



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

Appeal Number: IA/11301/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 10th February 2015**

**Decision & Reasons
Promulgated
On 22nd April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MRS NASEEM AKHTAR
(NO ANONYMITY ORDER MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sarwar, Counsel

For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 1st January 1955. She was the wife of the original first Appellant. On 21st August 2013 application had been made on the Appellant's behalf for indefinite leave to remain outside the Immigration Rules. The Appellants had arrived in the UK on visit visas on 12th January 2010. On 18th February 2010 they made applications in time for indefinite leave to remain as dependent relatives. Subsequent applications for leave to remain were dismissed. The final application led to a decision being made on 24th January 2014 to refuse

their applications for leave to remain on the ground that removal would not place the United Kingdom in breach of its obligation under the Human Rights Act 1998. Removal directions were dated 14th February 2014. The Secretary of State was not satisfied that the Appellants had met requirements as set out in paragraph 276ADE and Appendix FM and had found there were no exceptional circumstances to warrant consideration outside of the Immigration Rules.

2. The Appellants appealed and the appeal came before Judge of the First-tier Tribunal Lloyd-Smith on 25th June 2014. In a determination promulgated on 25th June 2014 the Appellants' appeals were dismissed under the Immigration Rules and pursuant to human rights grounds.
3. On 2nd July 2014 Grounds of Appeal were lodged to the Upper Tribunal. On 22nd July 2014 First-tier Tribunal Judge Robertson granted permission to appeal. On 31st July 2014 the Secretary of State opposed the appeal by way of response under Rule 24.
4. It was on that basis that the appeal came before me to determine whether or not there was a material error of law in the decision of the First-tier Tribunal. However I was advised of one material development that has considerable effect on the conduct of this litigation. Sadly on 3rd August 2014 the former first Appellant died. A copy of his death certificate is produced to me. In such circumstances I accept representations by his solicitors (not challenged by the Secretary of State) that his appeal be marked abandoned.
5. The remaining Appellant appeared in person and by her instructed solicitor Mr Sarwar. The Secretary of State appeared by her Home Office Presenting Officer Mrs Petterson. The issue was to determine whether there was a material error of law in decision of the First-tier Tribunal Judge.
6. When finding that there was a material change to the scenario that was originally before the court when the Appellant had applied with her former husband I noted that one of the arguments that had been forcibly previously raised by the Secretary of State was that the Appellant along with her late husband could return together to Pakistan where they could provide mutual support. I had acknowledged that that clearly was not the current position following the death of Mr Jan and that Mrs Akhtar's claim remained extant pursuant to Article 8 of the European Convention of Human Rights.
7. In finding a material error of law I noted that the First-tier Tribunal Judge had erred in failing to assess the then Appellants' cases adequately under Article 8 on the basis of family life where the Appellants were clearly dependent on their family members in the UK and that the First-tier Tribunal Judge should have considered that if the Appellants were returned to Pakistan whether they would be forced to live in the most exceptional compelling circumstances and whether additional support could or could not be offered by siblings and that the judge had failed to follow the

“notwithstanding” test set out in *Mohamed v The Secretary of State for the Home Department [2012] EWCA Civ 331*.

8. However I also noted that there was a material change due to the death of Mr Jan in the whole basis upon which the appeal was presented and I gave directions that there be leave to the Appellant (Mrs Akhtar) to adduce additional evidence both by way of witness statement and medical evidence relating to her change of circumstances and to her appeal pursuant to Article 8 of the European Convention of Human Rights. I reserved the case to myself and it is on that basis that the appeal comes back before me.
9. In this instance the Secretary of State is represented by her Home Office Presenting Officer Mr McVeety. The Appellant continues to be represented by her instructed Counsel Mr Sarwar. In addition I am provided with a supplemental bundle served by the Appellant’s legal representatives and an additional statement outside that bundle provided by the Appellant’s daughter Rahila Khan.

