



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-

000127

First-tier Tribunal No:
(HU/53081/22)

THE IMMIGRATION ACTS

Decision & Reasons Issued:

11th October 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Sumbul Saeed

Respondent

Representation:

For the Appellant: Ms Young, Senior Home Office Presenting Officer
For the Respondent: Mr Rashid, Counsel instructed by Kabir Ahmed and Co

Heard at Phoenix House (Bradford) on 23 August 2023

DECISION AND REASONS

1. The Respondent is a national of Pakistan born on the 23rd January 1985. On the 27th December 2022 the First-tier Tribunal (Judge Ali) allowed her appeal on human rights grounds. The Secretary of State now has permission to appeal against that decision.
2. The basis of the Respondent's human rights claim was that she is married to British citizen Mr Imran Ahmed Hanif, and that his circumstances are such but it would be very difficult for him to return to live in Pakistan with her. She accepts that she is unable to meet the requirements of the Immigration Rules, in particular it is accepted that as a visitor to the United Kingdom she could not

meet the eligibility requirements set out in Appendix FM to be granted leave to remain as a spouse. Her appeal was therefore brought on Article 8 grounds 'outside of the rules'.

3. In allowing the appeal Judge Ali accepted that Ms Saeed and Mr Hanif were in a genuine relationship and that there were particular reasons why the appeal should succeed on Article 8 grounds. The Tribunal heard that Mr Hanif faces an unusual domestic situation. Ms Saeed is not his only wife. His first wife, Fozia Qammar, lives with their two children in a home in Bradford. One of those children has significant disabilities which means that she requires a high level of care from her parents. Ms Qammar would not be able to cope on her own if her husband had to go Pakistan to live with his second wife, Ms Saeed. Furthermore the family need him to remain in the UK in order to work to provide for them. Ms Qammar wrote to the Tribunal to express her consent to her husband's second marriage, contracted in Pakistan and not therefore unlawful.
4. It was on the basis of this factual matrix that Judge Ali accepted that it would be unduly harsh/unreasonable to refuse to grant leave to remain to Ms Saeed. This was a genuine and subsisting relationship and Mr Hanif would face insurmountable obstacles in establishing himself in Pakistan with her.
5. The Secretary of State appealed that decision on two interconnected grounds. I considered those grounds at a preliminary 'error of law' hearing on the 24th of May 2023. The Respondent was represented at that hearing by Ms Coen of Counsel. I concluded that the First-tier Tribunal had erred in law. I begin this decision by setting out why before progressing to the re-making.

Polygamy

6. The first ground relates to the First-tier Tribunal's findings on the marriage itself, which read:

"The Respondent had sought to assert that the Appellant's husband by having 2 wives has committed bigamy. However, I do not agree with that because simply while the UK does not recognise a person having more than 1 spouse the marriage ceremony between the Appellant and her husband took place in Pakistan where the laws of the country allow the provisions to have more than 1 spouse. I find that the marriage was conducted within the appropriate legal jurisdiction and as such I find that this issue does not undermine the fact that the Appellant and her partner are in a genuine and subsisting relationship".

7. It is submitted that in reaching that finding the Tribunal has failed to have regard to paragraph 278 of the Rules:

278. Nothing in these Rules shall be construed as allowing a person to be granted entry clearance, leave to enter, leave to remain or variation of leave as the spouse and civil partner of a man or woman (the sponsor) if:

- (i) his or her marriage or civil partnership to the sponsor is polygamous; and

- (ii) there is another person living who is the husband or wife of the sponsor and who:
- (a) is, or at any time since his or her marriage or civil partnership to the sponsor has been, in the United Kingdom; or
 - (b) has been granted a certificate of entitlement in respect of the right of abode mentioned in Section 2(1)(a) of the Immigration Act 1988 or an entry clearance to enter the United Kingdom as the husband or wife of the sponsor.

For the purpose of this paragraph a marriage or civil partnership may be polygamous although at its inception neither party had any other spouse or civil partner.

