



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)**

APPEAL NUMBER: IA/44443/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 4 February 2016**

**Decision and Reasons Promulgated
On 1 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

**MRS SHAHEEN NASIR
NO ANONYMITY DIRECTION MADE**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms L Kullar, SH & Co Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan, born on 14 June 1972. Her appeal against the decision of the respondent refusing her application to remain in the UK on the basis of family and private life was dismissed by the First-tier Tribunal Judge under the Immigration Rules and Article 8 of the Human Rights Convention, in a decision promulgated on 5 June 2015.

The background evidence

2. The appellant entered the UK on 16 February 2014 as a visitor.

3. She married Mr Syed Nasir in Pakistan, in June 1999. He is a British citizen and they have three children who are also British citizens. Two of the children, aged 9 and 12, came to the UK with their father in 2012. The youngest child, who was aged 6 at the time, remained in Pakistan with the appellant, because she was too young. Her husband cared for the two elder children in the UK. He is a taxi driver who lives in rented accommodation.
4. The appellant claimed that she had intended to visit the UK for two weeks and after that to return to Pakistan. The Judge found that the appellant had changed her mind about her priorities and decided she should remain in the UK with her children instead of returning to her siblings, job and home in Pakistan. There was some merit in this evidence which was supported in part by medical letters noting her son's problems with headaches. She did not find the respondent's assertion that the appellant had used deception to gain entry as a visitor in order to circumvent the immigration rules, had been made out [15].
5. In her application for a visit visa, the appellant had stated that she needed to return to Pakistan to care for her brother and sister. That, she claimed, is still true. However, when her children cried and were not trusting her to return and her son had headaches, she changed her mind [6].
6. The appellant produced medical letters confirming her son's medical situation. He has had a CT scan "and that was clear" [6]. She extended her visa but claimed his situation had worsened. Her siblings live in her home in Pakistan and her aunt assists them. Her sister is divorced and has a disabled child. She maintains them [6].
7. The appellant's husband gave evidence. He married in 1999 and came to the UK after a few months. In April 2012 he brought his two children back to the UK to live with him. He works around their schooling and stays at home with them at weekends. He claimed that the appellant has responsibilities in Pakistan but her siblings there are now grown up and her children want and need her in the UK [7]. Their son suffers from migraine and is always anxious about both parents. They need their mother and do not want to live in Pakistan. The children have been in the UK for over three years and returning to Pakistan would not be good for their well being. They have adjusted to the way of life here [7].
8. The Judge referred to a letter from a doctor dated 28 July 2014 confirming that the child [S] has been under his care since November 2013, suffering from recurring headaches and vomiting. His symptoms got worse in 2014 and he was admitted to hospital. Examination revealed no underlying physical cause. It is noted that his symptoms are triggered by his being upset, and are highly suggestive of an underlying separation anxiety associated with his mother not residing with the family. He recommended the input of a clinical psychiatrist.
9. The Judge referred to two further letters dated 24 April and 14 May 2015 from a doctor and a nurse respectively, confirming headaches, vomiting and emotional upset "which it is said worsens with separation from his mother." There is also a vitamin D deficiency [8].
10. The Judge outlined the respondent's case in the refusal letter. The appellant did not meet the eligibility requirements under the partner route of Appendix FM as she

made her application here whilst a visitor. As she failed to meet the eligibility requirements under the partner and parent routes, the requirements of section EX.1 of Appendix FM could not be met [10]. Nor did she meet the requirements of paragraph 276ADE (1)(vii) and (vi) of the rules.

