Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11857/2019
& HU/11859/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 September 2020	**On 29 October 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

Mr. IQBAL [K]
Mrs BALQEES [A]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. M Moriarty, Counsel, instructed by Central Chambers Law
For the Respondent: Mr. D Clarke, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are a married couple who are nationals of Pakistan. Mr. [K] is aged 78 and Mrs. [A] is aged 74.

2. Their appeals were linked and initially heard by the First-tier Tribunal sitting at Hatton Cross. JFtT Lal allowed the appeals by a decision sent to the parties on 30 September 2019. The respondent was granted permission to appeal to this Tribunal and by a decision dated 28 May 2020 (UTJJ Gill and O'Callaghan) her appeal was allowed to the extent that the decision of the First-tier Tribunal was set aside, with certain identified findings of fact kept, and the decision to be remade by this Tribunal.

Anonymity

3. By means of its decision dated 28 May 2020, this Tribunal set aside the anonymity direction issued by the First-tier Tribunal observing, *inter alia*, that the appellants had not sought such direction before JFtT Lal. The Tribunal observed that even in cases involving exploration of intimate details of an appellant's private and family life, the full force of the open justice principle should not readily be denigrated from: *Zeromska-Smith v. United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB**)**.

4. No request was made by either party for an anonymity direction at the hearing held on 15 September 2020.

Background

5. The appellants were first issued with multi-visit visas in 2010 and 2004 respectively. Until their latest visit they acted in compliance with the requirements of their visas. On 10 November 2015 they were issued with 6-month family visit visas and subsequently entered this country on 27 December 2015. On 13 April 2016 they applied for derivative residence cards, relying upon the Court of Justice judgment in *Case-34/09 Ruiz Zambrano v Office National de l'Emploi (ONEm)* EU:C:2011:124, [2012] Q.B. 265. The respondent refused the applications by a decision dated 29 October 2016, from which the appellants enjoyed no right of appeal.

6. On 4 May 2017 the respondent issued the appellants with notices of liability to removal. The appellants subsequently applied for leave to remain on human rights (articles 3 and 8) grounds. The respondent refused their application by a decision dated 2 August 2017. Four further representations were served and rejected. A fifth application for leave to remain on human rights (article 8) grounds was submitted on 19 October 2018 and accepted by the respondent as satisfying the fresh claim requirements of paragraph 353 of the Immigration Rules ('the Rules'). The respondent refused to grant the appellants leave to remain in this country by a decision dated 2 July 2019. The appellants proceeded to exercise their right of appeal to the First-tier Tribunal.

7. The appellants live in Bedfordshire with their son, Mubbeen, their daughter-in-law and their two grandchildren, who are presently aged 8 and 5. A second son, Sohail, resides with his family in London.

8. Prior to their arrival in this country in December 2015, the appellants resided in Pakistan with their son, Faisal. He subsequently relocated to the USA with his family

in 2019. Another son, Javed, continues to reside in Pakistan with his wife and three children, one of whom is aged 18 and has autism. His condition is such that Javed is required to work at home to provide care because his wife is unable to physically cope with the strength of their son when he becomes angry. The appellants have two daughters, Sayeda and Asma, who are married and reside with their families in Pakistan.

Evidence

9. The appellants rely upon an unindexed bundle filed with the First-tier Tribunal on 18 September 2019. No supplementary bundle was filed with this Tribunal. I observe that save for a letter relating to an appointment for Mr. [K] to see a member of a hospital colorectal team in September 2019, the medical evidence relied upon for both appellants concerning treatment in the United Kingdom runs from March 2016 to October 2018 with the latest document concerning an outpatient appointment for Mr. [K] in relation to a CT scan. The appellants' GP notes were printed by the surgery in May 2018.

10. By a witness statement dated 10 September 2019 Mr. [K] details, *inter alia*, his family circumstances in Pakistan as well as his present personal circumstances. He states at paras. 28 and 29:

> '28. At the time of application, I was living with my son Mubbeen. I and my wife were fully dependent on my sons and daughters in law in the UK. I had prostate issues. Although I had operations in Pakistan for prostate, I have developed problem of regularly going to the toilet. At night, I have to go to toilet 6 to 8 times every night. This has been going on for more than 10 years. I also have diabetes since 2012. It was diagnosed for the first time while I was in the UK. I have restless legs would start moving any time even when I am standing. When I do get such restlessness, I need massaging. When there is no one around, I start walking and take medicine. I cannot control it until someone massages it. I get intolerable pain. I lie down on the sofa or bed and roll in pain. When neither Mubbeen or Sohail is around, I call my wife. She cannot climb up on the bed or on the sofa to sit on my legs. I lie down on the floor and I ask my wife to either sit on my legs will stand up on them. She gets confused and cannot do as I say because of her age and her own back and hip bone problems. Since 2015 my medication has increased from 1 tablet a day to 5 tablets a day for restlessness syndrome. It happens at least 5 times in a week. It usually happens in the evening. It rarely happens during the day.
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> 29. My medical problems have caused me constipation which I take other [sic] 4 tablets. if that was not all, I have now been diagnosed with 50% dementia. I have not been recommended any medication yet but they keep monitoring me. My family make sure that I do not leave the house alone.'

11. He further details at para. 33 of his statement that he requires the aid of his son to go to the toilet at night. He cannot shop, lift bags or drive. He is required to hold a glass with both hands consequent to limited grip.

