



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number:

IA/30094/2013

THE IMMIGRATION ACTS

Heard at Field House, London

Decision & Reasons

Promulgated

On the 4th January 2016

On the 4th May 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS AKSAR BIBI

(Anonymity Direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chakmahjian (Counsel)

For the Respondent: Miss Savage (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Turquet dated the 6th May 2015, but promulgated on the 12th May 2015, dismissing the Appellant's appeal against the Respondent's

decision to issue removal directions against her following the Respondent's refusal to grant her indefinite Leave to Remain as a dependent relative under paragraph 317 of the Immigration Rules and after the refusal of her human rights claim.

Background

2. The Appellant is a national of Pakistan who was born on the 1st July 1952. On the 5th July 2012 she applied for indefinite Leave to Remain as the dependent relative of her son and sponsor Mr Khalil Ahmed Sudhan under paragraph 317 of the Immigration Rules. That application was considered by the Respondent in a decision dated the 1st July 2013, in which her application was refused under paragraph 317, but also her claim was considered in respect of her private life under the Immigration Rules, and consideration was given as to whether or not her application should be allowed outside of the Rules. A decision to remove the Appellant was made under Section 47 of the Immigration, Asylum and Nationality Act 2006.
3. The Appellant appealed that decision to the First-tier Tribunal, and that appeal was heard before First-tier Tribunal Judge Coutts in a decision promulgated on the 4th March 2014, in which he allowed the Appellant's appeal under the Immigration Rules. The Respondent appealed that decision to the Upper Tribunal, and that decision was set aside by Deputy Upper Tribunal Judge Frances on the 4th June 2014, and the case was remitted back to the First-tier Tribunal for rehearing. The matter then came before First-tier Tribunal Judge Turquet on the 4th April 2015. He dismissed the Appellant's appeal both under the Immigration Rules and on Human Rights grounds for the reasons set out within his decision.
4. The Appellant sought to appeal against that decision to the Upper Tribunal, and permission to appeal has been granted by Upper Tribunal Judge Finch on the 18th September 2015, in which she stated that it was

arguable that the Judge had erred in law in considering the question as to whether or not the Appellant enjoyed family life with her son and daughter for the purposes of Article 8.

5. At the appeal hearing before me in the Upper Tribunal, Miss Savage on behalf of the Respondent conceded that the decision of First-tier Tribunal Judge Turquet did contain a material error of law. It was agreed with both advocates that the Appellant in this case had applied in country for a variation of her Leave. The Appellant had arrived in the United Kingdom on the 2nd May 2011 on a visit visa which expired on the 22nd October 2012. Her application dated the 5th July 2012 was for a variation of that Leave. It was therefore agreed by the representatives that Section 85 (4) of the Nationality, Immigration and Asylum Act 2002 applied and that in considering the appeal First-tier Tribunal Judge Turquet was able to consider evidence about any matter which the Tribunal considered relevant to the substance of the decision, including evidence which concerned a matter arising after the date of the decision. It was therefore agreed with the advocates that First-tier Tribunal Judge Turquet, therefore had to consider the circumstances if the Appellant were to be returned back to Pakistan as at the date of the appeal hearing on the 24th April 2015.
6. However, Miss Savage on behalf of the Respondent conceded that when considering the Appellant's application both in respect of the application under the Immigration Rules and in respect of Article 8, that the First-tier Tribunal Judge had considered the circumstances appertaining at the time when the Appellant was still in Pakistan in 2011, rather than the circumstances which she would face, were she to be returned to Pakistan as at the date of the appeal hearing on the 24th April 2015. Although Miss Savage stated that consideration of past circumstances may well be relevant to the circumstances as at the date of the appeal, were the Appellant to be returned, she did concede that the First-tier Tribunal Judge had not gone on to consider the circumstances that would be faced

by the Appellant were she to be returned to Pakistan as at the date of the appeal hearing before him.

7. Indeed, I find that concession was perfectly properly made by Miss Savage. When one considers the decision by First-tier Tribunal Judge Turquet, the Judge has erred in law, in simply considering the circumstances that the Appellant faced as to whether or not the Appellant was living alone outside of the United Kingdom in the most exceptional compassionate circumstances, at the time when she was in Pakistan in 2011, rather than considering whether or not she would be living alone outside the United Kingdom in the most exceptional compassionate circumstances as at the date of the appeal hearing before him on the 24th April 2015.
8. Further, in considering whether or not family life existed between the Appellant and her sponsor, it is clear again that the Judge has considered this based on the circumstances when the Appellant was still in Pakistan in 2011, rather than the circumstances as at the date of the appeal hearing. At [33], the First-tier Tribunal Judge considered the living accommodation that was available to the Appellant while she was living in Pakistan, rather than considering the living accommodation which would be available to her if she were to be returned. The Judge went on at [34] to find specifically that "there is no medical evidence from Pakistan indicating that she was unable to look after herself" and the Judge went on to state that "the current problem relates to her knee injury a few months ago. I note that the consultant surgeon, who saw her, stated in his letter dated 31st March 2015 that the Appellant denied any previous knee symptoms and pain now appeared to be the overriding feature rather instability. It was affecting her walking distance, which had been approximately 500 yards. Her pain was improving and she was taking regular paracetamol. This has been a recent problem and I do not find can be taken into account when considering her circumstances in Pakistan". Clearly, this was something that the Judge was able to

consider, and the Judge was in error in a matter of law in finding that he could not take account of the change in the Appellant's medical condition.

9. It was as a result of the Judge considering the circumstances as at the wrong date, that led to the problems identified within the Grounds of Appeal, namely that the Judge had failed to take account of the recent medical evidence and had focused too much on the care previously provided by Arshad Mahmood, when the Appellant was in Pakistan, despite the fact that the evidence was that he had gone to Saudi Arabia in 2011. At [40] the First-tier Tribunal Judge stated specifically that "she has not satisfied me on the balance of probabilities that she was living alone outside the United Kingdom in the most exceptional compassionate circumstances" and at [42] the Judge found that "she was not financially wholly or mainly dependent on her relative present and settled in the United Kingdom this clearly shows that the Judge has applied the wrong date when considering the appeal under the Immigration Rules, as conceded by Miss Savage.

10. It is also perfectly clear that the Judge further erred, as was conceded by Miss Savage, in respect of the date of consideration of the Article 8 claim, in that again, the Judge has simply considered the circumstances of the Appellant whilst in Pakistan, rather than considering whether or not family life actually existed between herself and her son, when she was now living in the UK, as at the date of the appeal hearing and had simply taken account of the fact that the sponsor and his sister would have been aware that their decision to leave Pakistan would mean separation from their mother and in finding that there was no evidence of more than normal emotional ties between the son and parent took account of the fact that "the son took the decision to stay in a country far away from his mother. The Appellant has lived in the same community all her life. I do not find that family life has been established for the purpose of Article 8". In this regard, the Judge again has clearly failed to consider

the circumstances as at the date of the appeal hearing, at which time the Appellant was living in the UK.

11. In light of the concession made by Miss Savage, that the decision of First-tier Tribunal Judge Turquet does contain a material error of law, which concession I wholly support and it is clear that the Judge has considered the application both under the Immigration Rules and outside of the Rules, on the basis of the circumstances appertaining at the wrong date, namely at a time when the Appellant was still in Pakistan in 2011, rather than as at the date of the appeal hearing, I do set aside the decision of First-tier Tribunal Judge Turquet.

12. As again quite properly conceded by Miss Savage on behalf of the Respondent, I do find that it is appropriate to remit the case back to the First-tier Tribunal for a complete rehearing de novo given that all of the Judge's findings I consider have been contaminated as a result of this error. The matter is therefore remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Coutts or First-tier Tribunal Judge Turquet.

Notice of Decision

The decision of First-tier Tribunal Judge Turquet does contain a material error of law and is set aside;

The case is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Coutts or First-tier Tribunal Judge Turquet;

No anonymity order was made before the First-tier Tribunal, no such order was sought before me. No anonymity order was therefore made.

Signed

Dated 4th January 2016

Rob McGinty

Deputy Upper Tribunal Judge McGinty