Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11195/2018
HU/11196/2018, HU/11198/2018
HU/11200/2018, HU/11202/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 April 2019	**On 26 April 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR M J (FIRST APPELLANT)
MR Z A (SECOND APPELLANT)
MRS Y K (THIRD APPELLANT)
MR H J (FOURTH APPELLANT)
MR F J (FIFTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Miss S Iqbal, Counsel, instructed by House of Immigration Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Pakistan. The first and third appellants are husband and wife (aged 60 and 52). They are parents of the second, fourth and

fifth appellants. The latter three are now 27, 22 and 21 years old respectively. The third appellant was diagnosed with stage 4 non-Hodgkin's lymphoma on 14 February 2018 and commenced chemotherapy on 27 February. This comprised six cycles of Bendamustine and Rituximab, the last of which occurred on 12 September 2018. Her remaining treatment consists of Rituximab maintenance for 2 years (at 2-monthly intervals) delivered by injections under the skin.

2. In a decision sent on 16 November 2018, Judge O'Brien of the First-tier Tribunal (FtT) dismissed their appeals against the decision made by the respondent on 8 May 2018 refusing them leave to remain on human rights grounds. The judge noted that there had been a previous appeal which had been dismissed by Judge Parkes in December 2016. In a decision sent on 1 March 2019, I set aside Judge O 'Brien's decision for material error of law in respect of her treatment of the medical evidence relating to the third appellant, which took the form of a letter from Dr Ahsan, a consultant clinical oncologist dated 27 October 2018 based in Pakistan. I considered she failed to engage with the opinion of the doctor that specialised oncology hospitals in Pakistan would not accept the third appellant in the middle of treatment and that discontinuation of therapy might "cause relapse or transformation into a more aggressive form of lymphoma and endanger [the] life of the patient". I also considered that she had failed to consider the third appellant's health circumstances cumulatively alongside other relevant considerations.

3. At paras 12-13 I said:

> "12. Given that there has been no challenge to the judge's findings of fact regarding the appellants' circumstances save in relation to the health circumstances of the third appellant, I conclude that the case should be retained in the Upper Tribunal. In fairness to the appellants, since the judge's findings of fact were heavily dependent on Judge Parkes' assessment of their Article 8 circumstances in December 2016, I shall not exclude the production of evidence updating the family circumstances.
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> 13. As regards the issue of whether the third appellant would in fact be able to obtain treatment in Pakistan for the Rituximab maintenance treatment specified as being necessary for her between September 2018 – September 2020, I consider it is open to both parties to adduce further evidence relating to this issue."

4. In response to my directions, the appellants' representatives submitted a consolidated bundle of some 508 pages which included new witness statements dated 9 April 2019 from each of the five appellants and a letter dated 16 March 2019 from a Dr Arshad Mehmood, former consultant haematologist and oncologist of Walli hospital, Khurrianwala, Faisalabad.

5. Given that I stated there has been no challenge to the judge's findings of fact save in relation to the health circumstances of the third appellant, it is salient to set out the judge's findings on matters other than the third appellant's health circumstances: At paragraph 40 the judge observed that there had been an appeal decision by Judge Parkes dated 30 December 2016

concluding that removal of the appellants as a family unit would not be disproportionate. The judge concluded at paragraph 41 that she saw no basis for going behind the decision of Judge Parkes.

6. In seeking to explain why she saw no significant change in circumstances since the last judicial findings, the judge first considered the first appellant's business, concluding at paragraphs 42–46 that it had not been shown that its benefits to the UK economy were significant or that the first appellant could not re-establish it in Pakistan.

7. At paragraph 47 the judge then addressed the medical evidence regarding whether the first appellant was at real risk of committing suicide concluding that there would be no such risk. At paragraphs 48–49 the judge then set out why it had not been established that the family's removal would pose very significant obstacles to their integration in Pakistan or insurmountable obstacles.

8. Mr Tarlow confirmed that the respondent did not dispute the updated witness statements put forward by the appellants. I then heard submissions.

9. Mr Tarlow submitted that in assessing the further medical evidence from Dr Mehmood, I should attach weight to the fact that it confirmed that the third appellant had so far been responding well to her treatment and that it did not state in definite terms that the third appellant would not receive treatment in Pakistan. Mr Tarlow asked that I bear in mind what had been said by the UK doctor treating the third appellant regarding the third appellant's ability to tolerate any treatment without toxicities.

10. Miss Iqbal submitted that Dr Mehmood had identified a number of concerns, relating to affordability, admission for treatment and risks to the patient. This evidence corroborated that of Dr Ahsan. It should not be forgotten either that the first appellant has psychological problems and suffers from depression and anxiety and has been prescribed anti-depressants. The family had integrated strongly into British society. The up to date witness statements, the educational documentation and other materials indicated the positive contribution they had made.

