Upper Tribunal
(Immigration and Asylum Chamber) Case No: UI-2023-004041
FIRST-TIER TRIBUNAL NO: PA/51813/2020

THE IMMIGRATION ACTS

Heard at Field House
On 16 February 2024

Decision & Reasons Promulgated

23rd February 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

TB
(ANONYMITY DIRECTION CONTNUED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H. Gilmour, Senior Home Office Presenting Officer
For the Respondent: Ms S. Iqbal, Counsel instructed by OTS Solicitors

DECISION AND REASONS

1. The appellant is a citizen of Pakistan, born in 1984. The following immigration history is taken from the appellant's skeleton argument that was before the First-tier Tribunal ("FtT").

2. The appellant arrived in the UK on 27 March 2012, with leave as spouse. The relationship is said to have broken down and the appellant applied for further leave to remain. An appeal to the FtT on asylum and human rights grounds was dismissed in July 2015. A further asylum claim was refused and certified as clearly unfounded Further submissions were refused but appear to have been accepted as a fresh claim. That decision gave rise to the appeal that came before the FtT on 3 April 2023 and which is the subject of the appeal to the Upper Tribunal ("UT").

3. The appeal before the FtT was heard by First-tier Tribunal Judge Herlihy. She dismissed the protection aspect of the appeal (asylum and humanitarian protection), as well as dismissing the appeal on human rights Article 8 grounds.

The grounds of appeal and 'rule 24' response

4. Permission to appeal to the UT was sought, and granted, on the sole ground that Judge Herlihy failed to address the submission that it would be disproportionate in Article 8 terms to expect the appellant to return to Pakistan given that his wife was, at the time, a GP in training in the UK and was lawfully present as a sponsored worker. Notwithstanding her connections to Pakistan, it is argued that it was in the public interest to retain the services of a doctor who had already undergone significant training at the taxpayer's expense. This relates to the question of whether her departure from the UK would be 'unjustifiably harsh', as in the respondent's guidance.

5. The respondent's rule 24 response points out that the issue raised in the grounds was not in the appellant's skeleton argument that was before the FtT and there is no indication in Judge Herlihy's decision that submissions were made on the matter. The respondent's hearing minute does not reveal that either (although that minute has not been provided to me).

6. The rule 24 response goes on to state that whilst the appellant's wife briefly mentioned in her witness statement that she was to start GP training in August 2021, her work as a GP was not said by her to be a matter that would result in unjustifiably harsh consequences for her individually.

7. It is further said that Judge Herlihy had regard to her work as a GP at paragraph 54. In addition, Judge Herlihy made negative findings in relation to the appellant's unlawful immigration status and noted that his relationship was commenced after his leave had expired. Judge Herlihy also pointed out that the appellant's wife only had limited leave to remain.

Judge Herlihy's decision

8. Materially, for the purposes of this appeal to the UT, Judge Herlihy noted at paragraph 28 the appellants' wife's evidence that she had a tier 2 visa until 2025, and had recently purchased a home that she and the appellant would shortly move in to. Although she is an Iranian national, she had lived in Pakistan since the age of three and had last visited Iran in 2022 on a pilgrimage. She said that her parents and siblings live in Karachi.

9. Her evidence was also that with the appellant's "issues" he could not live anywhere in Pakistan. However, she also said that there was no barrier to her living in Pakistan as she has always lived there.

10. At paragraph 54 Judge Herlihy said this:

> "The Appellant has a wife and very young child in the United Kingdom, none of whom are British citizens. The Appellant's wife although a national of Iran, has spent almost the entirety of her life living in Pakistan where her family continue to reside. The Appellant's wife has limited leave in the United Kingdom where she is working as a doctor. I find that family life could continue without difficulty in Pakistan, the Appellant's wife has acknowledged that she would have no barriers to living and working in Pakistan. The Appellant's leave expired in 2014 and his relationship with his wife commenced after the expiry of his leave at the time when he knew that his immigration status was precarious. The Appellant has acknowledged that his mental health has improved with the support of his wife and following the birth of his child and I see no reason why family life could not continue in Pakistan."

