Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001846
on appeal from HU/05028/2021

THE IMMIGRATION ACTS

Heard at Field House
On 18 August 2022

Decision & Reasons Promulgated
On 17 November 2022

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

AZRA SALEEM
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:	Mr Raphael Jesurum of Counsel, instructed by Worldwide Immigration
For the respondent:	Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision on 21 November 2020 to refuse settlement in the UK on an exceptional basis, outside the Immigration Rules HC 395 (as amended).

2. The appellant is a citizen of Pakistan, born on 16 October 1953 and currently 68 years old. Her home area is Lahore, where four of her daughters also live.

© CROWN COPYRIGHT 2022

3. **Vulnerable appellant.** The appellant is a vulnerable person and is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance. She is a wheelchair user who has osteoporosis, a fracture of her lumbar spine, type 2 diabetes, hypertension, depression and mental health problems. She takes various medications. She was being assessed for possible dementia at the date of the First-tier Tribunal hearing.

4. No adjustments were required today for the appellant's vulnerabilities: she attended the hearing as an observer only, using her wheelchair and accompanied by her British citizen daughter Iran Saleem, who is her sponsor in this application.

5. **Mode of hearing.** The hearing today took place face to face.

6. **Record of proceedings.** The First-tier Judge's record of proceedings was not on the Upper Tribunal's electronic file. Mr Jesurum did not have with him Mr Burrett's note of the hearing. We are grateful to Mr Tufan for providing a copy of the Home Office Presenting Officer's note of the proceedings. Mr Jesurum was given time to read it and did not suggest that the respondent's record of the sponsor's cross-examination was inaccurate. We have therefore treated the respondent's record as accurate when dealing with the issues raised in the grounds of appeal.

Background

7. The appellant lived in Pakistan until coming to the UK for the last time in March 2020, when she was 66 years old. Until 1994, she lived with her husband, who died that year. After her husband died, the appellant went to live with her son, and did so until 2019.

8. The appellant and her late husband had 6 children, one son and five daughters. One son and four daughters still live in Pakistan.

9. The other daughter, Ms Iram Saleem lives in the UK, where she migrated in 2011 to join her former husband. She has a daughter from that marriage, born in 2012, now 10 years old, who is autistic. She has a new partner, who is said to help with both the childcare and caring for Ms Iram Saleem's mother, this appellant, when the daughter is at work. The family receives Universal Credit.

10. The appellant has been visiting the UK regularly since her daughter moved here. The first visit was in 2013: she arrived in May 2013 and left before the expiry of her visa in November 2013.

11. In 2015, the appellant sold her property in Pakistan, dividing the proceeds amongst her 6 children. After that, she made her home with family members, first her son, and then one of her Pakistan-based daughters.

12. Passport evidence which we have seen, which was not before the First-tier Tribunal, indicates that the appellant visited the UK from 12 August 2017 to 8 October 2017, within the currency of a visit visa issued on 27 July 2017, which expired on 27 January 2018. Again, she embarked before the visa expired.

13. The appellant made an application under Appendix V, paragraph V4.2 in June 2017, which was unsuccessful.

14. In 2018, the appellant had a bad fall in Pakistan and fractured her lumbar spine. In 2019, the sponsor says that her brother, the appellant’s only son, refused to look after her any longer, and disappeared. He is estranged from his family and nobody knows where he is.

15. The four remaining sisters in Pakistan reluctantly agreed to take on the appellant’s care from 2019: she lived with one sister, with the other three helping her with their mother’s care. She was taking about 10 different medications, which her sisters paid for while she was in Pakistan.

16. A multi-entry visa was issued on 21 May 2018, due to expire on 21 May 2020. During the currency of that visa, the appellant came twice to the UK. She visited from 21 December 2019 to 13 January 2020, then returned to Pakistan. On 9 January 2020, during that visit, she registered with a local GP in the UK.

17. The appellant returned to the UK on 14 March 2020, just a week before the first lockdown in the Covid-19 pandemic. At a health screening on 17 March 2020, she reported osteoporosis, asthma, essential hypertension and osteoarthritis, and later, type 2 diabetes. Her medication has neither changed nor increased since her arrival in 2020.

