



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/27559/2012

THE IMMIGRATION ACTS

Heard at Field House

**On 26 April 2013 & 19 June 2013
Prepared 15 July 2013**

**Determination
Promulgated
On 17th July 2013**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

RAZIA EBRAHIM ATTIA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nasim, Counsel, instructed by A K Law Chambers
For the Respondent: Ms Isherwood, Presenting Officer (26/04/13)
Ms C Martin, Presenting Officer (19/06/13)

DETERMINATION AND REASONS

1. The appellant with permission against the determination of First-tier Tribunal Judge M A Khan promulgated on 27 February 2013 dismissing her appeal against the respondent's decision made on 27 November 2012 to refuse her leave to remain in the United Kingdom.

2. The appellant is a citizen of Pakistan born 6 February 1963. It is her case that she is married to Mr Saleh, who is a British Citizen, and that they have a son born in 1999. who is also a Pakistani citizen as he was born before his father was naturalised.
3. The appellant and her son entered the United Kingdom on 6 July 2011 with leave to enter as visitors. On 19 December 2011 the appellant applied for leave to remain as the spouse of a British citizen; no application was made for their son to be granted leave in line. The application was refused on 11 November 2012 by reference to Appendix FM and paragraph 276 ADE of the immigration rules. The respondent also took a decision to remove the appellant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.
4. The appeal against these decisions came before First-tier Tribunal Judge M A Khan on 21 February 2013. He was not satisfied that the appellant's son is the son of the sponsor; that the relationship between the appellant and her husband was subsisting; or, that removing the appellant to Pakistan would be in breach of her protected rights pursuant to article 8 of the Human Rights convention. He therefore dismissed the appeal on immigration rules and human rights grounds but allowed the appeal against the section 47 decision. Permission to appeal against that decision was granted by First-tier Tribunal Judge Saffer on 19 March 2013. The matter then came before me on 26 April 2013.

Did the determination of the first-tier Tribunal involve the making of an error of law?

Hearing on 26 April 2013

5. Mr Nasim sought permission to vary the grounds of appeal to include a claim that the judge (and the respondent) had erred in considering the appeal by reference to appendix FM and paragraph 276 ADE, given the transitional provisions set out in HC 194, as the application had been made prior to 8 July 2012.
6. In the circumstances, and given that this was a clear error acknowledged by Ms Isherwood, I was persuaded that it would be appropriate to admit this late ground of appeal.
7. I am satisfied that this ground of appeal is made out, and that determination had been made by reference to entirely incorrect provisions of the immigration rules; the application should have been considered by reference to paragraph 284 of the Immigration Rules.
8. That said, as Mr Nasim candidly admitted, the appellant could not meet the requirements of paragraph 284 of the Immigration Rules as she had not at the time of application been in possession of leave to remain for a period of sufficient length.

9. I am persuaded that, as the appellant contends, the conclusion that the appellant's son is not the son of the sponsor, was made as a result of errors of fact. The judge ignored the presumption that a child born within wedlock is the child of the married couple. He also misread the child's passport which gives his surname as "Saleh" followed by a comma and then his forenames as giving "Saleh" as his first name. While there are differences in the transliteration into English of the forenames, there is no indication that there was any variance in the Urdu originals, and I take note that there are several different renderings into English of Mohammed. Further, it was incorrect to state that there was no other evidence of the son's parentage; the sponsor's daughter had confirmed this in her evidence and the citizenship numbers in the appellant's passport and birth certificate match.
10. I considered that such an error is likely to have infected other findings about the marriage and the best interests of the child, and thus these are unsustainable.
11. Accordingly, for these reasons I am satisfied that the determination did involve the making of errors of law, and I set it aside. As it is accepted that, owing to the length of her leave to remain, the appellant cannot meet the requirements of the immigration rules, I do not set aside the determination insofar as it relates to dismissing the appeal on immigration grounds. I do not set aside that part of the determination relating to the section 47 appeal either. I do however, set aside the determination insofar as it relates to article 8 of the Human Rights Convention, and that part will need to be remade in its entirety. The matter was then adjourned, and I gave directions as to how the matter was to be remade, entailing a further hearing on 19 June 2013.

