



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16865/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On 19 March 2021
By Skype for Business**

**Decision & Reasons Promulgated
On 26 April 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**AB
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sohail Mohammed, Solicitor Advocate, Kingstons Law

For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

This hearing was held remotely via video link and neither party objected to the manner of the hearing. Both parties participated by Skype for Business. I am satisfied that a face-to-face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. There were no IT problems during the hearing and neither party complained of unfairness.

Appellant's Immigration History and History of the Appeal

The appellant is a citizen of Pakistan. At the date of the hearing before the First-tier Tribunal she was aged 64. She is a widow and has nine surviving children, all of whom live in the UK. Prior to 2017 she made several visits to the United Kingdom, on each occasion returning to Pakistan within the currency of her visa. In 2017 she entered the United Kingdom on a visit visa valid for six months from 2 March 2017. On 17 August 2017, prior to the expiry of her visa, she made an application for leave to remain based on the basis of her Article 8 ECHR right to family and private life. This application was refused with no right of appeal. A further application for leave to remain on the basis of Article 8 ECHR was made on 12 March 2019. The application was refused in a decision made on 3 October 2019. The appellant appealed against the decision and her appeal was dismissed by First-tier Tribunal Judge Moran on 17 December 2019. On 4 June 2020 First-tier Tribunal Judge Bibi granted permission to appeal.

On 27 July 2020 Upper Tribunal Judge Rintoul, in a Memorandum and Directions, indicated that it was his preliminary view that the decision of the First-tier Tribunal judge involved the making of an error on a point of law and that the decision should be set aside to be remade in the Upper Tribunal.

On 8 October 2020 Upper Tribunal Judge Coker determined the issue of whether there was an error on a point of law without a hearing pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. She decided that the judge had erred by failing to take into account that the appellant's health had deteriorated since the last application; contrary to the provisions of E-ECDR 2.5, finding that the British sponsor could assist the appellant in Pakistan and failing to take into consideration Britcits v SSHD [2017] EWCA Civ 368. Upper Tribunal Judge Coker set aside the decision to be remade in the Upper Tribunal and made extensive directions. The error of law decision is annexed to this decision.

On 11 February 2021 pursuant to the Senior President of Tribunals' Practice Statements, Principal Resident Judge Kopieczek made a transfer order on the basis that it was not practicable for the original Tribunal to give its decision without undue further delay and that it was appropriate for the appeal to be heard by a differently constituted Tribunal.

Further to the directions of Upper Tribunal Judge Coker dated 8 October 2020 there was a considerable amount of correspondence between the appellant and the respondent in respect of agreed factual findings. The respondent indicated that she was hampered by working remotely without access to the Home Office file. The day prior to the hearing the appellant forwarded the appeal bundle and the original skeleton argument to the respondent.

Decision under Appeal

The decision under appeal is the decision dated 3 October 2019 to refuse the appellant's human rights claim.

The appellant's claim

The appellant asserts that she has established family life with her sponsor and his wife in the UK. All of her children remain in the UK. She is elderly, has no remaining family in Pakistan apart from one sister. She is in poor physical health and has significant mental health problems following the death of her husband and eldest son. She requires 24 hour personal care. This care is not available in Pakistan. She is too unwell to travel by herself. It would be a disproportionate breach of her family life to remove her to Pakistan or to require her to return to Pakistan to apply for entry clearance to make the correct application under the immigration rules.

Reasons for the Refusal

The Secretary of State's position is that the appellant does not satisfy the requirements of the immigration rules for adult dependent relative rules at Sections EC-DR through to D-ILRDR at Appendix FM because such an application can only be made from outside of the United Kingdom. The appellant cannot meet the requirements of paragraph 276ADE(1)(vi) of the immigration rules because she cannot demonstrate that there would be very significant obstacles to her integration into Pakistan because she has spent the majority of her life in Pakistan including her formative years and retains knowledge of the life, language and culture. The respondent goes onto consider the application under paragraph GEN.3.2 of Appendix FM but it is considered that there are no exceptional circumstances in the appellant's case which would render the refusal a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for the appellant.

The respondent noted that the appellant is a widow and has nine children remaining in the United Kingdom with their families. The appellant's eldest son died in a fire in 2017. It is considered that the appellant does not have permission to remain in the United Kingdom permanently and has never been given any legitimate expectation that she could stay. Prior to her last entry to the UK, the appellant lived with her sister after her husband died and the appellant's family in the United Kingdom took turns to visit the appellant in Pakistan because they have property there. The respondent considers that these arrangements can continue. The appellant could apply to visit her family in the United Kingdom and they could visit her. It is also not considered that any Article 3 ECHR medical claim was made out because there is a functioning healthcare system in Pakistan which could provide treatment to her.

Grounds of Appeal

The grounds of appeal assert that it would be a breach of Article 8 ECHR to remove the appellant from the United Kingdom.

The Burden and Standard of Proof

It is for the appellant to show that there will be, if the Secretary of State acts as she intends, an interference with her human rights. If an interference is established, it is for the Secretary of State to establish that the interference is justified. The standard of proof is the balance of probabilities.

The relevant date for the determination of the Article 8 ECHR issue is the date of the hearing.

Documents

I had before me the previous documents produced at the appeal before First-tier Tribunal Judge Moran including the Secretary of State's bundle, the appellant's original 180-page bundle of evidence and the skeleton argument. There were no new documents before me. The appellant did not seek to adduce any further evidence.

The Hearing

At the outset of the hearing, Mr Lindsay for the respondent conceded, having viewed the case in the light of the directions of the Upper Tribunal and the judge's findings, that the appeal should have been allowed under Article 8 ECHR.

Discussions and Analysis

I am in agreement with Mr Lindsay that it would be a disproportionate breach of the appellant's Article 8 ECHR right to family life to remove her from the United Kingdom.

Evidence before the First-tier Tribunal

At the original hearing in front of First-tier Tribunal Judge Moran, there was a considerable amount of documentary evidence before the judge including medical evidence in relation to the appellant. This included a letter from the appellant's GP, Dr Niazi, dated 1 March 2019 which stated;

“AB has been suffering from severe bereavement reaction with anxiety and depression symptoms since the death of her husband, aggravated significantly by the death of her son.”

The letter goes on to say that since coming to the United Kingdom, the appellant's mood improved with support of her family but there was a significant deterioration after she was refused leave to remain in the United Kingdom. The appellant was referred to as voicing suicidal thoughts, being extremely anxious, crying all the time and sleeping very little etc. As a result, she was referred for psychiatric review.

There was then a letter from her GP dated 23 September 2019 in similar terms but with the additional opinion that the appellant was not fit to travel due to “her disturbed mental state and inability to cope in Pakistan on her own without any family support”.

Additionally, there was a letter from a consultant psychiatrist Dr Mahapatra dated 19 November 2019. He saw AB twice after a referral from her GP. Each time she sat motionless with her eyes closed and he was unable to take any history from her. He relied instead on information given by the appellant's

daughter. This information included that she was threatening to take a drug overdose, needed help in maintaining her personal hygiene and was incontinent of urine on some nights. Dr Mahapatra concluded that she was suffering from psychotic depression and that she lacked capacity to manage her affairs. The assessment concluded that her condition is so severe that she requires in-patient psychiatric care and in all probability would require treatment with modified ECT. It was noted that she had been treated with anti-depressants (sertraline and mirtazapine) for several months. The letter concluded by saying that she lacked insight into her condition and that she also lacked the will to live.

There was also evidence before the judge of the provision of medical and healthcare assistance in Pakistan including the respondent's Country Policy and Information Note "Pakistan: Medical and healthcare provisions" of August 2018. The evidence confirmed that a range of anti-depressant medication is available; private healthcare has proliferated in Pakistan's increasingly commercialised health sector and that due to this commercialisation, health services for the poor have become limited. It therefore distinguishes between private and public healthcare. While private healthcare is said to be of better quality, access to it is limited by the cost. Finally, the judge had before him evidence of the provision of alternative personal care in Pakistan in the form of a letter from M Nadeem, the Director of the Health and Welfare Department in Jhelum, Pakistan, which says that in Pakistan there is no concept of buying care for the elderly as it is provided by the family, it being the culture that the oldest son will take responsibility for the personal care of his parents.

The judge's view was that although the appellant could not access personal care in Pakistan, her family members in the UK including the British sponsor and his wife could travel to Pakistan to care for her. This approach has been found to be in error and this finding is not preserved.

Unchallenged Findings by the First-tier Tribunal

The judge made the following findings. None of these findings have been challenged by the appellant or the respondent. The appellant listed these findings in a "Proposed Schedule of Agreed Facts" and Mr Lindsay did not submit that any of these facts should not be agreed. On this basis I find that the agreed facts are as follows:

AB's husband died on a date before 2017.

