Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12715/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 5 December 2017 **On 22 December 2017**

Before

THE HON. MR JUSTICE MORRIS
UPPER TRIBUNAL JUDGE SOUTHERN

Between

R A S

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Chelvan, of counsel
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of Pakistan born on 13 February 1949, arrived in the United Kingdom on 16 December 2014, then aged 65, and was admitted as a visitor. Although in applying for entry clearance she had said that she intended a visit of just three weeks, she was, in the usual way, in fact granted leave to remain for six months.

2. On 16 June 2015, which was a few days before her leave to remain expired, she made an application for indefinite leave to remain “outside the immigration rules”, explaining that since her arrival in the United Kingdom she had been staying with her son and daughter-in-law and that she wished to remain because she suffered from physical and mental ailments and she had no one to care for her in Pakistan. In a covering letter, the appellant’s solicitors made clear that the application was made

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on the basis of rights protected by Article 8 ECHR. There was no suggestion that the appellant could meet the requirements of any immigration rule nor that her medical condition or need for treatment was such to demand the protection of Article 3.

3. Evidence submitted in support of that application included a report from Dr Kottalgi, a consultant forensic psychiatrist, who confirmed a diagnosis of recurrent depressive disorder and expressed the opinion that her condition was likely to deteriorate further “without appropriate treatment and support increasing the risk to herself”. He said that an important factor contributing to her stability has been the support she had received from her son being “around her”. That report was dated 23 October 2015. That was, of course, after the date of the application, the appellant’s solicitors having said that they would forward further medical evidence as soon as it was available.

4. The appellant’s application was refused by a decision of the respondent made on 19 November 2015. Because of the nature of the challenge being pursued by Mr Chelvan in his oral submissions, it is necessary to discuss in some detail and at some length the reasons for the respondent’s decision and the reasons given by the First-tier Tribunal for dismissing the appeal.

5. As we shall see, it is part of the challenge to that decision that the respondent, and indeed the judge who dismissed the appeal, did not properly appreciate the nature of the submission that was being advanced on behalf of the appellant. Therefore, it is important to establish what the respondent made of the nature of the application, which was summarised in the decision letter as follows:

> “… It is stated that you wish to remain in the UK with your son and daughter in law because you have physical and mental ailments and no-one to return to in Pakistan. It is further stated that since your late husband became severely ill in 2011 you have been suffering from severe depression and that this has worsened after your husband died in January 2014. In addition, it is also stated that you have a number of physical ailments including arthritis, sight problems following a bilateral cataract operation and hypothyroidism.”

The respondent then referred to evidence from a General Practitioner the appellant had been taken to see by her son, who provided a letter dated 9 October 2015:

> “The General Practitioner states that you have been suffering from hypothyroidism, gout, hypertension and depression since 2010. It is also stated that your general anxiety comes from a fear of being alone and that you asserted a large degree of reliance on your son. You showed typical depressive symptoms and medication had been prescribed.”

Next, the respondent considered the report from Dr Kottalgi, the consultant forensic psychiatrist:

> "The Consultant Psychiatrist has diagnosed recurrent depressive disorder with current episode being moderate to severe. The prognosis is that if your mental illness is left untreated you are at high risk of further deterioration of your mental health and of self-neglect and causing harm to yourself through your negative cognitions. It is stated that you have been on antidepressant medication prescribed by a private GP for the previous 10 months and had responded to some extent."

Although no assertion had been made that requiring the appellant to return to Pakistan would bring about an infringement of Article 3 ECHR, the respondent addressed that possibility anyway, saying:

> "Although it is accepted from your medical evidence, that you suffer from recurrent depressive disorder, hyperthyroidism, gout and hypertension, it is not accepted that you have established that there is a sufficiently real risk that your removal would be a breach of article 3 medical…."

The respondent went on to explain why the circumstances of the appellant's case did not meet the high threshold to engage protection of Article 3. As it is no part of the appellant's case that the respondent was wrong about that, it is not necessary to say any more about it.