8. I am satisfied that paragraph 278 plainly applies to this claim. Ms Qammar is living, she is the wife of the sponsor, and she is currently in the United Kingdom. This paragraph of the Rules reflects public policy. The legal status of the marriage in Pakistan is therefore of no relevance to this appeal. The effect of paragraph 278 is that this application for leave to remain on human rights grounds should have attracted a mandatory refusal 'under the rules'.
9. I should add that it is very unfortunate that paragraph 278 was not brought to Judge Ali's attention. Nor was he told about section 11(d) of the Matrimonial Causes Act 1973 which provides that a polygamous marriage contracted abroad shall be considered void where one of the parties is domiciled in the UK. Mr Hanif is unarguably domiciled here. His marriage to Ms Saeed, regardless of its status in Pakistan, is therefore void in the UK. That is because parliament has specifically legislated to create an exception to the principle of *lex loci celebrationis* in respect of polygamous unions.
10. Ms Coen, the Respondent's representative at the initial hearing, accepted that all of that is correct. But, she says, this makes no difference to the outcome of the appeal, since the decision of Judge Ali lies squarely on Article 8 grounds 'outside of the rules'. This brings us to ground 2.

Proportionality and the Public Interest

11. The second ground concerns the reasons given by the Tribunal for finding the refusal of leave to be disproportionate:

It is submitted that the FTTJ has failed to give adequate reasons as to why the appellant's removal from the UK would result in unjustifiably harsh consequences, such as to outweigh the public interest in maintaining an effective immigration control. The appellant has family in Pakistan with whom she could live, the sponsor may provide financial support. Her relationship with the sponsor may be maintained by visits, as has been the pattern in the past.

Given what is said under the heading above, the “public interest in maintaining effective immigration control” must also be read to include the public policy goal of deterring polygamy reflected in the Rules.

12. I gave careful consideration to what was said by Ms Coen in defence of the decision. Whilst accepting that the Tribunal has failed to have regard to the rules on polygamy, she submitted that the reasons given for allowing the appeal have very little to do with the relationship and much more to do with the undisputed fact that Ms Saeed is now mother to a British child, whose best interests lie in being cared for by both parents. I accept Ms Coen’s analysis that this appeal will turn ultimately on the position of the Respondent’s British child. I do not however accept that this was the sum of the reasoning employed by Judge Ali.
13. I say that this appeal will turn on the position of the child, because it is very difficult to see how a properly directed Tribunal could conclude that the relationship with Mr Hanif could attract protection capable of outweighing the public interest in refusing leave in these circumstances. Ms Saeed entered the UK as a visitor. She did not return to Pakistan at the end of that visa’s currency but stayed in the UK and made an application for leave to remain. The relationship upon which that application was based was a marriage void by operation of statute. As Ms Coen accepted, nor was it a relationship which made her a “qualifying partner” as defined at GEN.1.2 of Appendix FM since she had not, at the date of application or appeal, lived with Mr Saeed for a period of more than two years. Were the relationship with Mr Hanif the only matter engaging Article 8(1) I am in little doubt that the public interest would decisively outweigh those factors when it came to the proportionality balancing exercise.
14. What then was the reasoning of the Tribunal below? In Ms Saeed’s favour the following matters are weighed in her favour by the judge. She is the mother of a British child, and regardless of what recognition it might attract under Appendix FM, she does have a relationship with Mr Hanif. She also enjoys a relationship with his children by Ms Qammar. She and Mr Hanif both play an important role in looking after his children with Ms Qammar, in particular his daughter who has numerous health complaints. Ms Saeed has also suffered personal loss in that she had had a miscarriage, and needs the support of her husband. If she were to return to Pakistan she would take her infant child with her and this would not be in that child’s best interests: the child should not be required to leave the UK and she would benefit from having both her parents around her, and to have relationships with her half-sisters. It would be unreasonable to expect Mr Hanif to go to Pakistan with the Appellant and their child because he has responsibilities and work here. In particular there would be a detrimental impact on his elder daughter who needs him. Against her is the failure to meet the requirements of Appendix FM, and paragraph 276ADE of the rules.
15. As is apparent from that summary, it is not in fact accurate to say that this appeal was allowed simply on the grounds of the child’s best interests, since at least some of the reasoning focused on the inconvenience to Mr Hanif of having his two wives living in separate countries. That was an assessment made without any reference to the fact that this is a situation quite plainly of Mr Hanif’s own making. Furthermore, in assessing the reasonableness of expecting this child to leave the UK with her mother – to which s117B(6) Nationality, Immigration and Asylum Act 2002 refers – I am satisfied that the Tribunal has failed to look at all of the relevant circumstances. ‘Reasonableness’ must be assessed in the ‘real

