



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/13632/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 11<sup>th</sup> October 2017**

**Decision & Reasons**

**Promulgated**

**On 18<sup>th</sup> October 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

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

Appellant

**and**

**MRS SABITA DIN  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms Willocks-Briscoe, Home Office Presenting Officer

For the Respondent: Mr R Ahmed instructed by House of Immigration Solicitors

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a national of Pakistan, appealed to the First-tier Tribunal against the decision of the Secretary of State of 20<sup>th</sup> November 2015 to refuse her application for leave to remain in the UK on the basis of her private and family life. First-tier Tribunal Judge Obhi allowed the

Appellant's appeal and the Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Woodcraft on 7<sup>th</sup> August 2017.

3. At the hearing before me it became apparent that there were two versions of the First-tier Tribunal Judge's decision, however it seems that the differences between them were in formatting only, and it was agreed at the hearing that the final and appropriate version of the decision is the one that was promulgated on 30<sup>th</sup> January 2017.
4. The background to this appeal is that the Appellant came to the UK on 12<sup>th</sup> October 2006 with entry clearance as a student valid until 31<sup>st</sup> January 2010. Her leave to remain was extended until 30<sup>th</sup> November 2011 and again extended as a Tier 1 (Post-Study Work) Migrant until 19<sup>th</sup> December 2013. On 7<sup>th</sup> July 2012 she married Amir Yousaf Din and they have two children, a son born on 2<sup>nd</sup> January 2013 and a daughter born on 20<sup>th</sup> June 2016. The Appellant made an application for leave to remain in the UK as a spouse but that application was refused on 17<sup>th</sup> December 2013 and the Appellant chose not to exercise a right of appeal against that decision. On 20<sup>th</sup> November 2014 the Appellant's husband was granted discretionary leave to remain until 20<sup>th</sup> November 2017. The Appellant submitted a Statement of Additional Grounds on 2<sup>nd</sup> November 2015 which was considered as a fresh application for permission to remain. That application was refused on 20<sup>th</sup> November 2015 and is the subject of this appeal.
5. The judge heard oral evidence from the Appellant and her husband. The judge noted in her findings that both parties accepted that the Appellant did not meet the requirements of Appendix FM or paragraph 276ADE of the Rules, noting that the Appellant is unable to meet the requirements of the Rules because of her husband's immigration status as he is in the UK on a discretionary basis. The judge said that the Appellant's husband's parents are British nationals and his siblings have indefinite leave to remain in the UK. It appears that the Appellant's husband was given discretionary leave to remain as his mother's carer. He has lived in the UK for seventeen years and although he is a national of Pakistan he has never lived in Pakistan as he spent the first part of his life in Libya. The Appellant and the children are Pakistani nationals.
6. The judge went on to look at whether she could consider the appeal under Article 8 outside the Rules noting the fact that the Appellant cannot meet the requirements of the Immigration Rules is a strong factor against her. In considering whether there are exceptional circumstances in this case the judge looked at the decision in **SS (Congo) [2015] EWCA Civ 387**. The judge identified the compelling reasons why the case should be considered outside the Immigration Rules as being the fact that the only part of the Rules that the Appellant cannot satisfy relates to the immigration status of her husband and that this was an unusual situation in that if the husband had been a student or a temporary migrant his wife's wish to enter and remain in the UK would have been dependent upon and in line with his. The judge also considered that it is likely that

the Appellant's husband will be granted indefinite leave to remain after his permission expires in November 2017. The judge also accepted that if the Appellant had been aware of the refusal of her application for leave to remain in February 2014 she is likely to appeal against it and that this was the only possible blemish on an otherwise satisfactory immigration history.