6. Similarly, although the respondent went on to discuss at length the availability of suitable medical treatment in Pakistan that could be accessed by the appellant, this was not in issue. Indeed, the appellant had been able to access a wide range of medical treatment in respect of mental and physical health issues. In particular, as is confirmed by a letter from Dr Zaheer-ud-din, Senior Psychologist at the Centre for Counselling and Psychotherapy in Lahore, the appellant had been under the care of medical professionals since being diagnosed as suffering from severe depression in January 2012, since when it appears that she had weekly counselling sessions for nearly three years. On her last visit to that centre on 10 December 2014, a week before she travelled to the United Kingdom for what she had said initially was to be a three week-long visit, Dr Zaheer-ud-din records that she told him that she "won't be able to come now for any more sessions".

7. In the refusal letter, the respondent noted that as well as regular treatment in respect of her depression, the appellant had accessed other medical treatment:

> "… an ultrasound at the Services Hospital in Lahore; and x-rays and medication from the Shaukat Khanum Memorial Cancer Hospital and Research Centre in Lahore. It has also been stated that you had a bilateral cataract operation in Pakistan. You have submitted receipts for medicine and other services dated 26 May 2015 from the Shaukat Memorial Cancer Hospital and Research Centre in Lahore. It is therefore believed that you will be able to continue to receive treatment for your medical conditions, including depression, in Pakistan."

This led the respondent to conclude:

> "Your case has been carefully considered but it is not accepted that there are sufficiently compelling or compassionate circumstances to justify allowing you to remain in the UK outside the Immigration Rules."

That was because:

> "... when you applied in October 2014 for a visa to visit the UK you stated that the main purpose of your visit was to spend quality time with your son and daughter-in-law and during your 3 week stay you would be visiting historical places. .... It is believed that you will be able to continue to receive treatment for your medical conditions, including depression, in Pakistan. Your son will be able to continue to provide financial support for you in Pakistan. He will also have the option of organising any help you may require with your medication. You will also be able to maintain contact with your son and daughter-in-law by means of visits and various forms of communication.
>
> It is not accepted that your medical conditions are so debilitating such that they would prevent you doing normal everyday tasks...
>
> Your application for indefinite leave to remain outside the Immigration Rules has been refused under paragraph 322(1) of HC395 (as amended). The Secretary of State is satisfied that a variation of leave to enter or remain is being sought for a purpose not covered by the Rules."

8. Although it had not been suggested that the appellant could succeed under paragraph 276ADE of the Rules, the respondent considered whether she might be able to meet those provisions but concluded that she could not. As we shall see, in his oral submissions, Mr Chelvan argued that the respondent should have accepted that the requirements of 276ADE(vi) were met. In that respect the respondent had said this:

> "In order to meet the requirements of paragraph 276ADE(1)(vi), an applicant must show that... there would be very significant obstacles to their integration into the country to which they would have to go if required to leave the UK.
>
> It is not accepted that there would be very significant obstacles to your reintegration into Pakistan... because you will have spent the vast majority of your life in Pakistan and were last resident there in December 2014. You have also obtained treatment for your medical conditions from hospitals and medical practitioners in Pakistan
>
> Consequently, you fail to meet the requirements of paragraph 276ADE of the Immigration Rules."

9. Finally, the respondent looked to see if anything had been disclosed that demanded a grant of leave outside the rules to secure an outcome compliant with Article 8 but, for reasons similar to those discussed above, concluded that nothing was.

10. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Judge Walters who, by a determination promulgated on 27 February 2017, dismissed her appeal. Because of the

nature of the challenge now pursued against the decision of the judge, it is necessary to examine both the grounds upon which the appellant appealed to the First-tier Tribunal and the reasoning that led the judge to his conclusions.