Re-making the determination

The hearing on 19 June 2013

12. When the matter came before me to be remade, I heard oral evidence from the appellant, the appellant's stepdaughter, the appellant's husband and the appellant's sister. In addition I heard submissions from both representatives.
13. The appellant adopted her witness statement and was cross-examined. She said that she had married her husband in 1998 but did not recall the date on which her husband had been divorced although appears to be January 1990. She said that her husband had last visited her in Pakistan in 2011 some one or two months before she came to the United Kingdom. She said that she had applied to come to the United Kingdom some four to five years before that to attend her sister's daughter's wedding and had been sponsored by her sister and her husband on that occasion. She said there had been no special reason to wait until 2011 to visit the United Kingdom again but that her husband had called her here and, as he was

not so well, she wanted to stay here. She said that she knew that she should have returned but her husband's condition was such that she realised that he needs her and she could not leave him here. She said that she and her husband had decided that they wanted to live together in one country and had applied for a visa in Pakistan but it had been refused. She did not recall when but it transpired that this was in 2001. She confirmed that the visa was to stay in the United Kingdom with her husband.

14. The appellant said that there was no special reason why she and her husband decided not to live together but he used to visit her regularly in Pakistan staying some three to four months each year. She said that they had had no other option prior to 2011 because an application had been made before and had been refused. It was put to her that all the previous visa applications had been for visit visas which she confirmed. As to why there had been no previous application to join her husband as a spouse she said she had told her husband but he had done nothing; that he was unwell and used to come to visit her in Pakistan which is why they never thought of coming here but that now he was not able to come to Pakistan and so she wanted to stay here. She said that her husband has kidney problems, diabetes and now problems with his eyesight which requires an operation in July 2013. She said he had not told her prior to July 2011 that he was unwell although she did know that he had diabetes and kidney problems. She said that before he came he was not feeling too bad but now feels worse and has a problem with hearing also. She said that prior to coming to the United Kingdom she had been in close communication with his daughter. She said the daughter had told her that her father was not well and that she had used to look after him but is now married and cannot do so. She said that the daughter works at John Lewis' on Saturday and Sunday and during the week stays at home to look after the children. She said she cannot look after her father as she has to take care of the children but that prior to her arrival in the United Kingdom the father had not been so well and now has difficulty getting up from his bed without help. She said he sometimes cannot control his bladder and has hearing problems. She said that she has also had to call an ambulance for him some two to three times. She denied exaggerating his illnesses.
15. The appellant said that she, her husband and their son live in a single bedroom in a shared house which is occupied by strangers. The rent is paid by housing benefit and she and the son's presence there has been declared. The room has a double bed and a single bed and there is a separate living room. She said that if she is granted permission to be here they will arrange another house and that she will be able to get a job to pay for that. She said at present they cannot afford to move to bigger premises as they cannot afford to do so.
16. The appellant said that prior to coming to the United Kingdom she had lived in a two bedroom flat with her son and no-one else; that she had started living in that flat after getting married, had lived there alone with her son and had had no problems at the time but the situation would now

be different as she has a grown up child whom she could not send anywhere in the city as there are so many cases of kidnapping. She said that she owned the flat; that it is currently deserted as there is no-one living there and that she still owns it.

