



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/19298/2019 (V)  
HU/19305/2019 (V)

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
Remotely by Microsoft Teams  
On 29 July 2021

Decision & Reasons Promulgated  
On 25 August 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

NAVIDA AJMAL  
KHAWAJA AJMAL AHSAN BUTT

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr E Gajjar, instructed by Burney Legal Solicitors  
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellants, who are married, are citizens of Pakistan who were born on 5 November 1953 and 15 March 1946 respectively.

2. They entered the United Kingdom on 27 September 2014 with entry clearance as visitors valid until 28 February 2015.
3. On 28 February 2015, both appellants applied for indefinite leave to remain outside the Rules on compassionate grounds. On 5 May 2015, the Secretary of State refused each appellant the leave sought. On 15 May 2015, the appellants lodged an appeal with the First-tier Tribunal. On 3 May 2016, the First-tier Tribunal (Judge O'Brien) dismissed each of the appellants' appeals. Each of the appellants was refused permission to appeal by the First-tier Tribunal on 4 October 2016 and by the Upper Tribunal on 22 November 2016. They became appeal rights exhausted on 22 November 2016.
4. On 20 December 2016, they were served with a RED.0001 document. On 13 April 2018, the appellants applied for leave to remain under the family and private life rules in Appendix FM of the Immigration Rules (HC 395 as amended).
5. On 11 November 2019, the Secretary of State refused the applications of both appellants.

### **The Appeal to the First-tier Tribunal**

6. The appellants appealed to the First-tier Tribunal. Their appeals were heard by Judge L Murray on 11 March 2020. They relied upon para 276ADE of the Rules and the Adult Dependent Relative Rules (the "ADR Rules") in Section EC-DR of Appendix FM. Further, they relied upon Art 8 outside the Rules.
7. In her determination sent on 25 March 2020, Judge Murray dismissed the appellants' appeals on all grounds. First, she did not accept that there were "very significant obstacles" to their integration on return to Pakistan under para 276ADE(1)(vi). Secondly, she did not accept that the appellants met the requirements of the ADR Rules in Appendix FM. In particular, the appellants were within the UK, rather than applying from outside the UK, and the judge did not accept that the long-term personal care they required to perform everyday tasks as a result of their health and age was neither unavailable nor unaffordable in Pakistan. Finally, the judge found that the appellants' removal would be proportionate in that the public interest in effective immigration control outweighed their personal circumstances.
8. The appellants sought permission to appeal on a number of grounds in reaching her adverse finding under the ADR Rules, including failing properly to assess the evidence as to whether the required care was available to the appellants in Pakistan.
9. On 24 April 2020, the First-tier Tribunal (Judge Nightingale) refused the appellants permission to appeal. On 15 July 2020 the Upper Tribunal (UTJ Kopiczek) also refused permission to appeal.
10. The appellants sought judicial review of Judge Kopiczek's decision under CPR 54.7A on a Cart basis.

11. On 13 November 2020, Lieven J granted the appellants permission to bring judicial review proceedings challenging the Upper Tribunal's refusal of permission.
12. On 7 April 2020, Master Gidden made an order quashing the UT's refusal of permission to appeal.
13. In response to that order, on 21 April 2021 the Upper Tribunal (Judge Ockelton, VP) granted the appellants permission to appeal.
14. The appeal was listed for hearing on 29 July 2021 at the Cardiff Civil Justice Centre. I was based in court and Mr Gajjar, who represented the appellants, and Mr Avery, who represented the Secretary of State, joined the hearing remotely by Microsoft Teams.

### **The Grounds**

15. In the Cart judicial review, the appellants relied upon grounds going beyond those upon which permission had been sought both in the First-tier Tribunal and Upper Tribunal. In granting permission Lieven J under "Observations" identified the arguable errors of law that led her to grant permission to judicial review of the UT's refusal of permission to appeal as follows:
  - "1. In my view there are a number of aspects of the FTT's decision where the Cart test is made out.
    - a. The FTTJ has not considered the family life of the grandchildren and s.55 of the 2009 Act;
    - b. it is not apparent whether s.117B of the 2002 Act applies to family life between elderly parents, their children and grandchildren;
    - c. the FTTJ's conclusions that family life could continue because the appellants could continue to travel to the UK when the medical evidence strongly suggests that it would not be the case;
    - d. the FTTJ's conclusions on care in Pakistan are also very difficult to follow in the light of the evidence that care facilities suitable for those with conditions such as the appellants are not available in Pakistan;
    - e. there is a dispute as to whether the evidence was that the former employer would continue to pay medical fees. This may be less material given that the real issue is the availability of personal care, rather than the affordability of medical care.
  2. These grounds are arguable. The compelling reason to grant permission is the devastating effect that this decision is likely to have on the appellants and their family and they need to be sure that the decision has been lawfully made."
16. At the hearing, Mr Gajjar recognised that he was "treading a fine line" in relying on the JR grounds of appeal upon which Lieven J had granted permission in the Cart judicial review challenge as they went beyond the grounds in the application refused by the UT.