11. The key point made in the grounds of appeal to the First-tier Tribunal was this:

> "… while it is accepted that Pakistan does in fact have medical treatment both for the appellant's physical as well as psychological ailments, it is submitted that the primary point of concern was not dealt with adequately by the SSHD. As stated in the application, the appellant no longer has anyone to look after her in Pakistan following the death of her husband…, and her psychological wellbeing is wholly dependent on her capacity to be with her son… who is the only direct family member alive. Her son is a British citizen and lives in the UK with her (*sic*) wife… and together they have been making every effort to ameliorate the appellant's condition since her arrival to the UK. It is submitted that the appellant's circumstances are exceptional enough to warrant a grant of leave to remain outside of the Immigration Rules…"

Two observations may be made about those grounds. First, it is clear that the refusal of leave was being challenged on the basis that the appellant should have been granted leave outside the rules, not on the basis that it should have been accepted that she met the requirements of any rule, in particular para 276ADE. Secondly, it is not correct to say that the appellant's son is "the only direct family member alive" because, as she confirmed to Dr Kottalgi, and as he records at paragraph 4 of his second report of 22 December 2016, the appellant has a younger sister who lives in Rawalpindi and a brother who lives in Faisalabad. She explained that she did not enjoy a good relationship with either but it is hard to see how the draftsman of the grounds felt able to say that her son was her only direct relative still alive. Further, when the appellant's son gave evidence at the appeal hearing, he spoke of having contacted members of his father's family "who had been there (in Lahore) since the 1960's. He said they were his cousins". He had contacted them after the tenancy of his mother's house ended (and was not renewed) in June 2015 so that they could dispose of his mother's belongings.

12. The judge heard oral evidence from the appellant, as well as her son and daughter-in-law. Having noted that the appellant had said in her application for entry clearance:

> "Main purpose of my visit to the UK is to spend quality time with my son and daughter-in-law. I have a keen interest in history so during my three week stay I will be visiting historic places along with my son and daughter-in-law."

and that, as mentioned above, she had told the doctor who had been treating her depression and providing weekly counselling sessions for getting on for three years that she would not be able to attend any more

sessions and that her son and daughter-in-law had arranged for her possessions in Pakistan to be disposed of, the judge made this clear finding of fact:

> "Having considered this evidence, I found that the appellant and her family intended that she used the device of a visit visa to gain entry to the UK and from here to make an application for permanent residence…"

13. Before the First-tier Tribunal the appellant was represented by Ms Bagral of counsel. At paragraph 23 of his judgment the judge recorded that:

> "Ms Bagral had not produced a skeleton argument but said at the commencement of the hearing that she put her case "under Article 8 medical"."

14. Before considering the appellant's case outside the immigration rules, that being the submission being pursued, the judge recognised that had the appellant applied for entry clearance as a dependant relative that was an application that could not have succeeded. The relevant rules are found at Section EC-DR: Entry clearance as an adult dependant relative. An applicant for entry clearance as a dependant adult relative must meet all of the requirements of E-ECDR 2.1 to 3.2. One of those requirements is E-ECDR2.5 which provides, so far as is relevant:

> The applicant…must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living because-
> (a) It is not available and there is no person in that country who can reasonably provide it; or
> (b) It is not affordable.

The judge found that this is a requirement that could not be met because there was no evidence to the contrary. Indeed, as the appellant, when living in Pakistan was supported financially and emotionally by her son in the United Kingdom, had been able to obtain all the medical treatment that she required, and was living in adequate accommodation with two maids to assist her with everyday tasks, that finding by the judge is simply unassailable. The judge concluded:

> "Of course in the present case the appellant simply wants to be in the UK with her son and his immediate family. Unfortunately, that is simply not possible unless a person meets the requirements of the Immigration Rules."

15. Addressing the position outside the rules, the judge accepted that the appellant enjoyed family life with her son and daughter-in-law and that she had established a private life since being admitted as a visitor in December 2014. He accepted also that Article 8 was engaged because if the appellant was required to return to Pakistan there would be an interference with her right to respect for her private and family life. He

concluded, though, that such interference would be proportionate to the legitimate aim being pursued of maintaining immigration control and so he dismissed the appeal "on human rights grounds".

