65 years of age;
    b. the Sponsor was her nephew or that his wife was her daughter;
    c. the Appellant was widowed and that she had no ties in Pakistan;
    d. her sponsor supported her financially in Pakistan;
    e. the Appellant is wholly or mainly financially dependent on the Sponsor or that she had no close relatives in her country to whom she could turn for financial support; and
    f. that she is living alone in Pakistan in the most exceptional compassionate circumstances.

3. It was refused under paragraph 276ADE because the Appellant could not establish that she had lived continuously in the UK for at least 20 years and, because her period of residence was considerably less than 20 years, she was not able to establish that she had severed all ties with Pakistan, including social, cultural and family ties.

4. As to background, the Appellant came to the UK as a visitor on 17 May 2012, with a five year family multi visit visa permit. On 9 July 2012 the Appellant applied for leave to remain as the 'parent, grandparent or dependent relative of a person present and settled in the UK'. This application was made on the basis that the Appellant's husband, on whom she was dependant, passed away whilst she was in the UK. The Judge accepted that the Appellant's husband had passed away whilst she was in the UK [22].

5. The Judge found that the Appellant was not over 65 years of age [17 – 19]; that whilst the Appellant was currently cared for by the Sponsor, this did not establish that she was wholly or mainly financially dependent on him [20]; that she had family ties in Pakistan that had not been broken [21], that she had a property to return to in Pakistan [22] and that there was no evidence before her that the Appellant's medical condition could be not be managed in Pakistan [22].

6. The grounds of application are that the Judge erred in law by failing to interpret 'dependence', 'without close relatives to turn to' and 'living alone in the most exceptional compassionate circumstances' in accordance with the law because:

    a. She made a paradoxical finding as to dependence. She found that whilst the Appellant was currently being maintained by the Sponsor, this did not establish that she was 'wholly or mainly' financially dependent on him;
    b. She found that the Appellant had siblings in Pakistan to whom she could turn but failed to consider that they were some distance away with their own families and she incorrectly assumed that they

would be willing to provide financial and other support to the Appellant; and

c. She 'undervalued' the Appellant's circumstances in Pakistan because she suffers from epilepsy, she came to the UK and in her absence, her husband passed away, she would be returning to Pakistan without his financial and emotional support. Her circumstances amounted to exceptional compassionate circumstances.

7. Permission was granted on all grounds.

8. The Respondent, in a rule 24 Response, opposed the appeal, submitting in summary that the Judge directed herself appropriately and made sustainable findings of fact.

The Hearing

9. At the hearing before me, I raised with Mr Martin and Mr Smart the issue of which rules were applicable at the date of decision, bearing in mind that it was stated in the RL that the date of application was 9 July 2012 and the Immigration Rules were changed significantly for all such applications by HC 565 (the new Rules).

10. The date of application was stated in the RL to be 9 July 2012. My concern was that it is not possible for an applicant to make an application under paragraph 317 of the Immigration Rules on or after 9 July 2012, as provided by paragraph A277 of the new Rules. Mr Smart stated that his understanding was that it was still open to applicants to apply under paragraph 317 of the old Rules. However, paragraph A277 specifically provides:

> "From 9 July 2012 Appendix FM will apply to all applications to which Part 8 of these rules applied on or before 8 July 2012 except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280."

11. No reference is made within paragraph 280 (a) or 280 (b) to paragraph 317.

12. Under paragraph 280 (c), paragraph 317 is only available to an applicant if an application was made before 9 July 2012 but which was not decided as at 9 July 2012 or where an applicant had previously been granted entry clearance or leave to enter under part 8 before 9 July 2012 and had extant leave under part 8 at the date of application. The Appellant was in the UK as a visitor, and entry clearance or leave to remain had not been granted to her under part 8.

13. Paragraph 280 (d) did not assist her because the Sponsor on whom she claimed to be dependent was not a full time member of the armed forces.

14. In view of these provisions, Mr Smart stated that he would need to take instructions. I rose notifying the parties that I would need to hear

submissions on this issue before proceeding to determine whether or not the Judge had materially erred in law.

15. On resuming the hearing, Mr Smart confirmed that my understanding of the provisions of paragraph A277 and paragraph 280 was accurate and that applicants who did not come under those provisions could not rely on the provisions of paragraph 317 of the Immigration Rules.