12. In respect of Mr. [K] his GP records detail that he was diagnosed with Type 2 diabetes in 2012. An entry dated 15 August 2016 confirms that he was prescribed Ropinirole whilst in Pakistan for restless legs syndrome, also known as Willis-Ekbom disease, which is a common condition of the nervous system that causes an overwhelming irresistible urge to move the legs. His GP notes record regular attendance in relation to diabetes and various aches and pains in his body. Respiratory concerns are noted. The notes discuss the approach adopted to medicating his restless legs syndrome. He had a period of numbness in his hands in 2017 but is recorded as stating that it did not particularly bother him and that it came and went. By 2017 the records confirm regular nocturnal urination. Concerns as to cataracts were noted in 2018.

13. By May 2018 Mr. [K]'s GP records detail that he was being prescribed Tamsulosin for his prostate, Lansoprazole for his stomach, Pioglitazone for diabetes control, Colecalciferol for vitamin D deficiency and Fenbid, a brand name for Ibuprofen. In addition, he was prescribed Docusate Sodium and Macrogal compound for constipation.

14. As to his proposed return to Pakistan Mr. [K] observes by means of his statement that there are no family members in Pakistan capable of providing support and care to him and his wife. Further, he does not believe that he can afford the cost of treatment in Pakistan observing that accommodation and care will amount to 9 Lakh Rupees (£4500) for one person with an additional requirement for the provision of food amounting to £4,000. He therefore asserts that he and his wife require £16,000 for care, accommodation and general living expenses if returned to Pakistan.

15. It is his belief that if he is required to return to Pakistan his son Mubbeen would have to accompany him otherwise he and his wife would not receive the care they require.

16. Mrs. [A]'s statement is dated 10 September 2019 and details her health concerns. She confirms that though she can walk she cannot stand for long periods of time and tires easily. She has difficulty in aiding her husband when he requires massaging, save when he lies on the floor.

17. Mrs. [A]'s GP notes confirm by an entry dated 10 August 2016 that she was diagnosed with hypertension and hypothyroid in Pakistan and had been prescribed several forms of medication before her arrival in this country. Concerns were raised in March 2017 as to memory and dementia, but no diagnosis was made. In May 2018, Mrs. [A] was being prescribed Levothyroxine sodium for her hypothyroid condition, Irbesartan for hypertension, Atorvastatin to lower cholesterol and Loratadine, an antihistamine medicine that relieves the symptoms of allergies. According to her GP notes amongst the medication that she was prescribed in Pakistan was Irbesartan as well as Simvastatin which is used to lower cholesterol.

18. As accepted by Mr. Morarity at the hearing before me, the appellants have regularly accessed NHS treatment since 2016, despite not being entitled to such treatment.

19. The appellants rely upon a witness statement from their son, Mubbeen, who details his care for them. He further details his income and explains the difficulty he would have, in conjunction with his siblings, of affording care and related fees in the sum of £16,000 a year if his parents were to return to Pakistan. In addition, he states that a further £1,200 would be required for their medication. Mubbeen states that he would be required to leave the United Kingdom and return to Pakistan to care for his parents because of the impossibility of meeting the financial requirements for suitable care provision.

20. Their son Sohail details in his witness statement of 10 September 2019 that his brother Faisal provided the appellants with care in Pakistan, but this is no longer available consequent to Faisal having emigrated to the USA. The other siblings in Pakistan are said to be unable to provide care and support.

21. The appellants rely upon two documents issued by Physiotech International on 17 October 2018. Physiotech International is a company based in Islamabad, Pakistan, that provides nursing and care services. The first document details the annual cost for providing care at 'old home', inclusive of food and general attendant services, in the sum of 840,000 rupees (£4,765.97 as on 17 October 2018). This amounts to £9,531.94 for both appellants. The second details the costs for a male/female attendant for male/female patient care, in circumstances where 'food and accommodation shall be provided to our staff on duty by you'. This is strongly suggestive that the individual costs identified, in the sum of 900,000 rupees (£5,106.39 as on 17 October 2018), relates to 24-hour care at the appellants' home. I further observe that this schedule of costs relates to a male carer being provided for Mr. [K] and a female carer for Mrs. [A], resulting in combined annual costs of 1,800,000 rupees (£10,212.78). I address the adoption of the conversion rate below at para. 46.

22. Reliance is also placed upon a report from Mr. Charles Musendo, an Independent Social Worker, dated 17 October 2018. Mr. Moriarty accepted at the hearing before me that there were difficulties with this report, and he placed greater reliance upon the witness statements filed with the Tribunal.

23. For the sake of completeness, I confirm that I have read and considered all the evidence filed with the Tribunal, not just the documents referred to above, as well as the oral evidence presented to JFtT Lal.

Decision

24. The introduction of Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') has not altered the need for a two-stage approach to article 8 claims. Ordinarily, the Tribunal will firstly consider an appellant's article 8 claim by reference to the Rules that set out substantive conditions without any reference to Part 5A considerations. Such considerations only have direct application at the second stage of the article 8 analysis, when the claim is considered outside of the Rules.

25. Mr. Moriarty accepted on behalf of the appellants that they cannot meet the requirements of article 8 under the Rules, including paragraph 276ADE(1)(vi), and so exceptional circumstances are required to establish that removal would be a disproportionate interference with their article 8 rights. This requires the appellants to establish that their removal to Pakistan would result in 'unjustifiably harsh consequences': *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 W.L.R. 823.

26. In *Razgar v. Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 A.C. 368 Lord Bingham held that decisions taken in pursuit of the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases identifiable only on a case by case basis. I observe that this is an expectation, not a rule of law and that treating exceptionality as the yardstick for success is to confuse effect with cause.

