Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14373/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9th June 2014	**On 24th June 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

PRIYAMVADA MANDALIA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Panagiotopoulou, Counsel instructed on behalf of Edwin Coe Solicitors
For the Respondent: Mr P Deller, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of India born on 23rd December 1949.

The factual background:

2. Following a hearing held on 4th February 2014 the Panel (Mr Justice Hickinbottom and Upper Tribunal Judge Reeds) found an error of law in the determination of the

First-tier Tribunal (Judge Prior) who in a determination promulgated on 5th December 2013 dismissed her appeal against the refusal to vary her leave to remain as a dependent relative under paragraph 317 of the Immigration Rules HC 395 (as amended).

3. The factual background to the appeal may be briefly summarised. At the age of 21 years, the Appellant married Kirtikumar Mandalia, an Indian citizen. They lived together for over 40 years in a rented flat in Dar-es-Salaam, Tanzania until 7th April 2012 when sadly Mr Mandalia died suddenly. It was following his death that the Appellant utilised a multi-entry visit visa originally issued in May 2008 to enter the United Kingdom on 30th May 2012 to visit her son and daughter, both of whom are resident in the United Kingdom.

4. On 6th July 2012 she applied to vary her leave to remain by making an application for indefinite leave as a dependent relative of her son Rajesh Mandalia, a British citizen, under paragraph 317 of the Immigration Rules.

5. That application was refused by the Respondent in a notice of immigration decision dated 16th April 2013. In that refusal letter, it was noted that whilst she was under 65 years of age and widowed and that her son had been providing financial support, it was considered that he could continue to do so from the United Kingdom to India. Whilst it was further noted that she would feel isolated in Tanzania, it was said that she would be returned to India where she had numerous family members who, whilst they could not offer financial support or accommodation, could offer emotional support. It was stated there was no evidence to demonstrate she would not receive adequate support in India. The Ground of Refusal was that she had not demonstrated that she was a widow over the age of 65 years or that she would be living alone outside of the United Kingdom in the "most exceptional compassionate circumstances". The decision also gave consideration to Article 8 and set out the change in the Immigration Rules brought in on 9th July 2012 as set out in Appendix FM and paragraph 276ADE of the Immigration Rules. Those Rules were applied to the Appellant but it was found she could not meet them.

6. The Appellant exercised her right to appeal and it came before the First-tier Tribunal (Judge Prior) sitting at Hatton Cross on 29th November 2013. In a determination promulgated on 3rd December 2013, Judge Prior dismissed the appeal under the Immigration Rules and on Article 8 grounds. In summary the judge identified the issue that he was required to consider by the parties at paragraph 12 namely that it was not in dispute that the Appellant was a parent under the age of 65 living alone outside the United Kingdom and was mainly dependent financially on a relative settled in the UK but that the Appellant, if she either returned to Tanzania or India, would be living in the "most exceptional compassionate circumstances". The judge reached the conclusion on that issue that he was not satisfied that she would be so living in the most "exceptional compassionate circumstances" and gave his reasons at paragraphs 12 to 19 of the determination. Thus the appeal was dismissed.

The hearing before the Upper Tribunal:

7. The Appellant sought permission to appeal that decision and on 13th December 2013 permission was granted by a Judge of the First-tier Tribunal (Judge Brunnen) on 31st December 2013. Thus the appeal came before the Upper Tribunal Panel (Mr Justice Hickinbottom and Upper Tribunal Judge Reeds) on 4th February 2014. The Upper Tribunal, in a determination following that hearing reached the conclusion that there were errors in the determination of the First-tier Tribunal in respect of the decision on human rights grounds. There is attached to this determination a copy of the decision and directions of the Panel which should be read in conjunction with this determination.

8. Following promulgation of the determination the appeal was listed before the Upper Tribunal to remake the decision, the Panel having set aside the decision of the First-tier Tribunal. At that hearing Mr Deller appeared on behalf of the Secretary of State and Ms Panagiotopoulou appeared on behalf of the Appellant. It was plain from the submissions made by each of the advocates that since the decision not only of the First-tier Tribunal but also the Upper Tribunal, there had been significant issues that had arisen, both in fact and in law. Dealing with the factual issues, it was observed that the factual circumstances of the Appellant had changed including the death of two family members residing in India and also new psychiatric evidence advanced on behalf of the Appellant. Furthermore, Ms Panagiotopoulou raised an issue that had not been raised before the Upper Tribunal in February concerning the issue of removal of the Appellant. The reasons for refusal letter referred to Tanzania but also considered that removal to India was in contemplation. Given that the Appellant was not a national of Tanzania but of India and had no right to reside there, that was a further issue that required consideration. As to Article 8, both parties were in agreement that further issues of law had arisen which had not been identified by the parties before the First-tier Tribunal nor before the Upper Tribunal in February. It was noted that the initial application in the case was made on 6th July 2012, before the changes made to the Immigration Rules as they related to cases raising issues of private and family life of Article 8 of the ECHR ("the new Rules"). Thus there was an issue as to whether or not the new Rules applied, as set out in the decision letter and Counsel identified the legal dispute as to whether the new Rules had any bearing if they were not the ones against which an application was considered (see **Edgehill and Anor v the SSHD [2014] EWCA Civ 402** and the decision in **Haleemudeen v the SSHD [2014] EWCA Civ 558**, both cases having been considered after the decision of the Upper Tribunal in February). Accordingly directions were given to the parties on 12th May including the Secretary of State to file and serve a letter setting out the Secretary of State's position concerning the destination of removal and for each party to file skeleton arguments dealing with the outstanding factual and legal issues. The hearing was listed on 9th June 2014.