Evidence

10. Albeit that the Appellant is in attendance and whilst I acknowledge that appearances can be deceptive it appears that the Appellant is in poor health and it is not the wish of either Mr Sarwar or Mr McVeety that she gives any further evidence other than adopting her witness statement. The evidence therefore that is extant before the court is that of her children.
11. Evidence was initially provided by Mrs Rahila Khan. She confirms and adopts her witness statement of 15th January 2015. She confirms that she is the Appellant’s daughter and probably spends the largest amount of time within the family caring for her mother although her brothers and sisters do help with the day-to-day care that is provided. She emphasises that she has noticed a decline in the Appellant’s health since she has been in the UK and that this has unfortunately been accelerated since the death of her father. It is her belief her mother will need constant care for the rest of her life. She advises there are days when the Appellant does not want to eat and that it is for the family to ensure that she eats and drinks regularly. She points out that the Appellant is diabetic and it is important to ensure that her sugar levels are kept safe. She states that the Appellant needs constant reminding to take her medication and that family members have to stand in front of her to ensure that this takes place. She believes that it is very important for the Appellant to have her family around her and they do their best to stop her from dwelling on the fact that their father is no longer alive. She believes that the Appellant needs people around her who she trusts and to do everything for her best interests and that as her children she and other close family members are in the best place to do that. She advises that if her mother were forced to return to Pakistan it is her belief she does not think her mother would live for very long and points out that they no longer have a family home and

land because that has been taken over by the expansion of the Mangla dam. She further emphasises that none of the family are in a position to return to Pakistan with her mother as they all have jobs, children and mortgages to pay in the UK. She asks that her mother be allowed to remain in the UK.

12. Mrs Khan is asked by Mr Sarwar of the location of family members. She points out that the Appellant came to the UK on 12th January 2010 and that the only close family member she has in Pakistan is a much older brother who is aged over 85. As to her family members in the UK she has six children, four sons and two daughters all of whom are now British citizens and eighteen grandchildren. In addition one sister and one brother also reside in the UK.
13. Mr Sarwar draws to my attention the letter from Dr Ahmed from Mach Healthcare Limited at the Sun Valley Medical Practice, Oldham. That medical report states that the Appellant suffers with diabetes and has "poor control." It indicates that an attempt is being made to improve this with input from the family but that the Appellant also suffers with depression and possible dementia. Dr Ahmed's report states that this is a complex case scenario aggravated by the Appellant's PTSD problems which have arisen due to the death of her husband. He points out that the Appellant is currently awaiting an assessment from a memory clinic in order to confirm a diagnosis and possibly set out a care plan. His letter states that the Appellant receives active medical care and that the family is providing essential social care.
14. Mrs Khan confirms this scenario pointing out that her mother has her own room but lives with her brother Noeeb Quasim and that she is not capable of conducting her own affairs and requires 24 hour family care. She points out that the Appellant would forget to cook or eat or take drugs without family support and that she cooks for her and that the family run a rota of close family members who spend 24 hours a day with her so as to ensure permanent care. She confirms that the hospital appointment she is waiting is with a consultant in order to assess the Appellant's mental state.
15. The other principal witness is the Appellant's son Mr Moneeb Qasim. He confirms and adopts his witness statement of 15th January 2015. He states that he lives with his mother in Oldham and that he is one of the carers alongside his brothers and sisters and that the family have taken it upon themselves to look after the Appellant. He reiterates the Appellant's declining health and her inability to remember to take her medicines. He confirms that it is in his house that his mother resides and that it is a two bedroomed property. He confirms that his sister when looking after his mother and his mother reside in a back room and he lives in the front bedroom. He admits to being married with two children but that he is separated from his wife and that his wife and children live in local authority property. He works in a bakery.

