Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39606/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 14 July 2014	**On 4 August 2014**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And
SHAROON FATIMA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Counsel, instructed by the Respondent.
For the Respondent: Mr T Mahmood, Counsel, instructed by Syeds, Solicitors.

DETERMINATION AND REASONS

Immigration History

1. The Appellant in this appeal was the Respondent in the First-tier Tribunal hearing. However, for ease of reference the Appellant and Respondent are hereafter referred to as they were before the First-tier Tribunal. Mrs Fatima will therefore be referred to as the Appellant and the Secretary of State will be referred to as the Respondent.

2. The Appellant is a female citizen of Pakistan, whose date of birth is 1 January 1948. As to the background to the case, the Appellant entered the UK as a visitor on 31 March 2007 with a multivisit visa valid until 14 March 2009. She applied for indefinite leave to remain on 18 September 2008, which was refused on 3 March 2009, with a right of appeal. She appealed and her appeal was dismissed on 30 April 2009. She applied for a High Court Review, which was refused on 8 May 2009 and she was notified of her liability to removal.

3. She applied for leave to remain on 26 June 2013 on the basis of her family and private life in the UK; it was submitted that her age and 'significant health issues' would make it unreasonable to expect her to leave the UK. Her appeal against the decision of the Respondent to refuse her application for further leave to remain (FLR) and, at the same time, issue a decision to remove her under s 47 of the Immigration, Asylum and Nationality Act 2006 was allowed by First-tier Tribunal Judge Hubble under paragraph 276ADE, the reasons for which are contained within his determination promulgated on 1 May 2013. In summary, the Judge believed the evidence of the Appellant as to her circumstances in Pakistan and allowed her appeal under paragraph 276ADE on the basis that she had "…no ties (including social, cultural or family) with Pakistan…"

4. The Respondent appealed against this decision on the basis that the Judge erred:

    a. By failing to resolve issues and a conflict of evidence which cast real doubt on the Appellant's credibility because the Appellant stated that she had four children who were in the UK but it could be seen from the previous determination that she had six children. She told the Tribunal that one child had died and she did not know where the other child was but there was an affidavit from her brother saying that her daughter was in Pakistan;

    b. By failing to follow Home Office guidance in assessing the Appellant's ties to Pakistan. In particular, he failed to take into account the fact that the Appellant spent the vast majority of her life in Pakistan, that she had had significant exposure to the cultural norms of Pakistan during that time, that she had a daughter and a brother there and that she spoke the language; and

    c. By failing to consider the Appellant's alleged illness and dependency under the dependent relative requirements of Appendix FM; and this is a material error because she would not have met the 'threshold criteria' at E-ECDR.2.4 and E-ECDR.2.5.

5. In granting permission, Judge Lewis stated that the Judge had taken into account the Appellant's circumstances in Pakistan and found that although she retained cultural ties, she had no family or social ties but that the difficulty with this was that there was a conflict in the evidence as to lack of family there. Judge Lewis states that a number of references are made in the determination as to a daughter of the Appellant with the Appellant stating that she did not know her whereabouts but her brother, who resides in Pakistan, stating in his affidavit that that she is in Pakistan.

Judge Lewis further states that the although the Judge stated that he finds the Appellant's evidence, on balance honest and truthful [71], and that there was no evidence before him that the Appellant's daughter, who lived with her in-laws, could offer her accommodation [80], there was a clear conflict between the Appellant's evidence and that of her brother as to the whereabouts of her daughter and, in accepting the core of the Appellant's evidence at [71] the Judge does not address this conflict. Judge Lewis concludes, 'This, I find, is an arguable error of law. It relates to a significant evidential issue, which feeds into the finding under paragraph 276ADE.'

6. In relation to the application under Appendix FM, Judge Lewis concludes that if the Judge's findings are sound under paragraph 276ADE, it is not an error for him not to have gone on to consider the appeal under Appendix FM. However, if they are not sound, it is an error on his part not to consider the appeal under Appendix FM.

