Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/24534/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 May 2017	**On 15 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

TAHIRA BIBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Baruah of Counsel instructed by Marks & Marks Solicitors
For the Respondent: Mr K Norton, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Birk promulgated on 6 July 2016 dismissing the Appellant's appeal against a decision of the Respondent dated 30 April 2015 refusing a human rights claim.

2. The Appellant is a citizen of Pakistan born on 12 February 1989. Her immigration history is helpfully set out at page 2 of the Respondent's 'reasons for refusal' letter ('RFRL'). This is a matter of record, and

accordingly it is unnecessary to set out in detail the entire history here; in due course I will focus upon particular aspects of it. Suffice to say for the moment: the Appellant arrived in the UK on 10 March 2001 (at the age of 12) and was included as a dependant in her father's asylum claim, which although ultimately unsuccessful resulted in a grant of discretionary leave to remain ('DLR') from 18 August 2011 until 17 August 2014; an application for further leave to remain was made on 17 July 2014; the application was refused for reasons set out in the RFRL.

3. The Appellant appealed to the IAC. The appeal was dismissed by First-tier Tribunal Judge Birk for reasons set out in a Decision promulgated on 6 July 2016. The Appellant sought permission to appeal to the Upper Tribunal, which was initially refused by First-tier Tribunal Judge Wellesley-Cole but subsequently granted by Deputy Upper Tribunal Judge Davey on 1 March 2017.

4. The case was listed before Deputy Upper Tribunal Judge McGinty on 20 April 2017. The Appellant sought and obtained an adjournment with Directions. In due course the matter was relisted and thus it came before me.

5. Ms Baruah, who had appeared before Judge McGinty (but had not appeared before the First-tier Tribunal and had not drafted the Grounds of Appeal), applied for a further adjournment. The adjournment application was resisted by Mr Norton. After hearing argument in support of the application I refused the adjournment and indicated that the appeal would proceed. I then – after the intervening lunch break - heard submissions on the issue of error of law. I reserved my decision.

Refusal of Adjournment

6. Before addressing specifically the adjournment application it is helpful to set out in some more detail the contextual history – which also in due course, as may be seen, will be relevant to considering the substantive issue of error of law.

7. The following chronology of pertinent events emerges from the materials on file:

23 JUN 2011: Letter from the Respondent's Case Assurance and Audit Unit to representatives acting for the Appellant's father on the subject of the Case Resolution Directorate programme dealing with the backlog of older asylum cases – i.e. so-called 'Legacy' cases. The letter requested confirmation of current address and the personal details of the Appellant's father's and his dependants. The Appellant was included in the list of family members of which the Respondent was

aware; her date of birth was also stated by the Respondent – from which it would have been manifest that she was already over 18 (in fact being 22 years of age at the date of this letter).

18 AUG 2011: Standardised letter from the Respondent to the Appellant's father "+ *Dependants*" informing them of the grant of Discretionary Leave to Enter. Leave was granted until 17 August 2014.

16 JUL 2014: Solicitors letter to the Respondent's Status Review Unit written on behalf of the Appellant, her parents and siblings, requesting a grant of a further three years discretionary leave to remain. Amongst other things the letter asserts that "*this is one family unit*", and that there has been "*no fundamental changes*" since the grant of discretionary leave to remain in 2011. (See further below.)

30 APR 2015: Respondent's decision refusing the Appellant further leave to remain. The decision was taken with reference to Appendix FM of the Immigration Rules after consideration of the Appellant's family life with her partner and her status as a parent; by reference to paragraph 276ADE after consideration of 'private life'; moreover it was not considered that there were any exceptional circumstances in the case. In the context of the issues that have become the focus of these proceedings it is particularly pertinent to note the following: "*You entered the UK with your family on 10-03-2001 and you were granted leave as a dependant on 18 August 2011 until 17 August 2014. It is noted that you are no longer being considered as a dependant in the case as you have now established your own life and will be considered accordingly*".

19 JUN 2015: The Appellant's parents and four of her siblings granted further leave to remain "*in accordance with the published Home Office Asylum Policy Instruction on Discretionary Leave*" until 18 June 2018. (A fifth sibling is now a British citizen.)