16. Under cross-examination from Mr McVeety Mr Qasim is asked what would happen if he and his wife were to reconcile bearing in mind the overcrowding that would arise in the property. He states that they would all live together and that he would rent a larger house. He confirms that his mother does not have financial support of her own.
17. Mr McVeety points out that there was evidence that his parents' property was destroyed by the flooding of a dam in Pakistan and that a substantial sum of compensation was paid. Mr McVeety enquires as to what happened to that compensation. Mr Qasim responds that he does not know what money, if any, was given to his parents but that they were not given an alternative property. Mr McVeety presses the point stating that the Secretary of State knows that compensation was paid and that displaced families were given alternative accommodation so the Secretary of State does not accept Mr Qasim's evidence. His response is to state that he did not say that there was not any compensation received merely he does not know how much.
18. The final witness was Mr Rehman. Mr Rehman confirms and adopts his witness statement also signed on 15th January 2015 as his evidence-in-chief. He is in a slightly different position in that he lives in Peterborough but advises that he travels at least twice a week to see his mother. He points out that each time she sees him she repeats the same questions asking why he cannot stay longer with her. His response is that he comes to visit as often as he can but his job and family commitments restrict the length and frequency of his visits. He advises that he has seen his mother's health deteriorate over the past year particularly since the death of his father and he confirms that she needs round the clock care in order to ensure that she eats, has the correct clothes and takes her medication. It is his belief that his mother could not survive alone in Pakistan and that no family members are in a position to move there to look after her.
19. Under cross-examination from Mr McVeety Mr Rehman confirms that he is the executor of his father's estate and when asked as to what is happening to his father's money he confirms that there will be a small payment made but he does not know the exact amount but that there is no large pot likely to appear.

Submissions/Discussions

20. Mr McVeety points out that the Appellant cannot succeed under the Immigration Rules and that there is no evidence of private medical treatment being available in the UK. He submits that any application made has to be pursuant to Article 8 outside the Immigration Rules and Mr Sarwar agrees and acknowledges this point. He relies on Section 117B of the Nationality, Immigration and Asylum Act 2002 which came into force on 28th July 2014 relying in particular on the public interest grounds therein so far as it relates to NHS funding. He acknowledges that the case is completely different from that that was previously expounded before the court and he asked me to refuse the appeal.

21. Mr Sarwar submits that this is the unique case based on its own facts. He acknowledges that the case has to be considered pursuant to Article 8 outside the Immigration Rules but that basically this is an application for settlement. He reminds me that the Appellant has been here since 2010 and that she is now aged 60 and that the whole of her family is in the UK, all of whom are British citizens and that she has no immediate family in Pakistan who would be in a position to look after her. He submits that the proportionality balance has to be considered and that this is a case where such balance would clearly lie with the Appellant and that it is for the court to ask the question “is it reasonable for them (family members) to relocate to Pakistan for family life?” He points out that the family members are EU citizens and that it would not be reasonable for them to relocate relying on such well-known authorities as *Sanade* and *Dereci*. He submits that this is a case that should be allowed pursuant to Article 8 outside the Immigration Rules and he asked me to allow the appeal.

Findings

22. As has been said previously this appeal now takes on a completely different format to that that has previously been before the Tribunal and before the Secretary of State. The sad death of the Appellant’s husband has cast her application in a new light. I have had the benefit of hearing from three of the Appellant’s children. Mrs Khan is impressive. Mr Qasim is not. However I take that very much to reflect the fact that the care of the Appellant lies very largely in Mrs Khan’s hands. What is clear is that although not being in modern terms “aged” the Appellant regrettably portrayed herself as being extremely old and fragile and her health is clearly a matter of concern not just to her family but to her GP. She has been referred to a clinic to see if she has the onset of the early signs of dementia. She also has been diagnosed as suffering from PTSD following the loss of her husband. Evidence has been provided to me that she requires 24 hour care. I remain a long way from being satisfied that the conditions in which she is being looked after are satisfactory. After all whilst Mr Qasim may be separated from his wife it would clearly be impossible and impractical for his family to return to their home and at the same time for the Appellant to remain there.
23. I accept the view expressed by Mrs Khan that they seek continuity of accommodation and support for her mother. Again the situation by which Mrs Khan has to spend time looking after her mother when in fact it is not at her own home is far from ideal but the outcome I am satisfied is that this is an elderly lady who requires round the clock care. Further I am satisfied that save for an aged brother she has no family members living in Pakistan and that all her family have migrated to the UK and that she has a substantial number of children and grandchildren who are able to provide care for her. In such circumstances I have to look at the case pursuant to Article 8 outside the Immigration Rules.