7. A Rule 24 response was not submitted but Mr Mahmood stated that the appeal was opposed.

Submissions on behalf of the Respondent

8. Mr Mills submitted that he relied on the grounds of application and made the following additional points:

    a. The Appellant had spent nearly 60 years of her life in Pakistan, she had family there and the conclusion that she had no ties to Pakistan was perverse; the Judge had not taken into account the material before him. Despite referring expressly to **Devaseelan** in the determination on a number of occasions, he had had no regard to the conclusions set out in the previous determination. The Appellant had practised deception to enter the UK and the Judge on the previous occasion had stated that she had deliberately made false representations in the past on her entry clearance applications. In this context, the Judge does not state why he found the Appellant to be truthful. A number of witnesses are referred to within the determination but none gave oral evidence or were cross-examined. The Judge had evidence before him that this family had subjected a daughter to a forced marriage and she had been taken into care and a higher court had decided that a crime had been committed against her. Mr Mills asked the question, 'How is it that this aspect of the case played no part in the credibility assessment?' Mr Mills submitted that the Judge had stated he believed what he had been told, that he accepted that her circumstances had changed but it was not enough to say that he accepted that her circumstances had changed without saying why he thought that she was no longer being deceitful.

    b. The Judge stated that there was no evidence before him that the daughter in Pakistan could offer the Appellant accommodation but this appears to reverse the burden of proof. It is not enough to make an assumption from the absence of evidence; the Appellant

has to establish that her daughter cannot offer her accommodation.

c. The Judge had quoted from **Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC)** at [88] but he had only referred to that part of the determination which appeared to support his conclusion. It was further provided in **Ogundimu**:

> "124. We recognise that the text under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances. Nevertheless, we are satisfied that the appellant has no ties with Nigeria. He is a stranger to the country, the people, and the way of life. His father may have ties but they are not ties of the appellant or any ties that could result in support to the appellant in the event of his return there. Unsurprisingly, given the length of the appellant's residence here, all of his ties are with the United Kingdom. Consequently the appellant has so little connection with Nigeria so as to mean that the consequences for him in establishing private life there at the age of 28, after 22 years residence in the United Kingdom, would be 'unjustifiably harsh'.
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> "125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members. "

d. He submitted that the threshold under the Immigration Rules was high; as stated in **Ogundimu**, the "text under the Rules is an exacting one". There has to be a rounded assessment and there was no rounded assessment by the Judge. He found that the Appellant did not have relatives in Pakistan but she had a daughter there. Added to this, she had cultural ties there; she had lived there for nearly 60 years and **Ogundimu** provided for an assessment based on length of residence there, age when she left the country, which was nearly 60, the language she spoke (she had no language difficulties) and the quality of her relationships with family and friends there.

e. Mr Mills submitted that the Judge had accepted that the Appellant was credible without considering the findings on this point under

Devaseelan and he did not consider her ties in a rounded assessment and had thereby erred in law. He further submitted that if I found that there was a material error of law, it should be remitted to the FtT for a re-hearing.

Submissions on behalf of the Appellant

9. Mr Mahmood submitted that there was no material error of law in the determination of the Judge; he had considered all the evidence and reached his conclusions. He accepted that the Appellant still had cultural ties and made his assessment as to social and family ties on the evidence before him. When asked what the Appellant's response was to the evidence contained in the affidavit of her brother as to her daughter in Pakistan, Mr Mahmood stated that it was not recorded in the determination; in the previous determination the Appellant stated that she did not know where her daughter was.

10. He submitted that the Judge had found the Appellant to be 'honest and truthful' and had properly considered the evidence before him. He was not able to say, however, how or where in the determination the Judge had given reasons for his finding that the Appellant was honest and truthful in the context of the adverse credibility findings made by Judge James in 2009.

11. However, Mr Mahmood submitted that the Judge had been aware of the determination of Judge James, and had referred to it and given it consideration and had not materially erred in law. As he had allowed the appeal under paragraph 276ADE, there was no need for him to consider the appeal under Article 8 and Appendix FM.

12. Following submissions, I confirmed that in my view the Judge had materially erred in law in failing to engage with the evidence before him and in failing to provide adequate reasons for his findings and that a copy of my written determination with full reasons would be sent out. I asked the parties for their views on the resumed hearing.

13. Mr Mills submitted, and Mr Mahmood accepted, that given the scale of the findings of fact that would need to be made, the matter should be remitted for rehearing to the First-Tier Tribunal. Mr Mahmood submitted that the four witnesses who had attended the hearing, had not been called on to give evidence due to 'the way in which the hearing went' but that they would want to give evidence and a time estimate of 3 hours was necessary.