9. Since the date of hearing before the First-tier Tribunal and the Upper Tribunal, as recognised by the parties there had been a significant change of circumstances relating both to factual and legal issues. The Upper Tribunal had set aside the decision of the First-tier Tribunal and the scope of the hearing to re-make the decision should take into account those change of circumstances (see **Sarkar v the**

SSHD [2014] EWCA Civ 195). The Tribunal had directed the Respondent to set out her position as to the issues relating to removal and destination. The factual background, as can be seen is that the Appellant had resided in Tanzania for 40 years prior to the death of her husband, but had remained a citizen of India. The Secretary of State's refusal to vary leave decision of 16th April 2013 was accompanied by a Section 47 removal decision which was subsequently withdrawn as unlawful on **Ahmadi** principles. The notice of decision specified that, absent voluntary departure, the Appellant would be removed "to India". However as the accompanying reasons for refusal letter demonstrates and also the decision of the First-tier Tribunal, the position of the Appellant was considered in the light of her circumstances in both Tanzania and in India. The findings of fact which led to the conclusion of the First-tier Tribunal that the Appellant had not demonstrated that she would be living in the "most exceptional compassionate circumstances" were seen in the context of both countries and thus the decision made under paragraph 317 related to both of those countries. However, after reviewing the case the Secretary of State's position was that the only destination in contemplation in the appeal could be India. Whilst Tanzania was the Appellant's former place of habitual residence, it was realistically conceded on behalf of the Secretary of State that since the passage of time namely two years since she had left Tanzania, it would be unrealistic to believe that she would be able to return there for the reasons given in their letter of 23rd May 2014. In the intervening period, further medical evidence had been produced relating to the Appellant's circumstances, two members of her family residing in India had died and in the light of the significant changes relating to the nature of the cases advanced on behalf of both parties, it was agreed by the parties that the Tribunal should reopen the issues relating to paragraph 317 and Article 8 of the ECHR, including the legal issues raised by both advocates. The issue of the "most exceptional compassionate circumstances" had been considered holistically by taking into account the circumstances in Tanzania and India, Tanzania no longer being part of the factual matrix relied upon by the Respondent. In those circumstances it was difficult to separate those issues relating to Tanzania from the overall decision of the First-tier Tribunal and in those circumstances, it was accepted by Mr Deller on behalf of the Secretary of State that the scope of the hearing should be widened to ensure that all matters were heard fairly. The findings of fact made by the First-tier Tribunal were to be the starting point and I was invited to make any fresh findings of fact from the evidence advanced before the Tribunal.

The evidence:

10. The documentary evidence on behalf of the Appellant was contained in two bundles; bundle 1 which included the documents that had been placed before the First-tier Tribunal (comprising of witness statements from a number of family relatives, letters and medical reports) and bundle 2 which was the updated bundle including further witness statements, and psychiatric report. In addition Ms Panagiotopoulou had produced a skeleton argument in accordance with the directions ordered by the Tribunal. Mr Deller relied on a previous skeleton argument that had been produced and upon the Respondent's bundle.

11. The Tribunal heard evidence from five witnesses. The first witness to give evidence was the Appellant who is now aged 64½ years. She adopted as her evidence-in-chief the letter at page 12, her statement at pages 2 to 4 of the first bundle. In her oral evidence she confirmed that contrary to the view expressed by the First-tier Tribunal, her mental health had not improved and in fact it had deteriorated and that she had difficulty remembering things and had had feelings of self-harm. It was plain from seeing the witness give evidence that she was in distress and was tearful. She confirmed she had had no recent contact with family in India and could not remember the last time that she had seen them. In cross-examination, she confirmed that in the distant past she used to talk to some of her relatives but had only been to visit them in November 2009 and a visit in May 2011 for medical treatment. She had travelled with her husband. She could not remember the visit in 2009 but that in 2011 she had gone to Bombay for medical treatment. She had not met any relatives from the maternal side of the family but had met two of her husband's brothers. Of those two one of them had since died.

12. The Tribunal heard evidence from Mr Rajesh Mandalia who adopted a letter at page 19 of bundle 1 and witness statements dated 29th November 2013 and 20th January 2014. He updated the Tribunal as to the developments that had happened since the hearing before the First-tier Tribunal relating to family members and that two of them had died. He set out in his evidence the circumstances of the family members that did remain in India. He had produced a map before the Tribunal in which he sought to convey the distances between the relatives to demonstrate how they were dispersed in India and that contrary to the view taken by the First-tier Tribunal, and the Respondent, there was long distances between extended family members which was relevant to the Appellant's circumstances should she be returned to India. He gave evidence concerning the visits made to India. He could not give details of the visit in 2009 but in 2011 he confirmed that it was a visit for medical reasons and was for a short period of time. She did not visit family members during that time but had stayed for a short period at the home of his father's brother and had also stayed in a hotel. When asked how he thought his mother would cope living in India, a country in which she had not lived in for 40 years, he stated that for her it would be very difficult and referred to her previous life with his father in that she had lived with her parents up until the age of 21 and had been looked after then and had then embarked upon "a traditional marriage" at the age of 21 and that they had remained together for over 40 years following that marriage out of India living in Tanzania. He said that she had no real links with India despite her nationality, and that he could not see her surviving alone in a country that she had little knowledge of. He referred to her present condition and her upset and distress in relation to the death of her husband. It was plain from hearing his evidence that he was also distressed and thus a break was given for the witness to compose himself. On the resumption of his evidence he was asked about the last two years and the circumstances of his mother. He said that she had been under a lot of stress when contemplating being left alone in a country that she had not lived in for over 40 years. She was worried about how she would survive on her own bearing in mind that she had always been dependent on her husband who had provided everything for her. He described her mental state as poor and that the medical evidence and the psychiatrist made reference to her needing and requiring the care of her immediate family.

