



IAC-AH-CO/SC-V1

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

Appeal Number: HU/12463/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 19 February 2020**

**Decision & Reasons Promulgated  
On 22 April 2020**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**RA  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Janjua, Counsel instructed by Morden Solicitors (London)  
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This appeal comes back before me after a hearing on 25 November 2019 when, after a hearing when I sat with Upper Tribunal Judge Pickup, we decided that the decision of First-tier Tribunal Judge Talbot (the "FtJ") contained errors of law such as to require his decision to be set aside, and for the decision to be re-made in the Upper Tribunal. The further background to the appeal is set out in the following paragraphs of that error of law decision:

- “1. The appellant is a citizen of Pakistan, born in 1960. He appealed to the First-tier Tribunal (“FtT”) against a decision of the respondent dated 23 May 2018 to refuse leave to remain on Article 8 grounds. The application was made on the basis of the appellant’s family life as a partner, a parent, and on the basis of his private life.
  2. His appeal came before First-tier Tribunal Judge Talbot (“the FtJ”) at a hearing on 7 January 2019 following which the appeal was dismissed.
  3. The further background to the appeal is that the appellant’s wife, who is a British citizen, was granted asylum after an appeal against a refusal of asylum in 2004. She became a British citizen in August 2015. The basis of her asylum claim was domestic abuse by her husband (this appellant) and her husband’s family. Her parents also disowned her because they disapproved of her marriage to the appellant. She was subjected to physical and emotional abuse by the appellant (her husband) and his family.
  4. The appellant arrived in the UK illegally in 2003. He re-established his relationship with his wife and their three children in 2016, as accepted by the FtJ.
  5. The appellant has three children, born in 1993, 1994 and 1999. The youngest child, H, was born on 1 July 1999. At the date of the application for leave to remain he was aged 17 years and 10 months. He suffers from moderate learning difficulties and speech and language difficulties.”
2. The following are the material paragraphs from the error of law decision which explain why it was decided that the FtJ erred in law:
- “34. This is a case where, once the FtJ concluded that the appellant did not otherwise meet the requirements of the Rules under Appendix FM, he ought to have gone on to consider whether under GEN.3.2(2) there were exceptional circumstances rendering the refusal of leave to remain a breach of Article 8 because such refusal “would result in unjustifiably harsh consequences” for the appellant, his wife or H. It would appear that the FtJ did not have the assistance from the parties that he could have expected in terms of paragraph GEN since, as far as can be discerned, neither party referred him to it, either in submissions or in any skeleton argument. Having said that, GEN 3.2 is in fact referred to in the respondent’s decision refusing leave to remain under the heading of “Exceptional Circumstances”. Furthermore, regardless of whether or not the FtJ was referred to this aspect of the Rules, it is a matter that he needed to have considered.
  35. Although the FtJ did consider H’s circumstances, in particular his learning disability, he considered it within the context of whether there would be insurmountable obstacles to family life between the appellant and his wife continuing in Pakistan, and outside the Article 8 Rules. However, he did not consider it in terms of the ‘unjustifiably harsh consequences’ test. Before undertaking a consideration of Article 8 outside the Rules the FtJ ought to have completed his analysis of the appeal within the Rules, in respect of which paragraph GEN is a part.

