



IAC-AH-KEW-V1

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

Appeal Number: IA/41661/2013
IA/42129/2013

THE IMMIGRATION ACTS

**Heard at Bradford
On 29 September 2014**

**Decision & Reasons Promulgated
On 11 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**MRS GHULAM ZEENAB (1)
MR SYED MUHAMMED SIBTAIN SHAH (2)
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Karnick of Counsel

For the Respondent: Mr M Diwnycz, a Home Office Presenting Officer

**AMENDED DECISION AND REASONS
FOR FINDING A MATERIAL ERROR OF LAW**

Introduction

1. The present appeal is by the Secretary of State for the Home Department, who was the respondent before the First-tier Tribunal (“the FTT”). I will refer to the Secretary of State henceforth as “the respondent.” The appellants are a husband and wife, both Pakistani citizens. I will refer to

them collectively by their description in the FTT as “the appellants” or individually as “the wife” and “the husband.”

2. The respondent sought permission to appeal against the decision of First-tier Tribunal Judge Ransley (the Immigration Judge) who in her determination allowed the appellants’ appeal against the respondent’s decision dated 20 September 2013 to refuse to grant the appellants indefinite leave to remain (ILR).
3. Following the promulgation of that decision on 28 July 2014, the respondent obtained permission to appeal on the basis of the grounds which were drafted on 6 August 2014. Judge of the First-tier Tribunal Reid considered that the grounds disclosed an arguable error of law in that the appellants were illegal overstayers who were attempting to circumvent the Immigration Rules. They had invoked the European Convention on Human Rights (ECHR) as well as Section 55 (“Section 55”) of the Borders, Citizenship and Immigration Act 2009 (“the 2009 Act”) to avoid removal when in fact there were no compelling circumstances outside the Immigration Rules which enabled the judge to consider their applications on that basis. It was at least arguable that a proportionality assessment placed too much weight on the best interests of the appellant’s grandchildren rather than on the public interest of enforcing immigration control in the economic interests of the UK.

Background

4. The appellants are citizens of Pakistan born, respectively, on 1 January 1952 and 5 August 1942. Their immigration history is essentially as follows:
 - They arrived on six month visit visas on 2 March 1998.
 - On 23 July 1998 they applied for indefinite leave to remain as the dependants of their son living in the United Kingdom, but that application was refused on 8 November 1999.
 - They subsequently appealed that and subsequent decisions.
 - They first raised Article 8 of the ECHR on 5 August 2003 when they applied for leave to remain outside the Immigration Rules. However, that application was also unsuccessful.
 - There followed numerous applications on human rights grounds, none of which were successful. These included an application in 2012 on the grounds that Ghulam was suffering from “severe mental ill-health” and therefore her article 3 right to freedom from inhuman and degrading treatment would be interfered with if she were removed.
 - Finally, in their latest application, they sought ILR because they claimed their rights under article 8 of the ECHR would be unlawfully interfered with. This was refused by the respondent on 20 September 2013

5. The FTT dismissed the appellants' appeals against the respondent's refusal but Deputy Upper Tribunal Judge Lewis found that FTTJ Law had materially erred in the First-tier Tribunal and remitted the matter to the First-tier Tribunal to be heard by a judge other than FTTJ Law. The remitted appeal came before the First-tier Tribunal on 11 July 2014.
6. It seems at that hearing that Mr Karnick, counsel for the appellants, conceded that the requirements for leave to remain under the Immigration Rules were not met because the appellants did not meet the financial criteria under the Immigration Rules. It seems their principal reasons for remaining here was so that they could continue to obtain free treatment on the NHS and because they wished to maintain direct physical contact with their grandchildren. Neither of those reasons was covered by the Rules, at least without satisfaction of other conditions. The Immigration Judge considered that the appellants had formed such ties with their family in the UK (their son and grandchildren) that it would be a disproportionate interference with their human rights to remove them. Furthermore, he accepted the submission of their Counsel that their medical conditions and their age rendered their removal disproportionate within the terms of Article 8(2) of the ECHR.

Grounds of Appeal

7. The grounds of appeal appear comprehensive. They state that it is a material misdirection of law to ignore the need to show "compelling circumstances" which are not sufficiently recognised by the Immigration Rules before a freestanding application under Article 8 may succeed. The respondent relies on the case of R (On the Application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin). The appellant's length of residence in the UK, where of the correct character, would be recognised by the Immigration Rules and in particular by Rule 276ADE. The fact that the appellants did not meet those requirements was a reflection of the fact that they had not been in the UK for a sufficient length of time. They maintained considerable ties with Pakistan, where they could return. They would reintegrate into life there. They came as family visitors only but have always intended to remain in the UK by exploiting every opportunity to bring claims and appeals when those claims have been refused. The dependency on their family was disputed and their medical conditions were not compelling circumstances. Grants of leave outside the Immigration Rules were confined to those cases that the respondent considered to be "exceptional." They have been in the UK since 1998 but their removal was not thought to be unduly harsh. The Immigration Judge failed to make any proportionality assessment whereby the effect of removal of the appellants was weighed against the wider public interest of enforcing immigration control. Although the interests of the grandchildren were primary considerations, they were not the only consideration nor did their interests outweigh all other considerations. The appellants have continued to ignore the Immigration Rules and taken advantage of the NHS when they had no entitlement to treatment, as the Immigration Judge herself found. This had entailed considerable cost to the tax payer which was an important

factor in the respondent's decision to enforce effective immigration control. Given their immigration history and the wider public interest they should not be allowed to remain under Article 8.

