Neutral Citation Number: [2021] EWCA Civ 886

Case No: C5/2019/0994

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Deputy Upper Tribunal Judge Monson
HU032882018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2021

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE BAKER
and
LADY JUSTICE CARR

- -

Between:

NADIRA MOBEEN	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Manjit Gill QC and **Ahmed Badar** (instructed by **Connaught Law Limited**) for the **Appellant**
Neil Sheldon QC (instructed by **the Treasury Solicitor)** for the **Respondent**

Hearing date: 25 May 2021

- -

Approved Judgment

LADY JUSTICE CARR DBE:

Introduction

1. The appellant, Mrs Nadira Mobeen, is a widow and now 66 years of age. She was born, lived and married in Pakistan where she had a son and two daughters, all of whom are now residents in the United Kingdom ("the UK") and British citizens. She last entered the UK in June 2014 on a visitor's visa since when she has resided with her son and younger daughter. In July 2017 she applied for leave to remain in the UK on the basis of her private and family life. The respondent, the Secretary of State for the Home Department ("the SSHD"), refused her application by letter dated 11 January 2018 ("the refusal decision").

2. This is her appeal against the decision of the Upper Tribunal (Immigration and Asylum Chamber) ("the UT") dated 9 January 2019 ("the UT decision") to uphold the decision of the First Tier Tribunal ("the FtT") dated 11 January 2018 ("the FtT decision") dismissing her appeal against the refusal decision. Her appeal is limited to a challenge to the SSHD's refusal of her application under Article 8 of the European Convention on Human Rights ("Article 8").

The Facts

3. The appellant was born on 11 July 1954 in Peshawar, Pakistan. She married and lived with her husband in Karachi until his death in 2006. She is a qualified (and Montessori trained) teacher with a Master's degree in English and a diploma in painting. She worked as a teacher until she had her children. For ease of reference, and without meaning any disrespect, I propose to refer below to all three children by their first names.

4. From September 2007 onwards the appellant was a frequent visitor to the UK in order to see her son, Faizan, and younger daughter, Rija, who by then had both moved to live in the UK (in 2004 and 2005 respectively). Faizan worked as an investment analyst and Rija in commodity trading. In 2011 the appellant's elder daughter, Haya, who until then had lived with the appellant in Pakistan and qualified as a doctor, married a British citizen and came to live in the UK as well. The appellant continued to visit (now all of) her children in the UK, spending only 12 months in Pakistan after 2011 and the rest of her time in the UK.

5. For these purposes, she had applied for and been granted visitor's visas as follows:

   i) From 10 September 2007 to 10 March 2008;

   ii) From 11 June 2008 to 11 June 2010;

   iii) From 23 July 2010 to 23 July 2015.

6. In 2013 the appellant's home in Pakistan burned down because of defective wiring; it was too expensive to reinstate it. The appellant went to live with a niece, but in the following year was required to leave because the niece needed the accommodation for her father-in-law who had become ill. The appellant had no other close relatives or friends in Pakistan and said that she felt extremely lonely and alienated there.

7. Against this background, the appellant came to the UK on 7 June 2014 as a visitor (under the third visa identified above). She went to live with Faizan, with whom Rija also lived. She submitted an application for leave to remain on 22 January 2015. That application was refused on 17 March 2015 with no right of appeal. An application for judicial review was made at the end of the same month; it was dismissed in June 2016.

8. On 14 July 2017 the appellant made a further (and the index) application for leave to remain on the basis of her family and private life in the UK. It was said to be unreasonable to expect her to leave the UK on account of her circumstances. She was living with her son and financially dependent on her children, in particular her son. The children were all financially independent and supported her with private healthcare insurance and accommodation in the UK. She would not be relying on public funds or NHS services. Haya was also very dependent on her mother for child care for her young son, the appellant's grandson. The appellant suffered from arthritis and high blood pressure.

The refusal decision

9. The SSHD rejected the appellant's application made under the private life rules in paragraph 276ADE(1) in Part 7 of the Immigration Rules. In particular, she did not meet the requirements of paragraph 276ADE(1)(vi), since it was not accepted that there would be very significant obstacles to her re-integration into Pakistan. She had lived there until the age of 59, including her childhood, formative years and the majority of her adult life. She spoke the language and was educated there.