36. In the circumstances, we are satisfied that the FtJ erred in law in failing to consider paragraph GEN. We do not consider that the FtJ's assessment of H's circumstances otherwise, either within his consideration of the Rules or outside them, is a sufficient basis from which to conclude that that error of law is not material, even accepting that the FtJ's assessment included consideration of H's best interests.
  37. In terms of the FtJ's assessment of the issue of insurmountable obstacles in relation to the appellant and his wife continuing their family life in Pakistan, it was incumbent on the FtJ to assess the issue of unjustifiably harsh consequences not only in relation to H but also in relation to the appellant and his wife. Thus, his decision is vitiated by error of law for that reason also.
  38. The assessment of whether, on a self-contained basis, the FtJ's assessment of the issue of insurmountable obstacles is flawed in its reasoning in relation to the difficulties that may arise for the appellant and his wife from their respective families on return, is more finely balanced. However, we consider that the errors of law which we have identified are a sufficient basis from which to conclude that the decision must be set aside in terms of its conclusion dismissing the appeal on Article 8 grounds.
  39. In addition, although we note that the witness statements before the FtJ do not say much about any difficulties that they might encounter from their families on return, from the appellant's wife's family in particular, and the submissions made to the FtJ as recorded in his decision do not raise this as an issue, the FtJ nevertheless made an assessment of that issue, making observations that do not appear to have been put to the appellant. Thus, he said that there was nothing to suggest that the wider family would take positive measures to cause harm to them now that the marriage had been repaired. However, it seems to us that that is an issue that ought to have been canvassed at the hearing.
  40. Similarly, it is evident from the determination of Immigration Judge Corke, who heard the appellant's wife's appeal in December 2005, that he accepted her account that she moved to Karachi but was traced there and assaulted by her brother-in-law and others in January 2004. That is some indication, albeit from many years ago, that there was a persistence and determination in their persecution of her, and that her attempts at relocation failed.
  41. We also consider that the FtJ's decision fails to analyse the question of where the appellant and his wife, even without H, would live. If in their home area, there would need to have been more of an analysis of potential risk, with issues being put to the appellant and his wife in that respect. If it was to be suggested that they could relocate with H, obvious questions arise in the light of his learning disability and generally in terms of family support in circumstances of hostility from family members."
3. At the hearing before me for the re-making of the decision, there was a further bundle of documents amounting to 41 pages, in addition to those that were before the First-tier Tribunal. The appellant and his wife gave oral evidence, which I now summarise.

*The oral evidence*

4. The appellant adopted his witness statements in examination-in-chief, including the updated statement dated 12 February 2020.
5. In cross-examination he said that he has had no contact with anyone in Pakistan since he came to the UK in 2003. He has his mother, brother and sisters there. He lost contact with them about 17 years ago. He had not tried to make contact with them because he knows them very well. When they say “no” it means “no”. They are quite strict. His children have not tried to make contact with them either. To his knowledge his wife has not had contact with her family since coming to the UK.
6. His and his wife’s home area is Lahore. He does not think that there would be the right to schools or medical facilities for their son, H, who has learning difficulties. He had looked on the internet and did not find any such facilities. He had not lived anywhere else in Pakistan apart from Lahore.
7. In the UK he had done a few odd jobs. His son, A, is an engineer and supports the family. His wife and children are all British citizens. A lives with them and H in the family home. A could not provide support for H because he earns between £25,000 and £30,000 per annum after tax and he does not think he could manage to support H if he, the appellant, and his wife went to Pakistan.
8. He and his wife have to look after H because he has real learning difficulties. His wife is H’s carer. They do hope that H will be able to work in the future to support himself although he could not give a timeframe; maybe in a couple of years. He is good at computers and he is learning ICT. However, he cannot support himself at this stage. His wife helps him with food, clothing and everything. She looks after him.
9. FS, the appellant’s wife, adopted her witness statements in examination-in-chief.
10. In cross-examination she said that since she arrived in 2004 she has not had any contact with her family. She has no idea what family she has in Pakistan. When she left, she had her parents and her siblings there. There are eight brothers and sisters including her. She has not met them since 1992 when she got married.
11. She has not tried to make up with them since she arrived in the UK because her parents had disowned her when she married without their permission.
12. Before she came to the UK she was living in Karachi which is where she left from. She lived in two different places there. Her brother-in-law traced her to Karachi in 2004. He was very angry and tried to snatch the children away. He was verbally abusing her.
13. As to whether, if she returned now, she could live somewhere other than Karachi where she would not be able to be traced, she said that her parents are very strict. She married without their permission which is a very big sin in their eyes. She does

not think that they would forget her. She has no idea how they would know that she had returned to Pakistan but she knows that they are very, very angry with her. She fears them.

14. She does not think that there are schools for those with learning difficulties in Pakistan. They are not the same as here in the UK. If they are there, they are very expensive. H has a health and care plan in place but she does not think that that would be available there.
15. She has not worked in the UK because she is H's carer although she is not recognised as a carer by social services.
16. H could not remain in the UK with her other son A. H is too attached to her and her husband. He needs their help with everything, for example cooking and chores. Her daughter has a child so that makes her very busy. A has a job. She has not looked into whether social services could provide more help with H.
17. They had tried to apply for jobs for H to build his confidence but they have not been successful.
18. Her husband is not in contact with his family in Pakistan.