27. I observe that by its decision of 28 May 2020, the Tribunal confirmed that certain findings of fact made by JFtT Lal stood:

> '17. Both Appellant's [sic] are credible witnesses whose evidence has remained credible and consistent throughout. This evidence is supported by the evidence of other witnesses and in the Bundle.
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> 18. The Tribunal finds that the Appellant's [sic] lawfully visited the UK on many occasions over the years. It finds that they previously lived with a son who has now migrated to the USA. The Tribunal finds that the previously enjoyed accommodation provided for by that son is no longer available and the Appellant's [sic] have no wider family support in Pakistan as their sole son who lives there has an autistic son for who he is the carer. The Tribunal accepts that the Appellant's [sic] have a number of medical conditions related to old age which renders them frail and in need of some assistance with regard to their personal care. The First Appellant [Mr. [K]] has night needs in respect of incontinence and the Tribunal accepted the evidence in this regard from him and his witness.
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> 19. … It was accepted that the Appellant's [sic] could not meet the Immigration Rules in the case so the Tribunal turned to Article 8 of the ECHR.
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> 20. The Tribunal finds that the most important parts on which these appeals turned, were credible and consistent and supported by objective and other evidence as detailed above. The Tribunal accepted the evidence before it. The Tribunal is satisfied that the witness statement given by the Appellants was credible and was supported by the evidence in the Bundle. The Tribunal, taking all of these matters into account, is prepared to accept the evidence as set out in the witness statements as true and accurate.'

28. On behalf of the respondent Mr. Clarke accepted at the outset of the hearing that the appellants enjoy a family life for the purposes of article 8 with Mubbeen. He acknowledged the existence of such dependency satisfied the requirements established in *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ 31, [2003] INLR 170. The respondent accepts that Mubbeen provides such care to the appellants as to establish a dependency over and above that expected through blood

ties. Mr. Clarke confirmed that the respondent does not accept that the appellants enjoy a family life with their grandchildren or with other family members resident in this country.

29. Consequently, I accept that JFtT Lal made several positive findings of fact in favour of the appellants, *inter alia*:

i) They do not own a home in Pakistan, having sold their property in 2003.

ii) They resided with their son Faisal, and his family, in Rawalpindi until they travelled to the United Kingdom in December 2015.

iii) Faisal emigrated to the USA with his family in June 2019. The appellants are therefore unable to return and reside at their former home.

iv) Their son and two daughters residing in Pakistan are unable to provide them with care and support upon their return.

v) Mr. [K] has medical concerns relating to his prostate and Type 2 diabetes. He has restless legs syndrome for which he is receiving treatment. He experiences associated problems arising from such condition approximately 5 times a week, usually in the evening. He finds massage helpful in easing the accompanying pain.

vi) He requires to go to the toilet several times a night. He is mobile. However, he requires aid to walk to the toilet at night.

vii) He is unable to cook, cannot shop and cannot drive. He cannot lift bags and because of problems with his grip he requires two hands to bring a glass to his mouth.

viii) Mrs. [A] has been diagnosed with hypertension and hypothyroid. She is mobile but cannot stand for very long. She tires easily. She can massage her husband, using her feet when he lies on the floor, but cannot do so if he is on a bed or sofa.

30. Mr. Moriarty submitted that the preserved findings include a finding of fact that Mr [K] suffers from dementia. I observe that this issue is identified by Mr. [K] in simple terms within his statement, with the sole reference being: '*I have now been diagnosed with 50% dementia*.' JFtT Lal made no express finding as to this issue. However, he expressed his findings at para. 20 of his decision is general terms and so I proceed on the basis that he found the applicant to suffer from dementia, though there is no express finding as to the nature and extent of the illness, nor as to its impact upon Mr. [K].

31. I have considered this issue with care. Dementia is a group of related symptoms associated with an ongoing decline of brain functioning. Such symptoms can include, but are not limited to, memory loss, thinking speed, having trouble speaking, moods and adverse impact upon understanding and judgement. The two most common forms of dementia are vascular dementia and Alzheimer's disease which make up the majority of cases. I observe that there is no evidence before me identifying the form of dementia suffered by Mr. [K]. I address the lack of evidence below.

32. Health professionals discuss dementia in 'stages', which refer to how far a person's dementia or Alzheimer's disease has progressed. Consideration is given to how well a person thinks (cognitive decline) and functions (physical abilities). No two people with dementia experience the disease in the same way, and the rate of progression will vary by person and type of dementia.

33. I observe that no medical evidence was placed before either this Tribunal or the First-tier Tribunal confirming a diagnosis of dementia. The sole evidence as to a diagnosis was the brief reference in Mr. [K]'s statement. The only document authored by a medical practitioner that identifies a concern that Mr. [K] may have dementia is a letter from Dr L Reddy, MRCPsych, Berkshire NHS Community Mental Health Service, dated 25 September 2018. The letter details personal circumstances as recounted by Mr. [K] and his family:

> 'I understand that Mr [K] has been noticeably forgetful over the last 12 months and this has worsened over the last 8-10 weeks. Mr [K] felt that two years ago when he was in Southampton he felt confused, especially from his right to left. He also forgot he just asked for a drink of water and wondered why people brought him a drink. He has become forgetful of the order of his 'namaz' (prayer) which is unusual for him. He forgets the names of his children and sometimes loses track of time when outdoors. His forgetfulness is slowly worsening. He also worries about past regrets and his children's future, especially financially. His mood has been reasonably stable otherwise and he is happy to be alive and there are no psychotic symptoms evident. His sleep has been disturbed due to urinary problems and possibly restless legs. His appetite is normal. He gets frustrated easily and sometimes irate with his family for no reason.'
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> 'In addition to the above history provided by Mr [K], Sundus has noted he is repetitive in conversations and is unable to use electronic gadgets like mobile phones. He dwells excessively on certain issues. His family need to manage his finances and his choice of clothes - wears them the wrong way at times - and support with medication. He prefers not to go out for walks like he used to nor socialise as much.'