11. And at paragraph 55:

> "I find that the decision to remove the Appellant to Pakistan is not disproportionate given that there are no reasons why his family and private life in all its essential elements cannot continue in Pakistan and I consider any disruption to be proportionate. Having considered all the factors as part of my consideration of the Appellant's Article 8 claim I find that the Appellant has not disclosed sufficiently compelling and compassionate circumstances which justified the Respondent in a grant of discretionary leave."

The parties' oral submissions

12. I drew the parties' attention to the decision in *UE (Nigeria) & Ors v Secretary of state for the Home department* [2010] EWCA Civ 975 and *Lama (video recorded evidence -weight – Art 8 ECHR*) [2017] UKUT 00016 (IAC). Ms Gilmour referred to *Thakrar (Cart JR; Art 8: value to community)* [2018] UKUT 00336 (IAC). None of these authorities are mentioned in the grounds of appeal.

13. Ms Iqbal relied on the grounds of appeal. She submitted that there was a distinction to be drawn between the appellant in *UE (Nigeria)* and this appellant in that in this case it is the appellant's wife who benefits the community, rather than the appellant as in *UE (Nigeria)*.

14. I was referred to paragraph GEN 3.2.(2) of Appendix FM of the Immigration Rules in terms of the need to consider the issue of exceptional circumstances and unjustifiably harsh consequences for the appellant or his partner which would render a refusal of leave to remain a breach of Article 8.

15. It was submitted that the appellant's wife is continuing to work as a doctor who had a tier 2 visa valid until 2025 (at the date of the hearing before the FtT) and who would be due to make an application for indefinite leave to remain ("ILR"). It was submitted that the weight to be given to the public interest in removal is diminished because of the work that she is doing. No consideration had been given to that issue by Judge Herlihy, it was submitted.

16. Ms Gilmour relied on the rule 24 response. She submitted that the appellant's wife's circumstances were taken into account, in particular at paragraph 54 of Judge Herlihy's decision. Furthermore, this is the *appellant's* appeal, not that of his wife. She is a national of Iran but she came from Pakistan where her family continues to reside. She only has limited leave to remain. Judge Herlihy had found that there were no barriers to their continuing their family life in Pakistan. It was submitted that the conclusion that the decision is proportionate, at paragraph 55, must be read with paragraph 54.

17. Ms Gilmour accepted, with reference to paragraph 35 of *UE (Nigeria)*, that public benefit is capable of being a relevant consideration. However, she submitted that the fact that in the instant case it is the appellant's wife whose benefit to the public is in issue actually diminishes the strength of the appellant's argument. Reliance was placed on paragraph 36 of that decision (rare that public benefit would make a difference). It was submitted, therefore, that even if this is a matter that Judge Herlihy ought specifically to have addressed, any error of law in this respect is not material. *Thakrar* was to like effect, it was submitted.

18. Ms Iqbal in reply submitted that the appellant's wife's contribution to the public as a doctor is significant when seen against the stretched resources of the NHS. That is a matter that tips the balance in the appellant's favour, it was submitted.

Assessment and conclusions

19. The respondent argues that the appellant's wife's work as a doctor, and resultant benefit to the community, was not a matter that was advanced before the FtT. It is certainly the case that it was not a matter in the skeleton argument that was before Judge Herlihy. Judge Herlihy does not appear to have summarised the parties' submissions, and there is otherwise no explicit reference to the public benefit argument in her decision.

20. However, what is described as the appellant's 'record of proceedings', provided by counsel who appeared before Judge Herlihy, has been provided in the appellant's bundle before me. That states as follows:

> "Counsel makes submissions as per skeleton argument plus the doctor-in-training point; Respondent makes submissions as per the refusal letter and the two reviews".

21. There is no reason for me not to accept that that note is an accurate summary of the submission that was made to Judge Herlihy. However, *on its own* it does not provide any confirmation that the actual point that was made was in relation to the public interest in retaining her services. The "doctor-in-training point" could mean no more than what has been recorded by Judge Herlihy at paragraph 54 ("working as a doctor"). One has to resort to the grounds of appeal to the UT to find the contention that benefit to the community was what was being argued. There is, however, no witness statement from counsel who appeared before the FtT.