17. The appellant said that her husband could not go to live in Karachi as he is getting medical treatment which would not be of the same standard as in the United Kingdom. She said she had no medical conditions. She said that once on one of the occasions her husband had been in Pakistan he had an accident and had to have an operation and on that occasion the medical treatment was ok. He said he would not be able to afford the medicine and treatment in Pakistan as it is free in the United Kingdom.
18. The appellant said that when she was living in Pakistan her husband supported her and her son but that he could not return to Pakistan nor could they occupy the flat and live there, the only reason being that her husband knows this country better.
19. The appellant confirmed that she had enrolled her son in school in the United Kingdom on 6 September 2011 but denied saying that by that stage she had fully intended to remain here, and the reason for his admittance to school being that she did not want him to waste his time. She confirmed that she had waited until December 2011 to make an application. She said that her son would get a good education here which he would not be able to get in Pakistan and that her son is attached to his father. She said that most of the time the schools in Karachi are closed due to the situation but that when he was there he got a good education. She said her son is happier here and likes the education here. She said that her husband had paid for the son's school fees in Pakistan.
20. I then heard evidence from the appellant's husband who adopted his witness statement and was cross-examined. He gave evidence through a court interpreter.
21. The sponsor said that between 1998 and 2011 he did not make an application for his wife to join him here as he used to visit her regularly, was fit, and felt no need for this. He said he was not happy and used to visit regularly and that he had to live here due to his medical condition and he was totally unfit. He said that now his condition is worse and he cannot visit her; that his health has changed and he gets up in the night and needs to be taken to the bathroom. He said that his health is getting worse since June 2011, that his left leg was fractured and has three screws in it. He said that he confirmed that his health had begun to deteriorate substantially from 2009; that he told his wife about this and she had suggested that he should come to Pakistan but he was not able to travel or, that he should call her to the United Kingdom as he could not live without her. He said that he had decided to call her to the United Kingdom because he was not able to travel due to his medical condition.

22. The husband said that he did not recall when his son had been enrolled in school in the United Kingdom or when the application had been made for his wife to stay here. He said that he did not want to break his son's education which is why he was enrolled in September 2011 and that he had come here initially during his holidays.
23. After some difficulty in comprehending the questions, the husband confirmed that the application he had made in 2001 was for a visit and that there had been no intention for his wife to stay in the United Kingdom. He said that they had thought that when she comes here they would decide whether or not she would live here permanently.
24. The husband said that his daughter had used to help care for him but she was not able to visit regularly as she had been at university. She said that she has a full-time job, working Monday to Friday 9 - 5 at John Lewis and some weekends as well. She said that she is a single mother with two children and lives with her mother.
25. The husband said that he, his wife and the children all live in one room, that he pays £173 a week in rent which is paid by housing benefit and the government is aware that both his wife and child live there. He said that he supports his family on his pension and that if his wife gets status here she would do a part-time job and they would be able to get a better life as they could not all stay in one room.
26. The husband said that the property his wife had lived in in Pakistan had been his father's property long ago and that this had been sold. He said that it was a two bedroom house, it had been sold to pay money to creditors. It was put to him that his wife had said something different in her own evidence and he said that the sale of the house had not been finalised due to a dispute with the creditors eventually adding that the house was to be given to the creditors to settle the debt. He also said that the creditors were relatives.
27. The husband said that he had every right to stay in the United Kingdom as he is a British citizen, he is very sick, has spent half his life here and cannot start again in Pakistan. It was put to him that essentially it was more convenient for him to remain here to which he agreed. He said his son could not return to Pakistan now as people think all British citizens are multimillionaires and try to kidnap them.
28. In re-examination the husband said that his wife had lived in Karachi in the same house which had been owned by him with his son.
29. I then heard evidence from Sarah Attia, the appellant's stepdaughter. She adopted her witness statement adding that she had studied law but in 1999 to 2005, followed by a masters degree and the LPC in 2009/10. She said she is about to start work next week as a Case Adjudicator for the Financial Ombudsman and part of that has been working for John Lewis for

the past twelve years, at times part-time, at other times full-time particularly over Christmas and other busy periods.