16. The initial grounds upon which permission to appeal to the Upper Tribunal was sought and granted were drafted by Ms Bagral. Those grounds were developed significantly by Mr Chelvan in his oral submissions and those submissions navigated a course some distance from the destination of the original grounds. In summary, he argued that the determination of the judge disclosed the following errors of law:

   a. As the appellant was a vulnerable witness, regard should have been had to the Joint Presidential Guidance Note concerning child, vulnerable adult and sensitive appellant guidance. Had it done so that would have generated the "safe space" in which for the appellant to give evidence effectively. As that was not done, everything that followed was infected by that procedural irregularity;

   b. The appellant is said to be a person who claimed she would be unsafe in Pakistan. Therefore, it was incumbent upon the respondent's representative to draw to the attention of the judge the respondent's own applicable policy: "Pakistan: Women fearing gender-based harm/violence". See *UB (Sri Lanka) v SSHD* [2017] EWCA Civ 85;

   c. It was an error of law for the judge to have failed to consider whether the appellant met the requirements of paragraph 276ADE(vi) of the Immigration Rules. This, he submits, was in play because it was considered but rejected in the decision under appeal;

   d. As the appellant faced difficulties of the type considered in that guidance, because she would be a woman living alone, that, taken together with her mental health problems, amounted to the very substantial obstacles to integration on return demanded by paragraph 276ADE(vi) as a condition of qualifying for leave to remain;

17. As the original grounds were adopted, and not abandoned, for the sake of completeness we address first the initial grounds and then the matters explored by Mr Chelvan in his oral submissions.

18. There were two grounds. The first ground complained that:

> "At no point in the decision is there any express recognition given to the applicant's vulnerability as a person with mental health difficulties as relevant to the assessment of credibility."

Ms Bagral, who appeared for the appellant before the First-tier Tribunal, relied in drafting those grounds upon paragraph 15 of the Joint

Presidential Guidance Note No 2 of 2010 concerning child, vulnerable adult and sensitive appellant guidance:

> The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind.

This was not done by the First-tier Tribunal Judge.

19. The first obstacle standing in the way of that ground is that it is far from clear that this issue was even raised before the judge. This is important because at 5.1 of the Joint Presidential Guidance Note it is made clear that the primary responsibility for identifying vulnerable individuals lies with then party calling them, something reinforced recently by the Court of Appeal in *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123 at paragraph 32:

> "... The Guidance at [5.1] warns representatives that they may fail to recognise vulnerability and they might consider it appropriate to suggest that an appropriate adult attends with the vulnerable witness to give him or her assistance. That said, the primary responsibility for identifying vulnerabilities must rest with the appellant's representatives who are better placed than the Secretary of State's representatives to have access to private medical and personal information. Appellant's representatives should draw the tribunal's attention to the PD and Guidance and should make submissions about the appropriate directions and measures to be considered e.g. whether an appellant should give oral evidence or the special measures that are required to protect his welfare or make effective his access to justice. The SRA practice note of 2 July 2015 entitled 'Meeting the needs of vulnerable clients' sets out how solicitors should identify and communicate with vulnerable clients. It also sets out the professional duty on a solicitor to satisfy him/herself that the client either does or does not have capacity..."

20. There is no mention, at all, made by the judge in his manuscript record of proceedings that he was addressed on this issue. Mr Chelvan noted that this case was called before the judge as a float case so that neither the judge nor the Home Office Presenting Officer had read into the case. The only person fully informed at the beginning of the hearing was counsel for the appellant who, when asked to make an opening statement of what the case was about, said that she put her case "under Article 8 medical".

21. Ms Bagral, for reasons that are entirely respectable, was unable to attend the hearing before us but has produced a written witness statement in which she says this:

> "I have been asked to confirm whether I referred Judge Walters to the Joint Presidential Guidance No 2 of 2010. As the appeal before Judge

> Walters was heard approximately ten months ago, I cannot recall directly doing so. However, having referred to my brief and notebook, I consider it inconceivable that I did not do so for two reasons. First, there is a reference to the guidance in my preparation notes. … Second, a copy of the guidance which I printed is retained with my original brief. In the circumstances, I am of the firm belief that it is likely that I referred Judge Walters to the said guidance at the hearing."