11. Miss Iqbal submitted that I should consider that the third appellant's circumstances fell within the ambit of the principles set out by the ECtHR in **Paposhvili** application no. 41738/10 in respect of Article 3 health case. The third appellant was half way through her treatment and might not be able to access the remainder of her treatment if she has to return to Pakistan. It was vital that her treatment regime in the UK be not disrupted. If she relapsed she would face an even more aggressive form of the cancer and a significant reduction in life expectancy.

12. Miss Iqbal submitted that, looking at the appellants' case under the Immigration Rules first, there would be very significant obstacles to their return. The third appellant would not be able to access medical treatment. The first appellant's business (he was a wholesaler of fresh fruit and vegetables),

which was currently providing work for 70-100 people (40-50 in the UK), would have to close and the appellants would be left with nothing if he had to pay all his debtors here in the UK; he had a 15-year lease on a warehouse which he had paid for by way of a loan. She referred to the two statements from accountants. The fact that the family had got into immigration difficulties in 2010 stemmed from wrong advice given to the first appellant in 2011 when he made an application to stay on the basis of his business in the UK. Apart from their reliance on the NHS, the family had not had recourse to any public funds. When the third appellant was diagnosed with cancer in 2018, the family were in a position to pay.

13. As regards Article 8 outside the Rules, Miss Iqbal submitted that the medical evidence relating to the third appellant showed that she was responding well to treatment in the UK because she had a medical team able to manage her treatment regime and stand ready to intervene if there was any relapse. The doctors are familiar with her case and are monitoring her closely. If she had to return to Pakistan it is unlikely she would be able to find a hospital ready and able to take on her maintenance stage of treatment or to monitor it if she were to relapse. The first appellant's health difficulties had also to be factored in. I should place her severe health difficulties and his psychological problems alongside the fact that the family had put down roots in the UK and made a valuable contribution to the UK economy and were a strong family unit which needs to be kept together.

My assessment

14. It is convenient if I first address the third appellant's health circumstances in the context of Articles 3 and Article 8 outside the Rules. As regards the first appellant's circumstances, I have regard to his and his other family member's witness statements. I note that a psychological report dated 18 October from a Dr Shea was produced stating that in addition to diabetes the first appellant suffers from a depressive illness likely due to his wife's health problems and anxiety and that he feels frightened about being sent to Pakistan where he believes his wife will not be able to obtain treatment and he would want to commit suicide if that happened. The doctor considers that it will also be very difficult for the first appellant in Pakistan considering his age and his health problems. He has suicidal thoughts. The doctor considers that any reminder of returning to Pakistan triggers bad thoughts and worsens his psychological symptoms (including his anxiety and low mood), particularly because he strongly believes that if they have to return to Pakistan his and his wife's physical health will rapidly deteriorate. In relation to the first appellant's anxieties about being able to start all over again in Pakistan, I note that in his latest witness statement he describes his UK business as doing well. He does not suggest that his psychological problems are having a negative effect on his business activities here. I note also that he originally did business in Pakistan including in the fresh food business (ginger and garlic) (along with other areas of business) and he has paid several business trips back to Pakistan since. He now has three sons who between them should be in a position to help him shoulder business responsibilities. The son F states that he has done some

work experience in his father's business which gives him an insight into the workings of the business. His son Z states that when his parents tell him how they started an important business from nothing and extended it to the UK "I get very excited about turning [the business] into a multi-national business", although he goes on the add that he is not used to Pakistani ways of working. The first appellant's witness statement states that the existing business deals in perishable goods by importing them from different countries, including Pakistan, Jordan and Europe. I do not consider on this basis that the first appellant's business future is dependent on trading in Europe. I do not accept that return to Pakistan would transform him from being a successful businessman to being someone unable to quickly re-establish business activities there. As noted earlier, I see no reasons to depart from the findings made by Judge O'Brien regarding the first appellant's psychological problems. I would add that from the report of Dr Shea, it is clear that in part his anxieties are based on his belief that he and his wife's physical health will rapidly deteriorate if they have to return to Pakistan. Whilst I have no reason to doubt the sincerity of the first appellant's subjective belief regarding this, it is not borne out by the wider body of evidence available concerning access to treatment for his condition in Pakistan. For reason I now turn to I also consider that neither are his concerns about his own health or that of the third appellant's likely health circumstances in Pakistan objectively well-founded.

15. I shall first of all address the medical circumstances of the third appellant. Prior to her being diagnosed with cancer in 2018, she suffers from diabetes, hypertension and depression. The medical evidence shows that the treatment she has received so far for her cancer has gone very well. The chemotherapy stage having been completed, she is now in a two-year maintenance stage in which she continues to be monitored by way of Rituximab maintenance therapy. She is said to be tolerating Rituximab well with good control of the disease. The further evidence from Dr Mehmood confirms that treatment for her type of cancer is available in Pakistan including the Rituximab maintenance therapy. However, both Dr Ahsan in a letter dated 27 October 2018 and now Dr Mehmood have written to say that they consider that there is a danger of discontinuation of treatment (which would cause relapse or transformation into a more aggressive form of lymphoma and endanger the life of the third appellant) if she is returned to Pakistan. Dr Mehmood voices several concerns.

