



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

Appeal Number: HU/19121/2019

**THE IMMIGRATION ACTS**

**Decided Without A Hearing Under Rule  
34  
On 26 November 2020**

**Decision & Reasons  
Promulgated  
On 03 December 2020**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**AHSAN RASHEED BUTT  
(Anonymity direction not made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**ERROR OF LAW FINDING AND REASONS**

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Birk ('the Judge') dated the 7 April 2020 in which the Judge dismissed the appellant's appeal on human rights grounds.
2. Permission to appeal was granted by Upper Tribunal Judge Martin sitting as a judge of the First-tier Tribunal, the operative part of the grant being in the following terms:
  - "2. The appellant, it was accepted provides 24-hour care for his father who has physical disabilities and memory problems. The Judge found there to be Article 8 family life between the appellant and his father.

3. The judge dismissed the appeal, finding that he could access the required level of care either through the NHS, social services or by other family members.
4. It is arguable that in failing to consider whether the advent of coronavirus rendered removal disproportionate, as submitted at the hearing and referred to at [14], the judge erred.”
- 3.** Following permission being granted directions were sent to the parties inviting them to comment upon the method by which the error of law finding was to be determined and providing an opportunity for further submissions to be made.
- 4.** The time for providing a response has passed.
- 5.** Having considered the judgment of the High Court in *The Joint Council for The Welfare of Immigrants (Applicant) v The President of the Upper Tribunal (IAC) (Respondent) and The Lord Chancellor (Interested Party)* [2020] EWHC 3103 (Admin), in which neither the Pilot Practice Direction issued by the Senior President of Tribunals on 19 March 2020 nor Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 were declared unlawful, consideration can still be given to the appropriate venue for the next hearing of this matter in light of the overriding objectives.
- 6.** Paragraph 4 of the Practice Direction reads as follows: “Decisions on the papers without a hearing: Where a Chamber’s procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties’ ECHR rights and the Chamber’s procedure rules about notice and consent.”
- 7.** It noted there is no objection to a remote hearing, but regard has to be taken of the Overriding Objective contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
- 8.** Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.
- 9.** Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:  
‘34. -
  - (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
  - (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.

- (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
  - (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
    - (a) strike out a party’s case, pursuant to rule 8(1)(b) or 8(2);
    - (b) consent to withdrawal, pursuant to rule 17;
    - (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
    - (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.’
- 10.** It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers as opposed to directing an oral hearing. There have been no submissions from either party raising an issue that suggests otherwise, and nothing on the facts or in law makes consideration of the issues on the papers not in accordance with overriding objectives, a breach of the parties’ ECHR rights, and/or UTIAC’s procedure rules about notice and consent.

## **Background**

- 11.** The appellant is a citizen of Pakistan who was born in the 20 November 1991.
- 12.** Having considered the documentary and oral evidence the Judge sets out her findings from [19] of the decision under challenge.
- 13.** The Judge concludes that the appellant is unable to satisfy the Immigration Rules and goes on to consider the merits of the appeal outside the Rules between [25 - 37], writing between [27-37] the following:

“27. Mr Rashid suffered a car accident in or about 2016. There is a letter from Adult Social Care dated 31 10.16 which is addressed to Mr Rashid. This is the outcome of the assessment after Mr Rashid had suffered his car accident. It states that this has left him physically impaired and suffering age related memory problems. He is unable to achieve the following outcomes without assistance. These are managing and maintaining nutrition, personal hygiene, being appropriately dressed, maintaining a habitable home enrichment, developing and maintaining family and personal relationships and making use of necessary or services in the local community. Mr Rashid requires support during the day and night but adult social care do not fund this level of support through home-care. It is beneficial he is to continue receiving support from the Appellant.

