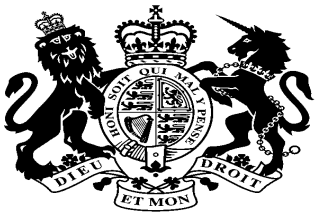

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02904/2019
HU/04081/2019
HU/04088/2019
HU/04086/2019

THE IMMIGRATION ACTS

Heard at Glasgow
on 2 August 2019

Decision & Reasons Promulgated
On 15th August 2019

Before

UT JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SYEDA [F] + 3

Respondents

For the Appellant: Mr A Govan, Senior Home Office Presenting Officer
For the Respondent: Ms N Loughran, of Loughran & Co, Solicitors

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this decision refers to them as they were in the FtT.

2. The appellants are wife, husband and two children, all citizens of Pakistan.

3. The respondent refused their application for leave to remain on human rights grounds by letter dated 29 January 2019, for these reasons:

- not eligible for consideration in terms of family life;
- requirements of the immigration rules, paragraph 276ADE, in respect of private life, not met;
- no exceptional circumstances, and no unjustifiably harsh consequences, taking account of the best interests of the children as a primary consideration;
- nothing to substantiate alleged risk on return as Shia Muslims;
- in so far as claim based on care given to Anisa Kazmi, aunt of the second appellant, no evidence of medical need for care, or non-availability of care from NHS, social services, other relatives, or friends.

4. FtT Judge Agnew allowed the appellants' appeal by a decision promulgated on 9 April 2019. The decision has gone astray by repeating some of the numbering of its paragraphs, which has to be borne in mind when referring to it. The essential points of the decision are these:

> [11] protection claim of no substance, and not significantly pursued;
>
> [13] case for appellants based on relationships with aunt and her family involving dependency going beyond normal emotional ties, and on exceptional circumstances;
>
> [14] aunt feels vulnerable to and harassed by ex-husband and his family, immense reassurance from presence and support of nephew, closeness among their respective children;
>
> [22] aunt a victim of domestic abuse and in fear of estranged husband, some security given by presence of her nephew;
>
> [23] reasons for aunt not returning to England not clear, difficult to see why it would not be in best interests of her children to do so, and to be with extended family there;
>
> [24] evidence not entirely reliable, and lacking, but first and second appellants provide "a significant amount of support … above the normal emotional ties of relatives living in the same vicinity … exceptional circumstances … which involve elements of dependency on" the first two appellants by aunt;
>
> [25] "… a close family unit and all will be affected, not just the [appellants] but also Ms K and her children, if they have to leave …".
>
> [28] third and fourth appellants young enough to adapt to Pakistan; interests of aunt's children also to be considered;
>
> [29] "… in the best interests of all the children of this family that the children of the [first] appellant remain in the UK albeit it would not be unreasonable for

them to accompany their parents to Pakistan because with support they could easily adjust …";

[30] no insurmountable obstacles to appellant and family going to live in Pakistan; reasonable to expect them to do so. "I find there are exceptional circumstances … which justify an argument for the appellant and her family remaining in the UK. It concerns me that they have changed the arguments over time … but I am looking at the evidence today and find it, just, sufficient to meet the standard of proof required that there are exceptional circumstances and that there are more than normal emotional ties between these families as well as a degree of dependency";

[31 – 33] section 117B of the 2002 Act, no positive right can be obtained from fluency in English or strength of financial resources; not financially independent; sources of income "vague and somewhat questionable … all accessing free public services since their arrival. I decline to find that it would be unreasonable to expect the children to accompany their parents to Pakistan albeit on balance it is in their best interests to remain in the UK … ";

[34] "In the balancing exercise, it is clearly in the public interest that the appellants be removed …";

[35] "On the other side of the scales I have the families' interests to consider. The appellant and her husband want to remain. Ms Kazmi wants them to do so. They provide care and support to a vulnerable woman and her children …. There are exceptional circumstances which outweigh the public interest considerations … removal of the appellants is not justified and proportionate when weighed against the interests of all the individuals concerned".

5. The SSHD's grounds of appeal are set out in an application for permission dated 18 April 2019. Headed as "making a material misdirection in law of any material matter", the grounds say that there were no exceptional circumstances, and no dependency beyond normal emotional ties.

6. Permission was granted on 9 May 2019, on the view that arguably the FtT erred in its article 8 assessment, and in particular in finding the case exceptional.

7. Mr Govan relied on the grounds. The points I noted from his submissions were these:

   (i) The SSHD's grounds were based on *Agyarko*. The FtT cited that case, but its decision was not consistent with it.