10. The SSHD then considered whether there were exceptional circumstances rendering refusal of leave to remain a breach of Article 8 because it would result in unjustifiably harsh consequences for her, a relevant child or other family member. The appellant's arthritis and high blood pressure were considered, but medication for such conditions was widely available in Pakistan. Treatment in Pakistan might not be free, but she was receiving privately-paid medical care in the UK. Thus, suitable treatment in Pakistan would be available. She also had remaining family members in Pakistan to support and assist her on her return. As for being lonely in Pakistan, the SSHD again identified that the appellant had distant friends and relatives in Pakistan. She could reconnect with them. She could also maintain regular contact with her UK-based family via modern forms of communication and it would be open to them to visit her in Pakistan. There was no reason why her son could not continue his financial support of her in Pakistan, including by the provision of accommodation. In terms of supporting Haya, Haya was a British citizen entitled to health related treatment via the NHS. The appellant had maintained her relationship with Haya long-distance previously; that could resume.

11. As for the appellant's very close bond with her family in the UK and wish not to return to Pakistan, she had only ever entered the UK as a family visitor, which was not a route to settlement. She was therefore aware that this did not entitle her to remain in the UK indefinitely. She had previously remained in Pakistan whilst her children were in the UK. She could continue that relationship in the same way as previously. In relation to her grandson, whom she stated she cared for two days a week, consideration had been given to his welfare. Alternative childcare arrangements could be made.

12. The SSHD concluded that there were no exceptional circumstances such as to warrant the granting of leave to the appellant to remain outside the Immigration Rules.

The judgments below

The judgment of the FtT

13. FtT Judge Brewer ("the FtT Judge") heard evidence from the appellant and two of her children, Faizan and Haya. He stated that he had considered the witness statements that had been served (including statements from all three of the appellant's children). He also had before him written reports from three medical professionals, two in the UK and one in Pakistan:

    i) From a clinical psychologist, Dr Rozmin Halari, dated 10 January 2015. This stated that the appellant suffered from mild to moderate depression which would probably worsen if she were to return to Pakistan;

    ii) From the appellant's doctor in Pakistan, Dr Behrouz Hashim, dated 5 December 2014. This stated that the appellant had hypertension which was controlled by medication, arthritis which was likely to worsen and that he had prescribed the appellant with anti-depressants in the past;

    iii) Dr John Stephens, a private general practitioner, dated 25 June 2018. He recorded that the appellant was on medication for hypertension. He commented that her arthritis affected her ability to perform household duties and that her knees were worse when she was walking or bending. She would need continued monitoring of her blood pressure, treatment for her menopausal symptoms, regular blood tests for her thyroxine and monitoring of her cataracts. His advice was that she be allowed to stay in the UK. If she returned to Pakistan, she would be "isolated and feel low and depressed". Her health remained in a stable condition due to the good care and regular monitoring provided by her children.

14. The FtT Judge made the following findings: the appellant was a widow who did not wish to return to Pakistan. It was her strong preference to remain with her three children, all of whom lived in the UK. The appellant suffered from hypertension and arthritis in her knees and back. In 2015 she had been diagnosed with mild depression. Her hypertension was diagnosed in and had been treated from 2007. The only medication that she was currently taking was for her high blood pressure, according to the latest medical evidence of June 2018. That report stated that her arthritis gave her considerable pain, although there was no reference to the prescription of painkillers, and affected her ability to carry out household duties. Food was cooked for her, and her shopping was done for her. She could go swimming and paint watercolours and essentially looked after herself when alone during the day. As for returning to Pakistan, her children could afford to house her there and provide her with care assistance.

15. The FtT Judge noted the evidence that the appellant had arthritis in her hands; that Haya regularly monitored the appellant's blood pressure and reminded her to take her medication; that servants in Pakistan could not be trusted and Karachi was a

dangerous place to live. However, as set out below, this was evidence that he did not accept, at least not without qualification.

