



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/14953/2019 (V)

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 23 February 2021

Decision & Reasons Promulgated  
On: 5 March 2021

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MUHAMMAD OMER RASHEED**

Respondent

**Representation:**

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer

For the Respondent: Mr A Hasan instructed by Haider and Hasan Solicitors

**DECISION AND REASONS**

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing
2. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Rasheed's appeal against the Secretary of State's decision to refuse his human rights claim.

3. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Rasheed as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

4. The appellant is a citizen of Pakistan born on 19 November 1981. He first entered the United Kingdom on 6 October 2009 with entry clearance as a student, valid until 14 January 2011 and was granted further leave as a Tier 4 student until 1 July 2011. Following an unsuccessful application and appeal, the appellant was granted further leave as a Tier 1 (post-study work) migrant on 8 October 2011, valid until 22 November 2013. His wife and two children joined him in the UK and on 20 December 2013 the appellant submitted a family/ private life 10 year application which was refused on 3 February 2014 without a right of appeal. An application for reconsideration was refused and on 23 July 2015 the appellant was served with a removal notice as an overstayer. He then made further submissions on family and private life grounds on 6 August 2015 which were refused and certified as clearly unfounded, followed by submissions on 17 August 2015 and 21 September 2015, both of which were refused with no right of appeal.

5. The appellant then made a human rights claim on 10 May 2019 on the basis of his private life in the UK. His claim was refused on 28 August 2019 on the grounds that he did not meet the requirements of Appendix FM or paragraph 276ADE(1) of the immigration rules and that there were no exceptional or compelling circumstances justifying a grant of leave outside the rules. The respondent noted that the appellant's wife was not British or settled in the UK and that the children had not lived in the UK for 7 years. It was accordingly considered that the family unit could return to Pakistan.

6. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 15 January 2020 by Judge Herbert. There was no representative for the respondent at the hearing. The appellant's evidence before the judge was that he had spent over 10 years in the UK and had completed an MSc and been in regular employment until 2013, that his children were aged almost 13 and 12 years and were doing well in school and were well integrated into society in the UK and that there would be significant hardship for all the family if they had to return to Pakistan as he had no accommodation or means of employment or support there and the children would be devastated if forced to leave the UK.

7. The judge found that the appellant could not claim that his family would face insurmountable circumstances on return to Pakistan and that the immigration rules were not met as the children had not yet been in the UK for 7 years. However, he found that the children had spent their most important years of their education in the UK and had been in the UK for 6 years and that taking all the factors together the balance lay in favour of the appellant and against the maintenance of immigration control. He accordingly allowed the appeal on Article 8 grounds outside the immigration rules.

8. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge's proportionality assessment was flawed, unbalanced and contrary

to the guidance in KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53.

9. Permission to appeal was granted in the First-tier Tribunal on 28 April 2020. The matter then came before me for a remote hearing by way of skype for business.

### **Error of Law**

10. Both parties made submissions before me.

11. Mr McVeety relied and expanded upon the grounds of appeal. He submitted that the judge had made several errors of law in his decision. Having found that there were no very significant obstacles to the family reintegrating in Pakistan and that the children were not qualifying children for the purposes of Appendix FM, and thus that the requirements of the immigration rules were not met, the judge failed to identify any compelling circumstances which would lead to a consideration outside the immigration rules. The factors that he identified in the appellant's favour applied equally to all cases with children living in the UK and there were no factors identified by the judge which took the case further to show that it would be unreasonable for the children to leave the UK. The decision was contrary to the "real world" situation referred to in KO (Nigeria). The judge's reliance at [40] upon the appellant's English language and possible financial independence as tipping the balance in the proportionality assessment was contrary to the guidance in AM (S.117B) [2015] UKUT 260 which found those to be neutral factors. The judge's findings were not open to him on the evidence and his decision should be set aside.

12. Mr Hasan submitted that the judge had considered all of the family's circumstances, in particular those of the children who had been in the UK for over 6 years, that he had properly applied the five-stage approach in Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27 and that he had made no errors of law in his decision. Mr Hasan submitted that the appellant had not been permitted to work, but once he was able to he would be able to get leave to remain here as his children had now been in the UK for over 7 years. He submitted that this case was different to KO (Nigeria) as the appellant's children were minors.

13. I have no hesitation in concluding that the judge's decision cannot stand and must be set aside. As Mr McVeety properly identified, there are several errors of law in the decision. I am entirely in agreement with Mr McVeety's submission that, having properly found that the requirements of the immigration rules could not be met, the judge failed to identify anything compelling about the family's circumstances which would justify consideration outside the rules on wider Article 8 grounds or a grant of leave outside the rules. Having properly directed himself at [39], that the children's rights were not the overriding issue, the judge then contradicted his own direction by finding that the interests of the children's outweighed the public interest in immigration control, without identifying any, or any compelling factors which would make it unreasonable for the children to return to Pakistan. In so far as the judge, at [40], gave weight to the fact that the

appellant spoke English and was unlikely to be dependent upon the state, not only did he speculate in regard to the latter, but he acted contrary to the guidance in AM (Malawi) as to such matters being neutral factors. Mr Hasan's submissions were little more than a re-statement of the appellant's claim and did not provide a proper response to the Secretary of State's grounds of appeal. As for his submission that the appellant's case was distinguishable to KO (Nigeria) because of the age of the child in that case, that is simply wrong.