3 JUL 2015: Appellant's Notice of Appeal and Grounds of Appeal. The Grounds plead amongst other things that the Respondent failed to have regard to her own Discretionary Leave Policy Guidance: "*In particular, the Appellant will submit that she was not granted discretionary leave to remain 'as a dependant' in 2011. At the time of the grant she was aged 22 years; she had then lived in the UK from the age of 12 to 22 and she was 'eligible' for a grant of discretionary leave in her own right under the policies in place at that time*" (Grounds at paragraph 4).

21 JUN 2016: Hearing before First-tier Tribunal Judge Birk. It is apparent from the Appellant's Skeleton Argument dated 19 June 2016 (drafted by Counsel who appeared before the First-tier Tribunal) that at the core of her case was a submission that she should have been granted a further 3 years leave to remain in accordance with policy in respect of transitional arrangements for those granted discretionary leave to remain before 9 July 2012. It was acknowledged that such policy did not apply if it could be shown that the circumstances that related to the grant of leave had changed such that it could be said that the basis upon which the previous leave had been granted did not persist: however it was submitted that there had been no such material change of circumstances. In particular it was argued that "*Whilst it is accepted that [the Appellant] was dependent upon her father's asylum claim by the time the family were granted leave to remain in 2011 she was aged 22 and thus was not a dependent child under 18*" (Skeleton Argument at paragraph 4). Further it was contended that at the time of the grant of discretionary leave the Appellant "*had her own private life in the UK that was separate to her ties to her family*", and in consequence "*It was submitted that she was not granted leave to remain because of her family life in the UK, rather it was based on her private life*" (paragraph 9). In essence it was argued that her current circumstances were an aspect of her own private life and thereby did not constitute a material change of circumstances from the time of the grant of DLR; in the same vein it was essentially contended that she had not been granted DLR as a family member of her father and therefore she could not be denied the benefit of the 'transitional arrangements' on the basis that she was now living independently of her father and that there had therefore been a material change of circumstances.

5 JUL 2016: Decision of Judge Birk dismissing the Appellant's appeal promulgated.

20 APR 2017: Hearing before Deputy Upper Tribunal Judge McGinty. The Appellant applied for an adjournment to seek clarity by way of disclosure from the Respondent in respect of the basis of the grant of discretionary leave to the Appellant. It was observed that the application was "*made exceedingly late in the day*" (paragraph 4), and it was acknowledged by Ms Baruah that such an application had only been instigated upon her advice on the previous day: Ms Baruah had not previously been involved in the appeal. Nonetheless Judge McGinty was persuaded that the basis of the grant of discretionary leave to remain was potentially relevant to a consideration of Article 8 grounds, and in particular whether the First-tier Tribunal Judge may

have "*proceeded on a mistaken factual basis*" (paragraph 8). Specifically the issue was whether the Appellant's current circumstances represented a material change in circumstances such that she could not take advantage of Home Office policy, or whether – as she contended – there had been no material change of circumstances and accordingly she could take advantage of policy.

28 APR 2017: Judge McGinty's adjournment decision promulgated include a Direction that "*The Respondent do file and serve the case notes supporting the previous decision letter in respect of the previous grant of discretionary leave in 2011 for the Appellant, plus any further documentation in respect of any other members of the family that the Respondent seeks to rely upon...*".

10 MAY 2017: Respondent's written response to the Directions of the Upper Tribunal, prepared by Mr Chris Avery of the Specialist Appeals Team, (who had been the Presenting Officer before Judge McGinty), enclosing the Respondent's letters of 23 June 2011 and 18 August 2011 (see above). In material part the Respondent's response to Directions is in these terms:

> "*This was a Legacy case handled initially by the Case Resolution Directorate and then the Case Assurance and Audit Unit. Consideration of the case had been considerably complicated by the appellants initial claim to be Indian nationals from Kashmir.*
>
> *In this instance there does not appear to be a specific case-working note relating to the decision to grant DL but the normal criteria relating to Legacy cases will have been applied in the making the decision. It is however clear that the family have always been treated as a family unit with Mr Abdel Qayoom, the appellant's father, as the principal. ...*
>
> *There is nothing in the papers to indicate that this appellant had ever been granted DL on the basis of her own private life, or even that such a case was put...*"

18 MAY 2017: Letter from the Appellant's solicitors to Mr Avery notifying the Respondent of an application for an adjournment of the hearing listed on 23 May 2017. The letter states in part "*the issue within the appeal centres on our contention that as an 18-year-old our client was not granted discretionary leave on the basis of family life with her father but on the basis of her private life in the UK*". The letter was 'copied' to the Tribunal by way of application for adjournment.

