The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/50707/2013**

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On November 10, 2014	**On November 11, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MRS FAZEELAT BEGUM
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Salem (Legal Representative)
For the Respondent: Mr McVeety (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born January 1, 1947 is a citizen of Pakistan. She applied for leave to remain under paragraph 317 HC 395 as a dependent relative of a person present and settled in the United Kingdom. The respondent refused her application on November 6, 2013 under the Immigration Rules and found no exceptional or compassionate circumstances to allow the appeal outside the Rules. At the same time she decided she should be removed under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed both decisions to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on December 2, 2013.

3. On March 21, 2014 Judge of the First Tier Tribunal McCall (hereinafter referred to as the "FtTJ") heard her appeal and refused it in a determination promulgated on April 8, 2014.

4. The appellant lodged grounds of appeal on April 17, 2014 and on May 16, 2014 Judge of the First-tier Tribunal Pooler granted permission to appeal finding it arguable the FtTJ had possibly erred by:

   a. Considering the article 8 appeal in accordance with the Immigration Rules in force at the date of decision as against the date of application.

   b. Arguably failing to give adequate consideration to all material factors.

   Although the other grounds were raised he found they probably did not disclose an error in law but nevertheless gave permission on all grounds.

5. The respondent filed a Rule 24 response dated June 4, 2014 in which she opposed the appeal and submitted Judge of the First-tier Tribunal Pooler himself had erred in his interpretation of the Court of Appeal decision of Edgehill v SSHD [2014] EWCA Civ 402.

6. The matter was listed on the above date and the appellant and her family were present. An interpreter translated the content of the hearing to the appellant.

SUBMISSIONS

7. Mr Salam adopted his grounds of appeal and submitted there was a material error in law for the following reasons:

   a. The FtTJ erred in his approach to the evidence in relation to paragraph 317 HC 395. Evidence had been given regarding financial dependency and the FtTJ speculated and erred by making the findings he did. Reliance was placed on paragraph 11.137 of MacDonald.

   b. The FtTJ decided the article 8 application with regard only to paragraph 276 ADE HC 395 and he should have considered the application outside of the Rules because the application was submitted prior to July 9, 2012. He failed to have regard to the Court of Appeal decision of Edgehill v SSHD [2014] EWCA Civ 402.

c. The FtTJ speculated on what money was used for and reached irrational conclusions.

d. The FtTJ had regard to matters that were not relevant for either paragraph 317 HC 395 or article 8 ECHR.

e. He placed too much reliance on the Rules and this amounted to a material error.

f. Leave should be given to admit the unreported decision that had been served.

8. Mr McVeety submitted there was no material error. He stated that both Mr Salam and Judge of the First-tier Tribunal Pooler were wrong in their approach to Edgehill. The appellant's representative had argued this appeal before the FtTJ on paragraphs 317 HC 395 and 276ADE HC 395. The "Edgehill" argument was wholly misplaced for two reasons:

   a. The transitional provisions A277-A277C make clear that any article 8 claim outstanding when the Rules changed was caught by the new Rules namely paragraph 276ADE and Appendix FM.

   b. Edghill was fact specific and related to paragraph 276ADE(iii) and had no relevance to this current appeal.

   c. The decision of Haleemudeen –v- SSHD [2014] EWCA Civ 558 confirms that the FtTJ was correct in his approach. _

   The FtTJ had full regard to all the evidence and reached conclusions that were open to him regarding the finances and the extent of any financial support.

   He did not speculate with his findings but considered the oral and written evidence and made findings open to him. He refused the appeal under paragraph 317 HC 395 and gave reasons and in particular found the witnesses to be evasive and vague.
   The FtTJ then properly considered the appeal under the Rules for paragraph 276ADE purposes and made findings open to him.

   The Court of Appeal decision of Haleemudeen was a binding decision and no regard should be had to the decision that Mr Salam sought to adduce.

9. Mr Salam responded and submitted that the fact the former representatives had argued the case on the new Rules did not prevent him arguing an error of law based on Edgehill as that decision made clear the correct approach and the fact the parties approached

it incorrectly did not negate the Tribunal's responsibility to address the matter correctly.