34. Limited information is provided by Dr Reddy as to cognitive assessment:

> 'On the SMMSE he scored 24/30 with points lost for orientation, time, place and recall. On the MOCA he scored 17/30 with points lost for orientation to time and place, serial subtraction, visuopatial and recall.'

35. Mr. Moriarty did not direct me to this letter, but I take judicial note that the Standardized Mini-Mental State Examination (SMMSE) is used as a screening test for cognitive impairment and is routinely used as an inclusion/exclusion criterion. A score of 20 to 24 suggests mild dementia, with a score of 13 to 20 suggesting moderate dementia. The score of 24/30 in the screening test, places Mr. [K] at the entry point of mild dementia. The Montreal Cognitive Assessment (MOCA) is a cognitive screening test designed to assist in the detection of mild cognitive impairment and Alzheimer's disease.

36. Dr Reddy summarily assessed Mr. [K] as having significant memory loss that required further assessment and she requested for a CT head scan to be undertaken,

to be followed by a review in memory clinic. The letter from the West Berkshire Community Hospital dated 3 October 2018 confirms that a CT scan appointment was made for Mr. [K] on 30 October 2018, though I have not been informed as to the findings of the scan. The extent of the medical examination before me is limited to the results of the screening tests undertaken by Dr Reddy. As no subsequent medical evidence has been filed, the height of Mr. [K]'s evidence goes no further than the short assertion in his witness statement coupled with the screening test results.

37. Whilst I accept that Mr [K] is genuine as to his belief that he suffers from '50% dementia', this is a very vague description in relation to a very serious medical condition and does not equate to a formal diagnosis which is usually identified in the stages of mild, moderate and severe. A concern as to the reference to '50% dementia' is that rather than being a reference to the stage of illness, it could be a reference to 'mixed dementia' which combines both Alzheimer's disease and vascular dementia, though with no medical evidence before me as to the cause of his condition I am not presently capable of proceeding to identify Mr. [K]'s personal diagnosis. The evidential gap arising as to this issue is significant. Unfortunately, though Mr. [K] gave evidence before JFtT Lal, he did not do so before me. I informed Mr. Moriarty as to the lack of medical evidence concerning Mr. [K]'s present health, but no application was made to adduce further evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('Procedure Rules'), nor was an application made for an adjournment so that such evidence could be secured and relied upon.

38. In observing that Mr. [K] was called to give evidence before JFtT Lal, and was cross-examined without concern, I note that there is a presumption of mental capacity. Mr. [K]'s legal representatives did not detail before JFtT Lal nor before me that they harboured any professional concern that Mr [K] lacks the requisite capacity to instruct them consequent to dementia. Nor was any professional concern identified as to his ability to prepare and sign his witness statement. If such concern did arise, it would be expected that relevant steps would be undertaken by the legal representatives to ensure to their satisfaction that Mr. [K]'s capacity was not adversely impacted by dementia, and such steps would be expected to be detailed to the Tribunal by the legal representatives when explaining that they had satisfied themselves as to capacity. In such circumstances, the Tribunal proceeds on the basis that Mr. [K]'s legal representatives are satisfied that he has capacity, and so understands the nature and substance of these proceedings. I therefore find that Mr. [K] is capable of making decisions for himself for the purposes of section 2(1) of the Mental Capacity Act 2005 and retains capacity to make personal decisions as to how he conducts his life, for example by being able to engage in care plans and to engage with carers outside of his family circle.

39. The lack of further evidence as to diagnosis post-dating Dr Reddy's letter of September 2018 leads me to conclude that the request for a CT head scan was to aid diagnosis though I acknowledge that the SMMSE suggests, in its role as a screening test, that Mr. [K] had entered the early stages of mild dementia. Without additional medical evidence the Tribunal is unable to ascertain the current state of Mr. [K]'s dementia and so proceeds on the basis that he continues to be in the early stage of

mild dementia and so can continue to function independently although with accompanying lapses in memory and, on occasion, the outward expression of irritability.

40. Consequently, in addition to the findings detailed at paragraph 29 above I find that:

    i) Mr [K] is the early stage of mild dementia. He has capacity, though suffers from intermittent memory loss and suffers lack of motivation. His language fluency shows signs of reduction but whilst he speaks slowly, he can be understood. He has shown no evidence of psychotic symptoms or anxiety. His mood rises to irritability, but he is not violent. Risk of wandering is low. Risks of falls is low. Risk of self-neglect is identified as potential, but that is through not receiving physical support rather than a consequence of dementia.

41. Mr. Moriarty submitted that the appellants enjoy a family life with their sons, daughters-in-law and grandchildren and that intra-generational dependency exists within the family unit. Consequent to the respondent's acceptance that such dependency exists between the appellants and Mubbeen as to constitute family life for the purpose of article 8, Mr. Moriarty identified the appellants as being vulnerable adults who are physically, emotionally and socially dependent upon the support of Mubbeen. He further submitted that as a corollary of such family life with Mubbeen, and being an integral part of his household, the Tribunal had accepted as part of Mr. [K]'s truthful evidence that Mubbeen would have to give up his life in the United Kingdom and return to Pakistan to care for his parents in Pakistan. Such action would inevitably affect Mubbeen's young children and not be in their best interest.

42. In making this submission, Mr Moriarty initially asserted that the preserved findings favourably covered the evidence of the appellants' family members including Mubbeen. However, he subsequently accepted that the preserved findings concerned the evidence of the appellants' alone, as is clear from a natural reading of paras 17 to 20 of JFtT Lal's decision.