13. In cross-examination, he was asked about resettling his mother and why it could not come from the extended family. The witness explained that culturally it was the son's responsibility to provide financial support and that whilst he would do what he could for his mother, in terms of his financial circumstances he would not be able to use his resources to in effect support two households, his own in the United Kingdom and his mother in India. He thought that the extended family in the United Kingdom, whilst they have been supportive would not be able to provide any long term financial assistance and that it could not be expected of them to support her realistically. He was asked how often the extended family in the United Kingdom visited India. The witness said it was difficult to say but that some of the family members who have siblings have family there but the majority of the relatives had no family members in India to whom they visited. The question posed by Mr Deller was that his mother had not been in India for a very long period and where did the witness think his mother could belong if returned. Mr Mandalia said that he could not even think of a place in which she would feel that it was her home and referring to the map, he said that the relatives as a whole would not be able to assist or provide the emotional support that she would require and made reference to the 24 hour support that he thought she required. When Mr Deller queried whether she needed that sort of care, Mr Mandalia said that in her current state of mind, she was worried about being alone and how she would manage things and that she had never lived alone throughout her life.

14. As to the change in her circumstances, over the last two years since the passing of the death of her husband, he gave evidence concerning the effect upon her daily life and that she had become forgetful, she remained tearful and distressed and that the length of time had not changed her outlook or presentation during this time. When asked about the nature of the marriage that he had described as a "traditional marriage" between the Appellant and her husband, he confirmed that the family responsibilities had all been undertaken by her husband and that she was in effect a housewife, she had never travelled on her own, her husband would arrange the local workers when the language was an issue, she had never learnt the local language. He described that his father passing away so suddenly had turned "her life upside down".

15. The Tribunal also heard from Mrs Swat Joshi who adopted a letter, and two witness statements contained in bundles 1 and 2. She gave evidence about the deterioration in the Appellant since the last hearing and referred to her becoming more and more depressed and the stress of the case building up and that this had affected not only the Appellant but also the family members. When asked how she thought the Appellant would cope living in India on her own, the witness stated that in her view and based on her knowledge of the Appellant that she would not be able to cope. She referred to her needs as requiring a close family and providing the care that she required. She was presently feeling loved by the family and that this had assisted her to some extent. She described her mother from coming from a "very traditional marriage" and that she thought that she would be lost on her own and not able to cope and that the family members that there were in India were spread out. She would not get the support that she needed. As to her physical health, she said that she was not able to do day-to-day chores lifting heavy things. When asked if there

had been any improvement in her physical condition, the witness confirmed that it had become worse and gave an example concerning the arthritis in her hands.

16. There was no cross-examination of that witness. There were two further witnesses Dr Pragna Mandalia who did not give evidence before the First-tier Tribunal but provided a letter at pages 23 to 24 of the bundle. That evidence was not challenged nor was the evidence of the last witness Rasika Rajesh Mandalia who had also provided a witness statement and gave brief oral evidence.

The submissions:

17. At the conclusion of the evidence, the Tribunal heard submissions from each of the parties. In respect of paragraph 317 Mr Deller on behalf of the Secretary of State accepted that the application was made on 6th July 2012 and in those circumstances it fell to be considered under paragraph 317 under Part 8 of the Rules. He confirmed that the decision of the Respondent established that all the criteria were met save for paragraph 317(i)(e) and the issue was whether or not "if living alone outside the United Kingdom in the most exceptional compassionate circumstances". It was accepted that she was mainly dependent financially on relatives settled in the United Kingdom thus he submitted if the Tribunal found that her circumstances were such that the test was met then the decision would not be in accordance with the Immigration Rules. However he submitted that the phrase "most exceptional compassionate circumstances" was a high test and the question was whilst the circumstances were compassionate were they the most exceptional compassionate circumstances and was the test met. The refusal letter made reference of the need to take into account living abroad with support however he submitted, applying the facts from the evidence there were relatives that were scattered around India on both sides who were either elderly and/or limited in the capacity to provide assistance to alleviate the most compassionate circumstances. It was further a question of where she could be established in India and that had not been made clear. He submitted that detailed evidence had now been provided as to the circumstances in which she would be living which included her physical frailty, her psychological frailty and that as the First-tier Tribunal had considered it on a flawed basis it did require to be considered again notwithstanding that it was a high test.

18. In respect of Article 8, he relied upon his earlier skeleton argument and that the initial application was made on 6th July 2012, three days before the changes made to the Immigration Rules as they related to issues raising issues of private and family life under Article 8 of the ECHR. Thus he relied upon the Statement of Changes HC 194. The implementation paragraph at page 1 provided a "classic transitional provision" namely that if the application had been made before 9th July 2012 and the application had not been decided, it would be decided in accordance with the Rules in force on 8th July 2012 and that was made apparent by A280(c)(i) and therefore the old Rule applied. However he submitted the Secretary of State looked at the new Rules (in relation to Article 8) because of the Statement of Changes in Immigration Rules HC 565. In that document the implementation set out that the changes set out in paragraphs 1 to 222 of the statement took effect on 6th September 2012. He relied on A277B where it is said that the Secretary of State is considering an application for

"indefinite leave to remain" to which Part 8 of the Rules continue to apply and where the application does not meet the requirements of paragraph 8 for indefinite leave to remain then the Applicant's case would be considered under Appendix FM and 276ADE. However whilst the refusal letter said that she could not meet paragraph 276ADE, under the parent route, there was a query as to whether or not she would succeed under 276ADE(vi) relating to the high absence of ties since she had moved to Tanzania. Whilst the Secretary of State considered that twenty years was the cut off for severing of ties, the question of whether someone had severed ties with the country of nationality is fact-sensitive (see the decision of the Tribunal in **Ogundimu**).