The Hearing

8. The hearing lasted approximately 45 minutes. Both parties attended represented respectively by Mr Karnick of Counsel for the appellant and Mr Diwnycz, a Home Office Presenting Officer, for the respondent.
9. For the respondent, Mr Diwnycz simply relied on the grounds of appeal.
10. For the appellants, Mr Karnick said that paragraph 276ADE was not a complete code. Neither the case of Gulshan [2013] UKUT 640 nor Nagre (reference above) limited the requirement for a proportionality assessment, indeed this was essential. The Immigration Judge clearly had these cases in mind and did not “go marching straight into Article 8.” I was referred to paragraph 10 of the determination where the Immigration Judge gave detailed consideration to the immigration history and all the circumstances of the case. Nevertheless, she found the case to be “exceptional.” The Immigration Judge also considered the appellants’ health. The appellants had presented a reasonably good case although, it was accepted, they had made unmeritorious applications in the past. The possibility that the appellants were “illegal overstayers” was also considered by the Immigration Judge but he did not consider it was a factor of such weight that it should outweigh other considerations. Looking at all the evidence it was not accepted that the Immigration Judge had erred in law. The balance shifted in favour of the appellants on acceptance of the medical evidence by the FTT.
11. In reply Mr Diwnycz relied on the case of Kugathas [2003] EWCA Civ 31. In that case the appellant had a family life which was primarily focussed outside the UK. Therefore, the only effect of removal would be to prevent the appellant creating a family life here which had not previously existed. It was held that on the facts of that case there was not a family life within the meaning of Article 8 in the UK. It was pointed out that the strength of family life in this case only related to the relationship between the appellants and their grandchildren. They could continue to have contact with those grandchildren if removed. It was submitted that this was not a factor that ought properly to outweigh all other considerations so as to prevent the removal of the appellants. To require the respondent to facilitate their family life with their grandchildren was excessive. Other considerations such as the public interest had not been given adequate weight by the Immigration Judge.
12. I allowed Mr Karnick a further submission to the effect that there would be an adverse impact on the grandchildren of the removal of the appellants from the UK. He submitted that there were clear fact-findings made and the decision should be allowed to stand.

Discussion

13. The starting point for consideration of the respondent’s grounds of appeal is the Immigration Judge’s fact-findings. She found that there had been material changes in their circumstances since 2006, as a significant bond had developed between the appellants and their grandchildren and she

was clearly impressed with a psychologist's assessment carried out in June 2014 to the effect that there would be a potentially deleterious effect on the grandchildren if the appellants were removed. Considerable weight must be given to the Immigration Judge's findings which were made after hearing oral evidence.

14. However, it has been submitted before me, and Mr Karnick did not dissent from this, that there must be "compelling circumstances" which justify departure from the requirements of the Immigration Rules.

15. The Immigration Judge plainly failed to consider adequately the following factors:

(1) The fact that the appellants had no right to be in the UK since 1998, such that little weight could be given to the private life relied upon, having regard to section 117B(4) of the Nationality, Immigration and Asylum Act 2002;

(2) The fact that under Article 8(2) of the ECHR provides that:

"There shall be no interference by a public authority with the exercise of this right (the right to respect for private and family life) except such as is in accordance with the law and is necessary in a democratic society in the interests of ... the economic wellbeing of the country."

The appellants represented a substantial burden to UK tax payers arising from the fact that they had no income or employment of their own and were largely, if not entirely, dependent on expensive treatment by the NHS to which they were not entitled. These were factors to which some weight ought to have been attached in the circumstances, having regard to section 117B (3) of the 2002 Act;

(3) The Immigration Judge failed to give adequate consideration to the possibility that the appellants may have a family support network in Pakistan, consisting of the appellant's three brothers, and that medical treatment would be available there;

(4) The Immigration Judge's conclusion that the respondent's decision would be contrary to the requirements of Section 55 of the 2009 Act failed to pay adequate regard to the fact that only two of the grandchildren were below the age of 18, they could continue to maintain contact with their grandparents if the latter returned to Pakistan and that the family unit between the children and their parents would remain intact.

