



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00466/2020

THE IMMIGRATION ACTS

Heard at Manchester (Via Microsoft Teams)
On 2 July 2021

Decision & Reasons Promulgated
On 23 July 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KALSOON BEGUM
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs U Sood (Public Access).

For the Respondent: Mr Tan a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Mensah ('the Judge') promulgated on 21st December 2020, in which the Judge dismissed the appellant's appeal on all grounds.
2. The appellant is a citizen of Pakistan born on 6 May 1941 who entered the United Kingdom lawfully as a visitor but who thereafter made an application for leave to remain in the United Kingdom on the basis of family and private life, which was

refused by the Secretary of State on 19 December 2019. It is the appeal against that decision which came before the Judge.

3. Permission to appeal was refused by another judge of the First-tier Tribunal but granted by a judge of the Upper Tribunal, the operative part of the grant being in the following terms:

“2. Despite a number of adverse findings, it is arguable that the judge erred in law by failed properly to consider the medical evidence of the appellant’s health need in the UK (such as the GP evidence) and, as a result, whether those needs will be met in Pakistan applying *AM (Zimbabwe) v SSHD* [2020] UKSC 17 - in addition, the judge arguably discounted the appellant’s evidence unduly because of her excusable absence, even if he was entitled - as counsel accepted - to take her absence into account.

3. The remaining grounds are less meritorious, but I, nevertheless, grant permission on all grounds. It will be for the appellant to show any established error of law is material to the ultimate decision.”

4. The Secretary of State, in her Rule 24 reply dated 24th March 2021, opposes the appeal.

Error of law

5. In relation to the scope of the hearing, Mrs Sood argued that both articles 3 and article 8 ECHR were large and that the Judge had failed to deal with the article 3 issue. Reference was made to a Case Management Review hearing (CMR) where it was submitted that the issue of the need to consider the appellant’s case in light of *AM (Zimbabwe)* was raised, that this matter had been included in the skeleton argument and had been taken on the appellant’s behalf.
6. The Secretary of State’s position in her Rule 24 response is that the appellant made an application based upon her private life in the UK, which was addressed in the refusal letter. The appellant had provided no evidence to demonstrate that article 3 was pleaded before the Tribunal, no consent had been obtained from the Secretary of State to a new ground being pleaded, and that it will be for the appellant to show that article 3 was a live issue.
7. The outcome of the CMR before First-tier Tribunal Judge Cox was confirmed in a Notice and Directions dated 27 October 2020, noting the five issues identified as being relevant as:
 - i. Whether family life exists between the Appellant and her adult children in the UK.
 - ii. If yes, has the appellant established that she and her family would suffer unjustifiably harsh consequences if the refusal decision were to stand (GEN.3.2. of Appendix FM).
 - iii. Whether the appellant has established a limited private life in the UK that engages article 8.
 - iv. If yes, whether there would be very significant obstacles to her integration into Pakistan, if she were required to leave the UK.
 - v. If the appellant’s application does not satisfy the requirements of the Immigration Rules are there compelling and compassionate grounds to justify her being granted leave to remain outside the rules.
8. A copy of the Visa application form is included in the Secretary of State’s bundle confirming the statement that the appellant applied for leave to remain on the family/private life route. A covering letter dated 9 August 2019 referred to the

extent of her family in the UK and at [16] that articles 3 and 8 are involved in maintaining the dignity of the authors mother (the appellant) in the latter part of her life. The refusal letter also refers to article 3 ECHR, where it is written:

“Your application has been reviewed to determine whether Article 3 of the European Convention on Human Rights (prohibition against inhumane and degrading treatment) is engaged as a result of the medical condition raised. Article 3 on medical grounds has a very high threshold and is applicable in exceptional cases only.”

9. Having set out a quote by reference to N v Secretary of State for the Home Department [2005] UKHL 31, and having examined the availability of healthcare in Pakistan, it was concluded by the author:

“On the basis of the above information it has been concluded that suitable medical treatment is available in your home country. You have not provided any evidence that you would be denied medical treatment, nor that you would be unable to travel to obtain such treatment.

Consequently, it is not accepted that your removal from the UK reaches the high threshold of severity to breach Article 3 of the ECHR on the basis of your medical claim and condition.”

10. The grounds of appeal against the decision specifically refer to article 3 ECHR.
11. Before the Upper Tribunal Mrs Sood made reference to the skeleton argument filed before the First-tier Tribunal, which refers to the notice by Judge Cox, but also to the medical evidence, the appellants relationship within the family, article 8 ECHR, and other issues, before concluding at [9]:

“9. Ultimately, as the GOA contender, the Respondent has not substantiated the existence of accessible good quality medical care in Pakistan, nor dealt with the lack of accreditation or regulated care that the Appellant might be able to access. These submissions (and the Grounds) also raise both Articles 3 and 8 being breached, including risking the life of the Appellant, and the effect on the dignity and loving needs of this mother in the final stages of her life.”

12. The Judge at [4 – 7] of the decision under challenge sets out what are described as the agreed issues in the following terms:

“4. Whether the appellant can meet the dependent relative rule or Appendix FM, given she entered the United Kingdom as a visitor and applied for leave outside the Immigration Rules?

5. Whether the Appellant can meet any of the criteria under Paragraph 276ADE of the Immigration Rules. In other words, whether she faces very significant obstacles to integration in Pakistan if she was to be returned.

6. Whether the Appellant meets any of the conditions under GEN (unjustifiably harsh consequences) unjustifiably harsh consequences.

7. If none of the above is met, whether there will be a breach of Article 8. In other words, whether removal will be disproportionate. Whether the public interest in the form of immigration control and protecting the public purse outweighs any family and private life considerations.”

13. I have had the benefit of reading the Judge’s Record of Proceedings (‘ROP’), which is legible as it was typed contemporaneously with the evidence and submissions. This shows Mrs Sood in her submissions did rely upon the content of her skeleton argument but what this document also shows is that the thrust of the evidence given and submissions made focused upon the issues identified by the Judge

between [4-7] set out above, with no specific submissions being made in relation to the article 3 test as it stood at the date of the hearing, 25 November 2020. In particular, despite AM (Zimbabwe) having been handed down on 29 April 2020 there was no specific reference to this judgement in the advocate's submissions or any specific submission to how the Judge should assess the merits of the article 3 appeal in light of the correct test.

14. Whilst there was nothing before the Judge to show that the article 3 case was abandoned it does not appear it was pursued with any vigour through appropriate questioning, submissions, or by reference to the relevant case law. Although the grant of permission to appeal refers to AM (Zimbabwe) being the guiding authority and that the Judge does not refer to, it is clear that the Judge was not referred to this case or the principles that arise therefrom, or their application on the facts, by the advocates.
15. The Judge sets out her findings from [9] of the decision under challenge starting with specific reference to an earlier decision of the First-tier Tribunal, heard by First-tier Tribunal Judge Caswell, in accordance with the Devaseelan principles.
16. The Judge refers to the findings of Judge Caswell between [14 - 15] including it being found at the date of the earlier hearings that the appellant had not shown that the respondent's decision to refuse her application made outside the Immigration Rules breached her right to respect for her family and/or private life pursuant to article 8. This too related to an application for leave to remain on a similar basis to that under consideration by the Judge in this appeal.
17. The Judge correctly directed herself at [16] to the fact that Judge Caswell had a very limited evidence as to the family circumstances in the United Kingdom and in Pakistan and there was no evidence to support any mental health conditions. It was clear there was more evidence before the Judge in this appeal than was available to the earlier tribunal.
18. Having assessed that evidence, the Judge sets out her own findings of fact on the relevant issues which can be summarised in the following terms:
 - i. The appellant has lived with her son, her Sponsor and his family since she arrived in the UK in April 2018 [17].
 - ii. As a starting point the fact the appellant is living with her adult son, his wife and the grandchildren does not of itself demonstrate the relationship is beyond the normal emotional ties between a mother and adult son, a grandmother and grandchildren, or the Sponsor's wife and the appellant [17].
 - iii. The appellant's GP gives no information to demonstrate knowledge of the availability of medical treatment in Pakistan and his letter was read simply as stating the information he had been given by the appellant and her family. There is also no reference in the GPs letter to the appellant's mental health. [17].
 - iv. The GP letter does not set out whether the appellant's medical condition has any impact or functional limitation on her ability to care for herself [18]. The GP letter does no more than confirm the appellant's medical conditions. A second letter from the GP asking for a postponement as the appellant was "a little bit too frail to attend at the moment" suggests the GP thought the appellant's frailty was not a permanent limitation [18].
 - v. The letter from the Consultant Respiratory Physician dated 15 May 2020 indicates the author could not say whether the appellant's chest x-ray showed

signs of cancer or damage caused by an earlier infection of TB but did say it appeared stable for the past two years. The letter does not address any functional impact and the reference to breathlessness and poor appetite is what the Physician had been told during the course of a telephone assessment through the Sponsor. A follow-up report of 8 July 2020 shows no sign of progression in the right lung, indicates the damage to the right lung could represent scarring after TB or cancer, but that the only realistic treatment will be supportive care [19].

- vi. In relation to the reports from Ms Vicky Lyn Davison, the author took her entire account from the appellant's son, the Sponsor. Concern is expressed by the Judge that evidence from the appellant had not been taken with an independent interpreter and concerns regarding the reliability of what Mrs Davison had been told [21].
- vii. That the appellant's claim in her witness statement that she did not have anybody in Pakistan who would take care of her is noted [22].
- viii. It came clear from the evidence of the Sponsor that the appellant had not been living alone in Pakistan before she came to the United Kingdom but with her son and his wife and three children in the family home since 2004, when her own husband passed away, a period of 14 years [23].
- ix. The property in Pakistan includes a room for the appellant and a room for her son and his family which the Judge found to be in direct contrast to the appellant's witness statement in which she stated her son does not live nearby, which was found to damage the reliability of the appellant's evidence further [23].
- x. The Judge noted the Sponsor in his witness statement failed to make mention of the fact the appellant was living with his brother and his brother's family in Pakistan and the Sponsor's claim that the appellant fell out with her son's wife in Pakistan was found to be inconsistent with the evidence given before Judge Caswell warranting "negative weight" being given to this claim [23 - 24].
- xi. The appellant's claim that culturally her daughter in Pakistan would not be able to provide any assistance with her care was noted by the Judge, as was the fact the appellant's daughter in the United Kingdom stated in her evidence she had good relations with her sister in Pakistan and that when the appellant was living in Pakistan her sister did assist in her care but could only do so when she visited. The Judge noted the appellant's daughter in Pakistan was a retired teacher with no children of her own. The Judge finds the appellant and sponsor gave inconsistent evidence about the appellant's daughter in Pakistan and it was not found there was any genuine cultural barrier to the appellant's daughter in Pakistan assisting in the care of her mother, a situation which reflects that in the United Kingdom where the appellant's UK-based daughter say she provides care for her mother even though her mother lives with her brother, the Sponsor. The Judge finds there was no credible reason why the daughter in Pakistan could not assist in meeting her mother's needs and that both the appellant, the Sponsor and the UK-based daughter have been untruthful and selective in the evidence they have given. The Judge did not find it credible in light of all the conflicting evidence that the appellants son and his family and the appellants daughter in Pakistan would not continue to provide care for the appellant in Pakistan [25].
- xiii. The Judge finds the starting point for Ms Davison's report is not reliable as it is premised upon the appellant living alone and having to live alone in Pakistan which the Judge does not find to be a credible claim. The Judge also finds Ms

Davison relied upon what she had been told about the appellant's needs by the Sponsor which the Judge finds undermines the weight that can be given to the report, as the Sponsor is not a reliable witness and is clearly motivated by the strong desire to have his mother remained with him in the United Kingdom [26].

- xiii. The Judge finds there is little medical evidence about the appellant suffering, osteoporosis and deformity of the left foot which it is claimed inhibits her walking, although the existence of osteoporosis is accepted as being likely in a person aged 79. The Judge notes concern expressed by Judge Caswell about inconsistent evidence about the appellant claiming to be bedridden on the one hand but mobilising for appointments on the other, which the Judge did not find was resolved by the evidence before her [27].
- xiv. Some of the conclusions made by Ms Davidson were said to be "surprising" as there was no evidence the appellant has active TB and there was no evidence of relevant expertise and the availability of paid care in Pakistan, no source materials referring to the availability of paid care or the quality of such provisions in Pakistan, and nothing to substantiate the claim that taking a flight could shorten the appellant's life expectancy when there was no medical evidence dealing with this issue [29].
- xv. The Judge finds comments made in the supplementary report from Ms Davison "unhelpful" as it contains "sweeping statements wholly unsupported by any independent evidence or reference to source materials" limiting the finding the Judge could make from the same to that the older an individual and those with underlying health conditions is they are generally at greater risk from Covid, which is the position both in the UK and in Pakistan [30].
- xvi. The independent evidence failed to provide any reliable evidence as to the appellant's care needs [31].
- xvii. The weight the Judge gave to the evidence from the family in the UK is limited as they were found to be unreliable witnesses [31].
- xviii. The submission of emotional dependency sufficient to create family life lacked reliable evidence regarding the formation of the emotional dependency beyond normal emotional ties, as those giving evidence had failed to establish their evidence is reliable with regard to the appellant's history and needs, making it difficult to see how they could establish emotional dependency beyond normal ties [32].
- xix. The appellant had failed to establish she has anything other than the normal emotional ties between herself and her adult children. The appellant had failed to establish she is dependent upon her family for her basic care needs. The Judge did not accept she was unable to cook, wash, dress and care for herself in her daily living activities. The evidence failed to establish the appellant is suffering from any recognised mental health condition or anything that impacts upon her functioning. The evidence fails to justify a departure from Judge Caswell's findings [33].
- xx. The evidence of the Sponsor and UK-based daughter undermines the case further. There was no further evidence that would show the relationship between the appellant and her grandchildren is any different than that of normal emotional ties [34].
- xxi. The appellant and adult children prefer for the appellant to stay in the United Kingdom and her adult children are doing all they can to achieve that result for her, but personal preference is not a factor relevant to the issues in the appeal [36].

- xxii. The appellant failed to show she would meet the dependent relative criteria under the rules. The Judge did not accept the appellant is dependent. The evidence failed to establish there will be unjustifiably harsh consequences if the appellant were to return to Pakistan where she had lived with her son for the previous 14 years, and daughter, who had previously cared for her. There will be no significant obstacles to her return to Pakistan where she had lived her entire life until 2018. The appellant's previous medical treatment was provided in Pakistan and paid for by her adult children. The Judge found no reason why that could not continue if the appellant is returned to Pakistan. The respondent had set out evidence of adequate medical treatment in Pakistan which the appellant failed to counter. The sponsor's evidence was that he had been paying for treatment for the appellant when she was in Pakistan [37].
- xxiii. In relation to section 55 and the grandchildren, there was a paucity of evidence showing the impact on the grandchildren. There was no evidence the best interests of the grandchildren in the United Kingdom require the appellant to remain in the United Kingdom or that they could not visit their grandmother at the family home in Pakistan [38].
- xxiv. The GP evidence shows the appellant accessing NHS services in relation to which a limited one-off payment of £1200 had been made, giving rise to strong public interest considerations [39].
- xxv. The appellant has not demonstrated that she can speak English and a private life formed in the United Kingdom has been precarious. The appellant has not established family life sufficient to cross the article 8 threshold. It is proportionate for the appellant to be returned to Pakistan [39].