19 MAY 2017: Notice issued to the parties informing them of the refusal of the adjournment application by Upper Tribunal Judge Rintoul in these terms: "*Your application for an*

adjournment is refused. While the assertion that the respondent is in breach of directions is noted, she has not asked for additional time, and it is not clear that the breach of directions would prejudice the appellant."

8. Ms Baruah renews the application for an adjournment already dismissed by Judge Rintoul. It is argued that the Respondent's reply to Directions is not categorical. It is also said that the Appellant now wishes to pursue a 'subject access request' to obtain details of her file held by the Respondent.

9. I have noted the contents of the adjournment application letter of 18 May 2017, expanded upon in part by Ms Baruah in the course of her submissions. The letter in particular seizes upon Mr Avery's use of the word 'appear' in the phrase "*there does not appear to be a specific caseworking note relating to the decision to grant DL*", and suggests that this does not constitute "*a categoric and definitive answer*". In my judgement this seeks to place too much emphasis on one word. I am satisfied that Mr Avery as an experienced Presenting Officer aware of his duties to the Tribunal intended to convey, and adequately conveyed, the meaning that there was not to be found on the Appellant's file a specific caseworking note relating to the decision to grant her discretionary leave. Ms Baruah makes no suggestion that Mr Avery's integrity is to be impugned.

10. I remind myself that this is an error of law hearing. The adjournment is sought to obtain evidence as to a 'hoped-for' fact upon which the Appellant would like to support a submission of error of law by way of contending that the First-tier Tribunal proceeded on a fundamental misconception of fact. In essence it may be seen that what the Appellant is seeking to do is to obtain evidence from the Respondent that might support the factual premise of her submission that she should have the benefit of the Appellant's policy in respect of transitional arrangements.

11. I make no personal criticism of Ms Baruah for seeking to do the best by her client. However, in so doing she has in substance embarked upon the pursuit of 'new' evidence ('new' in the sense of not having previously been before the Tribunal) in the hope of obtaining something useful to support a contention of fact. It seems to me that save in very exceptional circumstances the pursuit of new evidence will not ordinarily be appropriate in, or appropriately inform, consideration by the Upper Tribunal of 'error of law' on the part of a first instance Tribunal. To that extent I seriously doubt the appropriateness of granting the adjournment that Ms Baruah sought in April 2017 and the making of the Direction of 28 April 2017. It seems to me that the evidential basis of the Appellant's case should properly have been dealt with by her in the context of the proceedings before the First-tier Tribunal, and the Appellant's preparation for those proceedings. For my own part I am not persuaded

that it was appropriate that the proceedings before the Upper Tribunal in respect of error of law should have been permitted to afford the Appellant a further opportunity to gather evidence in support of her case.

12. Be that as it may, an adjournment was indeed granted with a Direction to which the Respondent has now replied. In my judgement the Respondent's reply is entirely adequate. In so far as the Respondent was directed to "*serve the case notes supporting the previous decision letter in respect of the previous grant of discretionary leave in 2011 for the Appellant*", Mr Avery adequately responds by stating that there are no such case notes apparent on the file. In so far as the Direction extends to "*any further documentation*" upon which the Respondent seeks to rely, the letters of 23 June 2011 and 18 August 2011 have been filed.