   (ii) The judge found it reasonable for the children to return to Pakistan. Her sole reason for allowing the appeal was the help the second appellant gave his aunt.

   (iii) The immigration rules did not provide a right to remain based on an extended family network.

(iv) The FtT did not go so far as finding the appellants to have family life with Ms K, in the sense of qualifying for protection under article 8.

(v) If the decision was to be read as including such a finding, it was not justified on the evidence.

(vi) The judge found clearly at [23] that Ms K had another practical option, and no good reason for not taking it. She failed to deal with the respondent's submissions recorded at [13] on page 4 on other support available to Ms K, and on relationships not going beyond the norm.

(vii) The judge took no account of the appellants' unlawful residence, and did not correctly apply the public interest considerations.

(viii) The decision should be set aside and reversed.

8. The points I noted from Ms Loughran were these:

(i) The grounds did not formulate any error on any point of law, but simply repeated submissions made to the FtT.

(ii) The judge did make a clear finding at [25] of ties going beyond the norm, which was key to the decision. There was one family unit, including the aunt and her children, for article 8 purposes. [28] was to be read in the same way.

(iii) The SSHD's grounds and submissions overlooked the position of Ms K at [25], as a victim of domestic violence, support from Women's Aid, her ex-husband's conviction and a non-harassment order, and her need for major medical operations [although not supported by medical evidence], all showing her need for support.

(iv) The FtT's finding at [30] of exceptional circumstances disclosed no error of law.

(v) At [35], referring to "the families' interests", although in the plural, the FtT was deciding on the basis of only one family for article 8 purposes.

(vi) The appellant in the FtT had referred to *Dasgupta* [2016] UKUT 00028 on the question of family ties going beyond the usual core relationships as "intensively fact sensitive". That case was also relevant to no error of law being found where the FtT reached a decision open to it, even if a more structured approach and more extensive findings would have been preferable.

(vii) The sole basis of the decision was not, as the respondent had submitted, the support given by a nephew to his aunt. The decision was also based on her having been a victim of domestic violence, and on vulnerability.

(viii) The decision should stand.

9. I reserved my decision.

10. The SSHD's grounds to some extent are repetition of the case put to the FtT, but in my view they raise questions relevant at this stage: whether the FtT has made a finding of family life going beyond the usual core, which would be an essential

underpinning; if such a finding was made, whether the FtT has given reasons capable of supporting it; and whether the FtT has given reasons capable of supporting the finding of exceptional circumstances.

11. As both sides say that their position is supported by *Agyarko*, I find it useful to look at the current understanding of the general approach to be taken to article 8.

12. R*azgar* [2004] UKHL 27 and *Huang* [2007] UKHL 11 are now to be read in light both of the amendment of the immigration rules to reflect article 8 (effective from 9 July 2012) and of the setting out in Part 5A of the 2002 Act of public interest considerations (effective from 28 July 2014).

13. In *Agyarko and Ikuga* [2017] UKSC 11 two applicants sought to challenge decisions of the SSHD that there were no "insurmountable obstacles" to family life being carried on outside the UK, in terms of the rules, and no "exceptional circumstances" to warrant leave outside the Rules. Lord Reed, giving the judgement of the court, considered the decisions of the European court and the approach approved in deportation cases in *Hesham Ali* [2016] UKSC 60, and continued:

> [57] That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.
>
> [58] The expression "exceptional circumstances" appears in a number of places in the Rules and the Instructions. Its use in the part of the Rules concerned with the deportation of foreign offenders was considered in *Hesham Ali*. In the present context, as has been explained, it appears in the Instructions dealing with the grant of leave to remain in the UK outside the Rules. Its use is challenged on the basis that the Secretary of State cannot lawfully impose a requirement that there should be "exceptional circumstances", having regard to the opinion of the Appellate Committee of the House of Lords in *Huang*.
>
> [59] As was explained in para 8 above, the case of *Huang* was decided at a time when the Rules had not been revised to reflect the requirements of article 8. Instead, the Secretary of State operated arrangements under which effect was given to article 8 outside the Rules. Lord Bingham, giving the opinion of the

Committee, observed that the ultimate question for the appellate immigration authority was whether the refusal of leave to enter or remain, in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8. If the answer to that question was affirmative, then the refusal was unlawful. He added:

> "It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* [*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368] , para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test." (para 20)

[60] It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above.