17. Mr Avery submitted that the appellants could only rely on the UT grounds unless those grounds were now amended to reflect the grounds upon which permission had been granted in the Cart challenge and, he pointed out, no application to amend had been made.
18. Neither representative developed this issue any further and both made substantive submissions on the grounds upon which Lieven J had granted permission in the Cart judicial review.
19. This situation creates a procedural conundrum. The Upper Tribunal has made clear that the basis upon which a Cart challenge should be made is that the UT failed properly to consider the grounds that were presented to it as part of the permission application. Further, and different, grounds should not be relied upon as that would be to allow an individual to have ‘three bites of the cherry’ in challenging the FtT’s decision.
20. In MA (Cart JR: effect on UT processes) Pakistan [2019] UKUT 353 (IAC) (Lane J, President and Judge Ockelton, Vice President) as set out at para (4) of the headnote observed that:
  - “(4) The requirement in CPR 54.7A, that there must be shown to be something arguably legally wrong with the way in which the Upper Tribunal reached its decision in response to the grounds of application that were before it, is important. If it is not observed, there is a serious risk of a ‘Cart’ judicial review being seen as a third opportunity for an appellant to perfect grounds of challenge to the First-tier Tribunal’s decision, when Parliament has ordained that there should be no more than two.”
21. Consequently, at [40] the UT said this about the need to amend the grounds to reflect those in the Cart challenge:
  - “If, as a result of ‘Cart’ judicial review proceedings, the grounds for contending that the First-tier Tribunal Judge erred in law have changed, compared with those that were before the Upper Tribunal when it made its (now quashed) decision, the appellant will need to apply to the Upper Tribunal for permission to amend his or her grounds of permission, in order to be able to rely upon the grounds advanced in the ‘Cart’ judicial review. The fact that such grounds have found favour in the High Court does not mean those grounds automatically become the grounds of challenge to the First-tier Tribunal’s decision.”
22. It is no doubt reflecting that approach that led Mr Avery to point out that the grounds upon which Lieven J had granted permission in the Cart proceedings should only become part of the appeal before me if the grounds of appeal were amended.
23. The Upper Tribunal returned to this issue in Osefiso and Another (PTA decision: effect; ‘Cart’ JR) [2021] UKUT 112 (IAC) (Lane J, President and Judge Ockelton, Vice President). In that case, the UT was concerned with a situation where an attempt to amend the UT grounds had been made based upon the grounds that had found success in the Cart challenge. At [22], the UT referred to its earlier decision in MA

and identified the approach that should be followed in Cart judicial reviews as follows:

“22. As the Upper Tribunal explained in MA (Cart JR: effect on UT processes) Pakistan [2019] UKUT 353 (IAC), the "Cart" judicial review jurisdiction for which provision is made by CPR 54.7A should not be treated by parties as merely an untrammelled third opportunity to raise grounds of challenge to a decision of the First-tier Tribunal, which have found no expression in the grounds put to the First-tier Tribunal and, then, the Upper Tribunal. In enacting section 11 of the Tribunals, Courts and Enforcement Act 2007, Parliament has provided for there to be a renewed application to the Upper Tribunal, following a refusal by the First-tier Tribunal. That renewed application is not constrained by whatever grounds have been put to the First-tier Tribunal. The "Cart" judicial review is, however, of a fundamentally different character. In order to satisfy the part of CPR 54.7A(7)(a) which requires the High Court to find an arguable case that the Upper Tribunal's refusal of permission to appeal was wrong in law, the court needs to be satisfied either that:

- (a) the Upper Tribunal's reaction to the grounds of challenge in the application for permission to appeal was arguably wrong in law; or
- (b) where the judicial review grounds have not found expression in the grounds considered by the Upper Tribunal, the judicial review grounds are of such an a nature as to have required the Upper Tribunal to have raised them of its own volition, and then considered them; and that its failure to do so is arguably wrong in law.”