16. As to the date of application, I stated that paragraph 34(g) of the Immigration Rules clearly established that when an application is made by post, the date of application is the date of postage. Mr Smart provided the special delivery envelope in which the application was made and, although the date was difficult to read, the postmark appeared to be 9 July 2012. Mr Martin also examined the postmark and accepted that that is what the postmark appeared to be. He also added that as the Appellant had stated in her witness statement that she made her application on 9 July 2012, he was in no position to dispute it.

17. To provide the context for the error of law hearing, to sum up, the Appellant made her application on 9 July 2012 and she was therefore not able to rely on the provisions of paragraph 317 for a grant of leave to remain. Her application for leave to remain as a *dependent relative* (my emphasis) should therefore only have been considered under Appendix FM. However, as correctly pointed out by Mr Smart, applications for leave to remain by dependent relatives could only be considered under Appendix FM if the applicant had extant leave as a dependent relative pursuant to the provisions of paragraph E-ILRDR.1.2. I would also note that, pursuant to **Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC)** (see headnote), the adult dependent relative rules of Appendix FM do not provide for a consideration of the Appellant's application under the provisions of paragraph EX.1 of Appendix FM.

18. This left Mr Martin in some difficulty as the grounds of application only attacked the findings of fact under paragraph 317 of the Immigration Rules, on the basis that the Judge erred in law by failing to interpret 'dependence', 'without close relatives to turn to' and 'living alone in the most exceptional compassionate circumstances' in accordance with the law.

19. His submissions were as follows: it was understandable that the Judge considered the Appellant's application under paragraph 317 because the Respondent had also considered it on that basis and the concentration on it influenced the weight she attributed to the various factors under it. The focus of the hearing was paragraph 317 and Article 8 was only considered as a 'backstop'; it was not argued as carefully as it might have been if the main concentration had been on Article 8. If she had applied paragraph 317 correctly, it would have been used as a tool for analysing the position under Article 8. The Appellant did not have close relatives she could turn to. He submitted that the grounds of application did not ignore the possibility of a challenge on Human Rights grounds particularly as the Respondent took into account matters she should not have taken into account, that is she considered the application under paragraph 317. The Appellant therefore had the option of arguing today that the appeal should be allowed

exceptionally outside the Immigration Rules. Mr Martin submitted that in summary, if paragraph 317 goes, all the Appellant's direct descendants are in the UK, her husband passed away whilst she was in the UK and her situation changed radically. If she returned to Pakistan, she would be living on her own, she would be relying on relatives in the UK for financial support, and she suffered from a medical condition which required 24 hour care.

20. I asked him if his submission was that the Judge's findings at paragraph 22 were unsustainable. He stated that they were not sustainable; the Appellant's husband had provided sufficient support for her when he was alive but he was no longer there. If she returned now, she would be relying on the support of members of the family who were living in a different country.

21. I asked Mr Martin if there had been any evidence before the Judge that the Appellant's husband was economically active as this information was not provided in the witness statements of the Appellant and the Sponsor which were before the Judge. He said that he did not know and it was not stated on the death certificate. However, she had been residing with her nephew and his wife for the last two years and had been financially supported by them.

22. Mr Smart submitted that he disagreed with Mr Martin's submission that the Article 8 assessment was before me. The Respondent made two decisions; one under paragraph 317 of the Immigration Rules and another under Article 8. The Judge gave reasons for her decision under paragraph 317 and under Article 8. The only challenge was under paragraph 317 and the grounds of application did not refer to Article 8. He submitted that it was not now open to me to consider a challenge under Article 8 because it had not been first put to the First-tier Tribunal and been refused and then subsequently renewed before me in the Upper Tribunal. I could not now vary the grounds of application so that Article 8 could also be raised. Mr Smart submitted that **Ved and another (appealable decisions; permission applications; Basnet) [2014] UKUT 00150 (IAC)** applied; the Upper Tribunal had considered in **Ved** the application of paragraph 21 of the Upper Tribunal (procedure) Rules 2008 and stated that grounds could only be raised if they had first been raised and refused by the First-tier Tribunal.