11. The respondent considered exceptional circumstances and found that she had “an appalling immigration history” [12]. As regards s.55 of the 2009 Act, her two children in the UK would be able to remain here with their father, who would have been complicit in the deception. The decision does not deny the children their rights as British citizens [12].
12. As already noted, the Judge did not accept the assertion that the appellant had used deception. She also found at [16] that the appellant did not meet the requirements of Appendix FM on the basis of family life and as a partner for the reasons already referred to. Nor could she rely on EX.1.
13. Moreover, she found that the appellant did not meet the requirements of paragraph 276ADE of the rules on the basis of private life. She has a home, family and a job in Pakistan where she has lived all her life and is familiar with the culture, language and society; there are no very significant obstacles to her re-integration into Pakistan [17].
14. She went on to find that “... given the appellant's children and the medical claims relating to her son”, that it was appropriate to consider the appeal under Article 8 of the Human Rights Convention and in line with the Razgar principles. The Judge took into account at [19], the decisions in Chikwamba v SSHD [2008] UKHL 40 and R (on the application of Chen) v SSHD IJR [2015] UKUT 00189 (IAC).
15. She found that the appellant lives with her husband and children and that there is a level of family and private life that deserves respect under Article 8. The respondent's decision was in accordance with the law.
16. She noted that the appellant's children are British citizens; she has to consider their best interests in line with s.55 of the UK Borders Act 2009. The two elder children had been in the UK with their father since 2012. Prior to that, they had lived their lives in the care of their mother in Pakistan.
17. One of them, their son, [S], has problems with headaches. The Judge found that there is no full medical or psychiatric report before her on the exact cause of his symptoms, treatment or prognosis. Accordingly, the conclusion that his problems are due to anxiety and being separated from his mother “are speculative.” [20]
18. Nevertheless, the Judge took the medical information into consideration. The youngest child has, since birth, been in the care of the appellant in Pakistan. She found that “clearly” the children should at the very least remain in the care of at least one parent as they were until the appellant came to the UK. Ideally, given the children's young ages and [S]'s potential difficulties, it is in their best interests to be together and in the care of both parents wherever they live [20].
19. She went on to consider the proportionality of the decision, noting that Article 8 is a qualified right. It did not permit a person to choose the country in which to establish family and private life, or to circumvent the immigration rules.

20. She took into account the public interest considerations under s.117B of the Nationality, Immigration and Asylum Act 2002. She referred to the public interest in the maintenance of effective immigration. The appellant does not speak English [22].
21. She found that it was the appellant and her husband who were responsible for the “split” in the family unit. Following their marriage, the appellant decided not to come to the UK but to remain in Pakistan with all three children, to maintain her home, employment and to give support to her siblings. In 2012 the appellant and her husband made a decision out of choice for the elder children to come to the UK to live with their father, thereby splitting the family unit [23].
22. She found that the present decision does not require the appellant's husband or children to leave the UK as it is within the power of the appellant to keep the family together by her husband and children accompanying her to Pakistan whilst she makes an entry clearance application, if they choose to do so. This is an option available to them, although they are not required to leave the UK [23].
23. Alternatively the appellant can take one or all the children to Pakistan or they can remain here with her husband for a “temporary period” whilst she makes an application. There is no evidence to show that a temporary break in their education in such circumstances would be detrimental and given that the two elder children were in Pakistan until 2012, it is likely that they would be able to resume education there for a temporary period [23].
24. She stated that there was no evidence that [S]'s medical condition would worsen if he returned to Pakistan for a temporary period. There was no evidence that he would not have access to medical treatment in Pakistan during such a period, if necessary. The Judge thus found that in any of those alternatives, “... the children's best interests will be met” [23].
25. Accordingly, any temporary separation that may occur whilst the appellant returns to Pakistan to make an application for entry clearance is not in itself disproportionate [23].
26. On 29 September 2015, Upper Tribunal Judge Reeds noted that whilst the grounds challenged the decision of the First-tier Tribunal relating to Appendix FM, the Judge had given adequate and sustainable reasons why the appellant could not so succeed. However, at [17] the Judge purported to consider Article 8 outside the rules “... and it is not wholly clear of the basis upon which the Judge considered the children's best interests in the light of medical evidence referred to in the grounds and disruption to the children with two of the children having left Pakistan in 2012 and to be expected to leave again or face separation from their mother.” Nor was there any consideration of their relationship with their father. The Judge also did not consider the statutory factors set out in s.117 although the grounds did not make any reference to this.
27. Ms Kullar relied on the skeleton argument dated 3 February 2016.
28. She referred to the decision in JO and others (s.55 duty) Nigeria [2014] UKUT 00517 (IAC), where the Tribunal noted that the duty imposed by s.55 of the 2009 Act 'required the decision maker to be properly informed of the position of a child affected