24. Having said that, at [34] the UT dealt with the approach set out in para 22(b) of its decision:

“34. In other words, because the basis of challenge in the judicial review was not the basis of challenge put to the Upper Tribunal in the appellate challenge to the First-tier Tribunal's decision, the appellants were inexorably faced with having to make their judicial review case on the basis set out in paragraph 22(b) above; namely, that the Upper Tribunal should have taken the points of its own volition. That is a more challenging task than under paragraph 22(a), since the basis of challenge needs to be a "Robinson" obvious one ( R v Secretary of State for the Home Department ex parte Robinson [1998] QB 929; [1997] Imm AR 568; R (Begum) v Social Security Commissioners [2002] EWHC 401 (Admin); Bulale v Secretary of State for the Home Department [2008] EWCA Civ 806; [2009] Imm AR 102).”

25. In this appeal, Mr Gajjar did not press any application to amend the grounds that had been rejected by the UT to include, or be replaced by, those that had found success before Lieven J. It will be obvious from the basis upon which she granted permission in the judicial review proceedings that the grounds, at least to some extent, went beyond not just the detail in the UT grounds but also the substance, in particular looking at the issue of family life between the appellants and their grandchildren and the latter's best interests under s.55 of the Borders, Citizenship and Immigration Act 2009 and the proper application of s.117B, in particular s.117B(4) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") to "family life" not established between a qualifying partner and the individual.

26. It is, perhaps, unfortunate that this issue was not explored more fully in the submissions before me. There was, as I have said, no application made by Mr Gajjar to amend the appellants' grounds. Mr Avery raised the issue but did not pursue it with any vigour, instead focussing on the substance of the grounds.
27. As the UT has pointed out in both MA and Osefiso and Another, the Cart grounds should seek to argue that the Upper Tribunal acted unlawfully in its approach to, and decision to reject as arguable, the grounds that were presented to it. The purpose of a Cart challenge is not to identify previously unarticulated arguable grounds upon which it is said that the First-tier Tribunal erred in law. However, the reality is, certainly in my own experience, that Cart grounds often do extend beyond those which were raised before the UT. The UT's decisions do not exclude this as a possibility but recognise, perhaps in seeking to focus representatives upon the proper role of the High Court in Cart challenges, that only the grounds relied upon before the UT may be pursued or other grounds which, on a 'Robinson obvious' basis, the UT could (and maybe should) have taken for itself - as the UT said on its "own volition" - which means that the error of law was 'obvious' in the sense it is one which has a "strong prospect of success" if it is argued and which, not taken might leave the UK in breach of its international obligations including under the ECHR (see, R v SSHD, ex parte Robinson [1998] QB 929 at [39]).
28. I apprehend that under the wide "case management powers" in rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended), UT may, not only as a result of an application by a party but at its own instigation, treat as amended a document, including the grounds of appeal. Rule 5(3)(c) states that the UT may "permit or require a party to amend a document"; clearly recognising that an application may not be necessary. I did not hear, as I have said, further argument on this issue. However, in this appeal, I prefer to consider the grounds relied upon in the Cart challenge on a Robinson obvious basis. Lieven J did not merely state, without further exposition, that the Cart grounds were arguable. She spelt out in some detail in para 1 of her "Observations" the basis upon which she considered the grounds were arguable. In para 2 she also considered there was "compelling reason" to grant permission on those grounds.
29. As regards the entirely new grounds relating to the Art 8 claim outside the Rules, in particular but not limited to the issue of the grandchildren's best interests and the proper scope of s.117B(4) of the NIA Act 2002, I consider that the grounds establish a more than arguable case which have "a strong prospect of success". Further, clearly if the current decision stands, any errors in regard to those matters potentially place the UK in breach of its obligations not to remove the appellants in breach of Art 8 of the ECHR. Consequently, I proceed to consider the appellants' grounds of appeal essentially derived from the Cart challenge grounds of appeal read, at least as regards the ADR Rules, with the UT grounds which, in respect of the latter matters, are in reality no more than a more detailed exposition of the challenge made in the UT's grounds.