23. He also submitted that **Ferrer (limited appeal grounds; *Alvi*) [2012] UKUT 00304(IAC)** did not assist the Appellant. In that case, the Upper Tribunal confirmed that the First-tier Tribunal, in granting permission, should be clear as to which grounds of appeal were accepted as being arguable and if the intention was to grant on limited grounds only, this should be made clear within the grant of permission. However, it was accepted by the Upper Tribunal in **Ferrer** that what should happen is that the First-tier Tribunal should identify the strongest grounds in the grant and let this form a backdrop to the hearing, rather than grant on limited grounds.

24. Mr Smart further submitted that although the Respondent considered the Appellant's application under paragraph 317, the Respondent also considered the application in detail under paragraph 276ADE (on the basis of the Appellant's private life). Factual assessments were made by the Respondent and these were not affected by a refusal under paragraph 317. The decision of the Respondent was in accordance with the law. He submitted that the Judge considered Article 8 properly at paragraph 24, applying the jurisprudence in **Gulshan (Article 8 – new Rules – correct) [2013] UKUT 640 (IAC)**, **Green (Article 8 – new Rules) [2013] UKUT 245 (IAC)** and **R (Nagre) v SSHD [2013] EWHC 720 (Admin)**. She found that the Appellant's circumstances were not exceptional for a grant of leave outside the Rules. Even if, therefore, I allowed a challenge under Article 8, her findings under Article 8 were open to her on the evidence before her. As to Mr Martin's submission that the Judge's finding that the Appellant failed to meet paragraph 317 coloured her assessment under Article 8, the argument was also that she did not properly interpret paragraph 317 in accordance with the law. If Article 8 was indeed open to consideration, we would also have to weigh against the Appellant that she had used deception because it was not accepted by the Judge that her date of birth was 1 January 1947 rather than the date given in all previous documents, this being 1 January 1965, a finding which was not challenged in the grounds. The Respondent may also wish to raise whether paragraph 320(7A) would be applied in refusing the Appellant's application.

25. Mr Martin submitted that he had nothing he wished to add by way of reply.

Analysis and reasons

26. As stated above, my consideration of this application is on the basis that the Appellant cannot rely on the provisions of paragraph 317 of the Immigration Rules.

27. I find that although the Respondent did consider her application under paragraph 317 and issue a decision under it, this decision was not in accordance with the law but only on the basis that these provisions were no longer applicable for persons in the position of the Appellant. However, a decision was also made under paragraph 276ADE and this decision was not infected by the unlawful decision as provided in **Ahmadi v SSHD [2012] UKUT 147** and confirmed in **Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC)** at paragraph 14. The Respondent's decision under paragraph 317 does not infect the decision made by the Respondent under the provisions of paragraph 276 ADE.

28. I accept Mr Smart's submissions in relation to **Ved** and **Ferrer**. In the absence of an application first to the First-tier Tribunal, I cannot entertain a renewed application before me today on the basis of Rule 21 of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the Upper Tribunal Rules) which provides:

> 21 (1) Where permission to appeal to the Tribunal against the decision of another tribunal is required, a person may apply to the

Tribunal for permission to appeal to the Tribunal against such a decision only if—

(a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and

(b) that application has been refused or has not been admitted.

29. Furthermore, the possibility of waiving the requirements under Rule 7 of the Upper Tribunal Rules was considered in **Ved**, and the view of the Upper Tribunal was that it was difficult to envisage in what circumstances the Upper Tribunal would waive the requirement for an application to be made first to the First-tier Tribunal. In the case before me, the Appellant has been represented throughout and even if all parties erroneously relied on paragraph 317, Article 8 was argued and if it was not vigorously pursued before the First-tier Tribunal Judge this is not reason enough not to raise it in the grounds of application.

30. I find that there is no appeal before me under Article 8 and I cannot consider it. The submission that the Judge did not interpret 'dependence', 'without close relatives to turn to' and 'living alone in the most exceptional compassionate circumstances' in accordance with the law (ie, in accordance with the jurisprudence under the provisions of paragraph 317), can no longer stand because the Judge was not bound to consider such jurisprudence in making her findings. Whilst it may be correct that a focus on the provisions and jurisprudence under paragraph 317 may have resulted in different findings, the fact that there was no such focus does not now render the Judge's findings unsustainable. Had the Judge applied the law correctly, she would have been bound to dismiss the appeal under paragraph 317 because of the change in the Immigration Rules on 8 July 2012.