19. Mr Deller also submitted that looking at the Article 8 under the "classic jurisprudence" it would be conceded on behalf of the Secretary of State that on the evidence now provided of the Appellant's circumstances that she had established dependency upon her family members and thus Article 8(1) was engaged and that all the questions were in the affirmative leading to the question of proportionality as to what went in the balance. In his submissions he sought to distinguish the case of **Edgehill** (as cited) from that of **Haleemudeen**, in which the decision which he submitted should be preferred. Paragraph 276ADE and Appendix FM was passed in September 2012 and the policy was to look at the new Rules even if the application fell primarily under the old one and translating this to the Appellant's case, it fell to be considered under paragraph 317 but also under Appendix FM. He argued that the new Immigration Rules had a powerful life in the Article 8 equation because the new Rules were a statement of executive policy and thus were part of the proportionality balance thus the public interest could not be ignored. Thus the key question was whether the powerful factor of the new Rules should it form part of the proportionality exercise or is the position as straightforward as **Edgehill** and any relevance of the new Rules therefore disappears? However, he posed the question as to whether or not the new Rules did made adequate provision (applying the decisions in **Nagre** and **Gulshan**). The new Rules do not make provision for those in the position of the Appellant as a dependent relative and therefore it is arguable that her circumstances in any event would fall outside Appendix FM and paragraph 276ADE and that there would be arguably good grounds for granting leave to remain outside the Rules and therefore it would be necessary to consider whether there are compelling circumstances that were not sufficiently recognised under the Rules.

20. Ms Panagiotopoulou, relied upon her skeleton argument produced for the hearing and identified the issues that the Tribunal was to consider. She began her submissions under paragraph 317 of the Rules. The factual matrix was such, she submitted, that it did meet the high test of the "most exceptional compassionate circumstances". This was a case where the Appellant had not lived in India for over 40 years. She was now nearly 65 (64 years 6 months) and had not lived in India since the age of 21. She had led a sheltered life and the evidence of the witnesses gave support for her having been part of a "traditional marriage" during the last 40 years. She has no real connection to India, the nature of her marriage was such that she had never lived alone and had not been used to dealing with day-to-day aspects of her life. Ms Panagiotopoulou referred to the evidence in support of this. She made

reference to her physical health which was frail by reference to the medical evidence and to that of the witnesses. As to the psychological affect of the bereavement, that evidence came from three different sources including doctors and a psychiatrist. The report from the GP (see page 24) made reference to her isolation and to suffering moderate to severe depression and the counsellor (at page 45) referred to her suffering "moderate depression" however since the finding of the First-tier Tribunal there had been no real progress and indeed the evidence demonstrated that her condition had deteriorated and reference was made to the psychiatric report and her examination on 21st January 2014. Thus the evidence demonstrated that she had deteriorated in her self-care, she was vulnerable, of an advanced age with a degeneracy of physical ailments and of a fragile psychological state with no likely improvement in her situation. She had a high dependency on her family. The two most important factors related to her loneliness and isolation which she would expect on return to India bearing in mind her lack of connections.

21. Whilst she submitted that it was a high threshold, each case must be "fact-sensitive" and that the circumstances of this case met that threshold given her lack of residence and ties to India. She made further submissions concerning the evidence relating to family in India by reference to the oral evidence given but also by reference to the map showing the family members dispersed over a large geographical area. Whilst the evidence of Mr Mandalia was that he had met her expenses and could do so whilst in the United Kingdom, that was different in terms of expecting the family to provide financial support in effect for two households both in the United Kingdom and India and she referred to the breakdown of costs provided in the evidence concerning resettlement in India, obtaining accommodation and a carer for her.

22. The main concern, she submitted was that she would not be able to cope on her own which was supported by the evidence of the family members and the historical evidence concerning her past. The conclusions of the psychiatrist were such that show that her immediate family are those who give her a sense of purpose and alleviate the depression that she undoubtedly suffers from. For those reasons, not only do her circumstances evoke compassion, they met the test required under paragraph 317.

23. In relation to the legal issues identified by Mr Deller, she relied upon her skeleton argument in this respect and on the transitional provisions set out in HC 194. In her submissions, she submitted the decision of **Edgehill** was to be preferred and that as stated at [32] the Immigration Rules needed to be understood by ordinary people thus the natural and ordinary meaning of the words in the transitional provisions were that the Secretary of State would not place reliance on the new Rules when dealing with applications made before 9th July 2012 and that a decision made with reference to the new Rules when the application predated 9th July 2012 would be unlawful.

24. She submitted that whilst it was asserted that **Edgehill** could be distinguished on its facts by the Respondent, it is not evident how that could be so. However whilst the decision of the Court of Appeal in **Haleemudeen** (as cited) where it was found that the First-tier Tribunal was in error for failing to consider the new Article 8 Rules (at

40 – 41), this is a case where the original application had been made on 28th February 2012 before the new Rules were introduced however the decision of **Odelola v the SSHD [2009] UKHL 25** was relied upon that the material date was the date of decision and not the application. However the decision of **Edgehill** sought to distinguish the decision of **Odelola** (as stated) as there was no express provision that the old Rules would continue to govern applications made before the Rules changed (see paragraph 27). Thus she submits, that in **Odelola**, Lord Hoffman stated that the Rule at the date of decision applied in the absence of any statement of the contrary. However HC 195 provided a clear statement to the contrary which did not appear to have been taken into account in the decision of **Haleemudeen**.