## Discussion

### *The ADR Rules*

30. I will deal first with a ground that was part of the original UT grounds but was amplified in the Cart judicial review grounds. It concerns the judge's findings in respect of the ADR rules.
31. So far as relevant, the ADR rules provide in Section E-ECDR.2.4 and 2.5 as follows:
- “E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.
- E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because-
1. (a) it is not available and there is no person in that country who can reasonably provide it; or
  2. (b) it is not affordable.”
32. Appendix FM-SE at paras 33 and 34 sets out the “specified evidence” and independent required to establish the requirements of the ADR rule:
- “34. Evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of:
- (a) Independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and
  - (b) This must be from a doctor or other health professional.
35. Independent evidence that the applicant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in the country where they are living should be from:
- (a) a central or local health authority;
  - (b) a local authority; or
  - (c) a doctor or other health professional.”
33. Before Judge Murray, the appellants largely relied upon the impact upon them due to their personal circumstances if they return to Pakistan. In particular, the appellants relied upon a number of health and medical matters which the judge set out at paras 16 – 22 of her determination, noting that there were over 300 pages of medical evidence in relation to both appellants.
34. The judge found, applying Section E-ECDR.2.4 and 2.5 that, under the ADR rules, that the appellants' medical conditions “including lacking mobility” resulted in them requiring long-term personal care in order to perform everyday tasks. The judge also

found that personal care was provided in the UK by their sons and daughters-in-law. However, the judge went on to find that it had not been demonstrated that the care they require was not available or not affordable in Pakistan. The judge found that the required evidence had not been presented in the appeal under paras 34 and 35 of Appendix FM-SE from a medical professional, a relevant health or local authority that the “required level of care” could not be obtained in Pakistan. At para 35, the judge said this:

“Whilst the medical evidence does not overtly state that they require long-term personal care for everyday tasks, I have accepted on the basis of their medical conditions including lacking mobility that this is likely to be so. I accept their sons and daughters-in-law provide personal care for everyday tasks and in view of the fact that their conditions are deteriorating, this is likely to be long-term. However, what is clear both from the Rules and from the case law cited above is that what is lacking here evidentially is the absence of expert medical evidence of what care is both necessary and reasonable for the applicant to receive in their home country. There is no supporting background evidence as to the availability of care homes and the facilities they offer. There is also no expert medical evidence as to the emotional and psychological requirements of the appellants. On the evidence before me, I accept that the appellants have been well looked after by their families here in the UK and that they would naturally prefer that to continue. However, it has not been demonstrated that the care they require is neither available, affordable or that standard is not reasonable.”

35. In fact, the judge had evidence, albeit from one of the appellants’ sons, that they had not been able to identify care homes in Pakistan who could look after the appellants. At para 18, the judge summarised his evidence as follows:

“He says that he has contacted care homes in Pakistan but none have responded to his emails and when he called them he was called that they could not look after elderly people with such medical conditions that they keep men and women apart. He states that carers do not treat elderly people well in Pakistan and the standard in nursing is poor there. He further states that his daughter was born here prematurely and suffers from severe eczema which will worsen if not treated properly and his brother faces a similar situation if he has to relocate to Pakistan as his daughter has autism.”

36. At para 19, the judge noted similar evidence from the appellants’ other son.
37. Paras 34 and 35 of Appendix FM-SE do require that the evidence, necessary to establish the requirements of the ADR rules, should come from a doctor or other health professional or a health authority or local authority. The evidence of the appellants’ sons does not satisfy that requirement. However, Mr Gajjar submitted that there was evidence from Dr Amin in the appellants’ bundle in relation to the first appellant at page 704 and in relation to the second appellant at pages 752–754 that the medical care that they required was “simply unavailable in Pakistan”.
38. Mr Avery submitted that it was difficult to ascertain what evidence was required given that the judge had not identified clearly what the appellants’ needs were. He



accepted what Dr Amin had said in his two letters which were dated from April 2018.