14. Accordingly, it is undoubtedly the case that Judge Herbert materially erred in law in his decision and I therefore set aside his decision.

### **Re-Making the Decision**

15. I invited a response from both parties as to the disposal of the appeal in the event that I found an error of law. Mr Hasan agreed that the decision could be re-made by myself on the basis of the evidence already available and considering that the children were qualifying children, having by now resided in the UK for over 7 years. I asked him if there were any further relevant factors to be considered other than the passage of time since the last decision. He told me that the appellant's wife and daughter had some medical issues involving "ladies' diseases", but he said that the evidence in that regard was before the First-tier Tribunal Judge. Mr McVeety was content for me to re-make the decision without a further hearing.

16. It seems to me that the appeal must fail, for the same reasons given above in relation to the error of law. There is no challenge to Judge Herbert's decision that the appellant and his family could not meet the requirements of the immigration rules. Clearly that was the proper conclusion given that the children were not qualifying children at the time of the application and that, as Judge Herbert found, there were no very significant obstacles to integration in Pakistan.

17. It is the case, when considering Article 8 outside the immigration rules, that the children have now spent more than 7 years in the UK and are therefore qualifying children for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. However, for the reasons stated above, there is no evidence to suggest that it would be unreasonable to expect the children to leave the UK. They came to the UK aged 3 and 5 years and are currently aged 11 and 13 years respectively. There is documentary evidence confirming that they are progressing well at school and the statements of the appellant and his wife refer to the children being integrated into society in the UK and considering the UK as their home. There is also a letter dated 4 June 2019 from Manchester Royal Eye Hospital referring to the appellant's daughter having eczema and to a previous problem of sore eyes in 2017. There is nothing in that evidence, or any of the other evidence before me, to show that the children could not resume their education in Pakistan and that the appellant's daughter could not receive treatment for her eczema in Pakistan. Neither is there any evidence to suggest that it would not be reasonable to expect the children to return to Pakistan with their parents as a family unit, nor contrary to their best interests to do so. None of the family has any lawful basis of stay in the UK, having had no leave to

remain for the past 7 years. The children and their mother have spent only a matter of months in the UK with leave to remain. The approach to be taken is set out in KO (Nigeria) as follows:

“18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* [2017 SLT 1245](#), [\[2017\] ScotCS CSOH 117](#):

“22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, ‘Why would the child be expected to leave the United Kingdom?’ In a case such as this there can only be one answer: ‘because the parents have no right to remain in the UK’. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made ...”

19. He noted (para 21) that Lewison LJ had made a similar point in considering the “best interests” of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [\[2014\] EWCA Civ 874](#), para 58:

“58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?”

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that “reasonableness” is to be considered otherwise than in the real world in which the children find themselves.”

18. For this family and these children, the real world situation in which they find themselves is such that it would clearly not be unreasonable for them to be expected to return together to Pakistan. Furthermore, little weight can be given to the private life they have established in the UK, pursuant to section 117B(4) of the 2002 Act. Although the appellant has been in the UK for several years, the majority of his time has been spent without leave. Whilst he has made several applications to regularise his stay, those applications have all been unsuccessful and he has chosen to remain in the UK with his family unlawfully.

19. As for any other compelling circumstances, there is, as Mr McVeety said, nothing. The appellant referred, in his statement before the First-tier Tribunal, to being subjected to serious threats in Pakistan and there are two FIRs in the appeal bundle, but he did not make an asylum claim, despite being invited to do so (as confirmed in the refusal decision) and gave very limited details of why he considered himself to be at risk. In any event, that evidence was before Judge Herbert and no challenge was made to his properly made

decision that there were no very significant obstacles to the family's integration in Pakistan. Likewise, Judge Herbert did not give any express weight to the medical issues raised by the appellant in regard to his wife and daughter. The appellant's wife, in her statement, stated that she was seriously ill, but the evidence produced in the bundle did not bear that out and simply confirmed that she had an ovarian cyst. There is no further and more recent evidence in that regard and no evidence to suggest that appropriate treatment would not be available in Pakistan.

20. Accordingly the evidence shows that it would be entirely reasonable for the family to return to Pakistan, having had no lawful basis of stay in the UK for many years. There are no compelling circumstances justifying a grant of leave outside the immigration rules and the respondent's decision to refuse leave to remain is entirely proportionate. There is no breach of Article 8 and the appeal is therefore dismissed.

### **DECISION**

21. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Rasheed's appeal.

Signed: *S Kebede*  
Upper Tribunal Judge Kebede

Dated: 23 February 2021