10. I reserved my decision.

MY FINDINGS ON ERROR IN LAW

11. The appellant submitted an application on July 7, 2012. That date, according to Mr Salam, is significant because it pre-dated the changes in the Immigration Rules brought about by HC 194 on July 9, 2012.

12. The respondent considered the appellant's application and refused it on November 6, 2013.

13. In her refusal letter the respondent considered the application under paragraph 317 HC 395-this being the Rule in force at the date the application was made. Having decided the appellant did not satisfy this Rule the respondent then outlined the change in the Rules and stated that family and private life were to be considered under Appendix FM and paragraph 276ADE.

14. The first ground of appeal challenges the FtTJ's finding that the appellant did not satisfy the requirements of paragraph 317 HC 395.

15. The appellant was sixty-five years old when she submitted her application for indefinite leave to remain as a dependent parent on the grounds she satisfied paragraph 317(i)(a). However, the respondent refused her application because he was not satisfied she satisfied paragraphs 317(iii) and (v) HC 395.

16. When the matter came before the FtTJ he took evidence from the appellant, Muhammad Aamir Latif (her son), Raheela Kaukab and Sajeela Sohail (her daughters). He made a number of findings on whether the appellant was wholly or mainly dependent on her son and whether she had any close relatives in Pakistan to whom she could turn to for financial support and these are recorded between paragraphs [20] and [35] of his determination.

17. Mr Salam has today submitted that these findings are speculative and were not open to the FtTJ and he referred me to an extract in MacDonald.

18. The FtTJ had found-

    a. The appellant remained in Pakistan for four months after her husband's death in accordance with her religious beliefs.

    b. He accepted the appellant's son supported his mother immediately following his father's death by sending her money to

meet the funeral expenses, her travel to the United Kingdom and her day-to-day expenses until her pension and her day-to-day expenses were resolved.

c. The appellant had been evasive and deliberately vague in regard to her account of the sale, the value of the sale and what happened to the proceeds because she knew disclosure of such evidence would undermine her case.

d. The appellant's account of her husband's employment and income was both vague and inconsistent.

e. Mrs Kaukab knew more than she was willing to disclose about the sale proceeds and her evasive and vague responses also undermined the appellant's case.

f. Mrs Sohail was not living with her mother as she was living with her in-laws and she knew little about the sale of the property and he found her account vague.

19. I am satisfied all the findings made by the FtTJ were findings that were open to him. He heard the evidence and had an opportunity to assess them as witnesses and after hearing all the evidence (oral and written) he made the findings he did.

20. The FtTJ considered why the money had been sent and he rejected the appellant's claim it was general support but found it was money sent for specific purposes and he rejected her claim that she was wholly or mainly financially dependent on her son. I am satisfied that all those findings were open to him and the submissions made to me today are a mere disagreement with those findings. The FtTJ was entitled to reject the application under paragraph 317 HC 395.

21. Having refused the application for indefinite leave the FtTJ was required to consider the claim for family/private life. It is here that the main legal argument arose with Mr McVeety submitting that the new Rules covered the article 8 aspect of the claim and Mr Salam submitting the FtTJ materially erred by predominantly considering the claim under the new Rules as against article 8 ECHR (outside of the Rules) and that any article 8 assessment in paragraph [44] was inadequate.

22. I have been referred to the two Court of Appeal decisions of Edgehill v SSHD [2014] EWCA Civ 402 and Haleemudeen –v- SSHD [2014] EWCA Civ 558.

23. In Edgehill v SSHD [2014] EWCA Civ 402 in determining appeals against refusals to grant the appellants indefinite leave to remain it was held that, subject to one caveat, it was not lawful to reject an

application, made before 9 July 2012 under Article 8 of the Convention, in reliance upon the applicant's failure to achieve 20 years' residence as specified in paragraph 276ADE(iii) of the new Immigration Rules as introduced by the Statement of Changes in Immigration Rules which came into effect on 9 July 2012. The caveat was that "mere passing reference to the 20 years requirement in the new rules will not have the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful if the decision maker relies upon rule 276ADE (iii) as a consideration materially affecting the decision".