AB's son MI died in the United Kingdom following a house fire in February 2017.

AB came to the UK in March 2017 but not in time for her son's funeral. She came lawfully on a visit visa. She reasonably wanted to be in the UK with her family following her son's death. AB had previously visited the UK and returned to Pakistan. It was her intention to return to Pakistan following her most recent entry into the United Kingdom. She changed her mind once she was in the UK, having discussed matters with her family in the light of her state of health.

AB's mental health was badly affected by the death of her husband and son.

AB's surviving nine children are all in the UK and are British citizens. Two of them are probably not fit to travel to Pakistan due to severe epilepsy.

Since AB has been in the United Kingdom, she has been living with her son MS and his family. AB has been dependent on MS and her other children financially, emotionally and practically. There exists family life between them.

AB's sister continues to live in Pakistan but she is elderly and in poor health herself.

AB has some physical health problems (diabetes and high blood pressure) but her state of physical health is not remarkable for someone of her age. It is her mental health that is more serious and having more of an impact on her ability to function. She has severe anxiety and depression to an extent that a consultant psychiatrist has recommended that she be admitted as a psychiatric in-patient. She has not been admitted as her family have indicated that they are willing and able to care for her at home.

Some medical care is available in Pakistan, although not to the same standard as the care that she receives in the United Kingdom. The appellant will be able to afford medical care because her family pays for her healthcare in the United Kingdom and there is no reason therefore why they cannot pay for it in Pakistan. The background evidence shows that healthcare provision in Pakistan is better for those that can afford to pay for it.

Professional personal/social care is not likely to be available in Pakistan. The evidence provided is limited, but has not been challenged by the respondent. It consists of the letter at A93. There is nothing in the background country evidence to suggest that the content of the letter is inaccurate.

AB is unfit to travel on her own.

AB can be maintained, accommodated and cared for in the UK by the sponsor without recourse to public funds.

Relevant undertakings for sponsorship have been provided.

Immigration Rule 317 and Appendix FM ADR Entry Clearance Leave to Remain

It is agreed by both parties that the appellant is not able to meet the requirements of paragraph 317 of the immigration rules nor the rules in respect of adult dependent relatives at Sections EC-DR.3 to D-ILRDR of Appendix FM because she is not over 65 years old for the purposes of paragraph 317 and the application as an adult dependent relative for the purposes of EC-DR.3 has to be made from within the United Kingdom. Therefore the appeal turns on a freestanding Article 8 ECHR proportionality exercise.

The House of Lords in the case of **Huang v SSHD [2007] UKHL 11** states:

“The ultimate question for the Appellate Immigration Authority is whether the refusal of leave to enter or remain in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere prejudices the family life of the applicant in a manner

sufficiently serious to amount to a breach of the fundamental right protected by Article 8.”

Lord Bingham in **Razgar [2004] UKHL 27** identified a number of step-by-step questions to be asked in Article 8 ECHR cases where an applicant has established a private or family life or both. These questions are:

Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or family life?

If so, will such interference have consequences of such gravity as to potentially engage the operation of Article 8?

If so, is such interference in accordance with the law?

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

If so, is such interference proportionate to the legitimate public aim sought to be achieved?

Family Life

It is accepted as an unchallenged fact that the appellant has established family life with her son and daughter-in-law. She has been physically living with the sponsors as a family for three years. The sponsors have borne all of the expenses associated with her maintenance and accommodation including the payment of expensive private medical treatment. The appellant is also emotionally dependent on her family and relies on her daughter-in-law for personal care. The relationship exceeds the normal bonds between adult relatives because of the strength and nature of the dependency by the appellant on her son and daughter-in-law. In terms of her private life, during the appellant’s stay in the United Kingdom she has also formed strong relationships with her other children plus their extended family including her grandchildren, all of whom assist her mentally or physically with her various conditions. It is agreed that a decision to remove the appellant would interfere with her family and private life. It is not possible for the British sponsor or his wife to relocate to Pakistan to be with the appellant since they live in a family unit with their own three British national children aged under 18.

With respect to the next stages of the **Razgar** test, I find that the decision is in accordance with the law and pursues a legitimate aim, namely the economic wellbeing of the country expressed as effective immigration control.

Proportionality Assessment

I go on to consider the issue of proportionality.

In R (on the application of Agyarko and Others) v The Secretary of State for the Home Department [2017] UKSC 11 it was said:

“The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.”

