Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08494/2014

THE IMMIGRATION ACTS

Heard at Stoke on Trent	**Determination Promulgated**
On 24 October 2014	**On 10 November 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Fazal Begum
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Ms C Wilkins, instructed by Sharif & Co Solicitors
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Fazal Begum, date of birth 12.4.31, is a citizen of Pakistan.

2. This is her appeal against the determination of First-tier Tribunal Judge Mathews promulgated 27.6.14 allowing her appeal against the decision of the respondent, dated 22.1.14, to refuse her application for leave to remain in the UK on grounds of private and family life outside the Immigration Rules. The Judge heard the appeal on 17.6.14.

3. First-tier Tribunal Judge Osborne granted permission to appeal on 21.8.14.

4. Thus the matter came before me on 24.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Mathews should be set aside.

6. The relevant background to the appeal can be summarised as follows. The appellant came to the UK as a family visitor in September 2003, to visit and nurse her husband who had settled here in 1993, but whose health was failing. She did not leave and thus became an overstayer. The appellant made a number of applications for leave to remain, all of which were refused. In 2004 she twice applied to remain as a spouse. Her husband died in 2007 and in 2009 she applied for indefinite leave to remain. Despite the several refusal decisions the appellant did not return to Pakistan. Her own health began to fail in 2013 and she has received and continues to receive extensive NHS treatment to which she was not entitled, including GP care and as a hospital inpatient. She lives with her son and his family, on whom she is dependent, and claims to have no remaining family in Pakistan and no viable home to return to.

7. Judge Mathews purported to allow the appeal, but on the basis that as there had been a failure to consider the family life of the appellant the decision of the Secretary of State was not in accordance with the law and that it remained for the Secretary of State to make a lawful decision.

8. Thus though the appeal was allowed, the appellant has appealed. There has been no cross-appeal by the Secretary of State and the Rule 24 response does not address any of the issues in the appeal.

9. Quite apart from the other errors of law detailed below, the decision to allow the appeal on the basis that the refusal decision was not in accordance with the law was itself an error of law. Under section 86 of the 2002 Act the Tribunal is required to determine any matter raised as a ground of appeal. To fail to do so could amount to a breach of section 6 of the Human Rights Act 1998. The judge should have gone ahead to deal with the family life claim of the appellant.

10. The grounds of application for permission to appeal assert that the appeal did not depend on the exercise of any discretion, as at §23 of the determination the judge made findings that should have enabled the appeal to succeed under the Immigration Rules, in particular paragraph 276ADE(vi), or alternatively outside the Rules on the basis of article 8 family life. At §23 the judge found that the appellant no longer has any family in Pakistan, her home is no longer habitable, and that she is not in contact with any friends in Pakistan.

11. In granting permission to appeal, Judge Osborne noted that, "In an otherwise focused and succinct determination it is arguable that the Judge having made the

above-mentioned findings at [23] should have gone on to allow the appeal under the Immigration Rules. As this arguable error of law has been identified, all the issues raised in the grounds are arguable."

12. Having considered §23, I find that the judge should have at least considered paragraph 276ADE of the Immigration Rules in relation to the existence of ties, including social, cultural and family with Pakistan. That was not addressed in the determination and the judge simply went on to find that the Secretary of State had failed to consider the appellant's claimed family life as a dependant of her adult children and wider family settled in the UK. At §21 the judge found that the appellant's health had further deteriorated and that she could not travel alone, live alone or live independently. At §25 the judge also suggested that the appellant's medical condition may amount to a "central element of her private life."

13. Whilst the appellant could probably not meet the requirements of Appendix FM, the judge of the First-tier Tribunal should have addressed paragraph 276ADE before going on to consider whether there were compelling circumstances not adequately recognised in the Immigration Rules such as to justify allowing the appeal on the grounds of private and/or family life article 8 ECHR outside the Rules, on that basis that the decision of the Secretary of State produced a result that was unjustifiably harsh, or was otherwise disproportionate. The judge failed to tackle the issues by applying the correct law and legal approach to the findings apparently made.

14. It follows that the decision of the First-tier Tribunal cannot stand and must be set aside and remade, even though that will involve rather different considerations now applicable, including section 117B of the 2002 Act.

15. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where a crucial issue at the heart of an appeal is unresolved, as in this case, effectively there has not been a valid determination of that issue. The errors of the First-tier Tribunal Judge vitiates all the findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

16. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusion & Decision

17. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside, remitted to the First-tier Tribunal to be remade, with no facts preserved.

I set aside the decision.

I remit the appeal to the First-tier Tribunal to be made afresh.

Signed: Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup

Consequential Directions

18. The appeal is remitted to the First-tier Tribunal at Stoke on Trent for hearing listed for 20.2.15.

19. No findings of fact are preserved and the appeal is to be remade afresh.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be determined.

Signed:  Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup