



Upper Tribunal
(Immigration Asylum Chamber)

Appeal Number: IA/35229/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 21st December 2015

Decision & Reasons Promulgated
On the 11th January 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS HURRIYAT JOSEPH

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Mr Grigg (Counsel)

For the Respondent: Mr Kandola (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Webb promulgated on the 28th April 2015, in which he dismissed the Appellant's appeal on Human Rights grounds both under and outside of the Immigration Rules. Permission to appeal has been granted by Upper Tribunal Judge Coker on the 21st September 2015, on the basis that it was arguable the First-tier Tribunal Judge had failed to properly apply the correct test to the assessment of the evidence before him and searched for compelling factors, as opposed to considering the factors in the round and cumulatively and that further it was arguable

that the Judge failed to factor into his assessment the violence allegedly sustained by the Appellant from her sister in Pakistan and the relevance of the son's occupation. Permission to appeal was granted on all grounds.

2. Within the Grounds of Appeal it is argued that the evidence in the case is largely undisputed and it is argued that the First-tier Judge accepted that the Appellant is dependent on her son, Dr Shaun Joseph, a British national, for support and that Dr Joseph is a Senior Registrar at the Royal Derby Hospital. It is argued his profession falls within the Home Office's list of Shortage Occupations and that it was accepted that the Appellant's husband Prof Donald Joseph had died unexpectedly, in the Appellant's presence, from a heart attack, and that the following day their local church All Saints in Peshawar was attacked by two suicide bombers killing 81 worshippers and injuring many others and that the psychiatric evidence from a Dr Pourgourids identified trauma arising from these events and this evidence was accepted by the First-tier Judge. It is argued that the Judge failed to consider the psychiatric evidence and dependency of the Appellant on her son under the Rules and Article 8, that the Judge failed to consider the evidence cumulatively; that he failed to consider the evidence of physical violence from the Appellant's sister against her when they lived together following the sudden death of the Appellant's husband; that the Judge failed to take into account the Article 8 rights of the Appellant's son as a UK citizen and also failed to take account of the son's profession as being on the Home Office's national shortage list.
3. Mr Grigg on behalf of the Appellant argued that the First-tier Tribunal Judge had failed to apply a cumulative approach, when undertaking the balancing exercise required for Article 8 and that the Judge had not properly weighed the evidence and had ignored relevant evidence in reaching his assessment on proportionality and considering the appeal under paragraph 276 ADE (1) (vi). However, he accepted that if the approach taken was correct for the purpose of Article 8, then he would not succeed in this ground under the Immigration Rules. He said that the question as to whether or not there are compelling circumstances in the case often distracted Judges from considering the overall picture and looking at all of the factors in favour of the Appellant in considering proportionality and considering the factors in favour of the Appellant compared to the public interest in carrying out the balancing exercise for the purpose of Article 8. He argued that here the Appellant was an elderly lady who was in ill health and who had suffered trauma after losing her life partner, her church had been bombed and fellow Christians killed the day after, her sister had been physically abusive of her and there would be difficulties for an isolated elderly lady returning to Pakistan and that the Judge had also failed to take into account her son's job in determining that he simply had a choice as to whether or not to return with her and that he was in effect imposing a decision on the UK national. He argued that the Judge had simply dissected each of the factors, rather than looking at them in the round for the purpose of

Article 8 proportionality and that the Judge had looked for one single compelling circumstance rather than considering whether the circumstances overall were compelling. He argued that the First-tier Tribunal Judge had failed to consider the violence against the Appellant from her sister and the relevance of her son's job.

4. Mr Grigg further argued that although the Judge had considered the Appellant's mental health, but had not considered this fully when balancing the evidence in the round for the purpose of Article 8.
5. He further argued that in respect of ground 3, the physical violence from the Appellant's sister to the Appellant, Mr Grigg said that he been conceded by the Respondent that evidence had been given at the First-tier Tribunal that the Appellant's sister had been violent towards the Appellant, but this was not dealt with at all in the decision of the First-tier Tribunal Judge. He argued that this was a relevant fact given that care by the sister was being suggested by the Judge as a potential source of care for her in Pakistan and that it covered the proportionality issue.
6. Mr Kandola on behalf of the Respondent did concede that there had been evidence before the First-tier Tribunal that the Appellant's sister had been violent towards the Appellant, and this was not dealt with within the decision. He argued that although this was an error of law, he argued that it was not material, given that the Judge had said that the Appellant's children could arrange for suitable accommodation in Pakistan for the Appellant and for suitable domestic staff from within the Christian community to assist the Appellant in that new household or to assist her with shopping, should she choose to or be unable to live with her sister and or brother-in-law at [48].
7. In respect of ground 4 of the Grounds of Appeal, Mr Grigg argued that although the First-tier Tribunal Judge did mention the case of Beoku-Betts (FC) v Secretary of State for the Home Department [2008] UKHL 38 at [58] of his decision, the judge did not properly then go on to consider the effect of the Appellant's removal on the family life of her son Dr Joseph and that the Judge put the "cart before the horse" in simply finding that the Appellant could regularly visit her son in the UK and that they can visit her in Pakistan and that they can speak on a daily basis by means of modern forms of communication. He further argued that the Judge was wrong in simply finding at [58] that "on the evidence before me, I simply do not see that Dr Shawn Joseph's permanent departure from the UK as being an inevitable result of his mother's appeal being dismissed. Ultimately, it is his choice as to his place of residence". He argued this was a failure to properly consider the effect of removal on the son's human rights.
8. In respect of ground 5 Mr Grigg argued that the Appellant's son's job was on the National Shortage List and that the Judge had failed to take account of the effect on the NHS, if Dr Joseph were forced to leave. He

argued that if there was a material error of law in the case the case should be remitted back to the First-tier Tribunal for a hearing *de novo*.

9. In his submissions on behalf of the Respondent Mr Kandola argued that the First-tier Tribunal Judge had properly identified the factors weighing in the Appellant's favour and set them out throughout his decision and that the Judge had not applied any intermediate test. He argued the Judge had not used any test of compelling features to determine proportionality but had looked at the circumstances in the round. He argued that it was a very thorough decision and the Judge had dealt with all of the issues raised by the Appellant as being factors which were said to mean that the decision was not proportionate. He argued that although the Judge had not mentioned the violence from the Appellant's sister on her, given that the Judge had found that alternative arrangements could be made other than living with the sister and brother-in-law, that any error in this regard was not material.
10. Mr Kandola also argued that the Judge had correctly directed himself regarding the effect on the family life of the Appellant's son and the fact that they could still speak on a daily basis and visit each other. He further argued that the Judge had taken account of the fact that the Appellant's son was in a socially useful job at [58] and the public interest in that regard had been properly considered and given proper weight.
11. I reserve my decision on error of law and materiality.

Error of Law and Materiality

12. In respect of the first ground of appeal, that the First-tier Tribunal Judge failed to consider the psychiatric evidence and or dependency of the Appellant on her son under Section E-ECDR 2.4, paragraph 276 ADE (1) (6) or Article 8, and the arguments that the First-tier Tribunal Judge failed to identify within his decision the trauma caused to the Appellant by the suicide bombing and the emotional dependency on her son mirroring the previous dependency on her late husband and that the Judge had failed to consider the cause of her mental illness, the mitigating effects of being with her son and the likely exacerbating the effects of removal, and the fact that her mental state in the UK was benefited by living with her son rather than her sister in Pakistan who had physically abused her and that her son was a vital source of emotional support for her, I reject this argument. It is clear having read the judgement of First-tier Tribunal Judge Webb as a whole, that he fully considered the report of Dr Pourgourids between [43] and [45] of his decision in great detail and gave adequate and sufficient reasons at [45] for his findings that towards the end of her report when she dealt with the consequences of the Appellant being removed to Pakistan, that Dr Pourgourids had strayed outside of her role as an expert, in giving evidence that despite the fact that she had no detailed knowledge of psychiatric provision within Pakistan that she would have concerns that

the treatment necessary for the Appellant would not be available in Pakistan, had given evidence about how she read about the marginalisation of Christians in Pakistan and this could hinder any therapeutic treatment and that in commenting on whether the Appellant could return to Pakistan Dr Pourgouridis had stated that the Appellant had never worked or supported herself and would be living alone in a possible climate of fear and insecurity, which First-tier Tribunal Judge Webb found was inconsistent with the evidence given that the Appellant had two degrees including a Masters in psychology and had worked as schoolteacher for many years in a country with not an insignificant Christian minority. He therefore gave clear, adequate and sufficient reasons for his finding that as a result of Dr Pourgouridis having strayed beyond her remit this undermined her conclusion that "in light of the above, I am of the view that removal to Pakistan would have a seriously detrimental effect on Mrs Joseph's mental health". The First-tier Tribunal Judge in reaching this conclusion came to the conclusion that was open to him on the evidence. The Judge had fully analysed the evidence of Dr Pourgouridis, the availability of medication and treatment in Pakistan and the quality of her evidence regarding the effect of removal upon the Appellant if she were to be removed.

13. The Judge further properly considered the evidence of Dr Burton at [46] and again gave adequate and sufficient reasons for finding that the expert strayed beyond his remit. The Judge quite properly then went on to consider the effect of the Appellant's depressive episode of moderate severity as found by Dr Pourgouridis, which evidence he accepted, for the purpose of paragraph E-ECDR at [47] and came to conclusions which were open to him on the evidence, especially in light of his finding that there was no medical evidence before him that the Appellant currently required long-term personal care to perform everyday tasks, and that on his own evidence Dr Joseph worked up to 50 hours per week.
14. The First-tier Tribunal Judge went on to consider the Appellant's health including her mental health, under Articles 3 and 8 between [49] and [57] in a very thorough analysis of the evidence and case law in this regard including the evidence of Dr Pourgouridis it is perfectly clear that the First-tier Tribunal Judge has fully had the psychiatric evidence and the question of the dependency of the Appellant on her son fully in mind, throughout his decision. The first ground of appeal therefore does not disclose any arguable error of law. Although it is suggested that the Tribunal had been asked in this regard to follow the approach in an unreported case by Upper Tribunal Judge Grub in the case of Nimiro Nour Osman v ECO (Riyadh) (OA/18244/2012), given that this is an unreported case, the Judge was under no obligation to follow the approach adopted by Upper Tribunal Judge Grub in that case, as the case is not binding, or to detail the contents of that case within his decision.
15. In respect of the second Ground of Appeal that the Judge failed to consider the evidence cumulatively, and the submissions that the Judge

had simply singled out factors which were said not to be compelling, I again reject that argument in its entirety. Mr Grigg of Counsel for the Appellant before the First-tier Tribunal advanced arguments as set out by First-tier Tribunal Judge Webb at [33] as to why it would be disproportionate and therefore unlawful to remove the Appellant from the United Kingdom in terms of an argument that the Appellant would be likely to succeed in an application for Entry Clearance to return to this country as an adult dependent relative and it was therefore not just or proportionate to remove relying upon the case of Chikwamba (FC) v Secretary of State for the Home Department [2008] UKHL 40; that the Appellant's psychological condition would worsen if she was in Pakistan; that if the Appellant had to leave the UK her son would have to leave with her and consideration should be given to the value of her son's contribution to the UK as indicated in the letter from Dr Lemon relied upon the case of UAE (Nigeria) and Others v Secretary of State for the Home Department [2010] EWCA Civ 975 and that pursuant to Section 117B, of the Nationality, Immigration and Asylum Act 2002, not only would it not be in the public interest for the NHS to lose specialist staff, the Appellant is able to speak English and would not be a burden on UK taxpayers. The fact that these four specific arguments had been raised before the FTTJ as to why the removal decision would be disproportionate and it would therefore be unlawful to remove the Appellant from the UK, I do not consider that the First-tier Tribunal Judge can be criticised for having dealt with those arguments raised by Mr Grigg in the First-tier Tribunal as to why it would be unlawful for the Appellant to be removed. He could be criticised, had he failed to do so. I do not consider that he should be criticised for having considered each of these arguments in turn, and then, at [61] having considered as he states the evidence in the round, whether or not the decision to remove the Appellant is proportionate to the legitimate public aim sought to be achieved by the Respondent.

16. I find that throughout his decision the First-tier Tribunal Judge has properly analysed the evidence which was said to be in favour of the Appellant in terms of proportionality, and then gone on at [61] to detail the factors counting against the Appellant in terms of the public interest, before weighing the same at the end of [61]. It is clear from his decision that the Judge has considered the evidence in the round as he states looking at both the factors said to be in favour the Appellant and those counting against, before reaching his decision.
17. In respect of ground 3 of the decision, although it is conceded by Mr Kandola on behalf of the Respondent that the Judge has failed to take account of the evidence that was given by Dr Joseph of a single occasion in which it was said that the Appellant's sister had been violent towards the Appellant, although this does amount to an error of law, I do not find that this error is material. Although it is argued by Mr Grigg on behalf of the Appellant that it is very significant that violence has been exercised against the Appellant by the person to whom it is said that she could return at [48] First-tier Tribunal Judge Webb stated specifically that "in

any event, should the Appellant be unable or unwilling to live with her sister in Pakistan, there is no objective evidence available as to why it would not be possible for the Appellant's children to arrange a suitable accommodation in Pakistan for the Appellant and for suitable domestic staff from within the Christian community either to assist the Appellant in that new household and/or to assist her with shopping. I reject the oral evidence of Dr Shawn Joseph that it would be impossible to employ a suitable domestic employee or carer/companion in Pakistan to assist his mother. There was simply no independent or objective evidence that the Appellant is unable, even with the practical and financial help from the sponsor, to obtain the required level of care in Pakistan".

18. Given this finding, I consider that the Judge would have reached the same ultimate conclusion in any event, when considering the Appellant's application both under the Immigration Rules and outside of the Immigration Rules for the purpose of Article 8.
19. In respect of the 4 ground of appeal that the Judge failed to take account of the Appellant's son's right as a UK citizen for the purposes of Article 8 following the case of Beoku-Betts (FC) v Secretary of State for the Home Department [2008] UKHL 38, again I find that the Judge fully and properly considered this issue at [15] of his decision. The Judge fully noted in this regard, how, although born in Pakistan, Dr Shawn Joseph migrated to the UK in 2003 when aged 26 and that he was now a British citizen who holds a responsible and socially useful position as a Senior Registrar in Accident and Emergency at the Royal Derby Hospital. He found that Dr Joseph would prefer not to return to Pakistan on a permanent basis and that he was nationalised British citizen who enjoys life in the UK and understandably that he has better economic and social opportunity in this country rather than his country of birth. The Judge further considered that if Dr Joseph left the UK an important position at the Royal Derby Hospital would become vacant which would possibly not be easy to fill from within the domestic resident labour force and might require entry of a suitably qualified Tier 2 migrant.
20. The FTTJ also fully noted that he had to have consideration of the impact of the Appellant's removal on a third party such as an adult son following the House of Lord's decision in Beoku-Betts, and went on to find specifically that alternative arrangements could be made for the Appellant in Pakistan, as he outlined at [48] of his decision and the Appellant and his mother could visit each other regularly and speak on a daily basis by modern means of communication. He went on to find that Dr Joseph permanent departure from the UK was an inevitable result of his mother's appeal being dismissed and that ultimately it was his choice as to the place of residence. I find that these findings were perfectly open to the Judge on the evidence available to him and that the Judge has in these circumstances considered the effect of the decision to remove his mother on Dr Joseph. The Appellant may disagree with the Judge's decision in that regard, but the decision was

open to him on the evidence. He has not "put the cart before the horse" as argued by Mr Grigg, but has properly considered what the effect of removal would be on Dr Joseph.

21. In respect of the fifth ground of appeal that the Judge failed to give any weight to the Appellant's son's profession being on the Home Office's National Shortage List, again within that same paragraph at [58] the Judge has fully considered the Appellant's son's profession and the fact that it is an important position at the Royal Derby Hospital which would become vacant and which would not be easy to fill from within the domestic resident labour force and might require entry of a suitably qualified Tier 2 migrant. Given that the Appellant's son was a naturalised UK national, the fact that the job might be on the Home Office's National shortage List, did not fundamentally alter the considerations given to this issue by First-tier Tribunal Judge Webb. He has considered the fact that the position would not be easy to fill from within the domestic resident labour force and that therefore it was a shortage occupation. No material error of law was disclosed in this regard and the Judge has properly and adequately dealt with this issue and his reasons are adequate and sufficient.
22. The decision of First-tier Tribunal Judge Webb does not disclose any material error of law and the decision is maintained.
23. The Appellant's appeal is therefore dismissed.

Notice of Decision

The decision of First-tier Tribunal Judge Webb does not disclose any material error of law and is maintained and the decision shall stand;

No order is made in respect of anonymity, no such order having been sought before the First-tier Tribunal, and no such order having been sought before me.

Signed

Dated 24th December 2015


Deputy Upper Tribunal Judge McGinty