39. It seems to me that the judge did not acknowledge this evidence which, although relatively sparse and conclusory, did address at least part, the availability of care (albeit medical) in Pakistan which emanated from a medical professional. What weight the judge would have given to that evidence is, of course, unclear as she did not consider it. In my judgment, in finding against the appellants in para 35 in respect of the ADR rules, the judge erred in law by failing to take this evidence into account.
40. Of course, the appellants could not succeed under the ADR rules as those rules require that they be outside the UK making an entry clearance application (see, Section. E-EC-DR.1.1(a) of Appendix FM). However, if apart from that requirement the appellants could establish they met the substance of the ADR rules that would be relevant to an argument based upon Chikwamba v SSHD [2008] UKHL 40 that, taking into account the public interest requirements in s.117B of the NIA Act 2002, there was no public interest in removal if they would successfully obtain entry clearance (see Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC)).
41. That ground which, in essence, was part of the grounds to the UT is, in my judgment, established. The error in assessing whether the appellants met the requirements of the ADR rules, apart from the fact that they were in the UK, was a material error in assessing whether the appellants could succeed under Art 8 *outside* the Rules.

*Art 8 Outside the Rules*

42. Turning to the remaining Cart grounds, in addition to relying upon the ADR rules, the appellants also relied upon the impact upon their private and family lives in the UK. In that regard, they relied upon their “family life” with their children and grandchildren in the UK. At para 39, the judge accepted that there was “family life” between the appellants and “their sons and grandchildren in the UK”.
43. Mr Gajjar submitted that the judge had erred in law in three respects in relation to her finding that the public interest in their removal outweighed any interference with their private and family life.
44. First, he submitted that the judge failed to take into account the impact upon the grandchildren if the appellants were removed, in particular the judge failed to consider their best interests. In this regard, he relied upon the witness statements of the appellants’ two sons at pages 18 and 23 of the appellants’ bundle.
45. In relation to the witness statement of Mr Khawaja Omer Ajmal Mr Gajjar pointed to paras 25 – 26 of that statement concerning his own daughter and that of his brother as follows:
  - “25. My daughter is a born British citizen who resides in the UK. She was born prematurely and has been admitted to hospital numerous times, she

currently is only 1 years (sic) old and is suffering from severe eczema which will get worse if not treated properly or if she is relocated to any warmer country like Pakistan. As such, it is unreasonable to expect my daughter who is born British to leave UK which will strip her off (sic) her right to stay here in the UK, get good level of life, medical care as well as good education which would simply neither be available nor affordable in Pakistan (if my parents will be refused visa and I along with my family have to relocate with them to Pakistan). It is further submitted that the separation of our parents from their granddaughter and their family will be a breach of their right to family life under Art 8 if this appeal is dismissed.

26. My brother faces a similar situation if he has to relocate to Pakistan (which was mentioned in our parent's (sic) refusal from this honourable and respectable court like over three years ago as it will be stripping him of his British rights) along with his British wife and British Born daughter (who is suffering from Autism, or autism spectrum disorder/ASD which on its own is not curable in Pakistan) it is unreasonable to suspect her daughter who is born British to leave the UK which will strip her of her right to stay here in UK, live a good standard of living, medical care as well as good education which would simply neither be available nor affordable in Pakistan (if my parents will be refused visa and my brother along with his family has to relocate with them to Pakistan). It is further submitted that the separation of my parents from their grandchildren and their family will be a breach of their right to family life under Art 8 if this application is refused."

46. In the witness statement of the appellants' other son, Mr Khawaja Ali Ajmal, at para 16, he also refers to the severe eczema of his brother's daughter. At para 15, he deals with the circumstances of his own daughter as follows:

"To complicate things further, by moving to Pakistan, my (British) daughter is autistic (ASD) - (awaiting appointments from consultants doctors and nursing staff) and would need a lot of help from consultants and has to go to special school here in the UK so she could live a normal life, now how could I be terrible/harsh/heartless/ruthless to my daughter by moving to Pakistan where she wouldn't be able to get any help close to the level available in the UK. ... My daughter has become very attached to my parents and she has become a source of relief in their old age and medical issues. It would be unduly unfair and harsh to have them separated from their grandchildren in their old age."

47. It was incumbent upon the judge to consider the best interests of the appellants' grandchildren. As Mr Avery pointed out in his submissions, their best interests did not form the focus of the appellants' case. It was, however, part of their case and there was, at least, some evidence as I have set out above, dealing with the best interests of the appellants' grandchildren, in particular their granddaughter who has autism or ASD. Whilst this evidence may not be the most detailed - I was not shown any supporting evidence from a social worker or school or medical professional in relation to the daughter's ASD and any impact the appellants' removal might have upon her - nevertheless, there was at least some evidence which, had the judge considered it, would have been relevant to her assessment of that child's best

interests. The judge made no reference either to the issue of their best interests or to this evidence. That was, in addition, in my judgment an error of law.