43. In the alternative, he submitted that as the appellants had been accepted to be truthful witnesses, the question as to whether Mubbeen would be required to relocate to Pakistan with them was settled. I conclude that the foundation of this submission is flawed. JFtT Lal accepted that the appellants were true and accurate in their evidence as to their subjective beliefs and concerns. However, in circumstances where such knowledge relates to hearsay or to facts existing outside of their personal knowledge, it remains for me to assess whether such evidence is objectively accurate, particularly in circumstances where the appellants' subjective beliefs may be inconsistent with other evidence upon which they rely. This is consistent with the observation by Green LJ in *GM (Sri Lanka) v. Secretary of State for the Home Department* [2019] EWCA Civ 1630 that there is a requirement for proper evidence and mere assertion by an applicant as to his or her personal circumstances and as to the evidence will not necessarily be accepted as adequate in an article 8 assessment.

44. As observed above I accept the finding of JFtT Lal that the appellants no longer have accommodation available to them in Pakistan and that they have no wider family support in that country. It remains for me to consider as to whether they can reasonably secure alternative provision of care and accommodation in Pakistan. The core of the evidence presented on behalf of the appellants on this issue is that as the family cannot afford health care and medical costs, said to amount to at least £16,000, Mubbeen would be required to leave his family in the United Kingdom and relocate to Pakistan to provide required personal care.

45. Whilst I accept that Mr. [K] truthfully believe that such sums are required to meet his care needs and those of his wife, and though silent on this issue in her statement I accept that Mrs. [A] holds the same opinion as her husband, I am required to undertake an objective assessment of the evidence before me. Mr Moriarty accepts that the only evidence addressing such fees are the two documents issued on the same day by Physiotech International, a company based in Islamabad, Pakistan, that offers care and nursing services. I have considered these documents with care. They were issued to the appellants' son, Javed. No detail is provided as to what identified services were requested by Javed when seeking a schedule of fees. I am required to seek to glean this important information from the documents themselves. Unfortunately, they provide limited information beyond detailing monthly costs for accommodation and personal care. It is not said where such care will be provided. I note that the company is based in Islamabad whilst the appellants' hail from close to Rawalpindi, some 20 kms away, and their son continues to reside there. I do not make an adverse finding on this point, as I accept that the company are likely to be capable of providing care in a neighbouring city, and that Javed and his sisters are content for their parents to live 20 kms or so away from them if necessary. I make the observation simply to identify the paucity of information provided by these documents.

46. More importantly, these are the only two schedules of fees secured in relation to the provision of care in Pakistan and so it is unclear to the Tribunal as to whether or not such fees are at the higher end of the scale. At the hearing I expressed my concern that the annual sums identified on the documents had not been identified in pounds sterling and I indicated a provisional view that the sums did not appear to equate to £16,000 for board and lodging, without food, as asserted by the appellant and Mubbeen at paras. 32 and 10 of their statements, respectively. Mr Moriarty was unable to help me in identifying the sterling equivalent so I indicated that I would take steps after the hearing to convert the sums. I used the reputable Oanda currency converter website[1] and secured the figures detailed at [21] above. The quotes for the provision of care by Physiotech International therefore range from £9,531.94 and £10,212.78 in total for both appellants. Such figures do not equate to the sums asserted by the appellants or by Mubbeen.

47. Apart from the failure to file a range of estimates as to care costs from several nursing and health care providers, the documents from Physiotech International give

[1] https://www1.oanda.com/currency/converter/

rise to further concerns. The document titled 'services for male/female attendant for male/female patient care' does not refer to any accommodation being provided by the company. Without an explanation being provided either by the company or Javed as to the original inquiry made, this schedule of fees relates to the appellants residing in either their own home, or a home provided to them, which the appellants assert before me is not a possible scenario in their circumstances. It appears that Physiotech International may have been informed to the contrary. In any event, the schedule of fees refers to the provision of 24-hour attendance of both a male and female carer. No explanation is given as to why the couple require 24-hour care. Both are mobile, though their mobility is limited in terms of time spent on their feet. Neither presents as being at risk of falling, according to their medical notes. Mrs. [A] in noted in her GP notes as of March 2018 to be suffering 'mild frailty'. She attends her GP on a more limited basis than her husband. Mr. [K] refers to needing support in walking to the toilet at night, but such support is not said to be required during the day. Mr. [K]'s pain from restless leg syndrome is said to occur during the evening, not the day. His GP records detail his observation in May 2018 that his experiences are better at night, but he 'can't rest until he has taken the tablets at around 8pm'. In April 2018 Mr. [K] was identified by his GP records as not experiencing weakness or numbness, not experiencing back pain. I further observe that Mrs. [A] does not assert that she is unable to cook.

48. There is no explanation provided within the evidence before me, let alone a reasonable explanation, as to why the appellants require 24-hour care and support from individual attendants upon their return to Pakistan. The medical notes confirm that they are safe to live together, and whilst they may well remain indoors for much of the day this is not an unusual occurrence for persons of their age. Between them they are capable of cooking and eating meals without support. No evidence is provided as to Javed or their daughters being incapable of providing them with regular weekly food provisions. There may well be a reasoned case for a male attendant to reside at the property over night, but no schedule of fees has been filed relating to such attendance.

49. I therefore find the document entitled 'services for male/female attendant for male/female patient care' to be wholly inadequate and no weight is placed upon it.

50. As to the second document, entitled 'services for male/female at old home', the limited detail provided confirms that the schedule of fees is concerned with the provision of accommodation at an 'old home', with facilities for male and female patient care. Such charges are inclusive of food and general attendant services. As observed above, the combined annual fee for both appellants is identified as £9,531.94. The level of care and attendance is not detailed, nor is any detail given as to this whether the costs include the provision of two bedrooms or one. I further observe that Mr. [K] is incorrect in his belief as detailed at para. 32 that he would be required to meet food bills in the region of £4,000 per annum as the provision of food is incorporated into the identified costs. The sum identified by this document is no-where near the £16,000 asserted by Mr. [K] and Mubbeen.