25. Thus she submitted that the classic Article 8 principles should apply. The Secretary of State had conceded the issue of dependency on the particular facts of this case and thus it fell to consider the proportionality of the decision. She submitted that the circumstances that had been advanced on behalf of the Appellant under paragraph 317 would be those that would be advanced on her behalf under Article 8 and the factual matrix would consider the same namely the very lengthy absence from India, no additional recourse to public funds, the impact on the Appellant taking into account **Huang**.

26. She submitted that even if paragraph 276ADE and Appendix FM did fall to be considered, when considering lack of ties, the Secretary of State had relied upon twenty years as the benchmark in the United Kingdom and thus that could be applied to the Appellant's circumstances in which 40 years had elapsed since she had lived in India and thus could be seen as having relinquished ties with her country of nationality by virtue of that time. Furthermore, this is a case that even on the **Gulshan** principles will demonstrate the circumstances are compelling and exceptional.

27. At the conclusion of the hearing I reserved my determination.

Conclusions

28. Paragraph 317 of the Rules provides as follows:

> "317. The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:
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> (i) is related to a person present and settled in the United Kingdom in one of the following ways:
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> (a) mother or grandmother who is a widow aged 65 years or over; or
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> (b) father or grandfather who is a widower aged 65 years or over; or
>
> (c) a parent or grandparents travelling together of whom at least one is aged 65 or over; or
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> (d) a parent or grandparent aged 65 or over who has remarried but cannot look to the spouse or children of the second marriage for financial support; and

where the person settled in the United Kingdom is able and willing to maintain the parent or grandparent and any spouse or child of the second marriage who would be admissible as a dependant; or

(e) a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom; and

(f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom; and

(ii) is joining or accompanying a person who is present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and

(iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and

(iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the Sponsor owns or occupies exclusively; and

(iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds; and

(v) has no other close relatives in his own country to whom he could turn for financial support; and

(vi) if seeking leave to enter, holds a valid UK entry clearance for entry in this capacity."

The issue that the Tribunal has to decide relates to paragraph 317(i)(e) as set out above. There is no dispute between the parties that the Appellant meets all the other requirements of paragraph 317 and also that she is mainly dependent financially on relatives settled in the United Kingdom and also that she is under the age of 65 (now aged 64 and 6 months) thus the issue is "if living alone outside the United Kingdom in the most exceptional compassionate circumstances".

In reaching a decision on this issue, I am required to make findings of fact upon the evidence. Both parties have recognised the reality of the circumstances of the Appellant and that there have been significant developments in the appeal since the decision of the First-tier Tribunal and for those reasons, the starting point must be the findings of the First-tier Tribunal but that fresh findings may be required as a result of the evidence that has been produced.

29. The First-tier Tribunal's findings that relate to her circumstances in Tanzania are no longer relevant in view of the change to the Secretary of State's decision. Thus I turn to the Appellant's circumstances in India. It appears to be accepted on behalf of the Secretary of State that the family members in India could not offer financial support or accommodation (see refusal letter; referred to in the decision of the FTT at [5]).

The only findings made by the First-tier Tribunal relating to India can be found at [14] – [15] of the First-tier Tribunal's decision. Those findings are as follows:-

> "14. If the Appellant chose to live in India then she would be living in the country where the evidence indicated that her aged mother lived as well as her siblings in Mumbai, a city that the Appellant travelled to, and entered, on 28th November 2009 and 6th May 2011. In Mumbai there also lives two brothers of the Appellant's husband.
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> 15. There was strong evidence before me that the Appellant's extended family – going beyond her children – in the United Kingdom were very supportive of her. The Appellant had never lived in the United Kingdom but had visited that country as she had also visited India. Despite the reservations expressed by Swati Joshi in her testimony I took the view that there was no more persuasive ground to find, despite the Appellant's departure from India more than 40 years ago, that the extended family in India would not equally be supportive of her if she were to decide to live in that country. Upon such a decision, although it would throw an extra burden upon the Appellant's children, they made it clear in testimony that they would do all that they could do to support her in India and thus the situation would be – despite the strain on the children – that they would use every endeavour to seek to ensure that the Appellant did not unduly suffer from having to live in India rather than the United Kingdom."

It is plain from those findings that the judge considered that the Appellant would be living in a country where the evidence indicated her mother lived as well as her siblings and that she had travelled there on two occasions in 2009 and 2011. However it is equally plain from those findings that nothing more was said about those particular relatives, their own circumstances nor their respective locations. That has been dealt with in the evidence heard by this Tribunal. As to the visits that have been made, the evidence of the Appellant was that she has not been back for four to five years and whilst it was common ground that she had visited in November 2009 she could give no details. Similarly the witnesses could not recall the circumstances of the visit in November 2009. As to the visit in May 2011, the Appellant recalled this visit noting that she had gone to India to access medical treatment being accompanied by her husband. She did not see her sisters but had spoken to one of them on the telephone and the evidence of Rajesh Mandalia was this was a short period of time where she did not visit family members although she stayed with her father's brother before relocating to a hotel. Thus I find as a fact there were two visits made, the most recent visit in 2011 was not for family reasons but was ostensibly for accessing medical treatment, it was of a short duration and there had been little contact with family members. She was accompanied by her husband on that visit.