world'. See the passage from EV (Philippines) [2014] EWCA Civ 874 cited with approval at paragraph 19 of KO (Nigeria)(FC) [2018] UKSC 53:

“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?”

16. Nowhere in the First-tier Tribunal’s assessment are the wider circumstances in this appeal considered, including the factors identified in the Secretary of State’s grounds (at 11 above). On this basis the First-tier Tribunal’s decision was set aside by my written decision dated the 24th May 2023.

The Re-Made Decision

17. It is not in issue that Article 8 is engaged in this case. At the date that I re-make this decision Ms Saeed and Mr Hanif have been cohabiting (at least on a part time basis) for more than two years. It is not therefore disputed that they share a family life together. Nor is it in issue that Ms Saeed’s British baby shares of family life with her father and half-siblings. The Secretary of State accepts that the refusal to grant Ms Saeed leave to remain in the United Kingdom will constitute an interference with that family life.
18. It is accepted that the Secretary of State is entitled as a matter of law to take the decision that she has. The only question remaining is whether the decision is proportionate.
19. In any case involving Article 8 I must have regard to those considerations set out in section 117B Nationality, Immigration and Asylum Act 2002:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

- (a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

- (a) a private life, or
- (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

20. The maintenance of effective immigration controls is in the public interest. For the reasons I rehearse above, there was good reason to refuse Ms Saeed's application under the rules. That is a factor that weighs heavily in the balance against allowing her appeal.
21. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers, and are better able to integrate into society. At the resumed hearing I heard oral evidence from Ms Saeed in fluent, perfect English. In fact I was so struck by her barely accented command of the language, that I enquired whether she had spent time in the United Kingdom as a child: she told me that she had spoken English all her life having learnt it at school. She has a Masters degree in English Literature from the University of Lahore and before she left Pakistan had worked as a teacher in Rawalpindi. I am therefore satisfied that Ms Saeed speaks English and that s.117B(2) is not therefore a matter that weighs against her in the balance.
22. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons are not a burden on taxpayers, and are better able to integrate into society. At the resumed hearing I heard oral evidence from Mr Hanif. He explained that he has income from two sources. He is a store manager at Tesco. He works 32 hours per week and receives just over 20,000 pounds per year in salary. He also owns six houses which he rents out. The income he derives from this property management business does vary, but it equates to approximately another £20,000 a year. Miss Saeed and her child are entirely dependent upon him. He has provided them with a house, and pays for all their living expenses. This evidence was unchallenged and in her submissions Ms Young did not seek to persuade me that s117B(3) is a matter that should be weighed against Ms Saeed. She properly asked me to treat this as a neutral factor.