51. I again observe that only one care provider was approached to provide a schedule of fees. When considering that the costs of care in an 'old home' individually for each appellant is identified by Physiotech International as 840,000 rupees per annum, or 70,000 rupees per month, I observe the respondent's CPIN 'Pakistan: Background information, including internal relocation' version 3.0 (June 2020) which identifies at para. 11.1.3. that according to the Pakistan Bureau of Statistics 'Household Integrated Economic Survey (HIES) 2015-16', the average monthly income per household in Pakistan is 29,130.49 rupees. It is appropriate that I observe that earnings in cities are likely to be higher than in rural areas and further that nursing and care fees may, as in this country, be expensive to many. However, I am not satisfied that this one document alone, without additional schedules of fees provided by other care and nursing providers, and absent clear details as to the inquiry made and the scope of care and accommodation provided, is sufficient to establish the true costs that will have to be met by the applicants upon return to Pakistan. Again, there is an evidential gap that cannot be bridged, and such gap arises in circumstances where the documentary evidence relied upon is inconsistent with Mr. [K]'s subjective understanding and Mubeen's evidence. I conclude that the second document issued by Physiotech International is inadequate and only limited weight can be placed upon it in the absence of schedule of fees issued by other care and nursing providers.

52. Neither Mr [K] nor Mrs [A] address the cost of medication in Pakistan in their evidence. Mubbeen details by means of his witness statement that Mr [K] was paying about £60 a month for the appellants' medication before they travelled to the United Kingdom in December 2015. He states that his parents have increased their daily medication and so instead of being required to pay £720 per annum for medication in Pakistan they would now be required to pay, at the lowest estimate, £1,200. I note that the GP records confirm Mrs. [A] as taking five separate tablets once a day and Mr [K] five tablets a day and using a prescribed gel. According to an entry in his GP notes on 15 August 2016, Mr [K] was taking Ropinirole in Pakistan before his journey to the United Kingdom in 2015. A note on 19 September 2016 confirms that he was also prescribed Tamsulosin in Pakistan to treat an enlarged prostate. Mrs. [A]'s medical regime in Pakistan is broadly similar to that prescribed in this country, though reliance upon a sleeping tablet that is not permitted to be prescribed in this country has stopped. The appellants have filed no schedule detailing the costs of their present medication or the costs incurred in Pakistan, I further observe that no evidence has been provided as the nature of appellants' medical prescriptions in 2020. As noted in the Tribunal's decision of May 2020, at [44], the decision not to provide further oral evidence at the resumed hearing was one made by the appellants. Being mindful that the burden rests upon the appellants, I do not accept that the cost of prescriptions upon return to Pakistan would amount to at least £1,200 per annum. No source is given for this estimate by Mubbeen nor is any adequate explanation provided as to how such sum has been reached.

53. I observe that the appellants could afford their medication whilst they previously resided in Pakistan. At para. 35 of his witness statement Mr. [K] confirms that he

receives a pension of £60 per month, which amounts to 151,720 rupees per annum.[2] Whilst he may prefer to provide this sum to his daughter, Asma, it is his pension, and I am satisfied that the funds are available to him to be used towards his and his wife's medication bills.

54. I find that the limited evidence relied upon by the appellants comes nowhere close to identifying the likely costs of health care and attendance upon their return to Pakistan. I am satisfied that the documents procured from Physiotech International are not an accurate reflection as to likely care costs. The request that a schedule of fees be provided in relation to 24-hour care by two attendants at the appellants' home, with food and accommodation to be provided to the attendants, is strongly suggestive that the appellants and their family have sought to identify likely costs at as high a range as possible. Such inflation as to costs consequently flowed through the evidence of Mubbeen who is clear in asserting that the costs of board and lodging alone for his parents on their return would be £16,000, with further attendant costs. I am satisfied that the effort to provide inflated costs was a deliberate effort by family members. Usually, such an approach would invite strong criticism from this Tribunal, but in this matter such concerns are tempered by an understanding that the family wish to continue to care for their parents in this country and may have lost sight of their obligation not to mislead the respondent and the Tribunal. I observe the income enjoyed by Mubbeen and Sohail as detailed at para. 10 of Mubbeen's witness statement. No evidence is provided as to outgoings. I further observe that Faisal has been able to relocate to the US and no evidence has been provided to this Tribunal that he is incapable of financially contributing to the care of his parents, nor as to his income and outgoings. In the circumstances and observing the lack of cogent evidence provided by the appellants, I am satisfied that their family can meet the costs of support and care required by their parents on their return to Pakistan. I further find that the assertion that Mubbeen would be required to leave his wife and children and relocate to Pakistan to care for his parents is simply a calculated effort to influence this Tribunal so as to secure the ability of his parents to lawfully remain in this country. For the reasons detailed above, I am satisfied that Mubbeen does not truly believe that he would be required to relocate as the family can afford to financially provide for their parents care and accommodation upon return to Pakistan. It is of concern that the approach adopted by Mubbeen has led to Mr. [K] accepting that there is a risk that Mubbeen will be separated from his wife and children and this has no doubt weighed upon Mr. [K]'s mind.

