Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/42870/2014

THE IMMIGRATION ACTS

Heard at Glasgow
On 3 November 2015

Decision and Reasons Promulgated
On 10 November 2015

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAMZAN BEGUM

Respondent

Representation:
For the Appellant: Mrs S Saddiq, Senior Home Office Presenting Officer
For the Respondent: Mr S Winter, instructed by McGill & Co, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The appellant is a citizen of Pakistan, whose date of birth is recorded as 1 January 1943. She sought to remain in the UK on human rights grounds. In a letter dated 24 March 2014 the respondent found that she has no dependency on her adult relatives in the UK going beyond normal emotional ties so as to amount to family life within the scope of Article 8 of the ECHR. That decision did not give rise to a right of

© CROWN COPYRIGHT 2015

appeal. Following various procedure, the SSHD issued a further letter dated 28 October 2014 which says that as the appellant entered the UK as a visitor any application for leave to remain as an adult dependant relative would fall to be refused; she does not meet the requirements of the Rules in respect of private life; there would be no significant obstacles to her return to Pakistan; and her medical condition is not such as to require a grant of leave by reference to Articles 3 and 8. An accompanying removal decision was made, giving rise to a right of appeal to the First-tier Tribunal.

3. The appellant brought such an appeal, on these grounds:

> The decision is unlawful because it is incompatible with Article 8 ECHR rights of the appellant and her family members. Removal … would be unlawful because it would be incompatible with her and her family's rights under Article 8 …
>
> The decision is otherwise not in accordance with the law.
>
> The decision is not in accordance with the Immigration Rules at paragraph 276ADE(vi).

4. First-tier Tribunal Judge Boyd allowed the appeal by determination promulgated on 4 June 2015.

5. The SSHD appeals to the Upper Tribunal on the following grounds:

> **A. <u>Section 117 Nationality, Immigration & Asylum Act 2002</u>**
>
> The judge fails to engage with Part 5A of the Nationality, Immigration & Asylum Act 2002 (S.117) – both in substance and form.
>
> … this is a material misdirection of law: it is incumbent upon the judge to have due regard to <u>all</u> the public interest factors contained therein, and the public interest more widely, in determining whether there is a breach of the appellant's private life under Article 8.
>
> While regard is given to 117B(4) at [49] the judge fails to engage with any of the remaining public interest considerations, namely that effective immigration control is in the public interest (117B(1)) and that A [the appellant] must demonstrate that she is financially independent. The judge should have had particular regard to the significant expense A has already cost the public purse and the relatively limited income of her sponsor – approximately £15,000-£17,000 per annum, see [19].
>
> B. **<u>Proportionality</u>**
>
> Moreover, having recognised at [49] that little weight <u>should</u> be given to A's private life … this ought to have been borne in mind substantively or at least acted as the starting point when considering a proportionality assessment.
>
> … the judge's conclusion that the 'balancing' exercise falls in A's favour is fundamentally flawed having regard to the Tribunal's initial findings, namely that A:

(i) was 68 years old when she entered the UK [36] (she lived in the family home for 15-20 years [11])

(ii) would have a carer in Pakistan [38]

(iii) would have access to suitable accommodation [40]

(iv) would have financial support [42]

(v) is not prevented from travelling [42]

(vi) would have access to appropriate care is available in Pakistan [48] and

(vii) having regard to the limited weight to be attached to A's private life as a starting point.

Despite such explicit findings the judge then goes on to rely on A's ill health and "*roots*" to conclude that her removal would amount to a disproportionate interference. This appears at complete odds with the findings set out above.

Moreover, in the "balancing exercise" no weight is given to the findings of fact that are demonstrative that A would be able to form a private life in her country of nationality, a country where she has lived for all but 4 years and has relatives, and where there is access to medical treatment (albeit perhaps not an equivalent standard to the UK). In addition to this the public interest as set out at Ground A above is not engaged within the relevant assessment.