18. While she was in the UK, the appellant was distressed to learn of the death of her cousin sister from Covid-19 and became very fearful that she might catch it herself and die. Her daughters in Pakistan are said to have refused to have her back to live with them: they said that if she returned she would have to live in one room, or alternatively, they might put her in an old people’s home. Their husbands had refused to allow them to accommodate the appellant again, saying it was the son’s responsibility. All of this distressed and depressed the appellant.

19. The appellant’s final multi-entry visa expired on 21 May 2020, but on 20 May 2020, using a policy available under pandemic rules which permitted her to make her application in-country rather than returning to Pakistan, the appellant applied for indefinite leave outside the Rules. While in the UK, she has been receiving free treatment, and her daughter has been ticking the box on her prescriptions for free medications also. The appellant did pay an Immigration Health Surcharge when she made her indefinite leave to remain application, but that would have been returned to her when it was refused.

20. On 23 July 2020, the appellant had an MRI scan. Her brain size had shrunk, and there was impaired blood supply to it, which Mr Mukhtar interpreted as 'a probable diagnosis of dementia', subject to psychological testing. A report from a senior occupational therapist on 11 September 2020 recommended Social Services support: the appellant was no longer able to care for herself without professional help.

21. A letter from Buckingham Legal Associates dated 27 August 2020 reframed the application for indefinite leave to remain as an Adult Dependent Relative application.

22. The appellant relies on a psychiatric report dated 18 September 2020 from Dr Amer Mukhtar, of the NHS East London NHS Foundation Trust Community Mental Health Team for Older Adults, Newham. The appellant had been referred to him by Newham Talking Therapies. Dr Mukhtar is also from Pakistan and was able to speak to the appellant in Urdu.

23. The appellant was described as low in mood, but with insight. The appellant was not lacking in mental capacity and was fit to fly. She had made a number of suicide attempts in the UK, and had an ongoing fracture of her lumbar spine, so special arrangements would need to be made for her return travel: this was an occupational health matter and outside Dr Mukhtar's expertise.

24. Dr Mukhtar said that he had no personal knowledge of healthcare in Pakistan: he accepted the sponsor's assertion that only private medical care was available, and too expensive for the family to afford.

Refusal letter

25. In her refusal letter, the respondent set out the immigration history and rejected the appellant's health claim as failing to meet the high test for leave to remain on Article 3 ECHR grounds. She noted that there were public and private mental health options in Pakistan, both inpatient and outpatient. The respondent considered that there were no compelling or compassionate circumstances for a grant of indefinite leave to remain outside the Rules, by reference to paragraph 322(1) of the Immigration Rules.

26. Nor could the appellant meet the eligibility requirements of sub-paragraphs 276ADE(1)(iii)-(vi) of the Rules. In particular, she had not demonstrated that there were 'very significant obstacles to her reintegration in Pakistan, where she had lived until 2020.

27. In relation to exceptional circumstances, applying paragraph GEN.3.2-3.3 of Appendix FM, the respondent was not satisfied that there would be unjustifiably harsh consequences for the appellant or any relevant child or family member if she were to return to Pakistan. The appellant had remained in Pakistan for over 25 years after being widowed.

28. The application was refused pursuant to paragraph D-LTRP.1.3 with reference to sub-paragraph R-LTRP.1.1.(d)(ii) and (iii) of Appendix FM, and paragraph 276CE with reference to sub-paragraphs 276ADE(1)(iii)-(vi) of the Rules.

29. There were no other compassionate factors over and above what had already been considered.

30. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

31. In a carefully reasoned decision, First-tier Judge Moon dismissed the appeal. The appellant attended the hearing, but appeared asleep or had her eyes closed for much of it. She was not called to give evidence, but the sponsor and her current partner did give evidence and were cross-examined.

32. The judge stated at [18] that she had taken into account two appellant's bundles, together consisting of 878 A4 pages, 5 medical treatment documents, a letter from the appellant's general medical practitioner dated 30 January 2022, further country evidence about healthcare in Pakistan, and a respondent's bundle of 59 pages.