55. The appellants rely upon their close relationship with Mubbeen's children. Their love for their grandchildren is evident in their statements and in the photographs provided. It is said on the appellants' behalf that the best interests of the children require the appellants to remain in this country, because their return to Pakistan would have an adverse impact upon them. The appellants rely upon an independent social worker's report authored by Charles Musendo, dated 17 October 2018. The Tribunal stated its concerns as to the approach adopted by Mr. Musendo during oral submissions at the error of law hearing in March 2020, such as his conscious straying

[2] OANDA Currency converter, 24 October 2020

into advocacy on the appellants behalf, and Mr. Moriarty acknowledged such difficulties before me. The report runs to 27 pages and Mr. Musendo identifies his methodology, the time he spent with the appellants and their family and provides detail as to his conversations. However, he proceeds upon a wholly uncritical assessment where all information is accepted at face value. An example is identifiable at para. 62 where Mr. Musendo accepts without any critical analysis the assertion that 'either [Mubbeen] or his brother [understood to be Sohail] has to accompany their parents to Pakistan to ensure [their parents] wellbeing is not compromised.' For the reasons detailed above, there is no requirement for Mubbeen to relocate to Pakistan to care for his parents, nor was it asserted before the Tribunal that Sohail was willing to relocate.

56. Further, I note that assertions are made by Mr. Musendo with no identification of relevant context, such as at para. 42 where Mr. Musendo opines: '[Mr. [K]'s] absence from the family unit deprives the children of the opportunity to develop an understanding of their identity needs'. Such opinion makes no reference to the children having parents of Pakistani origin who are not said to deny their children an opportunity to identify with, and understand, their Pakistani heritage and identity.

57. Mr. Musendo strays into considering, and then advancing, issues that are presently not relevant to this matter. An example is his consideration of palliative care at paras. 72 and 73 in circumstances where neither appellant is terminally ill.

58. Mr. Moriarty sought to rely upon the report in so far as it addressed the appellants' grandchildren, in particular the attachment the elder child has to Mr. [K] and that their separation may have an impact on the elder child's emotional needs. At para. 45, Mr. Musendo opines:

> '45. In contact children with insecure attachment are likely to develop problems such as behaviour problems, poor concentration, low self-esteem, poor relationships with peers and adults, compulsive self-reliance, hypervigilance and mental health difficulties. If [children] are removed from their attachment figures [they] could be at risk of suffering from disenfranchised grief and may not be able to get support for a successful grief resolution.'

59. I am significantly concerned as to Mr. Musendo's failure to identify and engage with the true position. It was not said by Mr. Moriarty before me that the children's parents are in any way neglectful of their children's needs. The evidence before me is that the children are being brought up in a loving home and their parents provide appropriate care and attention. I am satisfied that it is inexcusable that an experienced social worker identified a potential risk as existing in relation to the children that implicitly identifies the children having such insecure attachment to their parents that the departure of their grandparents from the family home could give rise to 'disenfranchised grief' and that they 'may not' be able to secure 'support' for successful 'grief resolution'. As Mr. Moriarty accepted before me, the children's primary attachment is to their parents who will provide support to them if separated from their grandparents. I would expect the same if one of the appellants' died. I am

satisfied that Mr. Musendo temporarily lost sight of his duty as an expert witness namely to provide objective and unbiased opinion. I find that he has descended into advocacy and has sought to present information in as positive a light as possible on behalf of the appellants. I therefore place no weight on the report.

60. The right to respect for family life of grandparents in relation to their grandchildren primarily entails the right to maintain a normal grandparent-grandchild relationship through contact between them. Such contact will normally take place with the agreement of the person who has parental responsibility, which means that access of a grandparent to his or her grandchild is normally at the discretion of the child's parents: *Kruskic v. Croatia (10140/13)* (25 November 2014), at §111 to 112. The enjoyment of article 8 family life rights between grandparent and grandchild is therefore more limited than between a child and his or her parent, and more easily ended by the decision of others.

61. Standing alone the rights of children cannot be decisive; nonetheless they must be afforded significant weight. Whilst there is love and warmth between the appellants and their grandchildren, there is no dependency. The grandchildren are dependent upon their parents. I am satisfied that whilst it is in the best interests of the children to continue to live with their grandparents, this being the home life the elder child has been accustomed to since the age of 5 and the younger child since the age of 12 months, their emotional and physical needs are primarily met by their parents and they would very quickly adjust to their grandparents residing elsewhere. The unhappiness they would have upon their grandparents leaving their home would be short in duration, and I would expect their parents to adopt appropriate strategies to ensure that any unhappiness is very limited in effect and time.

62. I therefore find that the proposed interference in the family life enjoyed between the appellants and their grandchildren is proportionate on the facts arising in this matter.

63. Having made relevant findings of fact, I proceed to consider the proportionality of the appellants being required to return to Pakistan. The Court of Appeal confirmed in *GM (Sri Lanka)* that section 117B of the 2002 Act and the Rules are to be construed consistently and that national authorities enjoy a margin of appreciation when setting the weight to be applied to various factors in the proportionality assessment. The test for an assessment outside the Rules is whether a fair balance is struck between competing public and private interests. I am mindful that a proportionality test is to be applied to the circumstances of the individual case. There is requirement for proper evidence.

64. Section 117A(2)(a) of the 2002 Act requires that when considering the public interest question arising where a decision is said to breach a person's right to respect for private and family life under article 8, I am to have regard to the considerations listed in section 117B of the 2002 Act. As confirmed by the Tribunal in *Dube (ss.117A-117D)* [2015] UKUT 00090 (IAC) sections 117A-117D are not an a la carte menu of considerations that permit discretion to a judge to apply or not apply. Judges are duty-bound to have regard to the specified considerations. These sections are an

elaboration of Lord Bingham's 'question 5' as identified in *Razgar* which concerns proportionality and justifiability.

65. When considering section 117B of the 2002 Act, I note that the provisions are not a straight-jacket and are to be read consistently with the overarching principles of article 8: *Rhuppiah v. Secretary of State for the Home Department* [2018] UKSC 58, [2018] 1 W.L.R. 5536, at [49].

