



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/13888/2015

**THE IMMIGRATION ACTS**

Heard at Stoke on Trent  
On 30 March 2016

Decision and Reasons Promulgated  
On 11 April 2016

Before

Deputy Upper Tribunal Judge Pickup  
Between

Secretary of State for the Home Department

and

Maqsood Begum  
[No anonymity direction made]

Appellant

Claimant

**Representation:**

For the claimant: Ms E Rutherford, instructed by Usman Khan Solicitors  
For the appellant: Ms CF Johnstone, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Smith promulgated 21.9.15, allowing the claimant's appeal against the decision of the Secretary of State, dated 25.3.15, to refuse her application made on 10.2.15 to vary leave to remain and to remove her from the UK pursuant to section 47 Immigration Asylum and Nationality Act 2006 . The Judge heard the appeal on 16.9.15.
2. Designated First-tier Tribunal Judge Manuell granted permission to appeal on 2.2.16.
3. Thus the matter came before me on 30.3.16 as an appeal in the Upper Tribunal.

## Error of Law

4. For the reasons set out below I find such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Smith to be set aside and for the decision in the appeal to be remade in the First-tier Tribunal, in accordance with the attached directions.
5. The relevant background can be summarised briefly as follows. The claimant, who is 68 years of age, has in the past regularly visited the 6 of her children who are resident in the UK. On each occasion she did so with a visit visa. She last entered the UK on 30.9.14, but failed to leave and became an overstayer, claiming that her ill-health prevents her from returning to Pakistan where there would be no care available for her. She has a husband and three further children still in Pakistan. However, it is said that the husband is too frail to care for his wife and the children have their own commitments.
6. Judge Smith did not allow the appeal outright but, finding that she had not followed her own policy in respect of compassionate circumstances, purported to quash the decision of the Secretary of State and 'remit' it to her to make a further decision. It follows that Judge Smith did not address the substantive issues in the appeal.
7. In granting permission to appeal Judge Manuell found it "arguable that the judge erred in her interpretation of the reasons for refusal letter because those issues had been considered under the heading 'Exceptional Circumstances' which amounts to the same thing. AS (Afghanistan) v SSHD [2009] EWCA Civ 1076 may be relevant. Permission to appeal is granted accordingly."
8. The First-tier Tribunal has no power of remittal to and no power to quash a decision of the Secretary of State. However, the intention of the First-tier Tribunal Judge is plain: to allow the appeal on the limited basis that the decision of the Secretary of State was not in accordance with the law, so that it remains for the Secretary of State to make a decision on the claimant's application which is in accordance with the law.
9. The claimant's undated Rule 24 reply, supplemented by Mr Vokes' skeleton argument dated 15.2.16, asserts that the grounds are misconceived in law. It is submitted that in addition to making a claim on the basis of private and family life under article 8 ECHR, the claimant submitted that there were sufficiently compelling compassionate circumstances to warrant a grant of discretionary leave outside the Rules. Reference is made to the Secretary of State's policy, recited at §11 of the decision of Judge Smith, suggesting that compelling compassionate factors are exceptional circumstances outside of Article 8.
10. However, it is clear from the refusal decision that exceptional circumstances were considered, stating "It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances." The refusal decision goes on to consider the very matters relied on in the application to the Secretary of State, including, in some detail, the claimant's health and what care provisions there might be for her in Pakistan. The matters relied on by the claimant

were set out in the letter from her solicitors, dated 10.2.15, including that she is totally dependant for her care and well-being on her two sons and daughters in the UK and does not have anyone capable of looking after her in Pakistan, and that given her medical condition and care needs she cannot return to Pakistan.

11. The Secretary of State considered that there were no exceptional circumstances in her case.
12. It is relevant to this consideration that the Immigration Rules under sections E-ECDR and E-ILRDR of Appendix FM provide for the settlement of an adult dependent relative. This claimant could not meet those requirements, not least because they apply only to entry clearance and those in the UK with existing valid leave to remain as an adult dependent relative, and not to other applications for leave to remain. However, the high threshold set out in those provisions, together with the specified evidence required under Appendix FM-SE are highly relevant to the assessment of what might be considered as compelling compassionate circumstances outside the Rules. The Rules are, of course, the Secretary of State's balanced response between private and family life claims and the public interest in immigration control. Those provisions require the application to demonstrate that as a result of age, illness or disability they require long-term personal care to perform everyday tasks and that they are unable, even with the practical and financial help of the sponsor, to obtain the required level of care in their home country because either it is not available and there is no person in that country who can reasonably provide it, or it is not affordable. The specified evidence required to justify such a claim is also quite comprehensive.
13. I see no practical difference between the policy relied on by the claimant and the way in which the claimed compassionate or exceptional compelling circumstances were considered in the refusal decision. Whether the considerations are within or without family and private life rights makes no material difference as they were in any event considered in full. In the circumstances, the First-tier Tribunal should have gone on to consider the appeal substantively. In failing to do so the Tribunal erred in law so that the decision allowing the appeal cannot stand.
14. 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. There has been no determination of the substantive issues in this appeal.
15. 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 parties of a fair hearing and 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.

**Conclusions:**

16. 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.

I set aside the decision.

I remit the making of the decision in the appeal to the First-tier Tribunal in accordance with the attached directions.



**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

Deputy Upper Tribunal Judge Pickup

**Consequential Directions**

17. The decision is remitted to the First-tier Tribunal sitting at Nottingham, or such other Tribunal venue as the Tribunal administration deem appropriate;
18. The appeal is to be reheard afresh in its entirety;
19. The estimated length of hearing is 1.5 hours;
20. There will be 3 witnesses, including the claimant;
21. An interpreter in Urdu, Mirapuri dialect will be required;
22. The Tribunal venue and courtroom must be accessible and meet the needs of the claimant's witnesses, one of whom has limited mobility.

**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.

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.

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 decided.

A handwritten signature in black ink, appearing to read "James", is centered on the page. The signature is written in a cursive style with a large initial 'J'.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**