16. First, there is the fact that the current medication is very expensive and not affordable to most patients (the same concern was expressed by Dr Ahsan). Tied to this, he states that whilst there are cheaper forms of treatment available, "[s]he may not tolerate the alternative regime well and during the transitional phase of change from one to another regimen{sic] disease may progress adversely and endanger her life." Regarding this concern, I do not find that it has been established that the family would be unable to afford in Pakistan the same treatment she is receiving presently. Accordingly, there would be no need for selection of a cheaper regime for management and follow up; the family is relatively well-off in the UK and would be more so in Pakistan; and in any event affordability is not determinative for either Article 3 or Article 8 purposes.

17. Second, Dr Mehmood (again echoing Dr Ahsan) states that there are only a few specialised oncology hospitals in Pakistan so the patient burden is very high and such institutes "usually do not accept the patients in the middle of their treatment.". He notes that his hospital already has a long queue of awaiting and booked patients. I do not find this evidence, nor that of Dr Arshad's, to be sufficient to establish that the third appellant would not be able to gain access to a specialised oncology hospital either in Pakistan or elsewhere. He does not definitely state that such treatment would be unavailable. Neither of them refers to any independent data regarding the accessibility to such treatment for persons able to pay. It is not said how many hospitals have such units or how relevant it is in terms of being able to be admitted that the patient's continued treatment is unlikely to be clinically burdensome (the third appellant's Rituximab maintenance phase, absent complications, only comprises two monthly injections together with monitoring). Dr Mehmood does not assert that patients can never be taken on mid-way through cancer treatments and, as already noted, the treatment stage which the third appellant is now in, is relatively uncomplicated. On the available evidence, it is not reasonable likely that the third appellant would relapse.

18. Dr Mehmood's third concern relates to disruption of her treatment in the UK. He says that it is very important for her to continue her maintenance therapy in the same institution as the medical team here is very familiar with her disease. However, there is no reason to think that the third appellant's medical records in the UK, including full details of her current treatment, would not be available to specialist doctors in Pakistan or that doctors there are not proficient in carrying out such treatment. The most difficult phase of the treatment has been completed successfully; and indeed, in a letter dated 8 March 2019 the opinion of the Consultant Haematologist treating the third appellant in Heartlands Hospital in Birmingham (Dr Murthy) was that:

> "We also note that on average people go on for 3 to 5 years before requiring 2nd line of treatment after the 1st line of chemotherapy. [The third appellant] has showed an excellent response with PET negative disease – in a situation like this we would expect a good remission status.
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> Regarding disruption of the Rituximab treatment, in her case I would be keen to continue the Rituximab maintenance for the time being as she is tolerating without toxicities. However, there is an optional stop in the Rituximab maintenance as well if she had any side effects from the treatment considering an excellent PET negative remission. "

19. Dr Murthy further states that the main purpose of Rituximab maintenance is to delay the need for 2nd line treatment. On the strength of this letter, the necessity for 2nd line treatment in the third appellant's case is low, as a good remission status is expected. I would add that given the family's financial circumstances, it would also be reasonably open to them, if for some reasons she could not gain access to a specialist oncology unit in Pakistan, to arrange for her to travel to receive this treatment privately in another country.

20. I have to bear in mind, in relation to Article 3, that the threshold set by the case law is a high one. As stated by Sales, LJ (as he then was) at [38] of **AM (Zimbabwe)** [2018] EWCA iv 64:

> "So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for believing that [the applicant], although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (para. [183]). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state."

21. Applying this guidance, the third appellant's is not a case where a real risk has been established that she would be unable to access the same regime of maintenance treatment she is following presently or that she would suffer a relapse. In assessing whether the third appellant would face a real risk of treatment contrary to Article 3, I must consider her circumstances cumulatively, including the first appellant's psychological problems. (In relation to his difficulties, I have already found that I see no reason to depart from the findings made by the First-tier Tribunal judge, that they are not sufficiently serious to constitute a factor capable of crossing the respective Article 3 or Article 8 thresholds even when considered cumulatively with all other factors.)