28. Mr Rashid in his unsigned statement states that currently he has severe neck pain, shoulder pain, significant lumbar spinal canal stenosis which causes back and leg pains. He also suffered a foot fracture which causes pain and issues with mobility. A letter from his GP dated 28.1.20 sets out that in addition to this he suffers from long standing symptoms of shortness of breath which has recently worsened and he has been referred to the chest clinic and he struggles to walk short distances. Mr Rashid is not totally immobilised.
29. I accept that the Appellant carries out the duties of daily care in terms of personal hygiene, shopping, cooking and looking after the house. Mr Rashid does not require 24-hour care since he states that the Appellant would commence part time work in the UK and there is no medical evidence which states that 24 hours 7 days a week is what is necessary for Mr Rashid. The account by the Appellant of Mr Rashid's memory problems points to minor and infrequent incidents. If this was a serious problem then his GP would have provided further assistance or the necessary referrals to medical professionals. There is no medical evidence that only the Appellant has the skills to look after Mr Rashid.
30. I find that if Mr Rashid could not manage on his own that he would be entitled and be able to access benefits to pay for assistance for his functional needs e.g. a cleaner, a shopper and also social care in terms of being visited by carers at his home and meals provided. If he is unable to move easily then he can apply for walking aids e.g. crutches, a wheelchair etc. If his condition required it he would also be entitled to be placed into a council care home. Therefore more there is sufficient and a myriad of state assistance available for him.
31. No attempts have been made by the Appellant, Mr Rashid nor his GP to enquire as to what care would be made available to the Appellant's father in the absence of the Appellant and accordingly I have no evidence that what I have set out in paragraph 30 above would not be available.
32. There is an unsigned statement from Mr Mohammed Butt. He is the person who was looking after Mr Rashid whilst the Appellant attended this hearing. He states that Mr Rashid is a good friend of his. He states that he believes that Mr Rashid would feel uncomfortable and uneasy if a stranger does what his son does for him every day. I face some weight on that letter as that witness was unable to attend for a good reason of caring for Mr Rashid. However, I find that these considerations carry less weight because there is nothing intrinsic in the duties and care that the Appellant performs which cannot be performed and carried by a combination of social worker, medical professional will care worker. It may be a personal preference but not a necessity.
33. I also find that Mr Rashid has the benefit of his daughter living in the area. I find that the Appellants assertion at paragraph 13 of his statement to be inaccurate and an exaggeration. He states that, *"We only have each other as we have no family*

*elsewhere.*” His sister lives a 10-minute drive away and his father as all his other children in Pakistan.

34. There is an unsigned statement from Ms Shakeel, who is the daughter of Mr Rashid. She did not attend the hearing in support of her statement. The Appellant accepts that she lives nearby. She asserts that she cannot look after her father or spare him much time. However, she does not work and she does not assert that she does not visit him. I find that she would be available to assist and provide some companionship her father even if she is unable to visit frequently or to reside with him.
  35. I also find that Mr Rashid can continue to enjoy family life by modern means of communication with his son. The medical evidence does not support that he would be unable to travel to Pakistan to visit the Appellant and the rest of his family in Pakistan.
  36. I move to consider whether the decision to refuse is a proportionate one.
  37. In balancing the relevant factors I take into account that the Rules have not been met and this is a very significant factor which weighs against the Appellant. I find the public interest for removal to be strong because the Appellant is not required to be the carer of his father in light of my findings above and there are no other factors which support him remaining in the UK, when much of his time in the UK has been without leave and precarious. I place no reliance upon his assertion that he does *“abide by all the rules and law here.”* (Paragraph 25 of his recent statement) as he has failed to do so as evidenced by his periods of being in the UK without leave.
  38. On balancing the various fact above, I find that there is no real risk of a breach of Article 8 and so the decision is a proportionate one.”
- 14.** The decision is challenged on three grounds the first of which relates to an alleged failure by the Judge to have regard to the exceptional circumstances prevailing at the date of hearing, 17 March 2020, namely the Covid 19 public health crisis. It is argued that the relevant date at which matter were to be considered was at the date of the hearing when, despite increasing deaths in the UK and the heightening rate of infection, there is no mention or consideration of this in the determination or likely impact upon Mr Rashid of living alone without a cohabiting carer in light of his vulnerability. The appellant asserts that should have been considered by the Judge as it was capable of forming “compelling circumstance” pursuant to article 8 ECHR. The second ground asserts the Judge failed to apply the correct test when assessing the proportionality of family life disruption, as having found that family life recognised by article 8 exists the Judge was required to consider whether separation of the appellant from his father was proportionate in all the circumstances. It is argued the Judge was required to evaluate whether the disruption of the relationship between the appellant and his father was proportionate weighing up the strength of the family life

against the public interest in immigration control. It argued the Judge should have considered the test of compelling circumstances and whether it was unjustifiably harsh. It is said the Judge failed to indicate what weight should be given to the family life against any hypothetical alternatives canvassed. Ground three asserts an irrational consideration of the factors in the proportionality assessment arguing the giving of significant weight to the purported availability of alternative care failed to have regard to the nature and extent of the current care provided by the appellant himself some aspects of which are said to be irreplaceable. The appellant argues that the appellant's ability to care for his father was an important part of the family life for both of them. It is also argued the Judge's finding Mr Rashid could maintain family life by means of modern communication is contentious and something the Upper Tribunal has long deprecated.

- 15.** The Secretary of State's case is set out in a Rule 24 response dated 26 October 2020 in which it is stated the application is opposed as the Judge direct herself appropriately and gave adequate reasons for the findings made. The document continues:

"The respondent submits that the Judge of the FTT accepted that the appellant's father had care needs but found that there was no medical evidence to demonstrate that he has significant memory problems or that he requires 24 hour care. The evidence indicating that the appellant intended to work part-time if permitted to remain in the UK supports a finding that his father does not require 24-hour care.