19. At [40] the Judge writes:

“40.I dismiss the human rights appeal under article 8. I find the Appellant has not demonstrated her care needs are not met in Pakistan. The Appellant has failed to demonstrate she has an Article 8 family life in the United Kingdom or that she is dependent upon her family in the United Kingdom. The Appellant has failed to demonstrate she has no family to whom she can turn to in Pakistan and in fact I find she has her son and his family, as well as her daughter in Pakistan, with whom she can live and access care and support.”

- 20. The challenge in the grounds of appeal to the article 8 findings do not establish material legal error. The Judge clearly considered the evidence provided with the required degree of anxious scrutiny and has given adequate reasons in support of her findings concerning the weight that can be given to the evidence relied upon by the appellant, family members, medical professionals and Ms Davison. It has not been shown those findings are irrational, unfair, or outside the range of those available to the Judge on the evidence.
- 21. The Judge clearly factored into her assessment both the evidence in relation to the situation that prevailed in Pakistan before the appellant entered the United Kingdom as a visitor, the medical and other family assistance that was received in the United Kingdom, and the availability of care that the appellant will be able to access on return to Pakistan.
- 22. The appellant has failed to establish that the Judge's findings that the respondent's decision is proportionate pursuant to article 8 ECHR is a finding outside the range of those available to the Judge.

23. What [40] shows, however, is that the Judge makes no specific finding in relation to article 3 concerning the health issues. This is clearly because the Judge believed, as reflected in the decision at [4-7], that article 3 was not a live issue. Even if it was a live issue and the Judge should have made of a specific finding, I find the failure to do so, even if legal error, is not material to the decision to dismiss the appeal on human rights grounds.
24. In AM (Zimbabwe) the Supreme Court applied the ECtHR's decision in Paposhvili v. Belgium as to the effect of article 3 and set aside the judgment of the House of Lords in N v. Secretary of State for the Home Department [2005] UKHL 31.
25. In this appeal, it is relevant that the Judge found there are realistic prospects of medical and family support available to the appellant on return to Pakistan. That finding is well within the range of those available to the Judge on the evidence.
26. It is clearly the Judge's finding, supported by the medical evidence, that the appellant's medical conditions had not reached a critical stage sufficient to establish compelling humanitarian grounds for not removing her from the United Kingdom. That is a sustainable finding in the evidence.
27. It is also unarguable that the evidence upon which the Judge felt able to attach any weight did not establish that there is a real risk for the appellant on return, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in her state of health resulting in intense suffering or to a significant reduction in life expectancy' see: Paposhvili v. Belgium (Application No. 41738/10) (13 December 2016) [2017] Imm. A.R. 867
28. The Supreme Court in AM (Zimbabwe) considered the meaning of "Significant", in the context of the new criterion identified by the Court in Paposhvili which was found to mean 'substantial'.
29. I find the evidence before the Judge did not established that if there was any reduction in life expectancy if the appellant was to return to Pakistan it would be substantial. Accordingly, it did not attain the minimum level of severity which art.3 required: AM (Zimbabwe) v. Secretary of State for the Home Department [2020] UKSC 17; [2020] 2 W.L.R. 1152
30. I therefore find that the only finding available to the Judge on the evidence in relation to article 3 was that the required minimum level of severity had not been shown to exist and that a claim on this basis would fail in any event. Accordingly, any error is not material to the decision to dismiss the appeal.
31. Whilst the appellant's family clearly want her to remain in the United Kingdom article 8 does not give a person the right to choose where they wish to live. I find no legal error material to the decision made out on the grounds, sufficient to warrant the Upper Tribunal interfering any further in this matter. Disagreement with the Judge's findings and desire for a more favourable outcome are not sufficient.
32. In relation to Covid-19, removals have continued throughout the pandemic, where appropriate, and the Home Office Guidance and procedures in relation to such removals have not been shown to be unreasonable or unlawful in the prevailing circumstances. No separate issue arises on this ground as it would only be if it was safe and appropriate to so that the appellant will be removed from the United Kingdom to Pakistan in an appropriate 'Covid secure' way.

Decision

33. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.

Anonymity.

34. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

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

Signed.....

Upper Tribunal Judge Hanson

Dated 7 July 2021