by the discharge of an immigration etc. function'. Thus equipped the decision maker must conduct a careful examination of all relevant information and factors.

29. Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.
30. The question whether the duties imposed by s.55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or Tribunal considering this question will frequently be confined to the application or submissions made to the secretary of state and the ultimate letter of decision.
31. Ms Kullar also relied on the decision of the Supreme Court in Zoumbas v SSHD [2013] 1WLR 3690, which considered the interplay between the best interests of the child and Article 8 of the Human Rights Convention. She relied on the "seven principles" enunciated by Lord Hodge to assist with the assessment of best interests.
32. Accordingly, the best interests of a child are an integral part of the proportionality assessment; the best interests of the child must be a primary consideration, although not always the only primary consideration; the child's best interests do not of themselves have the status of the paramount consideration; although the best interests can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant; while different judges might approach the question of the best interests in different ways, it is important to ask oneself the right question in an orderly manner to avoid the risk that the best interests of the child might be undervalued when other important considerations were in place; it is important to have a clear idea of a child's circumstances and what is in their best interests before one asks oneself whether those interests are outweighed by the force of other considerations. To that end there is no substitute for a careful examination of all relevant factors when the interests of the child are involved in an Article 8 assessment; and a child must not be blamed for matters which he or she is not responsible, such as the conduct of a parent.
33. Ms Kullar noted that four medical reports were produced. She submitted that the Judge's assessment at [20] that the absence of a full medical or psychiatric report on the exact cause of his symptoms, treatment or prognosis, resulting in the conclusion that his problems are due to anxiety at being separated from his mother, are speculative; she failed to attach sufficient weight to the medical evidence from three separate medical professionals confirming that the child suffers from recurrent headaches.
34. She submitted in particular, that the Judge failed to conduct a careful assessment of the best interests of the children and did not properly apply the fifth and sixth principles set out by Lord Hodge in Zoumbas, *supra*.
35. The letter dated 29 April 2014 from a consultant general paediatrician had not been taken into account by the Judge. The consultant stated that [S] has recurrent headaches which may represent the anxiety he is experiencing from missing his mother. The several letters from the nurse and consultant paediatrician and earlier

reports from Birmingham Children's Hospital dated 29 April 2014 referred to, associated headaches with periods of time when [S] was missing his mother, or that his symptoms are triggered by being upset, suggesting an underlying separation anxiety associated with his mother not residing with the family and that his separation from his mother is detrimental to his health and mental well being.