Decision and reasons

14. As provided in **Slimani (Content of Adjudicator's Determination) Algeria * [2001] UKAIT 00009**, in the determination the Judge need only tell the losing party why he has lost and enable him to identify whether there has been any appealable error; he need not deal with every issue

(para 7). There is a focus, in **Slimani**, on the adequacy of the reasons given by the decision-maker, as to which it is stated:

> "In *Save Britain's Heritage v Secretary of State for the Environment* [1991] 1 WLR 153, Lord Bridge said this:-
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> > "The three criteria suggested in the dictum of Megaw J [in *Re Poyser & Mills Arbitration*] are that the reasons should be proper, intelligible and adequate. If the reasons given are improper they will reveal some flaw in the decision-making process which will be open to challenge on some ground other than the failure to give reasons. If the reasons given are unintelligible, this will be equivalent to giving no reasons at all. The difficulty arises in determining whether the reasons given are adequate, whether they deal with the substantial points that have been raised or enable the reader to know what conclusion the decision-maker has reached on the principal controversial issues. What degree of particularity is required? I do not think one can safely say more in general terms than that the degree of particularity required will depend entirely on the nature of the issues falling for decision."

15. In reaching my decision, I also bear in mind the guidance in **R(Iran) v SSHD [2005] EWCA Civ 982**, at paragraphs 13 to 15, which confirms that "...unjustified complaints by practitioners that are based on an alleged failure to give reasons, or adequate reasons are seen far too often..." The Court of Appeal in **R (Iran)** then set out the factors to be considered in deciding if a Judge has given sufficient reasons for his decision. In summary, if the reasons for the decision can be understood from the determination, the Judge will have given adequate reasons, the questions being whether the Judge has identified the issues, resolution of which are vital to the case; and whether he has set out how he has resolved them.

16. Although the threshold for a finding of perversity is high, and in my view in this case is not crossed, I find that the Judge erred materially in the following ways:

    a. He had before him the determination of Judge James as the starting point for his deliberations, which he acknowledged. However, in the determination of Judge James contradictions and inconsistencies in the evidence given by the Appellant and the witnesses were noted (at paragraphs 28, 36, 41, 46 – 47, 53, 69) and he made firm credibility findings at paragraphs 73 and 76. He also found that the Appellant had her own property in Pakistan (at paragraphs 52 and 54). In the context of the clear adverse credibility findings being the starting point of the Judge's determination, he has not given any reasons for his own finding that the Appellant was 'honest and credible'. In the face of the previous adverse credibility findings, when the previous Judge had found that the Appellant and her witnesses had 'shaped' the evidence to support the appeal and had 'omitted information which does not support the appeal' (at

paragraph 73), it is necessary for the Judge to give reasons as to why he believes that she is now telling the truth, that the Appellant's daughter in Pakistan was unable to offer her accommodation when no evidence had been provided on this issue and, indeed, what had happened to the Appellant's own home which she was said to have owned in the 2009 determination. It is for the Appellant to prove as the burden of proof is on her. I find that the Judge failed to engage with the evidence before him in the context of the findings made in the previous determination. I find that these are material errors of law which impacted directly on his findings of fact and therefore undermined the conclusions for the purposes of paragraph 276ADE. This is a fundamental flaw such that his determination must be set aside.

b. As the findings under paragraph 275ADE are unsustainable, the Judge erred in failing to consider the Appellant's application under Appendix FM.

17. The determination of Judge Hubble contains material errors of law as set out above and his determination is set aside. No findings of fact are preserved. In assessing whether the matter should be remitted to the First-tier Tribunal pursuant to Practice Statement 4.2 (a) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal issued by the Senior President of Tribunal on 10 February 2010, taking into account that witnesses attended the hearing and did not have the opportunity to give evidence, and given the nature and extent of the findings of fact that are required, the matter is remitted to the First-tier tribunal for a de novo hearing. The following directions apply:

a. The Appellant's and Respondent's bundles before the First-tier Tribunal hearing shall stand as the evidence of the Appellant and Respondent respectively;
b. The Appellant and the Respondent shall file and serve a paginated bundle of all additional evidence to be relied on at the rehearing within 7 working days before the date of the hearing;
c. The matter is to be listed with a time estimate of 3 hours; and
d. A Mirpuri interpreter will be required. If this is not correct, and the language spoken by the Appellant is not Mirpuri, the Appellant must contact the First-tier Tribunal and confirm the language and dialect required of interpreters for herself and any witnesses.

18. It appears that at no stage in the proceedings has an anonymity direction been made. No request has been made for an anonymity order and pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I find no reason to make a direction as to anonymity.

Signed Date

M Robertson
Sitting as Deputy Judge of the Upper Tribunal