16. The FtT Judge found the appellant's evidence to lack credibility in a number of respects. He rejected the appellant's statement that when she was in Pakistan all her servants had stolen from her; in fact there were only one or two incidents of theft. He also rejected her evidence that, unless told to take her medication, she would forget to do so. There was no medical evidence of any memory problems and this is was not what Haya had said; rather Haya had said that she would check with her mother that she had taken her medication, as she could do if the appellant were in Pakistan. He also rejected Haya's evidence that the appellant's blood pressure required monitoring twice a week, given the length of time over which the appellant had suffered from hypertension and the lack of any supporting medical evidence. The FtT Judge also doubted the suggestion that the appellant had arthritis in her hands, again something not mentioned in the medical evidence.

17. The FtT Judge considered that the requirements of paragraph 276ADE (1) (vi) (for leave to remain on the grounds of private life) were not met: there were no very significant obstacles to the appellant's integration into Pakistan, and certainly nothing going beyond "inconvenience and mere difficulty". The appellant was an educated adult and gave no evidence of any difficulties for her to face on return other than the need to find accommodation, some medical issues and a lack of trust in servants. In summary, the FtT Judge found that there was nothing said, or which could reasonably be inferred from the evidence, which amounted to more than that it was the appellant's "strong wish" to remain in the UK.

18. The FtT Judge went on to conclude that the appellant did not have a family life for Article 8 purposes ("family life"). In summary, she and her children had no more than the normal emotional ties of a family and they did not have a family life when the appellant was in Pakistan. The fact that the appellant was now in the UK did not make a difference to this position:

> "42. The appellant has been living in the UK since 2014. Prior to that she has lived in Pakistan all her life. Her children decided to make lives in the UK, the last of them arriving in 2011. The appellant has made regular visits to the UK to see her children. It seems to me that if one is looking for more than the normal emotional ties which a family inevitably has, it is difficult to say that family life, in the sense required by an article 8 claim, does exist in this case. While the appellant's children gave evidence of the extent to which they look after their mother, it seems to me that they do that because she is present in the UK. Before her arrival they cared for her but from a distance and I see no reason why that could not continue if the appellant was to return to Pakistan. I find that the appellant does not enjoy family life in the UK beyond that which she enjoyed when in Pakistan other then she now has the convenience of co-location with her children and what that entails. If the appellant was in Pakistan, her children could still provide for her, they can house her, pay for carers, check she

> had taken her medication and in effect either directly or indirectly do all of the things they currently do."

19. The FtT Judge went on to consider the position in the event that family life for the purpose of Article 8 did exist, by reference to the well-known five questions identified in *Razgar* [2004] UKHL 27; [2004] 2 AC 368 ("*Razgar*") at [17]. In respect of the last of those questions, namely whether or not the interference was proportionate to the pursuit of the legitimate public end sought to be achieved, he stated (at [46]):

> "…in *Razgar* itself Lord Bingham said that decisions taken in pursuit of the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases identifiable only on a case by case basis. So, the issue is whether the respondent's decision was proportionate in all the circumstances of this case and given all my findings above and the relevant case law I conclude that, had I found family life for article 8 purposes, the decision of the respondent was proportionate in all the circumstances."

20. The FtT Judge turned next to consider Article 3 of the European Convention of Human Rights and the medical issues, concluding:

> "52. In my judgment nothing in this case comes close to meeting the high threshold in such cases. The appellant has had Hepatitis C and high blood pressure for many years and she takes medication and has taken it long before she came to the UK. Her arthritis would not appear to require medication, but if it does there is no suggestion medical assistance is not available in [Pakistan]. I do not accept the evidence of Ms Baig that her mother's blood pressure has to be monitored twice a week. There is no medical basis for this assertion and given the length of time she has had hypertension it would be expected that the correct drug mix and dosage has been found and again there is no evidence to suggest her blood pressure is not under control notwithstanding some variation to blood pressure when taken. Even if it is not currently under control, the appellant's history shows quite clearly that she has been under the regular care of her doctor in Pakistan and there is no reason why that cannot continue on her return."

The judgment of the UT

21. The appellant (realistically) did not challenge the FtT's finding that there were no very significant obstacles to the appellant's re-integration into life and society in Pakistan. Her appeal was limited to a challenge to the FtT's rejection of her appeal against the refusal of her application under Article 8.