22. I turn them to consider the third appellant's health circumstances in relation to Article 8. Bearing in mind the guidance given by the Court of Appeal in **GS (India)** [2015] EWCA Civ 40, I am satisfied that her health circumstances do not cross the threshold for Article 8 purposes either. Here again, however, I must consider the appellants' circumstances cumulatively and ask in particular whether, even if the third (and first) appellant's heath difficulties are not in themselves sufficient to make the respondent's decisions disproportionate, they are sufficient if taken together with other factors. In this regard the two main factors relied on by Miss Akhtar are the value to the UK economy of the first appellant's business (and as part of that, the economic detriment to him of having to terminate it) and the extent of the family's integration into UK society. I remind myself that the Article 8 balancing exercise requires me to weigh private and family life factors in favour of the appellants and those against. In addition to the factors that are in principal focus in this appeal there

is the evidence fact that all but the third appellant have a good command of English and it is unquestionably established that they are financially independent: see s.117B(2) and (3) of the NIAA 2002. Save for heavy reliance on NHS treatment, they have not had recourse to public funds.

23. As regards the first main factor, I have already noted that I see no reason to depart from Judge O'Brien's detailed assessment at paras 42-46 that it had not been shown that its benefits to the UK economy were particularly significant or that the business (or something along the same lines) could not be re-established in Pakistan. Judge O'Brien attached considerable weight to the findings of Judge Parkes made in February 2016 that the first appellant had significantly overstated the position of the business. To the extent that it is submitted again that the family's enforced departure from the UK would mean that the first appellant would have to terminate the business causing heavy economic loss, I am not persuaded that that has been established. It is clear from the financial information provided in the auditor's accounts that the business is a going concern. The first appellant states that selling it would cause him to go into debt as he already has a sizeable loan for purchase of the warehouse in the UK. However, I fail to see why he could not sell the business in such a way that he remains responsible for that loan. The evidence falls well short of establishing that the appellants' departure from the UK would cause them economic ruin and I note that the first appellant began his life as a businessman in Pakistan and originally had a Pakistan-based company. He has sons who are now adults who have had a UK education and would be able to bring their qualifications and skills and energy to assist if need be. As noted earlier, two of them have expressed some knowledge and interest in the family business and although they may wish to pursue further education, they are young adults who would clearly be a real support to their father if they chose to be.

24. So far as concerns the extent of the appellants' integration into the UK, the second main factor on which Miss Iqbal sought to rely, I would accept that the evidence shows that the first, second, fourth and fifth appellants have strongly integrated (and their ability to speak English is one aspect of that), but the children are now adults having gained the benefits of a UK education and whilst in many ways they could be described as a model family, the weight I can attach to their integration must be diminished by the fact that much of their integration has taken place at a time when their immigration status was precarious: see s.117B(5) of the NIAA 2002. As Judge Parkes noted in December 2016, any private life built up after refusal of their 2011 applications was in the knowledge that the family had to leave the UK. Further, as noted by Judge O'Brien at para 48, the three sons have completed or continued their education in various state-funded institutions and none of them has yet lived in the UK for half of their lives. Even taking the family's circumstances, medical and non-medical cumulatively, I am not persuaded that they suffice to establish a disproportionate interference with their Article 8 rights. The factors weighing in favour of their being required to leave the UJK outweigh those in favour of them remaining.

25. I now turn to set out my findings as to the appellants' ability to meet the requirements of the Immigration Rules. I am satisfied that it has not been shown that there would be very significant obstacles to the family's integration back into Pakistan society. All the appellants have spent over half their lives in Pakistan. The first appellant has worked as a businessman in Pakistan and two of his sons are now well-qualified to either help in his business activities if they choose or to seek employment of their own. The first four appellants speak Urdu and I concur with Judge O'Brien that the fifth appellant, because Urdu is the language his parents use at home, would be able to learn Urdu in a reasonable time frame (para 48). For reasons set out earlier, the third and first appellant's health circumstances would not significantly affect their ability to integrate back into Pakistan society and I have already found it reasonably likely that the third appellant would be able to access suitable treatment for her cancer maintenance treatment. The first appellant would clearly be able to obtain medical help in Pakistan for his psychological problems, if they did not significantly reduce once he became familiar again with the realities of Pakistan life and saw that his wife and he would in fact be able to access and received adequate treatment.

26. The appellants'' inability to meet the requirements of the Immigration Rules adds to the weight to be attached to the public interest in their removal from the UK and in earlier assessing their circumstances outside the Rules I have taken into account that it was incumbent on them to show that such circumstances were of a compelling character.

27. For the above reasons the decision I re-make is to dismiss the appellants' appeals.

28. I would only add that I do not consider the legal proceedings concerned with the appellants' immigration cases should reflect adversely on their credibility. Hence I consider that were any of them to make further applications for entry clearance to come to the UK, the history of proceedings in the UK and their outcome thus far should not be taken to reflect adversely on their credibility.

29. To conclude:

The decision of the FtT judge has already been set aside for material error of law;

The decision I re-make is to dismiss the appellants' appeals.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 24 April 2019

Dr H H Storey
Judge of the Upper Tribunal