36. There had been a cursory reference to the medical reports without any "meaningful assessment" of the children's best interests or the impact on the second child's health and medical well being in the event of separation.
37. She contended that the Judge did not make a careful examination of all the relevant facts when conducting the best interest assessment, and failed to consider any disruption that would be caused to the elder two children upon having to return to Pakistan, having previously left in 2012 and who were now settled into full time education in the UK. At paragraph 10 of her skeleton she contended that whilst the impact on the youngest child's return to Pakistan would not be as great "as the eldest two children, having now been settled in the UK for four years, no assessment nevertheless has been made upon the disruption caused to him following him embarking upon full time education in the UK or indeed the prospect of him being again separated from his elder siblings."
38. Whilst the Judge stated at [23] that the children, who are British citizens, are not required to leave the UK, she nevertheless envisages that their best interests can be achieved by the family choosing to return to Pakistan, even for a temporary period, has failed however to adequately consider the disruption to the children's lives, including the education and healthcare envisaged for that temporary period, which would nevertheless cause further disruption and anxiety when returning to the UK, forcing them to have to re-adjust to their lives in the UK. That is not in their best interests.
39. Mr Mills submitted that the Judge has carefully considered the evidence, including the finding that the respondent had not made out the assertion that the appellant had used deception.
40. He submitted that when considering an Article 8 claim of this sort, which the Judge found appropriate to do, this must be looked at and assessed on the basis that the appellant cannot succeed under the Rules. There is within the Rules a significant public interest in preserving the integrity of the immigration system. Accordingly, the scales are weighed against her.
41. He referred to AJ (Angola) and decision of the Court of Appeal SSHD v SS (Congo) [2015] EWCA Civ 387. The Rules under consideration provide evidence as to where the relevant public interest considerations lie when seeking to strike a balance of interests under Article 8. He also referred to the decision in Chen, *supra* at [39].
42. Whilst the best interests are a primary consideration, other considerations must also be taken into account. Their best interest does not constitute a paramount consideration.
43. He submitted that the Judge has taken into account that the appellant cannot meet the rules and that there is a weighty public interest to be taken into account.

44. Her complaint against the Judge's evaluation of the medical evidence is also not made out. The Judge has taken into account the evidence. At [6] she referred to the medical letters confirming the son's medical situation. That included the fact that he had a CT scan and that was clear. She had it in mind that his situation worsened resulting in her extending her visa.
45. At [7] she took into account the evidence of the child's father that his son's condition is "getting worse" and that he has been hospitalised in the past. [20] She noted that [S] has problems with headaches. She noted that there was no full medical or psychiatric report on the exact cause or the treatment, but nevertheless, she has taken medical information into consideration [20]. He submitted that in the circumstances, she arrived at a reasoned conclusion, having regard to the extent of the evidence produced. The letters themselves only refer to the fact that his condition "may be connected" to separation. There was no actual diagnosis in the hospital letter. He has had a CT scan which was clear [6].
46. Dr Debenham's letter confirmed that [S] had been under his care since November 2013 suffering recurring headaches and vomiting resulted in his being admitted to hospital. The examination revealed no underlying physical cause, it being noted that the symptoms are triggered by his being upset and are highly suggestive of an underlying separation anxiety associated with his mother not living with the family. The input of a clinical psychiatrist was recommended [8]. Mr Mills submitted that notwithstanding such recommendation in July 2014, it had not been put into effect.
47. The Judge considered Chen at [19]. There was no evidence that an application for the appellant to enter the UK under the rules would succeed.
48. He submitted that the Judge had proper regard to the nature of the family unit and the separation of the mother, her youngest child and the other two children in 2012. She properly considered the proportionality of the decision, setting out the available options, leading to the ultimate finding and conclusion that the proposed interference was not disproportionate and did not breach Article 8.

Assessment

49. I have set out the decision of the First-tier Tribunal Judge in some detail. The two elder children, aged 9 and 12, lived with the appellant in Pakistan prior to joining their father in the UK in 2012. The appellant stated in her evidence that she could have joined her husband in the UK 16 years ago [6]. In her application for a visit visa, she stated that she needed to return to Pakistan to care for her brother and sister. That is still true.
50. When however the children cried and were not trusting her to return and her son had headaches, she decided otherwise. As noted, the Judge did not find that the assertion of the respondent that she had used deception had been made out.
51. The Judge has taken into account the medical evidence. I accept that there is no express reference to her having considered the evidence of Dr Evans, a consultant general paediatrician, who stated that the child has recurrent headaches which may represent the anxiety he is experiencing from missing his mother. However, she has considered the other similar medical letters, including that from Dr Debenham, also a

consultant paediatrician and the letters dated 24 April 2015 and 14 May 2015 from Dr Asghar and Nurse Innes, confirming headaches, vomiting and emotional upset, said to worsen with separation from his mother.