31. The submission that paragraph 317 should have been used as a 'tool' to assess the position under Article 8 lacks merit. The new Immigration Rules provide the Secretary of State's position on the weight to be attached to the public interest in Article 8 applications and switching the basis of stay from a visitor to a dependent relative is prohibited to prevent abuse of the visitor route. Had the Judge used paragraph 317 as a tool to make her assessment under Article 8, she would in fact have misdirected herself in law.

32. Looking at the findings that were disputed in the grounds, on the face of it there appears to be some merit in the submission that the Judge made a paradoxical finding in that she accepted that the Sponsor was caring for the Appellant but at the same time she said that she could not find that the Sponsor was financially dependent on the Sponsor wholly or partially. However, this was only relevant, as stated in the grounds, as 'prima facie acceptance that the Appellant met the provisions of the Immigration Rules' (paragraph 5 of the grounds), these being paragraph 317. In the absence of an ability to rely on paragraph 317, there is no submission that this apparently paradoxical finding undermines her conclusions under Article 8,

particularly as there was no evidence before the Judge for her to find that the Appellant did not have resources in Pakistan. I appreciate that the Appellant stated in her witness statement that she was a housewife all her life and that her husband took care of everything. However, the thrust of the evidence before the Judge in the witness statements of the Appellant and the Sponsor was that it was the health of the Appellant that was the main concern and no evidence was provided that financially she would not be able to manage in his absence; no evidence was provided as to the source of his income. Furthermore, it was stated that the Appellant's husband had provided her with care because of her epilepsy. If she indeed required 24 hour supervision, he would not have been in a position to provide this personally if he was gainfully employed. I also note that the Sponsor did not state that he would be unwilling to send funds to her in Pakistan so that she could manage financially; he simply stated that it would be a problem because at the moment 'it would mean separate payments whereas here he can just pay for her' [13].

33. There was no evidence before the Judge as to how the Appellant's husband managed to provide the Appellant with 24 hour supervision and her finding that he would not have been able to provide it [22] is not open to challenge and was not in fact challenged. In the absence of a need to consider her findings within the ambit of paragraph 317, her findings of fact at paragraphs 21 and 22 are not open to challenge. There was simply insufficient evidence before the Judge on which she could have found differently.

34. Mr Smart correctly identified that the Appellant's application as a dependent relative could not be considered under the provisions of Appendix FM because she had not made an application for entry clearance as an elderly dependent relative. It was therefore necessary to consider the application under Article 8 ECHR directly applied, which the Judge does at paragraph 29. Although she does not refer to **Sabir**, it is clear that she has not considered the case under Appendix FM paragraph EX.1. As there was no provision within Appendix FM to consider the Appellant's particular circumstances, the Judge goes on to consider proportionality under Article 8 at [29] and it was not submitted in the grounds of application that the Judge's assessment under Article 8 was flawed.

35. My conclusion is that whilst the Judge did err in that she misdirected herself in law as to the provisions of the Immigration Rules in making a decision under paragraph 317, her error was not material to the outcome of the Appellant's appeal under Article 8, which was the only ground of appeal on which she could rely, and the decision of the Judge must therefore stand.

Decision

36. The determination of Judge Birk contains a material error of law in that she misdirected herself in law as to the provisions of the Immigration Rules. She could not consider the Appellant's claim under paragraph 317 after the Rules were changed from 8 July 2012, and that part of the decision is therefore not in accordance with the Immigration Rules. This part of the decision cannot be remade as paragraph 317 is not available to the

Appellant. This does not, however, have a material impact on the outcome of the Appellant's appeal under Article 8.

37. The Judge's decision under Article 8 was not challenged in the grounds of application, her findings of fact for the purposes of Article 8 are not perverse or irrational, and her decision must therefore stand.

38. The Appellant's appeal is dismissed.

39. There was no application for an anonymity order before the First-tier Tribunal or before me. In the circumstances of this case, I see no reason to direct anonymity.

Signed Date

M Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE ORDER

As the appeal of the Appellant was dismissed by the First-tier Tribunal and the outcome has not been changed, no fee order is made.

Signed Date

M Robertson
Sitting as Deputy Judge of the Upper Tribunal