23. S.117(4) provides that little weight should be given to a private life, or a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully. This does not apply to Ms Saeed, who entered the UK with a visitors visa. This does not however offer her any substantial assistance given the circumstances of her relationship with Mr Hanif. As I set out above, there is a strong public interest in refusing to permit polygamous unions, or in allowing such marriages to create an immigration advantage.
24. S.117B(5) states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. This does apply to Ms Saeed, and to the extent that Mr Rashid asked me to have regard to her relationships with the wider family and community, these are matters which only attract a little weight.
25. The final consideration listed in s.117B requires me to focus not on the position of Ms Saeed, but on the position of her British child. As all parties have recognised since the outset of this appeal, it is this matter that is going to be determinative. S.117B(6) provides that the public interest does not require Ms Saeed's removal if it can be shown that she has a genuine and subsisting parental relationship with a qualifying child, and that it would not be reasonable to expect that child to leave the United Kingdom. The baby is British and it is therefore accepted that she is 'qualifying'. The terms of the provision are such that the proportionality balancing exercise is ultimately therefore encapsulated in this question: its reasonable to expect the child to leave?
26. In KO (Nigeria) the Supreme Court gave consideration to what 'reasonable' might mean in these circumstances. The Secretary of State argued that the test invited decision makers to take into account all relevant circumstances but in its essence it required the best interests of the child to be balanced against any public interest there might be in removing a parent not entitled to leave under the rules. This submission was mirrored the Secretary of State's then policy cited by the Court at its paragraph 11:
- "The consideration of the child's best interests must not be affected by the conduct or immigration history of the parent(s) or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control; whether this outweighs the child's best interests; and whether, in the round, it is reasonable to expect the child to leave the UK." (Family Migration: Appendix FM Section 1.0b. Family Life (as a Partner or Parent) and Private Life: Ten-Year Routes, p 76)
27. The Court rejected the contention that the section invited a balancing exercise. It did however note that the position of the parents *as a matter of fact* remained highly relevant:
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.

28. Here it is a matter of fact that this child's parents find themselves in very different situations. Her father is a British citizen who lives and works in this country. Her mother is a Pakistani national with no entitlement to be here under the immigration rules: furthermore for the reasons I need not repeat, there is a strong public interest in her mother being refused to leave on Article 8 grounds. There are as I see it four options for this family. The first three are problematic for the people involved. The last option is problematic for the Secretary of State.
29. Option one is that Ms Saeed and Mr Hanif could both go to Pakistan with their baby. This is certainly a possibility as Mr Hanif is himself entitled to reside in Pakistan. He is fit, able and resourceful and I have no doubt that he would be able

to make a life for himself there and provide for his wife and child. This would however require him to leave behind Ms Qammar and his three children by that marriage. One of those children has significant disabilities. I have no reason to doubt the evidence that he is very close to his eldest three children, and indeed to Ms Qammar, and that he provides them with practical, emotional and financial support on a daily basis. I am satisfied that it would be strongly contrary to the interests of those children if their father were to leave the United Kingdom.

30. Option two is that Ms Saeed returns to Pakistan without her baby. When Mr Hanif was asked about this option in his oral evidence he immediately rejected it on the grounds that such a young child obviously needs her mother. Although he very much would like to stay with his daughter, he recognised without hesitation the need for her to be cared for by her mother. I agree with Mr Hanif that this option would be strongly contrary to the best interests of the baby.
31. Option three is that Ms Saeed returns to Pakistan with the child. In his submissions Mr Rashid argued that this would be strongly contrary to the interests of the baby who would miss out on having a day-to-day relationship with her father, but also with her siblings whom she sees at least once a week. Although I accept that an interruption to those relationships would be to this child's detriment, I conclude that this is the 'least worst' of the first three options from the perspective of the children involved. When Ms Saeed and Mr Hanif married in Pakistan, they did so on the understanding that they would live in separate countries, with the marital relationship being pursued by video call and regular visits by Mr Hanif. Ms Saeed was at the time working in Pakistan and they were both aware that the polygamous nature of their marriage meant that she would be unable to join him in the United Kingdom as his spouse. It seems to me that it must have been reasonably foreseeable to the couple that a child may at some stage be born; that child would necessarily be living in a country apart from her father and half siblings in the United Kingdom. So option three does no more than return the parties to the status quo that existed before Ms Saeed was granted a visit visa: this is the 'real world' scenario. Having heard from Mr Hanif I have no doubt at all that he would continue to honour his responsibilities towards his second family. Ms Saeed and the child would therefore be materially provided for. She is an intelligent and pleasant woman and I have no reason to doubt that she is, as Mr Hanif suggests, a wonderful mother. Whilst the child is British, and therefore entitled to enjoy the benefits of that nationality, she is of course also Pakistani. Living in that country she would have the benefit of growing up in the cultural, religious and social *milieu* that is her heritage. All of those factors would tend to indicate that it would be perfectly reasonable for the child to leave the United Kingdom.
32. On the other hand it is incontrovertibly the case that the child's best interests would be served by her growing up with both her parents. I heard evidence to the effect that Mister Hanif is scrupulous about the division of his time. He spends three days a week with each of his families and alternates the seventh day on a fortnightly basis. He struck me as being a conscientious and 'hand-on' father who cares very much for all of his children. I am reminded of the principle in *Zoumbas* that children are not to be blamed for the decisions or actions of their parents. This little girl neither knows nor cares about the unorthodox nature of her parents' relationship, nor of the fact that the British government have legislated to deem such marriages void. It will I think be very difficult for her growing up to understand why her father lives in the United Kingdom with her sisters, instead of in Pakistan with her. Her nascent relationship with her older