33. Judge Moon set out the appellant's history. She found it not credible that the appellant's other children in Pakistan were unwilling to accommodate her, they having cared for her between them for more than 25 years already. The judge noted that the appellant's suspected dementia was not yet being treated, nor had she been referred to a memory clinic. It was being kept under review.

34. The judge noted that all the health conditions now relied upon in the present application had existed, and were being treated with medication, when she was in Pakistan before her arrival in March 2020.

35. The judge correctly directed herself that the key issue in this appeal was whether the appellant's family in Pakistan were willing to accommodate her, as they had done previously. She considered that the sponsor's evidence did not give an accurate picture (see [60]-[61]) of the circumstances. Specifically, she rejected the assertion that the family in Pakistan would not accommodate the appellant. There was no evidence at all from the appellant's children in Pakistan and no proper explanation for the sudden and significant change in their position. The medication, and any further necessary investigations, could be paid for in Pakistan by the family combining: the appellant had been treated in Pakistan previously on that basis.

36. The judge then considered whether leave to remain should be granted outside the Rules. The judge found that there was family life between the appellant, her daughter Iran Saleem, and her grand-daughter in the UK.

The appellant also had private life, since she was under the care of the Community Mental Health Team.

37. The appeal was dismissed. The appellant appealed to the Upper Tribunal.

Grounds of appeal

38. After setting out the background, the grounds of appeal identify four areas of challenge:

(1) The inadequacy of the First-tier Judge's consideration of the appellant's medical health and the risk to her health on return at the date of hearing;

(2) The Judge's finding that the appellant did not intend to return to Pakistan when she arrived in the UK in March 2020;

(3) The findings made about the sponsor's agreement and ability to maintain and accommodate the appellant, without additional recourse to public funds; and

(4) The Judge's findings regarding the availability of family support in Pakistan from the sponsor's four married sisters there, or their brother.

39. In particular, the appellant challenged the First-tier Judge's reasoning at [39] and [63] in the decision. The Judge's reasoning at [63] cannot be considered properly in isolation and I have therefore included [61]-[62] for clarity:

> "39. It was put to the [sponsor] that flights had now reopened and she was pressed on why her mother could not now return to Pakistan. The sponsor's oral evidence was that her sister's husband had threatened a divorce if the appellant returned there. The sponsor was asked why the sister agreed to take in the appellant in the first place. The sponsor's evidence is that her sister was reluctant, and the pandemic gave them the excuse, they now say that the risk of having an elderly person in the house is too high. …
>
> 61. I have considered the overall plausibility of the account that the family are not willing to allow their mother to live with them. I do not consider it plausible that not one, out of any of the five siblings who remain in Pakistan, will allow their own mother [to] live with them in circumstances where all five siblings have joined together in providing support for a prolonged period of 26 years. I also cannot accept that the appellant's brother, having supported and accommodated the appellant between 1994 and 2019, decided that he was no longer willing to do so. No reason has been put forward for this apparent sudden and significant change in his position.
>
> 62. Considering all of the evidence in relation to this aspect, I do not accept that the family in Pakistan will not accommodate their mother.
>
> 63. The appellant has also not satisfied the Tribunal that the medication, and any further assessment work that is required, cannot continue to be

> paid for (if payment is needed, by the family combining together. It is clear that the appellant has received medical treatment in Pakistan before."

Permission to appeal

40. Permission to appeal was granted on the following basis:

> "2. Arguably, the basis of the Judge's decision for rejecting the contention that the appellant's family would refuse to accommodate the appellant is not sufficiently clear or inadequate. The Judge stated that there was no explanation for an 'apparent sudden and significant change' (Judge's decision, paragraph 63), but there was the explanation put forward, as the Judge noted, that the Covid-19 pandemic had given the family an excuse to refuse to accommodate the appellant (Judge's decision, paragraph 39). The Judge was not bound to accept that explanation, but arguably the Judge's reasons are deficient in not dealing with it. Accordingly the complaint in the grounds at paragraph 33 identifies an arguable error of law.
>
> 3. The other grounds appear to stray into being merely reasoned disagreements with the assessment of the evidence, or are complaints about findings made by the Judge that did not ultimately feature as factors in the Judge's decision, or, with respect to Article 3 (ECHR) are about an issue that was not identified in the appellant's skeleton argument [for the First-tier Tribunal hearing]. However, taking a 'pragmatic view' (*Joint Presidential Guidance 2019 No.1: Permission to appeal to UTIAC,* paragraph 48), I grant permission on all grounds. "