13. Ms Baruah's submission in support of the application for yet a further adjournment really comes down to this: the material produced in response to the Direction of the Upper Tribunal is unsatisfactory and the Respondent should be redirected to produce further evidence in respect of this issue, or the Appellant should be afforded time to obtain it for herself by way of a 'subject access request'. I do not consider the Respondent's response to the Direction to be inadequate and I do not consider that any useful purpose is served by inviting the Respondent to look again at the materials that it is clear Mr Avery has appropriately considered and reported upon. Nor, given Mr Avery's response, is it possible to discern that any further information supportive of the Appellant's case would be available pursuant to a 'subject access request'.

14. In all such circumstances I could identify no useful purpose in adjourning the hearing on the basis that the Respondent should be directed to scrutinise further the Appellant's file, and/or her family members' file/s, or for the Appellant to pursue a 'subject access request'. The response to Directions makes it clear, in my judgement, that there is nothing material to the issue that has become central in these proceedings to be uncovered by scrutiny of the Appellant's file.

15. The Appellant's application for an adjournment was refused accordingly.

Consideration of 'error of law'

16. The matters set out above are relevant to an understanding of, and a consideration of, the principal line of argument pursued by the Appellant before the Upper Tribunal. The Appellant essentially contends that she was granted discretionary leave to remain in August 2011 in her own right independent of her family and by reference to her own private life, and that the First-tier Tribunal Judge was in error in concluding otherwise.

In particular the Appellant seeks to impugn paragraphs 24 and 25 of the First-tier Tribunal's decision.

17. In the first instance, bearing in mind the context of an error of law hearing, I would observe that the contentious issue as to the basis upon which the Appellant had been granted leave in August 2011, and the related issue as to whether there had been a change in circumstance relevant to the Respondent's policy, were essentially issues of fact for the evaluation of the First-tier Tribunal Judge. To that extent any challenge to the Judge's conclusions is in substance an attempt to revisit findings of fact. It was for this reason, perhaps, that so much significance was placed on seeking to identify what might have been recorded in the Respondent's case file in order to argue that both the Respondent in the RFRL, and in turn the First-tier Tribunal Judge, had proceeded on a fundamental misconception of fact amounting to an error of law by concluding that the Appellant was granted discretionary leave as a dependent of her father (e.g. as per the RFRL at the bottom of page 5 of 11, and as quoted in the chronology at paragraph 7 above).

18. As indicated above the Appellant has been unsuccessful in her quest made in hope that something determinative would be apparent on the Respondent's caseworker notes.

19. In my judgement the First-tier Tribunal Judge's conclusion at paragraph 25 that the Appellant was in different circumstances when she made her application for further leave to remain compared with the circumstances at the date of the grant of discretionary leave such that she could not avail herself of the benefit of the Respondent's policy was entirely sustainable and adequately reasoned.

20. Moreover, in the premises it seems to me absolutely clear with the benefit of the letters filed in response to the Direction sought by the Appellant from the Upper Tribunal, that as between the letter of 23 June 2011 inviting confirmation of the personal details of the Appellant's father and his family members, and the grant of discretionary leave to remain approximately 8 weeks later, nothing of substance was communicated to the Respondent to suggest that the Appellant was no longer a dependant of her father. In my judgement it is clear that the Respondent granted discretionary leave to remain to the Appellant on the basis that on the information available to the Respondent's decision-maker the Appellant was indeed still a dependant of her father.

21. Further in this context, and in any event I note that nothing has been filed in the proceedings before the First-tier Tribunal or since to suggest that the Appellant had established an independent life by August 2011. In the Appellant's witness statement before the First-tier Tribunal she refers to completing her A-levels in 2011, being unable to apply to go to college

at that time because she did not yet have discretionary leave to remain, and then states "*after my A-levels and until my marriage I was at home helping my mother with the care of the rest of the family*" (Appellant's appeal bundle before the First-tier Tribunal at page 41, paragraph 6). The Appellant states that she was married in an Islamic ceremony in November 2012 (later registered pursuant to a civil ceremony on 8 January 2013), and that she began cohabitation with her husband from the date of the Islamic ceremony (paragraph 8). This sequence suggests that the Appellant was indeed living at home as a member of her father's family unit, not in employment and not studying, at the date of discretionary leave to remain - and it was not until over a year after such grant that she moved away from her parents and siblings. (However even in this context it is to be noted that in the Appellants DL Form submitted with the application for further discretionary leave to remain she gave a later date for leaving the family address - 27 April 2013: see Respondent's bundle before the First-tier Tribunal at E3.)