siblings will be seriously impacted. I heard evidence that at the moment she visits them at their home once a week, where they spend Saturdays together. They also come to visit her once a month in Ms Saeed's home. Given the potential expense and difficulty in travelling with a severely disabled child, it seems to me to be very unlikely that these children will visit Pakistan on a regular basis to see their little sister. All of this means that Ms Saeed and her baby will necessarily face some degree of isolation living in Pakistan. I was told that she would move to her husband's family home in Gujar Khan, so she would certainly be accommodated, but she would have no other close family around to support her. Her own family are from the Lahore area and although she has maintained contact with them her marriage has in her words "complicated" her relationships, particularly with her siblings. She and Mr Hanif met online; the marriage was not arranged in the traditional manner; he was already married; he lives abroad. These factors have combined to mean that at least half of Ms Saeed's family are openly hostile to her decision to marry Mr Hanif.

33. Having weighed all of these factors in the balance I am persuaded that it would not be reasonable to expect Ms Saeed's daughter to leave the United Kingdom. The test in section 117B(6)(b) is therefore made out, and the public interest does not require her removal. As Ms Young accepted, the consequence of this is that she must be granted leave to remain on human rights grounds.
34. I add this. I have been fortified in my decision by the terms in which the Secretary of State currently frames her own policy. As I set out above, at the time of KO Nigeria it was the Secretary of State's position that reasonableness was simply an assessment to be made in the round. There was no presumption either in favour of the child remaining in the United Kingdom, or in the child being required to leave. In his submissions Mr Rashid took me to the current version of the Secretary of State's policy. The document entitled *Family Policy: Family life (as a partner or parent) and exceptional circumstances* (Version 19.0, published 15th May 2023) has this to say about how decision makers should evaluate reasonableness [at page 51]:

The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.

In the caselaw of KO (Nigeria) & Others v Secretary of State for the Home Department 2018 UKSC53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that "reasonableness" is to be considered in the real-world context in which the child finds themselves. The parents' immigration status is a relevant fact to establish that context. The determination sets out that if a child's parents are **both** expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable.

35. As the emphasis that I have added highlights, the policy now operates a presumption that the child will not normally be expected to leave. The Secretary of State there reads the judgement of KO Nigeria - and the dicta that the assessment must be made in the 'real world' - to the scenario where neither

parent has leave. That is of course not the case here. In those circumstances the presumption in the policy must operate in Ms Saeed's favour.

Notice of Decision

36. The decision of the First-tier Tribunal is set aside.
37. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.
38. There is no order for anonymity.

Upper Tribunal Judge Bruce
7th October 2023