30. Dealing with the family relatives. It is necessary to consider their circumstances in greater depth albeit it is accepted by the Respondent that they could not offer financial support or accommodation. The evidence before the Tribunal is that originally on her husband's side of the family he had three brothers and she has two sisters in India. One of her husband's brothers has since died (Mr Mehta). There is a second brother Mr Mehta who is 69 who lives in Bhuj who is partially disabled and is looked after by the third brother Ashok Mandalia. He provided a letter (at page

28) who at the date of the letter in 2012 was 58 and therefore now in his early 60s who refers to looking after his mother who is disabled and elderly and therefore could not offer any support. The Appellant has two sisters; the first sister is in her 70s Mrudhula Kothi who spends time between her children in Bhuj and Sirat. The younger sister is Kokila Mehta who lives in Mumbai who lives with her husband and son and grandchild in a two bedroom flat in Mumbai. In relation to the husband's relatives, there are two brothers-in-law however since the decision of the First-tier Tribunal one has since died and there is one further brother in Mumbai who is in his late 80s.

31. I am satisfied that no other family relatives have been identified and the map provided for the Tribunal demonstrates the distances between those family relatives which shows that they are scattered in India and there is no evidence before me that they retain communications with each other or that there is any form of communication between the relatives on the paternal side with those on the maternal side. I also find on the evidence that there is little contact between the Appellant and those relatives historically and at best the last visit was in 2009. I have considered whether the extended family in India could provide emotional support if not practical support as the Respondent concedes that they could not offer accommodation or financial assistance. Having considered the evidence, I do not find that they are in a position either individually or acting together, to offer practical support in the light of the acceptance by the Respondent that they cannot provide accommodation or financial help due to their age and in some cases their infirmity. I take into account the evidence that I have heard that makes reference to the cultural tradition that it is the eldest son who would look after his mother. That factor should be given some weight. I have also had regard to the map and the distances between the relatives and there is no reason to believe that they would be able to offer emotional support of the level required for the Appellant other than occasional telephone calls or the occasional visit. It would be a case of the Appellant having to move between the relatives rather than those others, who whilst are related, have historically offered little by way of support be it emotional or otherwise. The question as Mr Deller posed to the Tribunal, because the Appellant has been out of India for so long for over 40 years, where in India would she belong? It is evident from the Appellant's own evidence that she has no real ties to India save for that of her nationality. It is common ground that for over 40 years and for the duration of her married life between the ages of 21 and 62 she has been resident out of India. She still refers to Mumbai as "Bombay" and there is no evidence before me that she has any real understanding of India as it now is. I take into account that it is likely that having lived in Tanzania she will have retained some cultural links but that is different from being expected to live in a country in which she has not resided for a significant period of her life. This is, in my judgment, a significant factor in establishing that she would be living in the "most exceptional compassionate circumstances" if living in India.

32. The findings of the First-tier Tribunal made some reference to the extended family and any assistance that they could provide. The First-tier Tribunal set out those findings at [15] set out above. At [34] of the UT decision, reference was given to the finding made by the judge that there was "strong evidence" before him that went

beyond the children's evidence that the Appellant's extended family were very supportive of her. As said at [34] this must refer to the letter that was co-signed by a number of relatives in the UK. That letter is found in the bundle at 21 to 22 (bundle 1). They are family who are living in close proximity presently to the Appellant in approximately a three mile radius. It is plain from the evidence not only in their letters but also from the witnesses who have given oral evidence that she has strong ties in the United Kingdom. However the question is what support would the extended family in the United Kingdom provide for her to enable her to live in India? The judge found that the relatives in the UK would provide support. The question is what type of support they would give to her India? The First-tier Tribunal did not go beyond its finding by stating that it would be support, and whilst that by itself was a matter the judge could take into account, this Tribunal has heard further evidence about this issue. I am satisfied from hearing the oral evidence of the witnesses that there is a world of difference of the extended family providing help in the United Kingdom as I am satisfied that they have done in an emotional sense and that which can properly be said to be provided if the Appellant is living in India. The evidence of Mr Mandalia was that they were not likely to provide financial help. That is realistic, all have their own commitments and family members who they support or are supported by. I find that whilst the First-tier Tribunal was right to reach the view that the extended family in the United Kingdom are supportive of the Appellant, and that is a factor, it does not take into account that any financial support would be realistically in the short term and not on any long term basis as that would be unsustainable and I place weight upon the evidence of Mr Mandalia in describing the circumstances of the family relatives in the United Kingdom and taking a commonsense approach. As to the visits made to India by the extended family, it is plain from the evidence that the Tribunal has heard that this has not been frequent; some of the members do have their own siblings but the majority have no family members in India as they are all residing now in the United Kingdom.

33. In reaching conclusions on the evidence, it is plain from the determination of the First-tier Tribunal at [16] that he found the evidence from the family members to be "clearly tendentious" and "sought to achieve the preference" of the Appellant living in the United Kingdom. I am, of course, alive to that preference and the example given by the First-tier Tribunal Judge at [16] concerning the evidence of Skype which was quite properly made. However, I have had the opportunity to hear the evidence and see the witnesses give evidence before me and additionally read and take into account the evidence of two additional witnesses whose evidence was not before the First-tier Tribunal nor was it challenged in cross-examination before this Tribunal. The family are undoubtedly feeling under stress and pressure of their close family member and the present predicament that the Appellant is in. At times as I have noted, the witnesses were tearful and plainly found the giving of evidence and discussing the issues involved difficult at times. Notwithstanding their own preference which is understandable to have their mother living with them, I did not reach the conclusion that their evidence was exaggerated or that they were seeking in their oral evidence to paint the worst case scenario but had tried as much as they could to give a truthful picture of her circumstances based on their knowledge of her and her background and history. I was particularly impressed with the evidence of Ms Swat Joshi who gave cogent and descriptive evidence of the deterioration and the

physical frailty of the Appellant and gave a vivid picture of her inability to carry her grandson whom she spends much time with and gave a description of looking at her hands after she had tried to carry him for a short while noting her hands were stiff and bent and her fingers had to be physically straightened for her. I further find that all the witnesses were consistent in their descriptions of the nature of her emotional dependency upon family members and the emotional and practical support that she had derived from her late husband with whom she had relied upon for the last 40 years and the lack of emotional support that there would be in India.