14. *KO (Nigeria) and others* [2018] UKSC 53 was a case mainly about the treatment of qualifying children and their parents under part 5A. Under the heading "general approach" Lord Carnwath, giving the judgement of the court, said:

> [12] This group of sections needs to be looked at in the context of the history of attempts by the Government, with the support of Parliament, to clarify the application of article 8 in immigration cases. In *Hesham Ali* … this court had to consider rule changes introduced with similar objectives in July 2012. The background to those changes was explained by Lord Reed (paras 19-21), their avowed purpose being to "promote consistency, predictability and transparency" in decision-making, and "to reflect the Government's and Parliament's view of how, as a matter of public policy, the balance should be struck …" (para 21).
>
> [13] In a case heard shortly afterwards, … *Agyarko* … paras 8-10, Lord Reed referred to the previous law as established in *Huang* … where it was held that

> non-compliance with the Rules, not themselves reflecting the assessment of proportionality under article 8, was "the point at which to begin, not end" consideration of article 8. The new Rules, as he said by reference to government policy statements, were designed to change the position comprehensively by "reflecting an assessment of all the factors relevant to the application of article 8" (para 10).
>
> [14] Part 5A of the 2002 Act takes that process a stage further by expressing the intended balance of relevant factors in direct statutory form. It is profoundly unsatisfactory that a set of provisions which was intended to provide clear guidelines to limit the scope for judicial evaluation should have led to such disagreement among some of the most experienced Upper Tribunal and Court of Appeal judges. Rather than attempt a detailed analysis of all these impressive but conflicting judgments, I hope I will be forgiven for attempting a simpler and more direct approach.
>
> [15] I start with the expectation that the purpose is to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute. I also start from the presumption, in the absence of clear language to the contrary, that the provisions are intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690, para 10 per Lord Hodge).

15. (The court went on to hold the misconduct of a parent was not a balancing factor, and that the reasonability of the departure of a child was to be approached in "the real world" of where the parent was expected to be.)

16. As well as looking at the general approach to article 8, I note the submission of Ms Loughran, based on *Dasgupta*, on the area of decision open to the FtT. To apply the correct test and reach a generous conclusion is not erroneous in law.

17. In *MM (Lebanon)* [2017] UKSC 10 the Court said:

> [107] It is no doubt desirable that there should be a consistent approach to issues of this kind at tribunal level, but as we have explained there are means to achieve this within the tribunal system. As was said in *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045, para 40 (per Carnwath LJ):
>
> > "… It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case … The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law … Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected."

18. *MM* makes it clear that the principle continues to apply, but the extent of "generosity" or discretionary judgment available to tribunals is as explained in *Agyarko* and *KO*.

19. The first question in this case is whether the FtT found family life, not in the broad sense but as qualifying for consideration under article 8, to extend beyond the appellants to the aunt of the second appellant and to the cousins of the third and fourth appellants.

20. The decision is not quite as clear as it might have been. At some points the two families are considered together and at others separately. There is no explicit conclusion that the four appellants, the aunt of the second appellant, and her children, are so closely bound by ties beyond the ordinary that they constitute one core family. However, the overall reading is that such a conclusion was reached.

21. The next question is whether the evidence and reasons justify that conclusion.

22. Although the issue is fact-sensitive, and all cases are different, there is force in the SSHD's challenge. The needs of Ms Kazmi for support were not backed by much evidence. The matters advanced were police, medical and social work responsibilities, not responsibilities of the second appellant. There was a justified finding that he gave support, but its nature was not out of the ordinary. Relationships among the children were close, but no more than might be expected among cousins living nearby. Most notably, the FtT at [23] found that Ms Kazmi had an obvious alternative, and could see no reason for her not to choose it. Her future was not conditioned on support from the appellants.

23. Making all allowance for the scope open to the FtT, its conclusion that article 8 protection went beyond the four appellants is not supported by adequate reasons. The findings at [23] point in the opposite direction.

24. Separation from extended family members is inherent in migration. There must be much more to constitute strong and compelling reasons, or exceptional circumstances.

25. The FtT found that there were no insurmountable obstacles to the four appellants as a family going to live in Pakistan, and it was reasonable to expect them to do so.

26. Even if the extended family did qualify for consideration, it would be difficult to identify any feature of such strength that the appeal might succeed.

27. After excising the FtT's insupportable conclusion of an extended family, there is nothing by which the appeal might rationally succeed.

28. The decision of the First-tier Tribunal is set aside. The four appeals, as originally brought to the FtT, are dismissed.

29. No anonymity direction has been requested or made.

5 August 2019
UT Judge Macleman