22. In the application covering letter of 16 July 2014 seeking further leave to remain – drafted by the same representatives to whom the Respondent had written on 23 June 2011 - the Appellant is included in the list of family members that appears as the subject of the letter; all family members, including the Appellant, are listed with the same current address. The opening paragraph states in terms "*Please note that this is one family unit*". Indeed, the letter closes by emphasising this claimed circumstance: "*You will also note that in the culture of the Asian community, especially in the subcontinent, there is a strong belief in the family unit. As you will see from the documents before you they are all living in the same family residence and have strong family ties*". Yet further it seems to me that the specific request for a grant of a further three years leave to remain, and the reference to "*no fundamental changes*" having taken place is a conscious echo of the transitional arrangements. On its face I find that this letter was written on the basis that it was understood that the Appellant, despite being 22 years of age at the time, was granted discretionary leave to remain as a member of her father's family, and it was now sought to secure further discretionary leave to remain on the basis that she continued to be a member of her father's family unit and as such there had been no change of circumstances since August 2011.

23. It has subsequently transpired that the contents of the letter of 16 July 2014 were inaccurate, that is untruthful, in asserting that all members of the family including the Appellant constituted "*one family unit*". For example, it is apparent from other documents on file, including in particular the Appellant's daughter's birth certificate based on a registration date of 5 March 2014, and a letter offering employment from 10 July 2014, that the Appellant was not living at the address given in the application letter of 16 July 2014. Indeed, the Respondent in due course refused the Appellant's application, despite granting discretionary leave to the other members of the family, because it was determined – as

indeed the Appellant accepts – that she was no longer living as a member of her father's household or family unit.

24. Notwithstanding the inaccuracies, it is to be noted that the application letter of 16 July 2014 confirms, and encloses, "*our clients' letters of authority dated 15 July 2014*".

25. Be that as it may, it seems to me that the real significance of the letter of 16 July 2014 in the context of the issue at hand is this. On its face the letter of 16 July 2014 constituted an attempt (seemingly made with due authority from the Appellant), to represent her inaccurately as still being a member of her father's household, on the premise that such a circumstance did not represent any change from the circumstances in August 2011. It may be inferred from this that the Appellant's representatives at that time (who had also been the family's representatives in 2011) understood, and in turn the family understood, that they had all been granted DLR on the basis of being members of the family unit of their father. It was only subsequent to the Respondent's decision in respect of the Appellant that any other scenario was advanced. In my judgement the submission that has been formulated to advance the Appellant's case has essentially been driven by expedience rather than because it is soundly rooted in fact. In my judgement it is transparent that hitherto the Appellant, her family, and their advisers understood and acknowledged that she had indeed been granted discretionary leave to remain in line with her other family members and on the basis of being a member of her father's family unit.

26. Moreover, and in any event I have ultimately reached the conclusion that it is more likely than not that there is no evidence by way of a file note to support the notion that the Appellant was granted discretionary leave to remain independently of the discretionary leave granted to all of her other family members, or that she was so granted discretionary leave on some different basis from her other family members.

27. In all such circumstances I reject the notion that the First-tier Tribunal Judge fundamentally misconceived the facts by overlooking that the Appellant had been granted discretionary leave to remain in her own right independent of her relationship to her father.

28. Even if it were otherwise, I am not satisfied that that would be determinative of the appeal in the Appellant's favour. It seems to me that the way in which the Appellant has sought to advance her submission that there has been no material change of circumstance is so fundamentally tenuous in nature that it lacks merit.

29. In essence the Appellant has sought to argue that because she was granted DLR in August 2011 on the basis of her own private life (and not on the basis of her shared family life with her father and his other dependants), and because she seeks to rely upon her own private life in her application for further leave to remain, there has been no material change of circumstances. In short, the Appellant has argued that because the umbrella term 'private life' covers both her circumstances in August 2011 and in July 2014 to date, there has been no change. In substance this is to equate a change of circumstance with whether or not the term 'private life' can be consistently applied; that is, a change of circumstance only takes place if there is a shift from reliance upon 'family life' to reliance upon 'private life', or vice versa.