7. The judge considered that these were exceptional circumstances and went on to consider the appeal in accordance with the guidance in the case of **Razgar [2004] UKHL 27**. Having found that there would be an interference with the Appellant's family life the judge considered proportionality and Section 117B of the Nationality, Immigration and Asylum Act 2002.
8. The judge's engagement with proportionality took place at paragraphs 28 and 29 of the decision. At paragraph 28 the judge noted that the Appellant has been in the UK for over ten years and the majority of that time has been lawful, noting that she married her husband in 2012 when she did have permission to be in the UK. The judge noted that it is arguable that the Appellant's position was precarious at that point in that she had limited leave to remain. The judge also noted that the Appellant's husband was and still is in a precarious situation, but considered that the husband is likely to be granted at the very least further discretionary leave, but more likely indefinite leave upon renewal of his permission to stay in the UK. The judge noted that the Appellant and her husband do not fall foul of Section 117B as they both speak English, are self-sufficient and the husband's business activities ensure that they are integrated into the community. The judge took into account that the husband has never lived in Pakistan and he currently has no right to go to Libya, the country that he was born and raised until he was 17 years old. The judge took into account that the husband's parents are also in the UK and are British nationals. The judge considered that there was a degree of exaggeration in the evidence of the Appellant and her husband and did not accept that the husband's mother requires the care that the Appellant ostensibly gives to her. However, the judge did accept that the family have lived as an extended family inter-dependent on each other, and that if the Appellant and the children are required to leave a significant part of the family will be severed from it. The judge considered that the evidence of the Appellant and his wife was exaggerated in relation to the husband's education and skills not being transferable, but did not think it reasonable to expect him to leave and to re-establish himself in another country. The judge considered that the husband's position is "pivotal" to this appeal and considered that it was disproportionate to require him to go and live in Pakistan even for a short period as his business will suffer and so will those who depend upon him.
9. The judge went on then to consider whether the Appellant should be required to return to Pakistan to apply for entry clearance, considering that this would involve the children being separated from their father and their grandparents, their friends, and the judge also noted that the Appellant would be unable to apply for entry clearance until the husband has indefinite leave and it was not clear when that will be. The judge

concluded that when balancing the public interest in treating all the factors set out in Section 117B with the impact of the decision on the Appellant, and taking into account her largely positive history, the judge was satisfied that the balance falls in the Appellant's favour and that the Appellant and the children should be given permission to remain in line with that of the Appellant's husband, and this would be a proportionate response to this application.

### **The grounds of appeal**

10. The Secretary of State contends in the Grounds of Appeal that the judge made a material misdirection of law in that she has not established any compelling reason why the case should be considered outside the Immigration Rules. It is contended that the reasons highlighted by the judge at paragraph 24 do not demonstrate anything of a compelling nature and it was a misdirection to use the failure of an Appellant to satisfy an aspect of the Rules as an element in her favour when considering whether there are compelling reasons to consider the case outside of the Rules. It is contended that this decision involved the judge speculating as to whether the Appellant's husband is likely to be granted indefinite leave to remain. On the evidence before the judge it is contended that the Sponsor's leave was precarious at the date of the hearing as it was given on a discretionary basis and that this could not amount to a compelling reason to consider the case outside the Immigration Rules and is thus a misdirection.
11. The second ground contends that the judge failed to provide adequate reasons why it would be unreasonable to expect the Appellant's husband to return to Pakistan, his country of nationality, with the Appellant and the children. Having found that the Sponsor had exaggerated the care required in the UK by his mother and that the evidence given about his education and skills not being transferable to Pakistan was disingenuous, the judge therefore misdirected herself in finding that the Sponsor's work and family connections in the UK make it unreasonable to expect him to resume family life in Pakistan. It is contended that the Appellant and her husband's status in the UK has at all times been temporary, and the presumption would be that they would all return to Pakistan at some point. It is contended that there is nothing advanced that would make their relocation unduly harsh, given the fact that the Appellant's family remain there and the Sponsor has transferable skills.
12. In granting permission Designated Judge Woodcraft considered it arguable that the judge has failed to explain why an inability to meet the Rules is of itself a good reason to allow the appeal.

### **Submissions**

13. At the hearing before me Ms Willocks-Briscoe submitted that the judge erred in her approach and the weight given to the matters and the failure to identify adequate reasons why the approach was taken. Ms Willocks-Briscoe relied on the decision in **Agyarko [2017] UKSC 11**, in particular

paragraphs 40 and 48. Ms Willocks-Briscoe submitted that the judge speculated as to whether the Appellant's husband would be granted indefinite leave to remain. In her submission it was not clear how the Appellant's husband's immigration status amounts to a compelling feature as that should carry limited weight in any assessment. In her submission the judge has not identified compelling circumstances for consideration outside of the Rules. Her alternative submission was that the judge erred in her approach to proportionality in her assessment of Article 8. She submitted that at paragraph 8 the judge approaches the whole of Article 8 in an incorrect basis, starting with the immigration history of the Appellant. In her submission the judge failed to recognise that the Appellant's status was always precarious as when she had leave to remain it was limited. The judge speculated as to the Appellant's partner being granted indefinite leave to remain in the future. The judge considered the factors under Section 117B including the fact that the Appellant and her partner can speak English and are self-sufficient and the business activities of the husband, however in her submission the judge failed to recognise in accordance with the decision in **Rhuppiah [2016] EWCA Civ 803** at paragraphs 59 to 64, but these are neutral factors.