That approach by counsel is, of course, quite proper, as she has no recollection of what did or did not actually occur and we are grateful to her for identifying all that speaks in favour of the submission now being made. Unfortunately, all the evidence points the other way. First, Ms Bagral is recorded to have told the judge that the case was about "Article 8 medical" and it is hard to accept that, had counsel raised the issue of the appellant's vulnerability at the outset, which would be the only rational point at which to do so, the judge would then have ignored that issue altogether and not recorded the preliminary finding on the appellant's vulnerability, one way or the other, that was required of him, had he been referred to the guidance. Second, there is no copy of the guidance on the Tribunal's file and so no evidence that the judge did actually receive such a document. Third, there is no mention in the record of proceedings made by the judge that the issue was raised. Fourth, no request had been made by the appellant's representatives prior to the hearing for any special measures for receipt of the appellant's evidence, section K of the notice of appeal form, completed by the appellant's legal representative, which asks whether any special requirements were sought, being left blank. Fifth, even now no indication has been given as to what way the proceedings should have been conducted differently and so it is not clear what purpose would have been served by raising this issue, as the judge, plainly, was fully sighted on the medical evidence and there was, and is, no suggestion that the appellant should not have given oral evidence.

22. Whether or not this issue was raised before the judge, the outcome is, in our judgment, the same.. It appears that the only direct reference to the appellant being a person of vulnerability is to be found at paragraph 18 of Dr Kottalgi's first report where he records the appellant's account of one of her maids having stolen items of her property, an experience that left her feeling "extremely vulnerable". But it is not remotely arguable that such a manifestation of vulnerability, being at risk of having possessions stolen by domestic staff employed to work in the household, is such as to engage the mechanisms under discussion.

23. If the issue was raised before the judge but simply ignored, it is impossible to see how that gave rise to any material error of law. It has not been suggested that the appellant was unable to recall events or to articulate her evidence as she wished to. It is no part of the challenge now pursued that there was something else that she could have but did not say in evidence or that she said something in evidence that she had not meant to. This is not a case about credibility. The essential facts are not in dispute. The only matter that might conceivably amount to an

issue of credibility is what the judge made of the evidence provided by the appellant herself that she had told those who had been providing her with counselling each week because of her depressive illness that she would need no more sessions, because she was going to the United Kingdom. But, as recorded above, that was not the only reason given by the judge for finding that the applicant had not disclosed her true intentions in seeking entry clearance for a three-week long family visit and whether or not the appellant had all along intended to remain in the UK was not, on the facts of this case, determinative.

24. The second of the grounds drafted by Ms Bagral complains, with reference to observations made by the judge at paragraphs 33 and 43 of his determination, that the judge wrongly treated the appellant's inability to meet the requirements of the Immigration Rules as determinative of the question of proportionality. But the judgment must be read as a whole and, when it is, it is entirely clear that he did no such thing. It was plainly open to the judge to take notice of the fact that had the appellant applied from Pakistan for entry clearance for the purpose for which she now sought leave to remain, as a dependant adult relative that was an application that could not succeed. That was a fact that informed his assessment of the public interest as he struck a balance between the competing interests in play. And nor was that assessment predicated, as the grounds suggest, upon an expectation that the appellant's daughter in law should move to Pakistan, accompanied by her own child, to spend several months of the year with the appellant. When discussing that possibility, at paragraph 33, the judge is doing no more than illustrating the different solutions found by families dealing with the needs of an elderly relative who has no basis of stay in the United Kingdom. As he explained, many families in such a position seeks to provide support with their elderly relative living outside the United Kingdom by making frequent visits.

25. Mr Chelvan, who has drawn from the grounds and the material available before the judge everything that could possibly be deployed in support of the challenge pursued to the decision of the judge, raised three further submissions, mentioned briefly above, which stretched the scope of the grounds to, and possibly beyond, their limit but we agreed to entertain that challenge.