30. Miss Attia said that at the time her stepmother had come here her father had diabetes but did not recall how bad his health was at the time and that although he was frail, it was not to the extent that it is now. She said that the appellant had not been brought to the United Kingdom as a carer but that it was in part a visit for her to see her children. She said it had not been an intention to apply for a spouse visa as up to that point it was for her to visit and return to Pakistan. She did not know whether her father and stepmother were happy in their relationship living apart but that there were no cracks and considered she could see and that they have a loving relationship. She said she did not know why her father did not want his wife to be with her and to have joined her and she had enough going on in her own life not to ask those questions. She said she had a close relationship with her stepmother but it would be difficult to continue were she to return to Pakistan. She said that her father had now been in the United Kingdom for forty years and he did not need to relocate.
31. I then heard evidence from Safia Begum Khan, the appellant's sister, who adopted her witness statement and was then cross-examined. She confirmed that she had used to take money to the appellant in Pakistan, given to her by the husband, that she had last been in Pakistan the previous month for a period of three weeks. She said she did not go to Pakistan every year.
32. There are, as Ms Martin submitted, a substantial number of differences between the evidence given by the witnesses who appeared before me. In assessing these, and the evidence of the witnesses overall, I note that the appellant, her husband, and the appellant's sister all gave evidence through an interpreter. It was also evident that the husband had difficulty in hearing the questions put to him and, it would appear, in understanding what was being asked.
33. In assessing the evidence, I bear in mind that the appellant and her husband were asked about incidents which had occurred as long ago as 2001. Further, as is indicated by the reports from the husband's GP dated 14 March 2013 indicates, his health is failing.
34. It is not clear from the evidence of the appellant and her husband that she thought the application made in 2001 was to join her husband permanently. It is not in dispute that the application was for a visit visa or that it was refused or that no appeal was lodged. Whilst Ms Martin sought to draw inferences adverse to the appellant from apparent discrepancies to whether she thought she was able to stay here permanently whereas her husband had said that he knew it was a visit visa, the words put to the appellant were that she wanted to stay here. Had she been asked whether she was wanting to stay permanently or to remain here then this

might have been a distinction but there was no follow up on that point nor was she asked how long she intended to stay.

35. That said, it is not entirely clear from the evidence before me whether the parties were happy with that situation whereby the appellant and her husband spent three to four months a year together in Pakistan rather than cohabiting permanently. Further, if the intention in 2001 had been, as said, to be to see whether it would work out with them living in the United Kingdom together, that does not explain why no decision was made after the appellant had spent time here in 2005. It does not explain either why, if the parties were not happy with the situation, no application was made for the appellant to come here as a spouse at any stage.
36. Despite Mr Nasim's submissions to the contrary, I consider that there are discrepancies in the evidence before me as to what the appellant knew about her husband's state of health before she arrived in July 2011. He accepted that his health had been deteriorating since 2009 and that he discussed it with his wife; she however said that he did not. Even allowing for the possibility that the husband had concealed the extent of his ill-health, and that the appellant was not fully aware of this until she arrived, I do not accept that I am being told the truth about what was known. I do not, however, consider that Miss Attia was aware of any intention on the part of either the appellant or her husband that she would not return to Pakistan. She gave no evidence to that effect, nor was it put to her that she was not telling the truth.
37. It is of course possible that a decision was taken for the appellant to come to this country because by this stage the husband's illness had deteriorated to such extent that he could not safely travel to Pakistan but it does not necessarily follow that because the appellant and her husband have not been truthful about one aspect of the claim, that they have been untruthful about other aspects.
38. It does, however, appear that by September 2011, a decision had been taken that the appellant and her son would not be returning to Pakistan, at least for an extended period, given that steps were taken to enrol him in school. It appears that certainly by that stage, a decision had been taken that an application would be made for the appellant to remain here permanently.
39. It is difficult to assess how much weight to attach to the appellant's decision to remain in this country rather than to return to Pakistan in accordance with the terms of her visit visa. It was of course open to the respondent, on considering the application, to make a decision that deception had been used to obtain the visit visa and accordingly to declare the appellant an illegal entrant. No such steps were taken.
40. While there was extensive cross-examination regarding the appellant and her husband's intentions at various stages and the reasons why they cannot live together in Pakistan, there was little or no cross-examination

as to whether they are living together as husband and wife, whether it is their intention to do so permanently and indeed there was no alternative submission made that there was no family life in existence between the appellant and sponsor and that therefore the appellant could be expected to return to Pakistan as there is no family life between them.