52. The Judge has had regard to the fact that the child has had a CT scan which fortunately was clear. She has also had regard to the father's evidence that his son suffers with migraine and is anxious about both his parents [7].
53. Notwithstanding the recommendation of Dr Debenham recommending the 'input of a clinical psychiatrist' in his report dated 28 July 2014, there was no evidence that such input was ever sought.
54. In the circumstances the Judge's finding at [20] that there is no full medical or psychiatric report before her on the cause of his symptoms, treatment or prognosis is correct. She concluded that the assertion that his problems are due to anxiety as a result of separation from his mother, was speculative. In the absence of any proper diagnosis or psychiatric or psychological report, that finding is sustainable.
55. The Judge nevertheless took the medical information into consideration [20].
56. She also had regard to the best interests of the children in accordance with s.55 of the 2009 Act. She considered their best interests, taking into consideration the medical information that was available. She considered that in the circumstances the children should remain in the care of at least one parent as had been the position until the appellant came to the UK [20]. Ideally, given the children's young ages and [S]'s potential difficulties, it would be in their best interests to be together and in the care of both parents wherever they live.
57. She had in mind as part of the assessment relating to proportionality that Article 8 does not permit a person to choose the country in which to establish family and private life or to circumvent the immigration rules. She noted that the appellant had not met the rules.
58. She also took into account the public interest considerations set out in s.117B of the 2002 Act flowing from the fact that she could not meet the Rules [22].
59. She took into account the decision in *Chen, supra*, where Upper Tribunal Judge Gill stated at [39] that if it is shown by an individual (the burden being upon her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirements of obtaining entry clearance is reduced. In cases involving children where removal would interfere with the child's enjoyment of family life with one or other of his parents whilst the entry clearance is obtained it would be easier to show that the balance of proportionality falls in favour of the claimant than in cases which do not involve children.
60. Ms Kullar accepted that no evidence had been placed before the Judge that an application for entry clearance from abroad would be granted. There was no evidence of the financial requirements that would have to be met. The only evidence in that regard related to the fact that the appellant's husband worked as a taxi driver,

who worked while the children were at school. There was no evidence of his income for any relevant period.

61. The Judge nevertheless considered the effect on the children of a temporary break from their mother should the appellant leave the UK alone. She noted that the decision did not require the appellant's husband or children to leave the UK. They are British citizens entitled to remain here.
62. She considered the options available in the circumstances. It was in the appellant's power to keep the family unit together with her husband and children accompanying her to Pakistan whilst she makes an entry clearance application. She also considered the alternative that the appellant could take one or all of the children with her to Pakistan or that they could remain in the UK with her husband for the temporary period pending the outcome of her application. There was no evidence showing that a temporary break in their education in such circumstances would be detrimental. The two elder children had been in Pakistan until 2012 and they would be able to resume education for a temporary period. Nor was there any evidence that [S]'s medical condition would worsen if returned for a temporary period, nor evidence that he would not be able to access medical treatment during such a period if necessary.
63. She accordingly held that in any of the "above situations" their best interests would be met. The availability of the options which she identified led her to conclude that any temporary separation that may occur whilst the appellant returns to Pakistan to make an application for entry clearance is not in itself disproportionate.
64. This was a full and carefully reasoned decision. The Judge did consider the children's best interests in the light of the medical evidence. She has also considered the potential disruption to the two children who left Pakistan in 2012 and has considered the effect of temporary separation if she went alone, as well as the option of the family accompanying her for a short period while she makes her application.
65. Having regard to the evidence as a whole, her findings were in accordance with the authorities she referred to, and are sustainable.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error on a point of law. The decision shall accordingly stand.

No anonymity direction is made.

Signed

Date 24 February 2016

Deputy Upper Tribunal Judge Mailer