Rule 24 Reply

41. There was no Rule 24 Reply on behalf of the respondent.

42. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

43. Mr Jesurum for the appellant explained that he had accepted the brief at short notice, due to the illness of Counsel who had previously represented the appellant. His instructions were at times limited, but the appellant and sponsor were present and it is, of course, the appellant's appeal.

44. Mr Jesurum said that he was not instructed to resile from any of the grounds of appeal settled by Worldwide Immigration, who represent the appellant, but his primary submission would be that it had not been open to the Judge to make a negative credibility assessment as the appellant and her representatives had not been placed on notice that the Judge was concerned about the credibility of the sponsor's account of her family circumstances in Pakistan. Mr Jesurum relied on *Rahme v Smith & Williamson Trust Corporation Limited* [2009] EWHC 911 (Ch) at [90], and *Browne v Dunn* [1893] 6 R 67, a decision of the House of Lords, for the proper approach to cross-examination.

45. The passport evidence now produced about the appellant's exits and entry visas made it clear that she had not, in fact, been signed up by the sponsor with a GP before arriving back in the country in March 2020. The Judge's findings were not open to him on the evidence, the appellant and her representatives were not placed on notice that the sponsor's credibility was in issue, and in consequence, the Judge's reasoning was fatally flawed.

46. The First-tier Judge had erred at [61] when considering Article 8 outside the Rules: the appellant's removal would be disproportionate. Exceptional circumstances were required and had been demonstrated.

47. Mr Jesurum asked the Upper Tribunal to allow the appeal.

48. For the respondent, Mr Tufan accepted that the evidence before the Upper Tribunal, which the First-tier Judge had not seen, indicated that the appellant was registered with a GP on her penultimate visit to the UK, and not while she was outside the jurisdiction. However, on the facts, that was immaterial to the outcome.

49. The more striking point was the complete absence of any evidence from the appellant's family in Pakistan. The sponsor asserted that all four of her sisters' husbands refused to have their mother-in-law to live with them, but given the absence of any corroborative evidence from them, it had been open to the Judge to find that part of the sponsor's account to lack credibility.

50. The standard set in E-ECDR.2.4 was a high one and was not met. Treatment for the appellant's various ailments had been accessed in Pakistan in the past, albeit at a cost, and the evidence was that it was available, with financial help.

51. As regards paragraph 276ADE(1)(vi), again, it was open to the Judge to find that the appellant had not demonstrated that there were very significant obstacles to her reintegration into Pakistan, where she had lived for the first 66 years of her life.

52. The circumstances in which the appellant would be on return were not sufficient to meet the high Article 3 ECHR 'health' test: see *AM (Zimbabwe)* and *HA (Nigeria).* An appeal which failed the Article 3 health test would also fail under Article 8 ECHR: see Lord Justice Sales (as he then was) in. there was no prospect of success on Article 8 ECHR grounds, within or outwith the Rules. The appeal should be dismissed.

53. We reserved our decision, which we now give.

Analysis

54. The core of the appellant's challenge to the First-tier Judge's decision is that the sponsor was not put adequately on notice that the credibility was

in issue of her account of her sisters' alleged refusal to resume caring for the appellant if she were to be returned to Pakistan.

55. We remind ourselves that there was absolutely no evidence from the sisters in Pakistan about this, or about the claimed family estrangement from their only brother, who was responsible for the appellant from 1994 to 2019, on the sponsor's account.

56. Mr Jesurum recognised, having seen the presenting officer's note of the evidence, that the sponsor was asked questions about why her sister had changed her mind, and specifically, that the credibility of her response was put in issue:

> "PO. You would now like the court to believe that none of the other siblings want to look after her.
>
> Sponsor. Yes."