48. Secondly, Mr Gajjar submitted that in assessing the proportionality of the appellants' removal the judge had been wrong to apply s.117B(4) of the NIA Act 2002 to the family life between the appellants and their grandchildren. He submitted that the "little weight" provision in s.117B(4) only applied to family life which related to "a relationship formed with a qualifying partner". It had no application to other relationship giving rise to family life such as between grandparents and their grandchildren or between parents and their adult children. In my judgment, Mr Gajjar's point is well-taken.
49. On its face, s.117B(4) states that:
- "(4) Little weight should be given to -
    - (a) a private life, or
    - (b) a relationship formed with a qualifying partner,  
that is established by a person at a time when the person is in the United Kingdom unlawfully."
50. That plainly has no application to family life established between the appellants as grandparents and as the parents of their adult children
51. It seems to me that in para 38 of her decision, the judge set out the factors relevant to the assessment of proportionality and the public interest in s.117B dealing with the appellants' financial independence and ability to speak English (relevant under ss.117B(2) and (3)). She then noted that the appellants, who had had leave since 2014 but that ceased since November 2016, had been here unlawfully thereafter and that:
- "Little weight should be given to their private life. Their family life was established when they knew that they had no leave to remain here."
52. That can only, in my judgment, reflect a progression through s.117B to consider s.117B(4).
53. Mr Gajjar did not seek to argue that the judge would have been wrong to apply s.117B(4) to the appellants on the basis that, assuming it otherwise applied, their family life had not been "established" whilst they were "unlawfully" in the UK despite the fact that for a period between 27 September 2014 and 22 November 2016, neither was in the UK unlawfully as they had leave to enter as a visitor which had been extended by virtue of s.3C of the Immigration Act 1971.
54. However, the judge was clearly in error if she applied s.117B(4) to the appellant's family life with their grandchildren and adult children as it only applies to family life with a "qualifying partner" as defined in s.117D(1). The judge's error in applying s.117B(4) to the family life between the appellants and their grandchildren would not be material if, in fact, on the basis of the Strasbourg case law "little weight" should be

given to family life established by other relationships in the circumstances such as the appellants.

55. In Rhuppiah v SSHD [2018] UKSC 58, one of the issues considered by the Supreme Court was the proper approach to the proportionality assessment where family life had been established between individuals to whom s.117B(4) applied and whether that was consistent with the Strasbourg case law. In substance, the Supreme Court recognised that s.117B(4) was consistent with the Strasbourg case law but, in doing so, noted that the Strasbourg case law was not exclusively concerned with family life established as a result of a relationship between partners but could include others such as between parents and adult children and grandparents and grandchildren.

56. At [27], Lord Wilson referred to with approval a decision of the Strasbourg Court in Mitchell v United Kingdom as follows:

“It was in its admissibility decision in *Mitchell v United Kingdom*, (Application No 40447/98) [1998] ECHR 120 24 November 1998, that the ECtHR appears first to have used the word “precarious” in the context of an application under article 8. It rejected, as manifestly ill-founded, a British citizen’s application that her husband’s deportation to Jamaica had violated her right to respect for her family life. Her husband had been admitted to the UK as a visitor for six months; and for the following five years, in the course of which the applicant had married him, he had remained in the UK unlawfully. The court said, at p 4:

“An important though not decisive consideration will also be whether the marriage ... was contracted at a time when the parties were aware that the immigration status of one of them was such that the persistence of the marriage within the host state would from the outset be precarious. The court considers that where this is a relevant consideration it is likely only to be in the most exceptional circumstances that the removal of the non-national spouse will constitute a violation of article 8 ...”

57. As can be seen, the Supreme Court recognised that the Strasbourg Court has accepted that a family life based upon a husband and wife relationship was “precarious” and that was an important consideration in the weight that should be given to that relationship in the proportionality assessment if that relationship was “contracted at a time when the parties were aware” of the immigration status of one of them when persisting with the relationship.