Conceded by Mr Lindsay at the Appeal

It is conceded by the Secretary of State that the appellant can satisfy all of the requirements for an adult dependent relative apart from the requirement that she be outside the United Kingdom when she makes the application. Mr Lindsay conceded that the appellant has provided medical evidence which demonstrates that she requires 24-hour personal care because of her mental health issues and that this personal care is not reasonably available to her in Pakistan on the findings of the judge in the First-tier Tribunal and that there is no person in Pakistan who can reasonably provide the personal care.

This is on the basis that the appellant’s sister in Pakistan is herself aged and infirm and is not able to assist the appellant and on the basis that all of the appellant’s children are residing lawfully in the United Kingdom and are not resident in Pakistan. The proposition that the appellant’s children could take turns to visit Pakistan has been demonstrated to be unlawful. The rules do not require the sponsor and his family to relocate to Pakistan to provide personal care.

Mr Lindsay also accepted that given the appellant’s current state of health and the fact that she is unfit to fly, it would be unduly harsh to even expect her to leave the United Kingdom temporarily in order to return to Pakistan to apply for entry clearance under the immigration rules, which she would inevitably be granted.

In assessing Article 8 ECHR, I am required by Section 117A of the Nationality, Immigration and Asylum Act 2002 as amended by Section 19 of the Immigration Act 2014 when considering the issue of proportionality to have regard to those factors set out at Section 117B. Section 117A(3) confirms that the Tribunal is required to carry out a balancing exercise setting the gravity of the interference against the requirements of the public aims sought to be achieved. The starting point is that the Secretary of State is entitled to control the entry of foreign nationals into the territory and the maintenance of effective immigration control is in the public interest.

I adopt a balance sheet approach to Article 8 ECHR in accordance with Hesham Ali [2016] UKSC 60. I must strike a fair balance between the competing public and private interests in accordance with the principles in Agyarko. I take into consideration that despite the fact that the appellant entered the United Kingdom lawfully as a visitor and applied to extend her leave to remain within the currency of her existing visa, she has remained in the United Kingdom with

a precarious immigration status or unlawfully in the UK at all times, initially having leave as a visitor, later remaining in the UK without leave. In these circumstances, I must give little weight to the private life built up during this period.

I note that the appellant's family life with her son and sponsor was in existence prior to her arrival in the United Kingdom and was strengthened at a time when her immigration status was precarious. I am not required to give little weight to family life (other than with a qualifying partner) which was built up while an applicant had a precarious immigration status. I take into account the unchallenged finding that the appellant entered the United Kingdom following the tragic death of her son in a house fire with the intention of returning to Pakistan at the end of her visit as she had done before and that during the time that she was in the United Kingdom her health deteriorated. I give weight to the fact that she did not set out to abuse immigration control.

The fact that the appellant is able to be supported by her son and daughter-in-law in the UK and that she has no criminal convictions are neutral factors. In the future it seems likely that AB will have recourse to medical treatment in the UK and access public funds and this is a factor that weighs against her as does the fact that she does not speak English.

I give weight to the fact that the appellant cannot satisfy all of the requirements of the immigration rules but note and take into account that the appellant is in extremely poor health and meets all of the substantive requirements of the immigration rules in respect of adult dependent relatives, apart from the requirement that the application should be made from outside of the UK. In particular it is agreed that she is suffering from severe bereavement reaction and psychotic depression and suicidal ideation to the extent that she requires in-patient psychiatric care, requires 24-hour personal care and is unable to access that personal care in Pakistan. I also note and take into account that the appellant is not fit to fly and that the respondent concedes that in all of these circumstances that it would be unjustifiably harsh for the appellant to be expected to be removed from the United Kingdom to Pakistan where she would not be able to access the personal care she needs or to be expected to return to Pakistan in order to apply for entry clearance when she is unable to travel alone and similarly cannot access personal care. Having taken all of the factors in the round and in line with the concession from the respondent, I find that the balance of proportionality falls in favour of the appellant.

Notice of Decision

The appeal is allowed on human rights grounds under Article 8 ECHR.

Anonymity

The First-tier Tribunal made an anonymity order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Procedure Rules 2008.

Signed R J Owens
Upper Tribunal Judge Owens

Date 15 April 2021

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because the appellant produced the evidence of the deterioration in her mental health and lack of facilities to provide personal care in Pakistan on appeal and there were complicated findings of fact which needed to be made by the First-tier Tribunal.

Signed R J Owens
Upper Tribunal Judge Owens

Date 15 April 2021