22. In commenting on the FtT's decision in this regard, Deputy UT Judge Monson ("the UT Judge") identified the twin limbs of the FtT's Judge's findings on family life, namely that the family life of the appellant in the UK did not meet the criteria set out in *Kugathas v SSHD* [2003] EWCA Civ 31 ("*Kugathas*") and, secondly and relatedly,

that the family life that she enjoys can "to all intents and purposes" be replicated in Pakistan. He went on to observe (at [20]):

> "These are "bold" findings. On the face of it, the mere fact that the appellant has resided under the same roof as one of her sons, Faisan Baig, since 2014 as a cohabiting dependent, is enough to justify a finding that the *Kugathas* criteria are met. Similarly, whilst the Judge envisaged the children in the UK providing support to the appellant from a distance, as they had done between 2011 and 2014 when the appellant was "alone" in Pakistan, the amount of emotional support that they would be able to provide from a distance was going to be considerably less than if the appellant was residing in the same country as her children."

23. On the other hand, reasoned the UT Judge, the FtT Judge had heard the witnesses and was not bound to take at face value the appellant's evidence that she needed her children's support in many respects, including moral, physical, emotional and financial or the evidence of her son that she needed both emotional and physical care. The obvious limitation in the probative value of the medical evidence was that the views expressed were based on the appellant's self-reporting. On the face of it, the only barrier to resuming family life with the appellant's niece was a practical one which could be overcome by the appellant's children funding accommodation in Karachi big enough to accommodate all of the family. In conclusion, the UT Judge was not persuaded that the findings of the FtT Judge at [42] of his judgment were perverse or inadequately reasoned. He stated that he was reinforced in this conclusion by the fact that the appellant was only living with one[1] of her three children upon whom she was financially dependent. The claim of emotional dependency was principally centred on the daughter who was living elsewhere in a separate family unit.

24. Further, the UT Judge was not persuaded that any error in relation to family life was material to the outcome of the proportionality assessment. The appellant entered the UK as a visitor and had no legitimate expectation of being able to remain in the UK on the grounds of either having enduring family life with her children or on the basis of having established life with her children since her arrival as a visitor. He found that it was open to the FtT Judge to find that the evidence tendered in support of the appeal was not sufficiently compelling to justify the appellant being granted relief outside the Immigration Rules. It was open to him to find that the refusal decision was proportionate in all the circumstances.

The parties' submissions

The appellant's position in summary

25. The appellant submits that the FtT's decision that she does not have a family life with her adult children in the UK was not one that was properly open to the FtT Judge on the facts. The case is plainly one of family life. In the alternative, the FtT Judge's

[1] In fact she was living with two of them, as set out above, though not Ms Haya.

approach was flawed: whilst the FtT Judge purported to ask himself the right question, he failed to answer that question as a matter of substance:

i) He failed to weighed in the balance all the relevant facts;

ii) He disregarded the very important factual and legal consideration that living together with a family member and the provision of practical support both from parent to child and child to parent were very strong indicators of family life;

iii) The basis for discounting the fact that the appellant lived with or close to her children was unprincipled;

iv) The concluding sentence of [42] missed the point (of whether there was in fact a relationship of effective, real or committed support) entirely.

26. As a "fall-back submission" the appellant contends that the FtT unlawfully failed to take into account the medical evidence which supported the existence of family life.

27. Mr Gill QC developed the appellant's case on family life orally by submitting that the FtT Judge wrongly confused what are properly to be treated as two separate issues, namely emotional ties and the provision of support. He failed to recognise the strength of the family life and its long history. He ignored the appellant's past vulnerability arising out of her husband's death and the loss of her home, the great emotional dependency of the appellant on her children, the best interests of her grandson and the impact that separation would have.

28. As for proportionality, it is submitted that the FtT Judge failed to have regard to the fact that he was required to weigh in the balance the relevant Immigration Rules and their underlying policy, as considered in *R (Britcits) v SSHD* [2017] EWCA Civ 368; [2017] 1 WLR 3345 ("*Britcits*"). Further, he incorrectly applied an "exceptionality" test and failed to take the appellant's family life into account, properly or at all. It is unsustainable to suggest that the FtT's brief proportionality assessment rendered the FtT's failure to take the appellant's family life into account immaterial. Nor can it be said that the outcome of remittal would inevitably be negative to the appellant.