14. Ms Willocks-Briscoe submitted that the judge's finding that it is disproportionate for the Appellant's husband to go and live in Pakistan because of the effect on his business flies in the face of case law and she relied on paragraphs 36 and 60 of **Agyarko**. In her submission the position of the Appellant here was very different in that her partner had discretionary leave to remain. Although he was working this was not sufficient to show that it was not reasonable for him to relocate to Pakistan. The judge needed reasons which were absent in that paragraph to justify a finding that that would be disproportionate. In terms of the consideration of a temporary separation at paragraph 29, Ms Willocks-Briscoe submitted that the Appellant's partner is the same nationality as the Appellant and the children. The judge made no findings that the children would not be able to integrate into life in Pakistan. The judge made a sweeping conclusion that separation would have an adverse impact on the family but the fact that the Appellant does not meet the Rules is not enough to demonstrate exceptional circumstances.
15. In relation to the children Ms Willocks-Briscoe relied on the case of **Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)** where the Tribunal noted that seven years from the age of 4 is likely to be more significant to a child than the first seven years of life, noting that very young children are focused on their parents rather than their peers and are adaptable. The children in this case are not of that age and she submitted that all of these factors point to the limited weight to be attached to the positive factors which would not outweigh the public interest. She submitted the fact that the judge has not applied relevant case law leads to a material error of law.
16. In his submissions Mr Ahmed said that he represented the Appellant in the First-tier Tribunal and submitted that he had accepted on the Appellant's behalf that it is likely that any application under paragraph 276ADE(1)(vi)

would have been refused as the Appellant had been in the UK for less than twenty years and would struggle to show that there would be insurmountable obstacles to her family life continuing in Pakistan. He submitted that it was in these circumstances that it was agreed that the Appellant would need to establish exceptional circumstances outside the Rules. He submitted that the judge had properly considered that were exceptional circumstances which merited consideration outside the Immigration Rules as identified in paragraphs 22 and 24 where the judge considered mainly the circumstances of the Appellant's husband. Having gone on to consider the case outside the Rules, in his submission the judge noted positive and adverse factors in relation to the Appellant and her husband at paragraph 28. The judge noted that the Appellant's husband has never lived in Pakistan and has no right to go to Libya. The judge noted that the Appellant's husband's parents are in the UK and are British nationals. The judge took into account that although the claim for care had been exaggerated, there was a caring responsibility and a relationship of dependence. In his submission the judge was right to have allowed the appeal to the extent that the Appellant should be granted leave to remain in line with that of her husband up to November 2017. In his submission the findings were open to the judge on the evidence

17. In response Ms Willocks-Briscoe argued that the fact that the 276ADE was conceded was a relevant factor as it would have included a consideration of barriers to integration in Pakistan which were matters that were not considered by the judge. This would have affected any consideration in relation to the Appellant's husband. She again referred to the case of **Agyarko** where it was found that it was not unreasonable for a British citizen to relocate, here the judge did not consider whether the Appellant and her husband could replicate their family life in Pakistan. She submitted that the judge has given weight to matters that she should not have and has failed to apply the case law. She submitted that the judge failed to give reasons, for example she failed to identify the evidence to show that the Appellant's husband's business would be adversely affected by his departure to Pakistan, therefore there was an absence of evidence to substantiate the findings made. She submitted that there was no challenge to the exercise of discretion by the Secretary of State in the reasons for refusal letter and if it was the view that the exercise of discretion was irrational, challenge should have been made in relation to that in terms of the grant of discretionary leave to the Appellant in line with that of her husband.