26. The first of those submissions, distilled to its essence, amounts to this. As the appellant had spoken of her vulnerability in Pakistan as a consequence of her possessions having been stolen by a maid, that equated to an assertion that she did not feel safe in Pakistan. As the appellant would be returning to Pakistan as a widow and so a single woman who would be living alone, therefore her safety was in issue. It is established by *UB (Sri Lanka) v SSHD* that there is an obligation upon the respondent's representative to bring to the Tribunal's attention her own guidance where that is relevant to the issues in dispute. Therefore, the failure of the respondent to direct the attention of the judge to the respondent's own guidance relating to risks faced by women living in

Pakistan without male support was a procedural irregularity such as to amount to an error of law.

27. While the legal principle relied upon is correctly articulated, that ingenious submission flounders on an examination of the facts of this case and the nature of the guidance under discussion. As was observed by Irwin LJ at paragraph 22 of *UB*:

> "The obligation is clear but must not be taken beyond proper bounds. There is no obligation on the Secretary of State to serve policy or guidance which is not in truth relevant to the issues in hand and complaints as to alleged failures of disclosure of material which is truly peripheral or irrelevant should readily be rejected."

The appellant is a 67-year-old widow. She is a well-educated lady having obtained a bachelor's degree in Arts and a Master's degree in Political Science (see Dr Kottalgi's first report at paragraph 4). It must be remembered, of course, that the appellant is not seeking to advance a protection claim, on the basis that she faces a real risk of persecution for a reason recognised by the Refugee Convention, but the guidance is concerned with that and it is relevant to see whether it identifies risks to which this appellant may be exposed, even if they are not established to the extent as to require the grant of international protection. Mr Chelvan seeks to demonstrate no more than that the judge should have recognised those risks, taken together with the other characteristics of the appellant, amounted to very substantial obstacles to integration on return so that the appellant met the requirements of para 276ADE(1)(vi) of the Immigration Rules.

28. Unfortunately for the appellant, scrutiny of the guidance does not assist her in that regard. That is because the guidance is concerned with risks of a nature than on no sensible basis this appellant could be suggested to be prone to. Thus, it cannot realistically be suggested that the appellant, described to be an elderly widow with physical and mental ailments, would be at risk of rape or forced marriage or domestic violence. The guidance draws attention to the country guidance provided by the Tribunal in *SM (lone women-ostracism)* CG [2016] UKUT (IAC) which makes plain that any assessment must be fact specific and that relevant factors include whether the appellant is educated and has sufficient financial resources.

29. It follows from this that the guidance had no relevance to the assessment by the judge of the case being advanced on behalf of this particular appellant and so there was no unfairness, nor procedural irregularity, in the failure of the respondent's representative to draws attention to the guidance.

30. In any event, that conclusion is reinforced by the fact that the applicant was represented by counsel instructed by a firm of solicitors who are highly experienced in this jurisdiction and who were, in these

proceedings, acting for the mother of a person employed in a significant role within the firm and it seems inconceivable that they themselves would not have sought to place reliance on this guidance if it had been considered to be remotely relevant.

31. There is some overlap with the next two submissions advanced by Mr Chelvan that the judge fell into error by not addressing paragraph 276ADE at all and that if he had done so, he would have found that there were established very significant obstacles upon return for this appellant.

32. As for the first of those submissions, although the respondent did address each limb of paragraph 276ADE in the refusal letter, explaining why she was satisfied that the appellant could not meet the requirements of any of them, there was no challenge to that aspect of the refusal decision raised in the grounds of appeal or in the oral submissions made before the First-tier Tribunal. Therefore, that was a matter that went unchallenged before the First-tier Tribunal and so it was not an error of law for the judge not to address it.

33. So far as the second part of that submission is concerned, when the determination of the judge is read as a whole it is entirely clear that it had not been established that the appellant would face very significant obstacles to integration on return to her country of nationality where she had previously lived without encountering such difficulties.

34. For all these reasons, and despite Mr Chelvan's efforts to persuade us to the contrary, we are entirely satisfied that the judge made no error of law, material or otherwise.

Summary of decision:

35. First-tier Tribunal Judge Walters made no material error of law and his decision to dismiss the appeal is to stand.

36. The appeal to the Upper Tribunal is dismissed

Signed

Upper Tribunal Judge Southern
Date: 13 December 2017