29. Mr Gill emphasises that the FtT Judge's error on the question of family life fundamentally infected his reasoning on proportionality: without a proper assessment of the family life it is not possible to identify what weight to give it for the purpose of assessing proportionality. Hence there is a need for (and the appellant is entitled to) remittal.

30. Mr Gill resists any suggestion that the Immigration Rules at E-ECDR.1.1 and 2.1 to 3.2 of Appendix FM, which provide for the granting of entry clearance as an Adult Dependent Relative ("ADR") ("the ADR ECR"), contain an exhaustive test for Article 8 purposes. They focus on physical dependency and set the bar high. They are said to have had a very damaging effect on family life and have been described as "harsh, unjust and unnecessary" (see the *Report on the Impact of the Adult Dependent Relative Rules on Families & Children* (July 2014) by the Joint Council for the Welfare of Immigrants). Mr Gill also submits that the policy underlying the ADR ECR, namely to avoid a financial burden on the NHS and taxpayer, is not engaged on

the facts here. The evidence is that the appellant's healthcare needs will be paid for privately by her children. Further, the NHS is protected by the requirement for someone with limited leave to remain to pay what is a substantial Immigration Health Surcharge before being able to access NHS treatment (see the Immigration (Health Charge) Order 2015 (Article 3 and Schedule 1)).

31. Thus, whilst he accepts (and indeed in some respects advocates) that the ADR ECR provide relevant context, Mr Gill submits that the ultimate test is always one of applying Article 8. The SSHD may have tried to set out certain rules in a manner which takes account of Article 8 considerations according to her, but that does not mean that the correct balance has necessarily thereby been struck, particularly when it is applied to the facts of a specific case. That depends in each instance on a proper proportionality assessment with full findings on the particulars facts on an up to date basis – hence the need for remittal.

The SSHD's position in summary

32. Mr Sheldon QC for the SSHD emphasises that the appellant's application was made outside the Immigration Rules; she was thus inviting the SSHD to exercise her discretion in her favour. Had the appellant sought entry clearance under the Immigration Rules her application would inevitably have been refused, and that refusal would have been proportionate. Her physical condition would not even approach the threshold imposed by the Immigration Rules. It is plainly possible for the appellant's family to fund adequate assistance in Pakistan, and the evidence was that one or more of her children would be prepared to return to Pakistan to look after her (although she would rather that her children were not put in that position).

33. The SSHD agrees that the existence of family life between adult relatives is a question of fact for the tribunal, to be determined by reference to all the relevant circumstances. Co-habitation of itself is clearly insufficient. The evidence considered by the FtT revealed that the appellant provided her daughter with some childcare assistance and her children provided her with some financial and practical help. This was a normal situation, and the FtT was entitled to find that it did not reach the family life threshold. The medical evidence was out of date and based on self-reporting and in any event concerned almost entirely with the appellant's emotional (and not physical) needs. When considering the question of leave to enter as an ADR, the court in *Ribeli v Entry Clearance Officer, Pretoria* [2018] EWCA Civ 611 ("*Ribeli*") made it clear that it is physical, and not emotional needs, that matter. It would be perverse for a different approach to be taken to an application for leave to remain as an ADR outside the Immigration Rules.

34. It is said that there is no basis on which to challenge the FtT's finding that, even if family life had been established, it would still have held the SSHD's decision to be proportionate. The FtT directed itself correctly on the law. The SSHD does not argue that remittal would be futile, rather simply that, having correctly identified the applicable principles of law (as set out in *R (Agyarko) v SSHD* [2017] UKSC 11; [2017] 1 WLR 823 ("*Agyarko*") and *Jeunesse v The Netherlands (Application No 12738/10)* ("*Jeunesse*")), and having recited the relevant aspects of the evidence, the conclusion reached by the FtT Judge (that the SSHD's refusal to exercise her discretion in the Appellant's favour was proportionate) was one which it was entitled to reach.

35. At the encouragement of the court, Mr Sheldon's oral submissions focussed on the question of proportionality. It is said that there are two fundamental features of this case which weigh very heavily in favour of refusal of the appellant's application to remain: first, the fact that the appellant would not qualify under the lawful rules formulated by the SSHD for entry for ADRs, namely the ADR ECR; and secondly, the fact that the family life upon which she relies was established when her status was "precarious". Very compelling circumstances would be required in order to tilt the balance in favour of allowing the appellant to remain. The Judge correctly analysed the law which he then applied to a series of findings of fact which he was entitled to make. On the facts, only one conclusion was possible, namely that refusal of leave to remain would be proportionate.