22. Nevertheless, I am prepared to accept that the point was advanced in the terms articulated in the grounds. Having said that, the lack of reference to any authority in the grounds and the brevity of the note of the submissions on this point suggest that the submission before Judge Herlihy was not fully formed. There is no reason to think, therefore, that in her assessment of proportionality, stating at paragraph 55 that she had "considered all the factors as part of my consideration of the Appellant's Article 8 claim", Judge Herlihy did not take into account such limited argument as was advanced on this issue.

23. Even if Judge Herlihy did not consider the submission, I am not satisfied that it was an error of law for her not to have engaged with an argument that does not appear to have been advanced as an argument of any substance.

24. Even if I am wrong, and Judge Herlihy did fall into legal error for failing to deal with the point, I am not satisfied that any such error is material. In *UE (Nigeria)*, as already indicated in my summary of the parties' submissions, the Court concluded that benefit to the community was a legitimate matter to be taken into account. However, at paragraph 36 of *UE (Nigeria)* the Court said this:

> "I would, however, before concluding, emphasise that, while this factor of public value can be relevant in the way which I have described, I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant, perhaps of the kind referred to by Lord Bridge in Bakhtaur Singh. The main element in the public interest will normally consist of the need to maintain a firm policy of immigration control, and little will go to undermine that. It will be unusual for the loss of benefit to the community to tip the scales in an applicant's favour, but of course all will depend upon the detailed facts which exist in the individual case and in particular on the extent of the interference with his private and/or family life."

25. This issue was further considered in *Thakrar*. After reviewing the authorities against the background of the current legislative regime, Lane J said this at paragraph 114:

> "Without in any way intending to be prescriptive, it is likely that one touchstone for distinguishing between instances that lie, respectively, exclusively in the policy realm and in the area of Article 8, is whether the removal of the person concerned will lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it."

And at paragraph 115:

> "If judicial restraint is not properly maintained in this area, there is a danger that the public's perception of human rights law will be adversely affected."

26. At paragraph 118 Lane J said the following in respect of the decision in *Lama* , which related to the contribution to society in the UK of a person other than the appellant:

> "In Lama…the Upper Tribunal (McCloskey J) extended the principle in UE to a case where the appellant's removal from the United Kingdom would prevent a third party, who would remain in the United Kingdom, from continuing to make a contribution to United Kingdom society. In Lama, the person in question was "Mr R, who made a significant contribution through his acting to the community in general and to the cohort of disabled people in society" (paragraph 43). Although McCloskey J held that someone else could, in theory, be substituted for the appellant in Mr R's life, nevertheless "in qualitative and emotional terms, [the appellant] is irreplaceable".

27. There is some similarity between *Lama* and the appeal before me, in that it is not the appellant's contribution or benefit to society that is relied on, but that of his wife. Here, however, the appellant's wife would leave the UK with the appellant. Thus, the benefit that she brings to society as a doctor would similarly be lost.

28. However, in the light of the authorities to which I have referred, I cannot see that on the basis of the evidence that was put before Judge Herlihy there could be said to be any materiality in her having failed to consider this issue if, contrary to my primary conclusion, she did fall into error in this respect. Of course, a GP brings real value to the community by the very nature of their work. However, without more, I am not satisfied that this consideration could have affected the proportionality exercise such as may have resulted in a decision in the appellant's favour under Article 8. There was no evidence, by way of example only, that the appellant's wife was working, or was accepted to work once she had finished her training, in an area where GPs are scarce or where recruitment is very difficult such as to mean that her not working would be a real and significant loss to the community. Furthermore, although the work of a GP is plainly valuable and

important, so are many types of employment that are within the scope of service to the community.

29. Accordingly, I am not satisfied that even if Judge Herlihy erred in law in her decision, that error of law is not material.

Decision

30. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

31. A.M. Kopieczek

Upper Tribunal Judge Kopieczek 20/02/2024