41. It is, however, unclear who owned the property in which the appellant and her son lived in Karachi before they came to the United Kingdom. She described it as a flat; her husband described it as a house. She said that she owned it; he said that he owned it; she made no mention of there being any difficulties about the house and stated that the sole reason they were not living there was it was not convenient. His evidence is that the house had been promised to creditors to repay a loan and was somewhat equivocal as to whether or not it had in fact been sold.
42. The effect of the husband's evidence was to suggest that the property was no longer available in, what I consider to be, an attempt to divert the possibility that they could be expected to go back and live there. I consider that it is instructive that nobody mentioned the creditors before now and I considered that this is an embellishment. I consider that I have not been told the truth about the accommodation, and that this casts doubt on the credibility of the appellant and her husband.
43. I accept, there being no reason not to do so, that the husband did suffer an accident in Pakistan at some point in the past during one of his visits and he received hospital treatment there. It does not, therefore necessarily follow, Ms Martin having failed to address the chronology, that, as she submitted, the appellant's continuing medical needs which now of course may be considerably different, would continue to be met by the facilities in Pakistan. I bear in mind that he is a British citizen and is therefore entitled to NHS treatment and I accept that he would not be able to get free medical treatment in Pakistan. Except perhaps on an emergency basis and certainly not to the level of care he now receives.
44. I consider, however, that the appellant and sponsor have deliberately exaggerated the difficulties they would have on return to Pakistan in terms of the general situation. There is in reality little or no evidence to suggest that the appellant and her son would be at risk, given that she admitted they had had no problems before 2011. There is insufficient evidence before me to suggest that there had been such a deterioration since then that she or he would now be at risk nor that he would be seen as British and therefore wealthy. I consider that this aspect is also an embellishment in an attempt to show how difficult it would be for the family to relocate to Pakistan.
45. Viewed as a whole, where the evidence of the appellant and her husband is lacking in credibility and truthfulness relates to the appellant's intentions when she most recently applied for a visa and the alleged accommodation difficulties, as well as the general situation she and her son would face, on return. The issue of the husband's ill-health is

corroborated by documentary evidence from various medical sources, and the family circumstances in this country are confirmed by the evidence of the appellant's stepdaughter.

46. There was no challenge to the evidence of the appellant's stepdaughter whom I found to be an impressive and clear witness and who confirmed the existence of the relationship, and its continuance in this country, including the fact of their continuing cohabitation. While I have considered that she may, as a relative, have reason to support her father and stepmother's evidence, I have discounted that possibility, and no submission to that effect was made.
47. Whilst there are differences in the evidence between what she said and the appellant and her husband said about her work for John Lewis, it is evident from her evidence that her hours and days of working have fluctuated over time and at no stage was either the appellant or her husband asked if the answer they had given as to *when* Miss Attia worked was a current situation or one in the past. Whilst it may be said that their answers were less than fulsome, I bear in mind the circumstances of giving evidence in court, their relative unfamiliarity with the situation, the fact they were giving evidence through an interpreter and for a second time, and I am not satisfied that there is in reality any significant discrepancy in their evidence.
48. In taking these factors into account including the evidence as a whole, I consider that I am satisfied that the appellant and sponsor live together in one room in a shared house. I am satisfied that they have established a family life together.
49. In considering the paternity of the son, for the reasons given above, I am satisfied that there are no discrepancies in the documents relating to him which include his passport and birth certificate which name the appellant's husband as his father. The statements of both the appellant and husband confirm that he is their son and I consider that none of the evidence put forward by the respondent is sufficient to rebut the presumption that a child born within marriage is the child of the parents, given the evidence of Miss Attia.
50. In assessing whether it would be a breach of the human rights of the appellant, her husband and her son, to require the appellant, and in practice her son, to return to Pakistan, I bear in mind that the child's interest is a primary consideration. Whilst there is some merit in Ms Martin's submission that it is wholly inappropriate for a 14 year old to be living in the same bedroom as his parents, and that he would have his own room were he return to Pakistan, it is difficult to accept that such material considerations would outweigh the needs of the child to be with both parents. I consider that the former is in the appellant's interests although for the reasons advanced above it is not a position without difficulty. That said, it does not necessarily follow that the child's best interests are that he should remain in the United Kingdom with his parents.