### *Submissions*

19. Ms Fijiwala accepted that, notwithstanding H's age, his best interests needed to be assessed as it would in the case of the best interests of a child.
20. I was referred to paragraph GEN.3.2.(2) and the question of "unjustifiably harsh consequences" as discussed in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11.
21. The burden of proof was on the appellants in terms of establishing a lack of suitable facilities for H and they had not looked into whether such facilities would be available in terms of treatment or schooling.
22. On return, the appellant would be able to do odd jobs in Pakistan as he has done in the UK. Similarly, there was no reason why his wife could not work. They could also find work for H in Pakistan, as they had been trying to do here. H does not need full-time care from the appellant's wife. The FtJ found that H speaks Urdu. There would be no unjustifiably harsh consequences involved in the appellant's removal. Although the appellant's wife may have a subjective fear, it is not objectively well-founded. There had been no contact between her and her family for a number of years. In any event, she would be able to move to another area.
23. The alternative is for H to remain in the UK with their son A. If there are financial difficulties they could turn to social services. Both the appellant and his wife could work in Pakistan.

24. It is not said that H needs help with his personal hygiene. Even though H's sister has a child, she could still provide some support.
25. So far as the public interest is concerned, the appellant had employed deception in relation to the application and appeal in 2009/10 on the basis of claimed long residency. He had used false documents and had overstayed by 15 years. His private life attracts little weight.
26. Similarly, given that the appellant and his wife re-established their relationship in 2015 when he was unlawfully in the UK, little weight should be given to that relationship. There was no relationship before 2015, before he arrived in the UK, even though they married in 1992.
27. Mr Janjua submitted that there would be unjustifiably harsh consequences involved in the appellant's removal, for the appellant, his partner, and their son H. H has a support package until the age of 25, according to the appellant's wife's evidence. I was referred to the letter from the College (in London) at page 15 of the appellant's additional bundle in which it is said that were H's Statutory Education, Health and Care Plan ("EHCP") to be interrupted it would have a severe and detrimental impact on his life chances. The opinion of the author of that letter was that it would be best for H if he were allowed to continue on his current programme of study.
28. Mr Janjua further submitted that the FtJ's conclusion that if H's parents moved to Pakistan without him it would be a "significant blow", amounted to a finding of unjustifiably harsh consequences. There was no bright-line in terms of dependency and the situation for H outweighs the other public interest factors.
29. In terms of the situation for the appellant's wife, Mr Janjua relied on his skeleton argument and the various authorities cited there in terms of the risks posed for women in Pakistan in terms of domestic violence. I was also referred to an extract, quoted in the appellant's skeleton argument, from the Home Office Country Information and Guidance - Pakistan: Women fearing gender-based harm/violence, dated February 2016 at paragraph 2.3.1.
30. It was submitted that although the appellant's wife left Pakistan in 2004, given the prevalence of domestic violence and that her family have the means to find her, the fact that a number of years had passed would make no difference. Aside from Karachi and Lahore, the remaining cities in Pakistan are relatively small.
31. In relation to H, I was referred to the Journal of Research in Special Educational Needs at page 37 of the additional bundle, in terms of the provision in that respect that there would be for H in Pakistan. In addition, it was submitted that given that H was a British citizen, the withdrawal of the educational package that he has would have a detrimental impact on him and that would amount to unjustifiably harsh consequences because if he returns to Pakistan it would be a "significant blow".

32. If he was to remain in the UK without his parents, his brother A would need to sacrifice his job to look after H who needs care every day, in terms of dressing and so forth. That care is provided by the appellant's wife.