30. I do not consider such a proposition to be sound. Such a submission guilefully avoids the facts that the Appellant was a single person with no independent income living in her parents' home helping her mother with domestic chores in 2011, but was by 2014 a married person living with her husband, was a mother, and had undertaken employment. The fact that both sets of plainly different circumstances might be characterised as falling within the ambit of the umbrella term 'private life' within the meaning of Article 8 does not, in my judgement, determinatively indicate that there has been no material change of circumstances. Indeed on the facts it flies in the face of commonsense to suggest that there had been no change of circumstances. Irrespective of the fact that she had reached her majority by 2011, the Appellant was plainly still a dependant of her father (who was in effect the f*ons et origo* of the grant of DLR to her), whereas by 2014 she was not.

31. As was acknowledged in the Skeleton Argument before the First-tier Tribunal, the Appellant could not claim the benefit of the Respondent's policy if "*the circumstances that related to the grant of leave have changed so that it can be said that the grounds upon which [the Appellant] was previously granted leave to remain do not continue to exis*t" (Skeleton Argument at paragraph 2). In my judgement it is absolutely clear that the circumstances had changed. More particularly, the First-tier Tribunal reached such a conclusion – which in my judgement was the only reasonable conclusion open on the evidence.

32. In all such circumstances I reject the Appellant's principal challenge to the decision of the First-tier Tribunal.

33. The Appellant also raised grounds of challenge in support of the application for permission to appeal in respect of the First-tier Tribunal Judge's approach to paragraph 276ADE of the Immigration Rules. Ms Baruah did not pursue such grounds before me with any vigour: she indicated that they were relied upon as drafted, and were not abandoned; however she also indicated that she did not seek to amplify such grounds by way of oral submissions.

34. Challenge to the Judge's approach to paragraph 276ADE is set out in the renewed grounds to the Upper Tribunal at paragraphs 7-9: (see also the initial grounds at paragraphs 11-13). The challenge relates to the Judge's consideration of 'significant obstacles'. It is pleaded in particular that the Appellant would be returning "t*o a very conservative society where the rights and freedoms of women are significantly restricted*".

35. I see no merit in this challenge. Contrary to paragraph 8 of the Grounds, the Judge did have regard to the fact that the Appellant had been present in the UK since the age of 11; did factor this circumstance in to her consideration of the question of relocation and reintegration; and was plainly aware that the Appellant had grown up in a liberal Western society. The contention that the Judge failed to have regard to such matters is unsustainable. See in this context in particular paragraph 14 of the First-tier Tribunal's decision, but also paragraphs 15-17.

36. At paragraph 9 of the Grounds it is pleaded that although the Judge identified that the Appellant had expressed a concern that her in-laws in Pakistan would restrict her ability to work there, the Judge erred in failing to conclude that this did not constitute a significant obstacle to reintegration. This is essentially a disagreement with the outcome, and does not in itself identify an error of law. In any event I note that under paragraph 276ADE the issue is one of integration into the country to which a person is expected to depart. The issue of integration is to be considered irrespective of the nature of the social and cultural norms or mores of the particular country: the question is whether or not the individual would face very significant obstacles to integration; it is not a question to be determinatively decided on the basis of some comparative analysis of the freedoms of that country (or restrictions thereupon) and the freedoms of the UK - albeit that such matters may be relevant to an overall consideration of the ability to integrate. The Judge sustainably concluded that the Appellant would be able to integrate into Pakistan notwithstanding the differences between that country and the UK, fully recognising that the Appellant would encounter real differences and experience some difficulties in adjusting.

37. In all the circumstances I do not identify any error of law in the approach of the First-tier Tribunal Judge

NOTICE OF DECISION

38. The decision of the First-tier Tribunal contained no error of law and stands. The Appellant's appeal remains dismissed.

Signed: **Dated: 14 August 2017**

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Deputy Judge of the Upper Tribunal I. A. Lewis