58. At [28], Lord Wilson acknowledged that the Strasbourg case law extended beyond marriage relationships. He said this:

“In its numerous subsequent reiterations of the consideration identified in the *Mitchell* case the ECtHR has adapted it so as to extend to cases in which the context of the alleged family life was not a marriage. So the question became whether *family life* was *created* at a time when the parties were aware that the immigration status of one of them was such that the persistence of *family life* within the host state would from the outset be precarious: see, for example, *Rodrigues da Silva, Hoogkamer v Netherlands* (2007) 44 EHRR 34, para 39. In that case a mother and her young daughter relied on their family life together. At all times the mother’s stay in the Netherlands had been unlawful and she had

given birth to the daughter there. It is implicit in the court's judgment that the persistence of their family life in the Netherlands was therefore known to be precarious and that it was only by virtue of exceptional circumstances that the court held article 8 to have been violated."

59. At [37], Lord Wilson reiterated the point as follows:

"It is obvious that Parliament has imported the word "precarious" in section 117B(5) from the jurisprudence of the ECtHR to which I have referred. But in the subsection it has applied the word to circumstances different from those to which the ECtHR has applied it. In particular Parliament has deliberately applied the subsection to consideration only of an applicant's private life, rather than also of his family life which has been the predominant focus in the ECtHR of the consideration identified in the *Mitchell* case. The different focus of the subsection has required Parliament to adjust the formulation adopted in the ECtHR. Instead of inquiry into whether the persistence of family life was precarious, the inquiry mandated by the subsection is whether the applicant's immigration status was precarious. And, because the focus is upon the applicant personally and because, perhaps unlike other family members, he or she should on any view be aware of the effect of his or her own immigration status, the subsection does not repeat the explicit need for awareness of its effect."

60. Although the Supreme Court was considering s.117B(5) and the "little weight" provision in relation to "private life" established when an individual's immigration status was "precarious", what is said about the Strasbourg case law in relation to "family life" claims and, therefore, s.117B(4), is instructive. The effect of the Strasbourg case law is, in my judgment, that when a non-settled immigrant seeks to rely upon family life, whether established by a relationship with a partner or with other family members, if that relationship was established at a time when both parties appreciated the precariousness (i.e. here meaning unlawfulness) of the non-settled immigrant's status, only in exceptional cases will the public interest be outweighed by any interference with that family life. That is a reflection, in our domestic law, of the "little weight" provision in s.117B(4) albeit restricted to family life derived from a relationship with a qualifying partner.

61. However, as is clear from Lord Wilson's judgment, and his citation of the relevant Strasbourg case law, the "precarious" nature of the non-settled immigrant's status must be something that *both* parties are aware of. That may well be a factual issue in cases concerned with parents and adult children. However, it is less likely to be a real issue in cases concerned with grandparents and their grandchildren or parents and their young children. Clearly, children are less likely to know when forming a relationship with their grandparents that this relationship has been formed at a time when the grandparents' immigration status is "precarious", in the sense that they had no leave to remain. It is, perhaps, unworldly to imagine that grandchildren, even of teenage years, will be concerned or knowledgeable about this. Of course, very young children simply will not fall into a category where they could conceivably be "aware" of their grandparents' immigration status.

62. In this appeal, the two grandchildren are very young indeed. One of the appellants' sons (Khawaja Omer Ajmal) states that his daughter is 1 year old in his witness statement dated 5 March 2020 (see para 25). The appellants' other son (Khawaja Ali Ajmal) does not state his daughter's age, but his wife in her witness statement (at page 33 of the bundle) states that their daughter is nearly 2 years and 6 months old. This witness statement is also dated 5 March 2020.
63. Whatever "weight" was to be given to the family life between the appellants and their grandchildren, it was not, in my judgment, a relationship which fell within the approach of the Strasbourg Court cited by Lord Wilson in Rhuppiah that warranted, in effect, "little weight" to be given to that relationship. Family life is, of course, established both ways in the relationship not only between the appellants and their grandchildren but also between the grandchildren and the appellants. This was not a case where the judge's application of s.117B(4) – which was undoubtedly an error – was not material to the assessment of the proportionality of the appellants' removal.
64. Thirdly, Mr Gajjar relied upon a further point in the judge's assessment of the evidence in relation to Art 8 and the impact on the appellants of their removal. The judge took into account in para 39 that there is "no good reason" why visits could not continue between the appellants and their children in the UK. In reaching that conclusion, the judge took into account that they have not been "declared to be unfit to fly". That, however, is not what Dr Amin in his reports states in relation to the second appellant (at page 704) and in relation to the second appellant (at page 753). In relation to the second appellant he states that:
- "He cannot sit for long periods so a long flight back to Pakistan is not possible".
65. Similar wording is used in relation to the first appellant. He also states in relation to both appellants that they are "not medically fit enough to undergo such a long journey/flight". The judge failed to grapple with this evidence in reaching her finding that "visits" may be possible, in particular by the appellants coming again to the UK.
66. For these reasons, I am satisfied that the judge materially erred in law in reaching her findings in relation to the ADR rules and also in relation to the appellants' claim that their removal would breach Art 8 of the ECHR outside the Rules. I also accept that the errors concerning the assessment of the appellants' circumstances in Pakistan must necessarily have affected the judge's findings in relation to para 276ADE(1)(vi) that there were not "very significant obstacles" to their integration on return.
67. For those reasons, which reflect in essence points (a) to (d) in Lieven J's grant of permission, the judge's decision to dismiss the appellants' appeals cannot be sustained and is set aside.