24. In Haleemudeen v SSHD [2014] EWCA Civ 558 the Court of Appeal appeared unbothered by the fact that paragraph 276ADE had been considered even though the application preceded the new rules. It was said that paragraph 276A could not be disregarded even once it was clear that the case did not fall within the Immigration Rules, because although it was not dispositive, it provided guidance about the Secretary of State's policy in the same way as paragraph 276ADE and Appendix FM.

25. The Court in Haleemudeen reached its findings having regard to the Supreme Court decision of Odeola [2009] UKHL 25. However, that case involved a change to the Immigration Rules with no transitional provisions whereas HC 194 contained transitional provisions. These transitional provisions are set out in Paragraphs A277 to A277C.

26. Paragraph A277 states:

> "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 8are preserved and continue to apply, as set out in paragraph A280."

27. Paragraph A277A states

> "Where the Secretary of State is considering an application for indefinite leave to remain to which Part 8 of these rules continues to apply (excluding an application from a family member of a Relevant Points Based System Migrant), and where the applicant:
>
> (a) does not meet the requirements of Part 8 for indefinite leave to remain, and
>
> (b) continues to meet the requirements for limited leave to remain on which the applicant's last grant of limited leave to remain under Part 8 was based, further limited leave to remain under Part 8 may be granted of such a period and subject to such conditions as the Secretary of State deems appropriate. For the purposes of this sub-paragraph an applicant last granted limited leave to enter under Part 8 will be considered as if they had last been granted limited leave to remain under Part 8; or

(c) if the applicant does not meet the requirements of Part 8 for indefinite leave to remain as a bereaved partner only because paragraph 322(1C)(iii) or 322(1C)(iv) of these rules applies, the applicant will be granted limited leave to remain under Part 8 for a period not exceeding 30 months and subject to such conditions as the Secretary of State deems appropriate."

28. Paragraph A277B states:

> "Where the Secretary of State is considering an application for indefinite leave to remain to which Part 8 of these rules continues to apply (excluding an application from a family member of a Relevant Points Based System Migrant) and where the application does not meet the requirements of Part 8 for indefinite leave to remain or limited leave to remain:
>
> (a) the application will also be considered under paragraphs R-LTRP.1.1.(a), (b) and (d), R-LTRPT.1.1.(a), (b) and (d) and EX.1. of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these rules;
>
> (b) if the applicant meets the requirements for leave under those paragraphs of Appendix FM or paragraphs 276ADE to 276DH (except the requirement for a valid application under that route), the applicant will be granted leave under those provisions; and
>
> (c) if the applicant is granted leave under those provisions, the period of the applicant's continuous leave under Part 8 at the date of application will be counted towards the period of continuous leave which must be completed before the applicant can apply for indefinite leave to remain under those provisions.
>
> Except sub-paragraph (c) does not apply to a person last granted leave as the family member of a Relevant Points Based System Migrant."

29. Mr Salam handed to me Chapter 8. Section 2.1 of the Immigration Directorate Instructions on the Transitional Provisions. This says-

> Applicants granted or who applied for leave under the rules before July 9, 2012 states-
>
> "A person who meets the following criteria, in one of the categories specified below, will remain subject to the Immigration Rules in force as at 8 July 2012 until settlement (the grant of indefinite leave to remain) even where the application is granted on or after 9 July 2012:

(i) to a person who made an application before 9 July 2012 under Part 8 of the Immigration Rules which was not decided by 9 July 2012; and
(ii)to applications made by a person who is in the UK and had been granted entry clearance or limited leave to remain under Part 8 following an application for initial entry clearance or leave to remain under Part 8 submitted before 9 July 2012 and this leave is extant where this is a requirement in Part 8.

… Transitional provisions under Part 8 will apply through to indefinite leave to remain to those persons who were granted in one of the following categories (on the basis of an application submitted before 9 July 2012):

… adult dependent relative….”

