Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23119/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 27 September 2017 **On 10 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ZUBAIDA NAZ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Bramble, Home Office Presenting Officer.
For the Respondent: Mr D Bazini, Counsel.

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal with the Secretary of State referred to as "the Respondent" and Mrs Zubaida Naz as "the Appellant".

2. The Appellant is a citizen of Pakistan who arrived in the United Kingdom on 17 December 2013 with entry clearance conferring leave to enter as a visitor until 14 April 2014. On 28 March 2014 the Appellant applied for leave to remain in the United

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Kingdom relying on Article 8 grounds of the ECHR on the basis of family and private life. The Respondent refused the application under the Immigration Rules and concluded that there were no exceptional circumstances to warrant a grant of leave outside of the Rules.

3. The Appellant's appeal first came before Judge of the First-tier Tribunal Talbot who, in a decision promulgated on 11 April 2016, dismissed it both under the Immigration Rules and on Article 8 grounds. Permission to appeal was sought and subsequently granted. In a decision promulgated on 10 November 2016 Deputy Upper Tribunal Judge Bagral found that Judge Talbot's decision contained an error on a point of law and set it aside before remitting it back to the First-tier Tribunal to be re-heard. She preserved the Judge's findings.

4. The remitted hearing came before Judge of the First-tier Tribunal N M Paul who in a decision promulgated on 18 January 2017 allowed it on human rights grounds.

5. The Respondent sought permission to appeal which was granted by Judge of the First-tier Tribunal Frankish on 31 July 2017. His reasons for so doing are:

> "1. In a decision promulgated on 18.1.17 F-tTJ NM Paul, following remittal of a previously refused appeal in which the findings were preserved (notably the family home having moved down a generation), allowed an appeal against refusal of leave to remain having overstayed a visit visa.
>
> 2. The application for permission to appeal asserts: non application of public interest per S117b and AM (Malawi), the appellant having overstayed a visit visa; lack of weight to the fact that the nephew could perfectly well support the appellant back in Pakistan.
>
> 3. The conclusion, outside of the Rules, was that while the appellant spoke no English, was not financially independent (§28) and likely to be a burden on the health service (§27), a key factor was her quasi grandmother role to her nephew's children (§16/30). Arguably, this places insufficient weight on the public interest factor under §2 above. §1 also demonstrates confusion about the appellant's age."

6. Thus the appeal came before me today.

7. Mr Bramble relied upon the grounds seeking permission to appeal but emphasised that it was ground 2 that dominated his submissions.

8. The first ground asserts that the Judge misinterpreted the public interest as set out in Section 117B of the Nationality, Immigration and Asylum Act 2002. Whilst the Judge at paragraph 27 of his decision acknowledges the statutory provisions as set out in Section 117B he has nonetheless failed to deal with the fact that the Appellant arrived on a visit visa and had a precarious immigration status. I was referred to the authority of **AM Malawi [2015] UKUT 0260 (IAC)** and the head note therein which states:-

> "Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave"

9. The second ground asserts that the Judge finds that there are exceptional and compelling circumstances but also finds that the Appellant's nephew can support her if returned to her country of origin by sending her money and paying her medical treatment and that these findings, within paragraph 20 of the Judge's decision, are at conflict with one another. The Judge has failed to follow the guidance given in **Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 13 (IAC)** and has given no significant reason why this Appellant cannot resettle in Pakistan given her precarious status. Mr Bramble expanded this ground emphasising that compelling circumstances had to be found. At paragraph 25 of his decision the Judge accepted that there was no medical evidence supporting the contention that, in some way, the Appellant had become a dependant upon a UK family as carers. Further that at paragraph 27 of his decision, when looking at the two sides of the argument, the Judge has not taken into account Section 117B factors. Moreover, the Judge concluded at paragraph 28 of his decision that the Appellant was someone who neither spoke English nor is able to be financially independent. The Judge's findings are potentially irrational and at best speculative. There is no medical issue why this Appellant cannot live alone in the country of origin or engage with her brother who continues to reside there. Mr Bramble did not accept Mr Bazini's submission that this was an Appellant with no "Article 8 family" in Pakistan.

10. At the outset of his submissions Mr Bazini referred me to the authority of **Dasgupta (error of law - proportionality - correct approach) [2016] UKUT 28 (IAC)**. The head note to that authority states:-

> "*(i) A tribunal's failure to make clear findings about family life is not per se erroneous in law where its existence has not been contested in the Secretary of State's decision and has not been challenged at the appeal hearing and the tribunal's decision is not otherwise unsustainable in law.*
>
> *(ii) The question of whether there is family life in a child/grandchild context requires a finding of something over and above normal emotional ties and will invariably be intensely fact sensitive.*
>
> *(iii) In error of law appeals, the Upper Tribunal should apply the principles in Edwards v Bairstow [1956] AC 14* .
>
> *(iv) In appeals involving the proportionality of an interference with a Convention right, the ultimate question for the Upper Tribunal is whether the interference is proportionate, per Huang v Secretary of State for the Home Department [2007] 2 AC 167.*"

I have taken this authority into account when coming to my decision.

11. Having considered the submissions made by Mr Bazini, and whilst I find that Judge Paul's decision may well be a generous one, it is nonetheless one that was open to the Judge, and one that he was entitled to come to, on the findings he made.

12. The issue of the Appellant's precarious immigration status has plainly been taken into account by Judge Paul. At paragraph 29 of his decision he states:-

> "29. Furthermore, I have to take into account that the application is made against the background of a precarious immigration status, because of course she is only here on a visit visa. I have taken these factors into account, and I consider that they should be applied in the following way:…"

I find ground 1 of the Respondent's reasons for appealing is not made out.

13. Likewise ground 2. In essence it amounts to a disagreement, and no more, with the Judge's reasoning and finding and does not identify a material error of law. The Judge took into account the preserved findings from the original appealed decision and recognised the strength of the relationship that this Appellant had with her nephew's minor children. This was a fact sensitive finding which the Judge had to place on one side of the balance. Within his decision he had gone on to consider the other competing factors and, contrary to ground 2, there is no internal conflict within the Judge's findings at paragraph 20 of his decision in relation to potential financial support from the Appellant's nephew and the payment of medical treatment. These were just factors the Judge placed on the balance. Likewise those referred to in paragraphs 24 to 29 of the decision.

14. Ultimately at paragraph 30 the Judge comes to a conclusion having effected the required balancing exercise that it would be disproportionate for this Appellant to be returned to Pakistan. As I say, that was a decision that was open to be made on the evidence and the individual facts of this case.

Decision

The making of the decision in the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

No anonymity direction is made.

Signed Date 9 October 2017

Deputy Upper Tribunal Judge Appleyard