34. I now turn to the medical evidence before the Tribunal. There is no dispute that she is physically frail. Indeed it is common ground that she has osteoporosis and there are degenerative changes in her lower back and her knee joints (see medical report at page 32). There is a letter dated August 2012 referring to the circumstances of the death of her husband which described her presentation as being "quite confused" and the physiotherapist thought that if her presentation continued that she should seek further help as she appeared to be depressed. As I state, there is no dispute that she is physically frail and I accept the descriptions given by the family members concerning her inability to carry out and function in many ways. The relevant First-tier Tribunal findings are at [16] and [17]. The judge took into account the GP's letter of 8th November 2013. And that "It might yet be that the Appellant will regain that past strength and confidence when the great shock of her bereavement gradually subsides." In this context the judge noted the GP's letter referring to the enabling of the Appellant … "to overcome the trauma of her bereavement." That was a finding that was challenged before this Tribunal as set out at [36] of the UT decision. We found that the wording might have been better but did not think it was speculative but that there was a good chance that the Appellant may regain her former strength and confidence and thus reached the conclusion that there was a good chance that it would not be longstanding and would subside.

35. I have been required to revisit that finding in the light of the passage of time and further evidence from a psychiatrist and evidence from the family members. The evidence is contrary to that expressed above, the Appellant has not overcome the trauma of her bereavement and rather than show improvement with the passage of time she has conversely deteriorated rather than having become stronger. I take into account the likely effect of the stress of the ongoing immigration proceedings upon her and that this must have some effect upon her and her state of mind but the description from her relatives which is consistent with the psychiatric report. demonstrates that whilst this may be a feature, it cannot account for her presentation on its own.

36. It is right in this context to note that the Upper Tribunal found that there was an error of fact in the First-tier Tribunal decision at [16] when in terms of her ability it was noted that the Appellant travelled alone to the United Kingdom at the end of May 2012. As the Panel noted at [39] that was an error of fact because she did not travel on her own but with family relatives.

37. The psychiatric report is found at [22] – [34] of bundle 2. The history of the present illness is set out at paragraph 6.1 and makes reference to her low mood, her inability

to sleep and some thoughts of self-harm. It refers to her forgetfulness and inability to concentrate and mistakes made such as leaving the gas fire on in the kitchen. At 6.2, there is reference concerning thoughts about her husband and her physical symptoms having increased in intensity. The examination of her medical state on 21st January is set out at paragraph 12.1 and at 12.3 it was found that her cognitive functions were grossly intact and had partial insight into her illness. The opinion is set out at 13.1 – 13.9. The psychiatrist reaches the conclusion that her bereavement at the age of 64 was complicated by the history of her profound dependence on her late husband throughout the major part of her adult life. The dependence was not only on her day-to-day living but more importantly emotional dependence which left her unable to cope without similar support at present and in the foreseeable future. He stated that "living alone is thus unimaginable and fearful for her. This may be one of the factors why she has developed signs of major depression." At paragraph 13.2 her depression by reference to the criteria was characterised by low mood, inability to enjoy, of her feelings of restlessness, poor sleep, early morning wakening, decreased appetite and forgetfulness. Whilst at 13.3 the doctor did not find she presented with active suicidal intention, the history of severe depression at this age after the loss of her spouse carried a significant suicidal risk and that returning to India would result in another loss, prolonging her complicated bereavement. He made reference at 13.4 to 13.5 to the emotional attachments that she had to her family in the United Kingdom and at 13.6 that the relatives in India, even if willing to provide support may not be able to give the emotional bond that she currently has. The prognosis at 13.9 was as follows

> "Her prognosis of depression is negatively affected by its chronicity and comorbid arthritis. She is likely to continue with the same level of depression for years to come however the severity of the depression would be much higher if she had to leave the UK due to the factors given above … Her suicidal risk is higher if there are loneliness and isolation, the factor is likely to be there more if she had to live in India."

I have therefore considered the medical evidence as a whole and find that the medical position has not improved despite the passage of time. Bereavement affects people in different ways. It is plain that the circumstances of the death of her husband has to be viewed in the light of the Appellant's social history. The Appellant was born in Kutch, Gujrat in India and left school at the age of 19 at the time that she was married. This was an arranged marriage to a man who was five years older than her. The marriage took place in 1970 at a time when her husband was living in Africa (Tanzania). It is plain from the evidence that I have heard from the witnesses that the Appellant has never lived on her own but lived primarily with her family until her marriage and then with her husband thereafter in Tanzania. The evidence strongly demonstrates that this was a traditional marriage in the sense that she undertook the role of cooking and household chores, was never involved in the management of financial tasks, it was her husband who was in contact and undertook all other duties and that she had never travelled on her own. On 17th April 2012 when sitting on the balcony of their home, her husband became semi-unconscious suddenly, she found him unresponsive. He was taken to hospital and was pronounced dead on arrival. He did not have any major physical ill health and his death was sudden and unexpected. It is plain from those circumstances outlined

above that she has found his death particularly hard to bear and no doubt in the knowledge that she may be required to live her later years alone without the support of her husband who had been the sole and real source of support in a country in which she has not lived for over 40 years.