57. The presenting officer made submissions on credibility, to which Mr Burrett for the appellant is recorded as responding, asserting on four occasions that the sponsor was a credible witness, and also that 'it is not unbelievable that the family don't want to look after [her]' and that it was not the sponsor's fault that the family had made use of the NHS without paying either for treatment or for prescriptions. The family were on Universal Credit and Mr Burrett described the sponsor's finances as 'stretched'.

58. He concluded by saying that it was 'unlikely [that the appellant] will be looked after by her family'. It appears that Mr Burrett came close to giving evidence, by asserting that 'it is different in Pakistan to the UK and they are less able to deal with vulnerable patients but it is worse in Pakistan'. It is not clear to us on what evidence that was based.

59. We have considered the guidance which can be obtained from the case law relied upon by Mr Jesurum. We begin with the rule in *Browne v Dunn,* as expressed in the judgment of Lord Herschell LC (with whom Lords Halsbury, Morris and Bowen agreed)*:*

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some. Questions, put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case; but is essential to fair play and fair dealing with

> witnesses. … All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted. ”

60. We do not find that the rule in *Browne v Dunn* avails this appellant. The sponsor was given an opportunity to make an explanation about her sisters' reluctance to care for the appellant. This is not a case where there was 'no suggestion whatsoever' that her account was not accepted.

61. In *Rahme v Smith & Williamson* at [90], Mr Justice Morgan said this:

> "90. … Every counsel should know the general rule that it is not open to counsel to invite the court to reject the evidence of a witness as deliberately untrue when the witness was not challenged in that way. … The need for cross-examination which specifically challenges the truthfulness of the witness' account is clearly established and is described in Phipson on Evidence, 16th ed., at para. 12-12 and is the subject of a very helpful consideration in the judgment of the Court of Appeal (delivered by Jacob LJ) in Markem Corp v Zipher Ltd [2005] RPC 31 at [50] – [61], discussing the decision of the House of Lords in Browne v Dunn (1894) 6 R 67 and the Australian case of Allied Pastoral Holdings v Federal Commissioner of Taxation (1983) 44 ALR 607. Whilst this approach may be open to some very limited exceptions, there is no possible exception relevant in the present case. In view of the failure to put to Mr Haddad that his evidence was a concoction, it is not open to me to consider that possibility. It would be completely unfair to Mr Haddad to make such a finding against him. ..."

62. Again, this decision does not avail the appellant. The sponsor was put on notice that the respondent did not believe her account of her sisters' unwillingness to care for the appellant if returned to Pakistan, as is clear both from the questions asked, and from Mr Burrett's submissions, which show that he knew that was in issue.

63. There is no unfairness in the Judge's decision nor any inadequacy of reasoning. The primary basis on which permission was granted cannot succeed.

64. As regards the remaining grounds, Mr Jesurum did not make much of them, and neither do we. They are an attempt to reargue and reopen findings of fact. We remind ourselves of the test for an appellate Tribunal such as this to interfere with findings of fact by a Judge who saw and heard the witnesses give their evidence: see the guidance on error of law appeals given by Lord Justice Brooke (with whom Lord Justices Chadwick and Maurice Kay agreed) in *R (Iran) & others v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90(1)-(3)]:

> "**Part 13 A summary of the main points in this judgment**
>
> 90. It may now be convenient to draw together the main threads of this long judgment in this way. During the period before its demise when the IAT's powers were restricted to appeals on points of law:

> 1. Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. This principle applied equally to decisions of adjudicators on proportionality in connection with human rights issues;
>
> 2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.
>
> 3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision."

65. There is no perversity, irrationality or *Wednesbury* unreasonableness in the First-tier Judge's findings of fact and credibility, nor is her decision 'wholly unsupported' by the rather limited evidence which the appellant and sponsor chose to advance. We have no difficulty in understanding why she reached the decision which she did, and we decline to interfere with it.

66. This appeal is accordingly dismissed.

DECISION

67. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law

We do not set aside the decision but order that it shall stand.

Signed Judith AJC Gleeson Date: 19 August 2022
Upper Tribunal Judge Gleeson