30. A perusal of these Instructions and Rules would support Mr Salam’s submission that the transitional provisions would have covered this application.

31. In considering the correct approach it seems the Court of Appeal have given conflicting decisions because the Court in Haleemudeen did not consider the Court of Appeal decision in Edgehill.

32. Mr McVeety’s submission was that the decision in Edgehill only applied to cases covered by paragraph 276ADE(iii) because that case and Haleemudeen were about long residence and paragraph 276ADE(iii) relates to a an applicant who is seeking to remain on the grounds of long residence.

33. I am satisfied that Edgehill is not restricted to merely cases under Paragraph 276ADE(iii). That was the issue argued before the Court of Appeal but it was the general principle that was under appeal namely whether an application made before July 9, 2012 should be considered under the old Rules or new Rules. I am also satisfied that Haleemudeen was decided on a case which had no transitional provisions and failed to consider Edgehill and consequently it does not “overrule” the decision of Edgehill. My understanding is that the Upper Tribunal in Haleemudeen has accepted that Edgehill applies and that the matter has to be decided on the basis of the pre-July 2012 Rules.

34. The Court of Appeal in Edgehill made it as clear as it could in stating that any application under the Rules made prior to July 9, 2012 should be dealt with by the Rules in place at the time the application was made.

35. Returning therefore to the original hearing the FtTJ correctly dealt with the application under paragraph 317 because he considered it having regard to the provisions of that Rule. For the reasons set out

above I have already found that there is no error of law in his approach to that issue.

36. It is well established respondent practice that paragraph 276ADE sets out her approach to article 8 ECHR namely that article 8 is now enshrined in the Rules. At the original hearing the parties approached the case under Paragraph 276ADE and in the alternative article 8 ECHR.

37. The FtTJ made a number of findings about the appellant's private life and whilst they were made when he was examining paragraph 276ADE that does not in itself create an error in law. The findings he made on medical issues, ties and finances were findings he would have to make in any proportionality assessment. The FtTJ stated at paragraph [44] of his determination he followed the Razgar approach and consequently this would have led to him having to make a proportionality assessment and he concluded-

> "Finally, even if the appellant's appeal did fall to be considered under article 8 ECHR and adopting the test referred to by Lord Bingham in Razgar I do find for the reasons set out above that her removal from the UK and her return to Pakistan would be proportionate."

38. In other words the FtTJ considered as part of his assessment all the factors that should be considered and ultimately found the appellant could not succeed under article 8 at all.

39. The Edgehill point confirms that the Tribunal must consider this case having regard to the old Rules and this is exactly what the FtTJ did. The fact he considered the case under paragraph 276ADE does not amount to an error in circumstances where he has had addressed article 8 outside of the Rules.

40. If the FtTJ had dismissed the appeal under paragraphs 317 and 276ADE and made no assessment under Razgar then Mr Salam's submission may have had some merit.

41. However, this is not what happened in this appeal because the FtTJ considered the arguments that arise on private life and at paragraph [44] he found it was proportionate to require the appellant to leave the country and that was a decision he was entitled to reach on the evidence.

42. Mr Salam's submissions on ties and money are mere disagreements with the FtTJ's decision and fail to address the fact they were findings open to the FtTJ who was then entitled to rely on those findings in his proportionality assessment. The FtTJ was not dealing with an appeal where a person had come to the United Kingdom with a legitimate

expectation that she would be allowed to stay. She came as a family visitor with the intention to leave within six months.

43. I am therefore satisfied that there was no error of law in either his approach to paragraph 317 or article 8 ECHR.

DECISION

44. There was no material error of law. The original decision dismissing the appeal under both the Immigration Rules and human rights shall stand.

45. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order was made in the First-tier Tribunal and I see no reason to amend that Order now.

Signed: Dated: **27 February 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

No fee award request was made and I do not make one in those circumstances.

Signed: Dated: **27 February 2015**

Deputy Upper Tribunal Judge Alis