The judge also erroneously considers that it would be disproportionate for the appellant to "*perhaps ultimately come back to the UK*" [54]. Since A has not succeeded under the provisions of Appendix FM as an adult dependant relative in this appeal, and given the findings of fact set out above, there is no basis to conclude that an application for Entry Clearance on essentially the same provisions would have any success either.

Finally, as the Court of Appeal have reiterated in GS (India) & Ors v The Secretary of State for the Home Department [2015] EWCA Civ 40 "*the "no obligation to treat" principle must apply equally in the context of Article 8" [§111]*. It was made plain that:

> "First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging Article 8: if that is all there is, the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in their country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the "no obligation to treat" principle."

The judge has plainly not directed himself appropriately when considering the issue of proportionality.

Submissions for SSHD.

6. After the discussion and findings in the determination, in particular from paragraph 37 onwards, it came as a complete surprise that the eventual conclusion was that the appeal was allowed. At paragraphs 51 and 52 the judge found that for Article 8 purposes there was no family life but only private life. Although in *Singh v SSHD* [2015] EWCA Civ 630 at paragraph 25 it was said that debate whether an applicant had or had not family life for Article 8 purposes was "liable to be arid and academic" that did not apply to a case involving part 5A of the 2002 Act, which draws a sharp distinction between private and family life. It was significant that this case was allowed on private life only. The judge said at paragraph 49 that he was "urged" by section 117B of the 2002 Act to give little weight to private life, but the judge was required to apply that provision in its terms. He was bound also to apply the considerations in section 11B(2) of the appellant's inability to speak English and in section 117B(3) of her lack of financial independence. The judge had simply not factored in these matters. He found at paragraph 45 that the appellant would have a degree of care available in Pakistan. At paragraphs 37-39 he did not find it credible that family members would be unable to assist her if required, including in respect of care at home in Pakistan. It was plain that there were public costs arising from the presence of the appellant in the UK – paragraph 44 and 46. The appellant had not shown that care she needed would not be available in Pakistan, and in any event *GS* established that non-availability of care could not by itself give rise to a breach, there being no obligation to treat. The conclusion was at odds with all the earlier findings, and amounted to a failure lawfully to carry out the balancing exercise. The determination should be set aside. The outcome should be reversed, either because Article 8 was not engaged, or because the respondent's decision was plainly proportionate.

Submissions for appellant.

7. The judge went wrong by finding that there was no family life for Article 8 purposes, but that was an error which could only rebound in favour of the appellant. *Gurung v SSHD* [2013] 1 WLR at paragraphs 45-46 showed that family life was a question of fact, and might exist between adult parents and children. To correct the error would significantly assist the appellant's case, because even if little weight were to be given to private life, that did not apply to family life. Section 117A(2) required the Tribunal to "have regard" to the considerations listed in section 117B. At paragraphs 49 and 55, the judge did so. He might have erred in thinking that there firstly had to be a good arguable case to look outside the Rules, but that was another error which could only rebound in favour of the appellant. The judge had regard to all relevant considerations both in form and in substance, as every relevant factor was set out in the determination. There was no material misdirection in law. The judge's reference to Part 5A of the Act encompassed recognition in terms of section 117B(1) that the maintenance of effective immigration control is in the public interest. As to financial implications, paragraph 19 recorded evidence to the effect that the appellant's sons would pay for house improvements carried out for the appellant's benefit, from

which evidence it could be implied that there would be no burden on the state. In her original application to the respondent (page 84 of the appellant's first bundle on the First-tier Tribunal) the appellant was asked if she was receiving any public funds and answered, "No". The grounds were not justified in suggesting that the judge had no regard to evidence regarding cost to the public purse. There was no evidence that the appellant would be a burden. The considerations listed in section 117B had to be taken into account, but they were not intended to be exhaustive. The judge had taken those factors into account. The statute was to the effect that certain matters should be given little weight, not that they should be given no weight. The grounds did not go so far as to say that the outcome of the case was perverse or irrational, and so it must be held to have been within the scope of the judge at first instance. The grounds amounted finally to no more than disagreement with the judge's striking of the proportionality balance. In *Mukarkar v SSHD* [2007] Imm AR 1 Carnwath LJ said:

> [40] Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case … The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law …

8. Mr Winter also cited *MA (Somalia) v SSHD* [2011] Imm AR 2, where the Supreme Court made general remarks on the degree of caution to be exercised in finding error of law in cases like this, saying at paragraph 45:

> "… The court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts."