24. The law is constantly developing. In any consideration of an Article 8 claim the starting point is the law itself. Article 8 states:
- (a) everyone has the right to respect for his private and family life, his home and his correspondence;
 - (b) there should be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing 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 freedom of others.
25. The general approach to Article 8 cases is that in *Nhundu and Chiwera (01/TH/00613)*. In those cases the Tribunal said that, in deciding claims under Article 8, there is a five stage test which must be applied in order to determine whether a breach has occurred:
- (1) does family life, private life, home or correspondence exist within the meaning of Article 8;
 - (2) if so, has the right to respect for this been interfered with;
 - (3) if so, was the interference in accordance with the law;
 - (4) if so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
 - (5) if so, is the interference proportionate to the pursuit of the legitimate aim?

Those were essentially the five questions endorsed by the House of Lords in *Razgar [2004] UKHL 27*.

26. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:
- “Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker.”
27. In *Haleemudeen v the Secretary of State for the Home Department [2014] EWCA Civ 558* Beatson LJ held at paragraph 17 that where the Article 8 ECHR element of the Immigration Rules is not met, refusal would normally be appropriate, “*but that leave can be granted*

where exceptional circumstances, in the result of 'unjustifiably harsh consequences' for the individual, would result".

28. There is a requirement to look at the evidence to see if there is anything which has not already been adequately considered within the context of the Rules which could lead to a successful Article 8 claim. The further intermediary test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion based Rules is now no longer appropriate and in *Ganesabalan, R (on the application of) v SSHD [2014] EWHC 2712 (Admin)*, there was no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which were called for were informed by threshold considerations.
29. It is against that general background that it is necessary to consider this claim. It is also necessary to consider Section 117B of the 2002 Immigration Act which was brought into force by the 2014 Immigration Act. Section 117B makes public interest considerations applicable to all cases. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, and while Section 117A(2) requires me to have regard to the considerations listed in Section 117B and 117C, there is no duty upon me to reach any specific conclusions or findings if the factors listed are ones that would normally have always been taken into account. I am though conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me a requirement to carry out a balancing exercise where an Appellant's circumstances engage Article 8(1) in deciding whether the proposed interference is proportionate in all the circumstances. In doing so I remind myself of the guidance contained within *Razgar* (mentioned above). Section 117B states that the maintenance of effective immigration control is in the public interest and it is in the interests and in particular the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are able to speak English. I do accept that this threshold is not met by the Appellant. She speaks Mirpuri but she communicates in that language with other family members and other family members do speak English.
30. This is an unusual case. The Appellant's circumstances changed dramatically while she was in this country. She has now been in this country for some five years. She is in poor health and I acknowledge does not have private medical insurance. However this is a case that I consider to be so exceptional as to one that should be allowed outside the Immigration Rules pursuant to Article 8. In reaching my conclusion I have weighed up the public interest and assessed the concept of proportionality. This is an elderly lady in poor health whose extensive family all reside in the United Kingdom. It was never her intention when she came here to remain permanently. That scenario changed dramatically with the death of her husband. I accept that she needs and receives round the clock care from family members. The family has shown

signs of being a close-knit family and there are many of them all of whom are prepared to help. It cannot be in the public interest to return an elderly frail lady who cannot look after herself to Pakistan when all her family are here and able to assist and provide for her support.

31. I make one final comment because Mr McVeety on behalf of the Secretary of State has made reference to monies received by families whose properties were compulsorily purchased due to the flooding of a river and the forming of a dam. It is accepted by family members that this took place but there is no evidence of finance being available although Mr Rehman has stated that his father's estate is being wound up and that there is some money albeit that it is not extensive. It is not really an issue in this matter save for the fact that if the Appellant is to remain in this country and if under the terms of her late husband's estate she is to be a beneficiary then I would hope that such monies fall into that estate and are used for her financial support. It is not however, I am satisfied, a prerequisite that that takes place for her succeeding in her claim pursuant to Article 8. For all the above reasons in this very exceptional case the Appellant's appeal is allowed outside the Immigration Rules pursuant to Article 8.

Notice of Decision

The Appellant's appeal is allowed under Article 8 of the European Convention of Human Rights.

No anonymity direction is made.

Signed

Date **10th February 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT **FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed

Date **10th February 2015**

Deputy Upper Tribunal Judge D N Harris