It seems to me that it is not simply a case of the Appellant being a national of India. Whilst I would accept that she has remained a national of that country, in reality it would be quite different to be living there, in circumstances, I am satisfied would be, effectively isolation. It is important in my judgment to consider the previous nature of her life in reaching a conclusion on the circumstances as they will be in India, bearing in mind it is accepted that it is not reasonable for her to return to Tanzania. I have set out earlier the nature of her marriage and the evidence and support of this being a traditional marriage of its type and how this over such a lengthy period serves to increase her vulnerability and ability to function in a country which she has not lived in for over 40 years and has no real links with. She has never lived alone, prior to her marriage she lived with her family and thereafter had lived with her husband for 41 years.

38. I have therefore applied the findings of fact and the circumstances as I find them to be now to the applicable law. In this regard I have considered the decision of **Senanayake v the SSHD [2005] EWCA Civ 1530**. It had been common ground before the court that the phrase "compassionate circumstances" means circumstances which would evoke compassion in the mind of an objective decision maker at [21]. The question the court went on to consider was as follows:-

> "What are the words 'most exceptional' intended to qualify in the context of Rule 317(i)(f). Do those words require that the circumstances are themselves most exceptional; or do they require that the circumstances evoke exceptional, or most exceptional, compassion in the mind of the decision maker? (at [22]).

The court concluded that:-

> "That question can be answered, as it seems to me, by postulating circumstances in which, although in themselves most exceptional, compassion is evoked only to a degree which is not exceptional. What policy objective could the rule maker have intended to be serve by permitting the grant of leave to enter in a case where a low degree of compassion is evoked by circumstances which are themselves exceptional; but denying leave to enter in a case where an exceptional degree of compassion is evoked by circumstances which are not in themselves unusual. The answer, as it seems to me, is that the words 'most exceptional' are used in that context to describe the degree of compassion which the circumstances evoke in the mind of the decision maker. It is because the circumstances of the applicant evoke compassion to an exceptional, or most exceptional, degree that leave to enter is to be granted. The degree of compassion compels a decision that leave to enter be granted."

And at paragraph [24]:-

> "In each case, as it seems to me, the decision maker is required to ask himself whether the circumstances which he has found to exist should evoke compassion to such an exceptional degree that, in the one case, leave to enter should be granted under the

Rules and, in the other case, the benefit of the family reunion policy should be extended for a family member who does not fall within the primary class."

39. I recognise, as Mr Deller submits, the test is indeed a high one. Having considered the most unusual circumstances of this particular Appellant, I am satisfied on the balance of probabilities that she meets the test as set out in paragraph 317(i)(e) and that as a parent under the age of 65 is living outside the United Kingdom in the "most exceptional compassionate circumstances".

40. As to the relevance of financial support as noted in the decision of the Court of Appeal in **Mohammed v the Secretary of State for the Home Department [2012] EWCA Civ 331**, at [6] there may well be cases in which notwithstanding the provision of financial support the parent simply cannot cope on their own – for example because of dementia or terminal illness, and the most exceptional compassion is called for. I find that that applies to this case that there are particular circumstances relating to this Appellant which demonstrate that she would not be able to cope on her own. While she does not have dementia or terminal illness, there are a combination of factors identified in the Appellant's circumstances when taken together would demonstrate that even with the provision of financial support, which is in doubt for the long term based on the evidence before this Tribunal, she would be living in the most exceptional compassionate circumstances. I do not consider that when taken together that her circumstances might simply be described as compassionate but ones that do evoke the most exceptional compassionate circumstances.

41. In this respect I have taken into account that she has family relatives but on the findings of fact that I have made they are elderly and limited in their capacity to provide material help to alleviate her circumstances in India. They are scattered geographically throughout India and a question that Mr Deller posed was after 41 years "where would she establish her life in India?". Before this Tribunal there has been more detailed evidence as to the circumstances in which she would be living which have included a greater consideration of her physical frailty, the psychological frailty that has not decreased but has in fact worsened and Mr Deller in his submissions fairly accepted that the First-tier Tribunal had considered the issue of paragraph 317 on a "flawed basis" and thus it has been right and fair to look at the evidence again. Notwithstanding the high test and threshold that must be met, each case of course is by its nature fact-specific and must be looked at on its own particular factual matrix and having done so in relation to this case I am satisfied by reason of the factual circumstances that I have outlined in the findings of fact that they meet cumulatively the test identified.

42. In the light of the findings in that respect, it is not necessary for me to reach a view on the legal issues identified by both Counsel and the tension between the two decisions of the Court of Appeal in **Edgehill** and **Haleemudeen** (as previously cited). I would observe that even if it could be said on behalf of the Respondent that the decision of **Haleemudeen** should be preferred and that by reason of the chronological dates in this case the application being made on 6th July 2012 but the decision being made on 16th April 2013 that the new Rules should be taken account

of, that this is a case in which Mr Deller concedes that paragraph 276ADE and Appendix FM do not deal with the circumstances of this particular appellant and therefore fell to be decided outside of those Rules (see **Gulshan [2013] UKUT 00640**) and thus it would be necessary to consider whether there are "compelling circumstances not sufficiently recognised under the Rules". In my judgment, for the reasons that I have already stated, if the requirements of the Rules are not met, leave can be granted where exceptional circumstances, in the sense of "unjustifiably harsh consequences" for the individual would result (see **Gulshan** and **R (Nagre) v the SSHD [2013] EWHC 720 (Admin)**) and that those identified in supporting the decision under the Rules, would apply when considering her circumstances under Article 8 of the ECHR, even taking account of the great weight to be attached to the Immigration Rules and the executive 's view of the public interest.

43. The decision of the First-tier Tribunal involved the making of an error of law and is set aside. The decision is remade as follows; the appeal is allowed under the Immigration Rules.

Signed Date

Upper Tribunal Judge Reeds