9. The present case did not turn only on the health of the appellant. There was also her age, the level of extended family support she has in the UK, and private life which is in reality extended family life with her closest relatives. No errors of law had been made out.

<u>Determination reserved</u>.

10. There was before the Tribunal an application by the appellant under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for consideration of further evidence on availability of care in Pakistan. Mr Winter said that he would move for admission of that evidence only if the case proceeded to the stage of remaking the decision. The appellant's preference was that if matters did move to that stage, there should be a further hearing. I indicated that in this case I would rather reserve my determination on the error of law issue, and decide on any further procedure in light of the outcome. Mrs Saddiq concurred with that course.

<u>Discussion and conclusions</u>.

11. It is perhaps unfortunate that neither party paid much attention to the question whether the appellant might have qualified under the Rules as an adult dependant relative, if she were permitted to make such an application. The answer might have

borne significantly on proportionality. However, not having been explored in the First-tier Tribunal, that must be put aside, as far as error of law goes.

12. The obligation in terms of Part 5A is to have regard in all cases to the considerations listed in section 117B. It might be thought inaccurate for the judge to say that section 117B "urged" him that little weight was to be given to private life in a case such as this. However, every sentence in a determination does not have to be written so as precisely to reflect statutory language.

13. Regarding the aspect of the burden on tax payers, Mr Winter relied upon paragraph 19. The determination there records that one of the appellant's sons said (on the matter being put to him) that he would reimburse the local authority for improvements to a house made for the appellant's benefit. That is a narration of evidence, not a finding. It was not shown that the appellant's family was likely to keep the public purse free of cost.

14. Having acknowledged the above, I do not think that the SSHD has shown that the judge failed to "engage with" part 5A of the 2002 Act in either substance or form. The grounds overstate the aspect of part 5A on which specific reliance is placed. They assert that the appellant "must demonstrate that she is financially independent"; but the provision is that it is in the public interest that she should be financially independent, not an absolute requirement for her to prove it. The judge mentioned all matters bearing on Part 5A which were aired before him, and said in his last paragraph that he was "fully taking into account the import of section 117A and B". He should be credited with having done as he says.

15. As the grounds and submissions pointed out, the judge set out many factors weighing against the appellant, perhaps to the extent that until the last two paragraphs the appeal appeared to have little hope. He found the appeal "extremely finely balanced". The factors he went on to weigh on the other side were that the appellant is an old woman (not doing well for her age); she has been here for over 4 years; her conditions are largely degenerative; the return journey would be extremely stressful, and might impact on her health; and her two sons and her grandchildren are settled in the UK.

16. I note *Mukarkar* also at paragraph 38:

> "Since neither Article 8 nor the case law lays down any specific limits to what may reasonably be regarded as "exceptional" in this context, a legal challenge would have to be one of perversity."

17. The statutory framework, the case law and the Rules in respect of Article 8 have all moved on since 2007. There has been much discussion of how to formulate the scope of Article 8 outside the Rules. However, the final judgement remains fact-sensitive.

18. It might have been difficult for the appellant legally to fault the result if the conclusion had gone the other way. However, I do not think that the second ground of appeal amounts to more than re-assertion of (and perhaps improvement upon) the case made by the respondent in the decision letter and in the First-tier Tribunal. The

outcome might be seen by some as unusually generous. Not every judge would have come to the same conclusion. However, it is not said to have been outside the judge's scope. I do not find any error of law such as to entitle or require the Upper Tribunal to interfere.

19. No anonymity order has been requested or made.

Upper Tribunal Judge Macleman

6 November 2015