*Assessment and Conclusions*

33. What is said in the appellant's skeleton argument about the appellant and his wife wishing to spread the Christian faith is not supported by the evidence and no submissions were made to me about that matter. Accordingly, there is no need for that to be considered further.
34. The parties agreed that the following findings of fact made by the FtJ can be preserved:
- The appellant is in a genuine and subsisting relationship with his wife who is a British citizen.
  - H was aged 17 years and 10 months at the date of the application for leave to remain and as at the date of the decision. He was almost 19 years and 8 months at the date of the hearing before the FtJ.
  - The appellant and his wife are familiar with the culture of Pakistan. Urdu is still spoken in their home. Both of them still have family members there.
  - It is possible that relations with some or all of those family members in Pakistan may continue to be strained and that they may be unwilling to offer them much in the way of support on their return.
  - There are links with Pakistan through their daughter's parents-in-law who remain living in Pakistan.
  - The appellant's wife suffers from some medical conditions but there was no evidence that those could not reasonably be managed in Pakistan.
  - The paediatric review dated 4 February 2015 from Dr Tsampanaki, undertaken a year before the appellant returned to the family home, painted a largely positive picture of H's life. He was said to be happy with no signs of depression or anxiety, has lots of friends, good social skills and is independent in all self-care activities despite his moderate learning difficulties and speech and language difficulties. He was said at that time to be slowly becoming more independent.
  - The more recent evidence from the family and school showed that he had further improved in his confidence, independence and living skills since then.
  - If his parents moved to Pakistan without him this would be a "significant blow to him". However, he would still have his elder brother in the family home who could provide him with at least some emotional and practical support.
  - H also has other family members in the UK including his married sister and cousins with whom he met regularly.

- If the choice was made for H to live with his parents in Pakistan, he would miss some of the services and opportunities that he has in the UK and his prospects of fulfilling his potential may well be limited. However, he would be able to maintain the support he gets from his parents and (possibly) build up links with his extended family in Pakistan.
- H speaks both Urdu and English, although he cannot read or write Urdu and prefers to communicate in English.
- The appellant has established a private and family life in the UK and his removal would amount to an interference with that private and family life.
- There is an element of dependency on the part of H on both his parents which goes beyond the normal emotional ties that exist between young people and their parents. H's best interests in terms of his private and family life are for him to remain living in the UK with both his parents.
- The appellant arrived in the UK unlawfully. He exercised serious deception in relation to his subsequent efforts to regularise his stay (as he admitted in evidence before the FtJ). In the application for leave to remain on the grounds of long residence in 2009, he claimed to have arrived in the UK in 1995, repeating that in the appeal. He supported that (false) claim with extensive documentary evidence to show his continuous presence in the UK since that date.
- The appellant admitted that all the evidence of his presence in the UK between 1995 and 2003/4 was false.
- The appellant was fully aware that he was trying to mislead the immigration and the judicial authorities.
- Nevertheless, the core of his evidence in relation to the family life that he has re-established with his wife and children since 2016 was true.

35. In the decision which followed the hearing on 25 November 2019 the relevant paragraphs of the Immigration Rules ("the Rules") were set out. It was explained at [32] why paragraph EX.1 has no application to H. To repeat, [32] states as follows:

"Thus, amongst other things, the appellant would have to show that he meets the 'sole parental responsibility/living only with the appellant as parent' requirement in E-LTRPT.2.3(a), or that he is not the partner of the person who normally lives with the child, namely his wife. It is for those reasons that paragraph EX.1 has no application to H."

36. So far as EX.1.(b) is concerned, the appellant must establish that there are insurmountable obstacles to family life continuing with his partner outside the UK. EX.2 explains what the phrase "insurmountable obstacles" means, again as set out in the earlier decision.

37. It is true that the appellant's wife's account of the abuse that she suffered from her husband's family was accepted by Immigration Judge Corke when he decided the earlier appeal in December 2005. That abuse amounted to persecution and included



an attempt to stage a domestic accident by electrocution by tampering with her iron, and an attempt to harm her by leaving a gas cylinder open. Further, when she moved to Karachi she was assaulted by her brother-in-law and others in January 2004. However, the evidence both from the appellant and his wife is that there has been no contact with any of their relatives for many years.