16. I start with the first of these points. The appellants had made at least six applications to remain in the UK outside the Immigration Rules on human rights grounds. These included claims under Article 3 of the ECHR. None of those applications contained any merit. They were all unsuccessful. They had all resulted in appeals and some of them subsequent appeals at, no doubt, substantial cost to the tax payer. On at least one occasion (in 2006) their application was subject to detailed consideration by an Immigration Judge (Immigration Judge Birkby) but roundly rejected. More

recently before Judge Law sitting at Manchester in January 2014 the argument was run that the effect of removal of the appellants was to compel the family to go to Pakistan which would “kill” the appellants’ grandchildren. Immigration Judge Law noted that the appellants’ physical health had deteriorated in the substantial time (now sixteen years) that they had been in the UK. The argument on that particular occasion was that they provided support for their grandchildren but as the Immigration Judge indicated, it was not credible that they could maintain the children during their periods of ill-health. As he put it, “they had made numerous applications of every variety possible to remain in the UK, all of them having been discharged.” The argument was run in front of him that the appellants were at a suicide risk but that appeared to be unsupported by the evidence. He described their immigration history as “shocking” and he found that there was no substance to their human rights claim. They were in contempt of the Immigration Rules and not merely failed to satisfy them and they had cynically exploited the Secretary of State’s failure to expel them.

17. Although Immigration Judge Law’s language was “strong” the Secretary of State is entitled to have regard to wider public interest including the perception of the UK as “a soft target” if it does not properly enforce immigration controls. The respondent has strenuously resisted any recognition of the appellants’ status in the UK. Due to their persistent failure to return to Pakistan they have now been here long enough to be suffering from some of the ill-health that tends to affect people in later life. However, I find that their poor immigration history was a significant factor to take into account when carrying out the relevant proportionality exercise required under Article 8(2). In my judgment the Immigration Judge failed to attach sufficient weight to this factor.
18. Secondly, the extent of the husband’s ill-health was exaggerated for the purposes of the hearing. He did have numerous reports from general practitioners and others in relation to the substantial treatment they had been receiving from the NHS. Epilepsy is relatively common and is largely controlled with anti-convulsant medication, as it appears to have been in this case. The wife is said to have suffered dementia by the date of the hearing before the FTT but that was also a common condition, particularly in later life. It was not suggested that either appellant was unable to travel, being only 62 in the case of the wife and 72 in the case of the husband. Furthermore, the evidence of Dr Latif, whose report has not been supplied to the Upper Tribunal, seemed to stray beyond medical expertise in terms of the family support network available in Pakistan. The sponsor, when he gave oral evidence, denied that the second appellant’s three brothers would be available to support the appellants if they returned to Pakistan. However, the sponsor had plainly not told the truth to the Tribunal when he gave evidence that he had been paying for their medical treatment and a degree of scepticism in terms of his credibility can therefore be applied to this evidence.
19. Additionally, the extent to which medical treatment may have been available in Pakistan was not adequately considered by the Immigration

Judge. In fact, the respondent had set out in some detail at paragraphs 23 and following in her refusal letter the extent to which treatment was in fact available there. It is not the function of the ECHR to facilitate entry to the UK to enable foreign nationals to use the NHS when they have healthcare in their own countries for which they would have to pay. The Immigration Judge gave inadequate consideration to the possibility that the appellants, other family members or the sponsor, could pay for them to receive medical treatment in Pakistan.

20. The finding that the respondent's decision was contrary to Section 55 of the 2009 Act appears to be a finding not properly open to the Immigration Judge on the evidence. Only two of the sponsor's children were below the age of 16, and one of those was already 15 years of age. It is the case that the welfare of a child is to be a primary consideration in making an immigration decision but this is to form part of the balancing exercise required under article 8 (2). However, the relationship was that of grandparents and grandchildren and the latter's removal from the UK would not have the effect of breaking up the family unit here. In any event, this had been a factor at the hearing in 2006 which was rejected by Immigration Judge Birkby. It may be desirable for grandparents to be close by but it is by no means established that the effect of removal on the emotional relationship between grandchildren and grandparents was such as to render the respondent's decision unlawful.

Conclusion

21. The grounds of appeal, which state that no good grounds existed for allowing the appellants to remain in the UK outside the Immigration Rules, are made out. The judge did materially misdirect herself in finding that there were "compelling circumstances" not recognised by the Immigration Rules having regard to the particular history of this matter. The appellants' poor immigration history, and substantial reliance on the NHS were factors of sufficient weight to lead a properly directed tribunal to a different conclusion than the one reached, particularly having regard to the statutory presumption in section 117B(1), and the 'little weight' provisions in relation to private life in section 117B(4). Additionally, the message that "spinning out" the appeal process for as long as possible ultimately results in being allowed to remain in the UK is a powerful factor weighing on the public interest and one the respondent was entitled to consider very important. This was not the type of case where the primary consideration of the children's interests required the respondent to allow grandparents to remain in the UK in circumstances where they had no right to be here and did not qualify under the Immigration Rules. There is no reason why they should not be able to maintain contact with their grandchild from Pakistan.

Decision

22. The decision of the First-tier Tribunal contained a material error of law and should be set-aside. The Upper Tribunal will re-make that decision.

- 23. The appellants' appeal against the respondent's decision to refuse further leave to remain in the UK is dismissed.
- 24. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Hanbury