



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

Appeal Number: IA/51060/2013

THE IMMIGRATION ACTS

Heard at Field House

On 21 July 2014

**Determination
orally**

On 1st Aug 2014

given

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ISMAIL HUSSAIN SHAIKH

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Mr C Mannan, Counsel

DETERMINATION AND REASONS

1. The respondent appeals with permission against the determination of First-tier Tribunal Judge Courtney sitting at Hatton Cross in which she allowed the claimant's appeal against the decision of the respondent made on 14 November 2013 to refuse him leave to remain in the United Kingdom. She allowed the appeal not under the Immigration Rules but on the basis that removal of the claimant would be a breach of the United

Kingdom's obligations pursuant to Article 8 of the European Convention on Human Rights.

2. The claimant was born on 1 January 1926 and is a citizen of Pakistan. He is in ill health and there is no challenge to the judge's findings that he lives in Bradford with his youngest son; that his wife died in 2005; that his middle son died in 2006; that he is suffering idiopathic Parkinson's disease and has been for more than fifteen years. He also suffers from chronic kidney disease, he has been completely bedridden since September 2013; is fragile; has poor appetite; and, his cognitive ability has deteriorated to such an extent that an application was made to the Court of Protection, prior to the appeal to the First-tier Tribunal, as his GP had assessed the claimant as being incapable of managing his own affairs.
3. The respondent's case as set out in the refusal letter is that he did not meet the requirements of the Immigration Rules and that having considered his case on an exceptional basis outside the Rules there were no sufficient compelling or compassionate issues such that the Secretary of State would be prepared to exercise discretion in his favour.
4. On appeal, the judge made findings with respect to the appellant's state of health. She also found that he had an established family life in this country with his relatives to the extent that he was almost entirely dependent on them.
5. The judge considered that, given his age, ill health and dependency, although there may be treatment available for him in Pakistan, that it would be disproportionate to require him to travel back to Pakistan for him to make an application out of country as an elderly dependent relative and that the legitimate aim of proper immigration control was outweighed by the rights of the appellant and his sons to respect for their family life in the UK.
6. The respondent sought permission on the grounds that the judge had erred in law by:
 - (a) not considering the case under the Immigration Rules;
 - (b) simply undertaking a freestanding Article 8 assessment; and,
 - (c) in failing to identify any arguably good grounds for granting leave to remain outside the Immigration Rules and identify whether there were compelling circumstances not recognised under the Immigration Rules as set out in **Gulshan**.
7. Permission to appeal was granted by First-tier Tribunal Judge Page on 14 May 2014. It is important to note that in the grant Judge Page said that it was clear that the judge had identified features which could have amounted to exceptional circumstances not recognised by the Rules because the health was so bad that the UK Border Agency had exempted

him from reporting, his cognitive abilities had deteriorated and the judge doubted whether the appellant could undertake the journey home.

8. Permission was granted on the basis that:

“The aims of immigration control were outweighed by the appellant’s circumstances but this is no longer the test. As the judge’s conclusions were formed outside of the framework of current case law the respondent has an arguable case; there may have been a material error of law.”

9. I heard submissions from both representatives.

10. Given the very clear findings of fact in respect of this appellant as to his age, disability and lack of cognitive ability, which are unchallenged and in any event sustainable, I am satisfied that the judge was properly entitled to conclude that there were compelling and compassionate circumstances.

11. Although she does not mention that explicitly, it was evident that the judge had considered that although the requirements of the Immigration Rules were not met that she should still nonetheless, given the compassionate facts in this case, have gone on to consider whether, despite that, there were still such circumstances that it would be disproportionate.

12. In this case, given the substantial number of compelling circumstances, it was open to the judge on the facts as found to conclude that, given the claimant’s illness, infirmity and evident lack of capacity, it would be disproportionate to require him to leave the United Kingdom, the weight of the public interest in ensuring that the Immigration Rules are met and are complied with notwithstanding.

13. On that basis I find that the determination of Judge Courtney did not involve the making of an error of law and I uphold it.

Signed

Date 25 July 2014

Upper Tribunal Judge Rintoul