38. If there was a continuing risk to the appellant's partner that would, in ordinary circumstances, amount to insurmountable obstacles to their continuing family life. However, there is no evidence of any threats made towards her since 2004 and there is no contact with their respective families. Quite apart from the issue of the ability of the appellant and his wife to live in another part of Pakistan, there is no evidence at all that her husband's family, or indeed her own family, would even know that they had returned to Pakistan. This was a matter that was put to the appellant's wife during cross-examination in relation to her own family.
39. Although I accept the background evidence that domestic violence against women in Pakistan continues, and that honour killings still take place, the evidence before me does not reveal a continuing risk, for the reasons explained above.
40. In terms of their ability to obtain employment, there is no reason to think that either of them could not find some employment.
41. Although there is evidence in earlier witness statements that the appellant's wife suffers from hypertension and heart palpitations, there is nothing in the most recent witness statements to suggest that she would be unable to return to Pakistan because of difficulties with her health. No medical evidence has been put before me. The conditions which were previously referred to are ones that she is likely to be able to receive medical treatment for in Pakistan.
42. Whilst I accept the appellant's wife's evidence that subjectively she still fears return, for the reasons I have given the evidence does not establish that she would, in fact, be at risk, particularly bearing in mind that she would be returning with her husband.
43. On a self-contained basis, therefore, without taking into account separation from H, I am not satisfied that there are insurmountable obstacles to the appellant and his wife continuing their family life in Pakistan.
44. Even taking into account the issue of separation from H, as a couple they would be able to continue their family life notwithstanding that I accept that it would plainly affect them very deeply emotionally to be separated from family members in the UK, in particular H in the light of his condition. Accordingly, I am not satisfied that paragraph EX.1.(b) is met.
45. Next, I consider GEN.3.2 which, materially, provides as follows:  
"GEN.3.2.  
(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain

which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

- (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.”

46. The question, then, is whether refusal of leave to remain would result in a breach of Article 8 because there are exceptional circumstances meaning that refusal would result in unjustifiably harsh consequences for the appellant, his partner, a relevant child or another family member whose Article 8 rights would be effective. Plainly, this is an issue that concerns H rather than any of the other children who are adults.
47. There is obviously H’s learning disability to consider. It is a preserved finding of the FtJ that if H’s parents move to Pakistan without him, this would be a “significant blow” to him. I do not accept the submission on behalf of the appellant to the effect that that finding is tantamount to a conclusion that there would be unjustifiably harsh consequences. A ‘significant blow’ is not, without more, synonymous with ‘unjustifiably harsh consequences’.
48. I have proceeded on the footing that H would not go to Pakistan with his parents and that it would not be reasonable to expect him to do so. That conclusion takes into account the very significant factor of his British citizenship, as well as the educational (and other) provision that he is receiving in the UK which, I accept, is unlikely to be able to be precisely replicated in Pakistan, at least not without significant cost which the family would not be able to meet. Quite apart from that, it is likely to be the case that H’s socialisation and confidence would be affected by a move to an environment which is now unfamiliar to him, given that he came to the UK at a very young age.
49. I do not consider that the word “unjustifiably” in GEN.3.2.(2) excludes consideration of matters beyond those affecting the individual concerned, unlike the “reasonableness” or “unduly harsh” provisions in ss.117B and C of the Nationality, Immigration and Asylum Act 2002, as explained in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53. Accordingly, the fact of the appellant’s significant acts of deception as already outlined, are significant relevant factors to take into account in terms of the public interest.
50. However, I do accept, as found by the FtJ, that H’s best interests are for him to remain living in the UK with both his parents. That, of course, is not determinative. Nevertheless, he plainly has a close relationship with both his parents that he depends on his mother in particular, for practical day-to-day support. He also has a very close relationship with the appellant.

51. Whilst H could continue living with his brother, A, in the UK and would be likely to receive emotional and practical support from him, that would not in my view replicate the close day-to-day support he receives from his mother, and, to a lesser extent, from the appellant. That is quite apart from the fact that H needs a level of support that A would be unlikely to provide given that he has full-time employment.
52. In those circumstances, I am satisfied that there are exceptional circumstances meaning that refusing leave to remain would amount to a breach of Article 8 because it would result in unjustifiably harsh consequences for H.
53. Accordingly, it is not necessary to go on to consider Article 8 outside the Rules.

*Decision*

54. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, allowing the appeal under Article 8 of the ECHR.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Upper Tribunal Judge Kopieczek

Date: 06 April 2020