### **Discussion and Conclusions**

18. At paragraph 40 in **Agyarko** the court set out the correct approach in relation to the removal of non-settled migrants as follows:-

“The European Court of Human Rights has considered in a number of judgments the application of article 8 to the removal of non-settled migrants (that is, those without a right of residence) who have developed a family life with a partner while residing unlawfully in the host state. In *Jeunesse v Netherlands*, the Grand Chamber analysed

the situation of such a person, consistently with earlier judgments of the court, as raising the question whether the authorities of the host country were under a duty, pursuant to article 8, to grant the person the necessary permission to enable her to exercise her right to family life on their territory. The situation was thus analysed not as one in which the host country was interfering with the person's right to respect for her private and family life, raising the question whether the interference was justified under article 8(2). Instead, the situation was analysed as one in which the person was effectively asserting that her right to respect for her private and family life, under article 8(1), imposed on the host country an obligation to permit her to continue to reside there, and the question was whether such an obligation was indeed imposed. In the light of this approach, counsel for the Secretary of State submitted that the refusal of leave to remain in the UK to persons unlawfully resident here should similarly be analysed as raising the question whether the state is under a positive obligation to permit the applicant to remain in the UK rather than whether the refusal of the application can be justified under article 8(2)."

19. Paragraph 60 of **Agyarko** says:-

"It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word 'exceptional', as already explained, as meaning 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate'. So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that 'exceptional' does not mean 'unusual' or 'unique': see para 19 above."

20. The first ground of appeal challenges the First-tier Tribunal Judge's decision to go on to make a freestanding assessment of Article 8 outside the Rules. The judge identified a number of factors around the status of the Appellant's husband as amounting to exceptional circumstances. At paragraph 24 the judge gave reasons for identifying these factors, including indicating that she accepted the submissions made by the Appellant's representative and accepted that there were sufficient reasons which had not already been considered under the Rules to go on to

consider Article 8. In my view the judge followed the approach set out in **SS (Congo)** in identifying what in her view were matters which had not already been sufficiently dealt with under the substantive provisions of the Immigration Rules [23]. In my view this was sufficient to enable the judge to go on to consider the appeal outside the Rules. The first ground has not been made out.

21. The second ground contends that the judge erred in her approach to the proportionality assessment. This is a more difficult argument for the Secretary of State, in my view. As set out above the judge considered all of the evidence before her. The judge conducted the proportionality assessment at paragraphs 28 and 29. The judge set out the factors for and against the Appellant in these paragraphs. Whilst the judge sets out Section 117B noting that the Appellant and her husband “do not fall foul of Section 117B at all”, contrary to a submission from Ms Willocks-Briscoe it is not clear that the judge attached undue significant weight to these factors as positive factors rather than neutral factors.
22. The judge did not accept parts of the evidence of the Appellant and her husband in relation to the extent of care given to the Appellant’s husband’s mother and in relation to the prospects of the Appellant’s husband’s education and skills being transferable. However it is clear that the judge did accept that there was an extended family who were inter-dependent on each other and also found that it was not reasonable to expect the Appellant’s husband to leave and re-establish himself in another country. Whilst the Secretary of State clearly does not agree with that assessment, in my view this assessment was open to the judge on the basis of the evidence.
23. Of particular significance in my view is the fact that the judge was not making a finding that the Appellant should be granted leave to remain indefinitely in the UK, or even for a long period, but simply that the Appellant and the couple’s children should be granted leave to remain in line with that of her husband. In my view the proportionality assessment is clearly made in the context of the ultimate conclusion that it is proportionate to grant the Appellant a temporary period of stay in line with that of her husband.
24. In that context the findings at paragraph 29 that it would not be proportionate for the Appellant to return to apply for entry clearance were also open to the judge who made those findings based on the fact that the husband has discretionary leave and the uncertainty in terms of an application for entry clearance in those circumstances are highlighted.
25. These findings must be viewed in the context of the judge’s decision that in order to comply with Article 8, all that is required is for the Secretary of State to give permission to the Appellant and the children permission to stay in the UK for a temporary period in line with that of the Appellant’s husband. Whether he is granted indefinite leave to remain is a question for the future, but the proportionality decision is based on a short-term period of leave.



**Notice of Decision**

The decision of the First-tier Tribunal does not contain a material error of law.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 17<sup>th</sup> October 2017

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 17<sup>th</sup> October 2017

Deputy Upper Tribunal Judge Grimes