### *Other Grounds*

68. It is not strictly necessary to consider the remaining grounds in the light of my conclusion above. However, for completeness, I should refer to two points made by Mr Gajjar.
69. I do not accept Mr Gajjar's submission that the judge erred in law by taking into account, as an aspect of the public interest, that the appellants had regularly received free medical treatment on the NHS apart from an ICU incident which had been paid for. Mr Gajjar relied upon what was said by the Court of Appeal in the case of BritCits v SSHD [2017] EWCA Civ 368 at [58] that the policy of the ADR Rules was:
- "To ensure that those ADRs whose needs can only be reasonably and adequately met in the UK are granted fully settled status and full access to the NHS and social care provided by local authorities."
70. That, of course, reflects a policy in relation to an individual who *meets* the requirements of the ADR rules. That was not the case for the appellants, who, even if they met the substance of the Rules, which the judge found that they did not, could not meet the requirements in the ADR rules that they were outside the UK seeking entry clearance. The policy, therefore, had no application to them. It is an aspect of the public interest, albeit not directly reflected in s.117B of the NIA Act 2002, that individuals are reliant upon the public purse, including the NHS (see e.g. EV (Philippines) v SSHD [2014] EWCA Civ 874 at [60] – [61] per Lewison LJ).
71. The final point relied upon by Mr Gajjar, and upon which Lieven J granted permission in the Cart judicial review, was that the judge found that the former employer of the first appellant would continue to pay their medical bills in Pakistan.
72. In the grounds of appeal, this is disputed as being what the second appellant said in his evidence. Mr Gajjar accepted that there was no evidence concerning the evidence given at the hearing. Mr Gajjar relied on the fact that the appellants' Counsel before the First-tier Tribunal had drafted grounds on the basis that the judge had misunderstood the evidence. There is, however, no witness statement from the appellants' (then) Counsel on this issue. Mr Avery did not accept, based upon the Presenting Officer's note, that the judge had misstated the evidence although Mr Avery acknowledged that there was no note of the evidence in the Home Office file. In these circumstances, given the view that I have taken in relation to the remaining grounds of appeal, I prefer to express no view on this ground and to leave it unresolved.

### **Decision**

73. For the above reasons, the judge's decision to dismiss the appellants' appeal under Art 8 involve the making of a material error of law. That decision cannot stand and is set aside. In view of the errors of law, the decision must be remade.

74. Mr Gajjar invited me, if that was my conclusion, to preserve any positive findings in favour of the appellants. In my judgment, given the errors of law there are only two findings that can be preserved. First, the judge's acceptance that the appellants satisfied the requirement in E-ECDR.2.4 that they required long-term personal care to perform everyday tasks as a result of their medical conditions and that that personal care is provided by their sons and daughters-in-law in the UK (see first two sentences of para 35). Secondly, the judge's finding that the appellants have established family life with their family in the UK, including their adult children and grandchildren should also stand (see para 39). Beyond that, none of the judge's findings are preserved.
75. With those two findings preserved, the extent of fact-finding based upon the evidence is significant and may well involve oral evidence given again by the appellants and their family in the UK. Having regard to that and para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal on that basis to be heard by a judge other than Judge L Murray.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
9 August 2021