51. As noted above, this is not a case to which, given the date of application to which Appendix FM of the Immigration Rules applies. That said, I do consider that due weight has to be attached to the Rules as an expression of how the respondent views the public interest in immigration control and the weight to be attached thereto.
52. In assessing Article 8, I have considered the five steps set out in **Razgar** [2004] UKHL 27. On the facts of this case I am satisfied for the reasons given above that there is a family life between the appellant, her son, and the appellant's husband who is the child's father and that removing any of them to Pakistan would interfere with their right to respect for family life. I accept also that this decision would have the legitimate of maintaining immigration control and is in accordance with law. The question then remains as to whether this would be proportionate.
53. It is accepted that the appellant did not meet the requirements of the Immigration Rules not just because she did not have the appropriate entry clearance but because of failure to meet the accommodation and maintenance requirements. I accept that it would be difficult for her to return on the current state of the husband's finances. It is evident from **Chikwamba v SSHD** [2008] UKHL 40, **Ekinci v SSHD** [2003] EWCA Civ 765 and the learning on article 8 as well as **SSHD v Hayat** [2012] EWCA Civ 1054 that such a course of action may be proportionate although that is less likely where children are involved.
54. The question here is, following **Hayat**, whether there is a sensible reason why this should not be required. The situation in this case is, however, somewhat different from those set out in **Chikwamba** or for that matter **Hayat**. Here, the appellant is here lawfully; her husband is a British citizen and whilst he is also a citizen of Pakistan, he has lived in this country for nearly 40 years. It would not be fair to say that the appellant has a poor immigration history given that she has always complied with the terms of her visa and is currently here with leave to remain.
55. This is not a situation where a couple have formed a union in full knowledge of their precarious immigration status. The marriage took place many years ago. I accept given the substantial amount of material relating to the husband's ill-health [appellant's bundle 63 to 112] that he has significant health problems which have increased over the years. He now suffers from a defect in his eyesight and is hard of hearing. He does, I accept, speak Urdu and is a citizen of Pakistan but he has lived in this country for some 40 years and has a daughter and grandchildren here. He has other relatives here and there would be significant difficulties in him now returning to Pakistan where, I accept on the basis of the evidence put before me, that the medical care for him would not be as good as that he accesses in the United Kingdom.
56. Whilst I note Ms Martin's submissions that that may be so, this is not a situation where there would be no medical care but that test is not appropriate where the person in question is a British citizen. The question

is whether it would be reasonable to expect him to go to a country where he would not get the care he receives now. I conclude that, taking into account his age, the length of time he has spent here and his health, as well as his ties to other family here, that it would not be reasonable to expect him to go to live now in Pakistan, irrespective of whether he has a house there.

57. While the appellant's child has spent a relatively short time here, he would now face separation from his father with whom he has now been able to form a stronger bond. I consider that it would not be in the child's best interests now to be separated from his father who could not be expected to go to Pakistan, and that would be the effect of removing his mother. While the interruption may well be temporary, its duration is uncertain and may well be prolonged. This is not a situation akin to that in **Ekinci**
58. That said, I consider that there is a significant public interest in the maintenance of a fair system of immigration control which applies to all. In this case the argument is that the appellant and her son should be allowed to stay here even though they do not meet the requirements of the Immigration Rules and where there is likely to be significant cost to the taxpayer. This case can be distinguished from **Nagre v SSHD [2013] EWHC** given that it is not a case to which the new Rules apply and, following **Green (Article 8 - new rules) [2013] UKUT 00254 (IAC)** it would not be possible to consider how the new Rules would apply given that by definition they do not.
59. Taking these factors into account, I consider that bearing the best interests of the child in mind, and given that that is a primary consideration, I consider that on the particular facts of this case, it would be disproportionate to require the appellant to leave the United Kingdom and I therefore allow the appeal on that basis.

SUMMARY OF DECISIONS

- 1 The determination of the First-tier Tribunal did involve the making of an error of law, and I set it aside.
- 2 I re-make the determination by allowing the appeal on human rights grounds.

Signed

Date: 17 July 2013

Upper Tribunal Judge Rintoul