66. Mr. Moriarty detailed an acceptance by means of his skeleton argument that the appellants do not speak 'fluent' English. I observe the entry on Mrs. [A]'s GP notes on 25 March 2017 where her son confirmed that she does not speak English. Mr. [K]'s GP notes regularly confirm family members interpreting on his behalf. I am satisfied that the appellants' command of the English language is poor and so for the purpose of section 117B(2) they are unable to speak English.

67. I accept that through the support of their children in the United Kingdom, the appellants are financially provided for. However, upon considering their GP notes there has been regular use of NHS services at a time when they were not permitted to access such services. Whilst I observe that the accessing of such services has been at the expense of the taxpayer, I do not place anything more than minimal adverse weight on such actions.

68. Mr. Moriarty submitted that the appellants have good immigration histories, and their present lack of status was attributable to a genuine change in circumstances consequent to a deterioration of health and the loss of familial support in Pakistan. As to the latter, I observe that Faisal left for the US in 2019, some 3 years after the appellants sought derivative residence cards in this country. As to the former, the GP notes are clear in that the appellants were seeking medical support in relation to pre-existing health conditions when they joined the GP surgery in 2016. As confirmed by Dr Reddy in her letter familial concerns as to Mr. [K] and dementia first arose in the summer of 2017. The appellants applied for derivative residence cards in April 2016, long before their medical records detail a deterioration in health. I am satisfied that upon arriving in this country in December 2015 it was the intention of the appellants and their close family members that they remain in this country and not return to Pakistan.

69. I am satisfied that the appellants only enjoyed a short period of precarious leave to remain and have mainly been residing unlawfully in this country. Little weight is therefore placed upon their private life as established whilst in this country. Mr. Moriarty did not submit that the appellants' private life has a special and compelling character that amounts to exceptionality. The case was advanced on family life grounds.

70. I have accepted that the appellants have a family life with Mubbeen consequent to their dependency upon him whilst they reside in this country. However, such dependency has developed consequent to the appellants overstaying and I have found that the family can ensure that requisite care and support is available to the

appellants upon return to Pakistan. The weight to be applied to the existing family life with Mubbeen is therefore limited, though not of the level of 'little'.

71. I observe that upon considering the true position in this matter, which is based upon the limited medical evidence filed with the Tribunal, the appellants could not succeed in an entry clearance application as dependent relatives under section E-ECDR of Appendix FM to the Rules. This rule gives effect to the respondent's policy intended to reduce the taxpayer's burden for provision of health and social care for those whose needs could be reasonably and adequately met in their home country, and to ensure that those whose needs could only be reasonably and adequately met in the United Kingdom were granted settled status. As detailed above there is a significant gap in the evidence relied upon by the appellants as to the costs and provision of health and social care available to them in Pakistan and the ability of their children to meet the financial requirements of securing such provision.

72. In weighing relevant factors in the assessment of proportionality, and noting the particular circumstances of the appellants as found above, I am satisfied that Mr. Clarke is correct as to the evidence presented to the Tribunal coming nowhere close to establishing unjustifiably harsh consequences for the appellants upon their return to Pakistan. Taking a holistic assessment, the appellants will secure appropriate care and accommodation upon return to Pakistan of a level sufficient to ensure that they enjoy appropriate practical and personal support. They can continue to secure emotional support from their children and grandchildren who reside in Pakistan as well as from their family in this country.

73. In reaching such conclusion I observe Mr. Moriarty's submission that the present Covid-19 pandemic is to be considered within the proportionality exercise, and at the present time the UK Foreign & Commonwealth Office currently advises against all but essential travel to Pakistan and that if the appellants return, they will be required to self-isolate for 14 days upon arrival. I am satisfied that the appellants can return home, with flights still operating between the United Kingdom and Pakistan. I further note that there is no evidence before me that the appellants will not receive appropriate care in government-designated isolation facilities upon return or if they are permitted to self-isolate elsewhere on the recommendation of the Home Isolation Committee that their children would not pay for suitable accommodation and care to enable them to self-isolate as required.

Postscript

74. The lack of recent medical evidence in this matter is a concern. I am required to consider the evidence relied upon by the appellant. I cannot engage in speculation or conjecture as to the appellants present health. I have therefore made findings on the medical evidence before me which is, in the main, now some 2 ½ years of age. The provision of evidence is a matter for the appellants, and I observe that they are legally represented and so will have been informed as to the nature and substance of corroborative evidence that will aid the Tribunal. I note that the appellants enjoyed the opportunity at the resumed hearing to file updated medical evidence under rule

15A of the Procedure Rules, but no application was made. I am therefore unaware as to the present prognosis of either appellant in 2020.

75. As to Mr. [K], I observe that there is no cure for dementia. Available medication seeks to temporarily reduce symptoms, but over time there will be deterioration. Consequently, I observe that there may come a time when the illness reaches such a point, when coupled with Mrs. [A]'s own health concerns, that removal may be a disproportionate interference with protected article 8 rights. However, this requires an evidential assessment, and a decision-maker would require appropriate medical diagnosis and up-to-date prognosis, which is presently missing in this matter. Such time has therefore not presently been reached.

76. I conclude by observing my thanks to Mr. Moriarty and Mr. Clarke in aiding me in this matter. Whilst I am unable to accept Mr. Moriarty's submissions, I wish to observe that he advanced his case on behalf of the appellants with clarity and great skill.

Notice of Decision

77. By means of a decision sent to the parties on 28 May 2020 this Tribunal set aside the decision of the First-tier Tribunal promulgated on 30 September 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

78. The decision is re-made, and the appellants' appeals on human rights (article 8) grounds are dismissed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 26 October 2020

TO THE RESPONDENT
FEE AWARD

The appeals are dismissed. No fee award is payable.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 26 October 2020