The respondent submits that it was open to the of the FTT to find that, if the appellant's father could not manage alone, he was entitled to benefits to pay for care, mobility aids, etc. The appellant and his father had made no enquiries regarding the availability of support and it was open to the Judge of the FTT to find the appellant had failed to establish that his father would enable to access suitable assistance.

It was also open to the Judge to find there were other family members who would be able to provide some support in the absence of the appellant, and that the appellant had not established that his sister was unable or unwilling to assist their father.

All though the Judge of the FTT did not consider the Covid-19 tube, the respondent submits that this is not material to the overall conclusions of the FTT.

The respondent submits the determination discloses no material error of law and should be maintained."

### **Error of law**

- 16.** In an application for leave to remain as a carer, the underlying nature of the appellant's human rights application, it is necessary to consider a number of relevant issues.
- 17.** An application for Entry Clearance as a carer would ordinarily be refused under paragraph 320(1) of the Immigration Rules as there is no provision in the Rules for entry is such capacity.

- 18.** A 'carer concession' exists which is a concession to enable a person already in the UK in a temporary capacity to make long-term arrangements for the care of a friend or relative. This was not, however, the nature of the remedy the appellant was seeking.
- 19.** In relation to an application for leave to remain such as this, whilst each case must be looked at on its individual merits, when considering whether leave to remain should be granted, a number points should be considered by a decision maker such as:
  - i. The type of illness or condition supported by a Consultant's letter;
  - ii. The type of care required;
  - iii. Care which is available (e.g. from the Social Services or other relatives/friends); and
  - iv. The long-term prognosis.
- 20.** These are all matters that the Judge took into account with the required degree of anxious scrutiny when assessing the proportionality of the decision.
- 21.** In respect of the Covid 19 pandemic, the Judge is criticised for not considering the impact of the same upon Mr Rashid living alone without a cohabiting carer in light of his vulnerability but the grounds fail to establish in what way this is material to the Judge's decision to dismiss the appeal.
- 22.** The respondent has published guidance dealing with removals and it was not made out at the date of decision that suitable care would not be available including within the care sector. A decision speaks from the date it was promulgated on 7 April 2020 when despite increased levels of deaths and pressures upon the NHS the care sector continued to function especially once additional PIP was available.
- 23.** It is not made out to be an irrational finding, on the evidence available to the Judge, that if Mr Rashid is reliant upon the type of care discussed such will be available to him within the care sector. In relation to Mr Rashid's psychological health, that was no evidence before the Judge to show that the impact of the appellant's removal, especially in light of the findings of the availability of in country family support, would result in a deterioration sufficient to warrant a finding of compelling circumstances.
- 24.** The Judge was clearly aware of the correct manner in which to approach an article 8 ECHR appeal. The Judge found in the appellant's favour in relation to the first of the Razgar questions and went on to consider the final question which is that upon which the appeal turned, whether the interference with the appellant's family and private life and that enjoyed by the appellant's father was proportionate to the legitimate aim relied upon.
- 25.** The Judge was not required to set out findings in relation each and every aspect of the evidence and it is clear that in concluding that the public interest outweighed the protected family and private life the Judge took into account the nature of the tie between the appellant and

his father, which was predicated on the support the appellant gives to his father, without which there was no evidence that the relationship was such as to amount to family life recognised by article 8 rather than de facto family life.

26. The Judge accepted that at the date of decision the appellant was Mr Rashid's main carer but found alternative care was available which did not require the appellant's presence in the UK and that although the Judge identified credible sources of such potential care and support it was noted no enquiries had been made by either the appellant or his father to establish whether the same was available.
27. The Judge clearly noted the human aspect of the case and the importance to Mr Rashid of the fact he is living with his son who is providing care. The evidence before the Judge did not establish, however, that this was the determinative factor.
28. There is nothing arguably irrational in the proportionality assessment in which all competing arguments were taken into account.
29. It is understandable that Mr Rashid would prefer to receive carer and support from his son, but there was nothing to show alternatives were not available or that the specific nature and extent of the support provided by the appellant could not be replicated by others. Whilst the appellant and his father may want the appellant to stay in the United Kingdom to provide such support, there is merit in the respondent's comment in the Rule 24 reply that the fact the appellant was indicating he would work part-time shows that support 24 hours a day, 7 days a week, as alleged, was not required for Mr Rashid.
30. It is also settled law that article 8 does not give a person the right to choose where they wish to live.
31. Disagreement with the Judges findings is not enough. The findings made are supported by adequate reasons. The weight to be given to the evidence was a matter for the Judge. It is not made out the findings are outside the range of those reasonably opened to the Judge on the evidence sufficient to warrant the Upper Tribunal interfering any further in relation to this matter.

### **Decision**

32. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

33. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed  
Upper Tribunal Judge Hanson



Dated the 26 November 2020