36. Finally, and so far as necessary, Mr Sheldon points to the evidence of the appellant and all of her children to the effect that, were she obliged to return to Pakistan, one or more of her children would (albeit very reluctantly) return to be with her. This he submits, relying on *Ribeli* at [66] to [71], is yet another reason why refusal was not disproportionate.

Discussion and analysis

The Immigration Rules relating to entry clearance and leave to remain as an Adult Dependent Relative

37. The ADR ECR came into force on 9 July 2012 as part of changes to the Family Migration Rules. They provide for the granting of entry clearance as an ADR. To meet the eligibility requirements for entry clearance as an ADR all of the requirements in E-ECDR.2.1 to 3.2 must be met (see E-ECDR.1.1). Those requirements so far as material are as follows:

> "**Relationship requirements**
>
> 2.1 The applicant must be the-
>
> (a) parent aged 18 years or over;…
>
> of a person ("the sponsor") who is in the UK.
>
> …
>
> 2.3 The sponsor must at the date of application be-
>
> (a) aged 18 years or over; and
>
> (b) (i) a British citizen in the UK; or
>
> (ii) present and settled in the UK;…
>
> 2.4 The applicant…must as a result of age, illness or disability require long-term personal care to perform everyday tasks.

> 2.5 The applicant…must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because-
>
> (a) it is not available and there is no person in that country who can reasonably provide it; or
>
> (b) it is not affordable.
>
> **Financial requirements**
>
> 3.1 The applicant must provide evidence that they can be adequately maintained, accommodated and cared for in the UK by the sponsor without recourse to public funds.
>
> 3.2 If the applicant's sponsor is a British citizen or settled in the UK, the applicant must provide an undertaking signed by the sponsor confirming that the applicant will have no recourse to public funds, and that the sponsor will be responsible for their maintenance, accommodation and care, for a period of 5 years from the date the applicant enters the UK if they are granted indefinite leave to enter."

38. If the applicant meets the requirements for entry clearance as an ADR of a British Citizen or person settled in the UK they will be granted indefinite leave to enter; if not, the application will be refused (see D-ECDR.1.1 and D-ECDR.1.3).

39. These rules were considered in *Britcits* upon a judicial review challenge to their lawfulness. The claimant charity contended, amongst other things, that the rules were incompatible with Article 8. The claim failed. As for Article 8, it was held i) that family life engaging Article 8 did not exist in every case where a UK sponsor wanted to bring an elderly parent to the UK in order to look after him/her; ii) that the new rules would not result in a disproportionate outcome in virtually all cases where Article 8 was engaged; and iii) that significant weight was to be given to the prior consultation, parliamentary debate and approval of the policy and objectives of the new rules (see [72] to [80], [82], [83], [86] to [88] and [90]).

40. At [58] Sir Terence Etherton MR identified the policy behind the ADR ECR as follows:

> "…It is twofold: firstly, to reduce the burden on the taxpayer for the provision of health and social care services to those ADRs whose needs can reasonably and adequately be met in their own country; and, secondly, to ensure that those ADRs whose needs can only reasonably and adequately met in the UK are granted fully settled status and full access to the NHS and social care provided by local authorities. The latter is intended to avoid disparity between ADRs depending on their wealth and to avoid precariousness of status occasioned by changes in the financial circumstances once settled here."

41. The test now imposed for entry as an ADR has rightly been described as "rigorous and demanding" (see *Ribeli* (at [43]).

42. The Immigration Rules also provide a route by which an ADR may apply for indefinite leave to remain as an ADR (see Section E-ILRDR of Appendix FM) under which an applicant must, amongst other things, meet all of the requirements of Section E-ILRDR (see E-ILRDR.1.1). Those requirements include that the applicant must be in the UK with valid leave to remain as an ADR and provide evidence of non-recourse to public funds (see E-ILRDR.1.2 and 1.4).

Article 8 and the application outside the Immigration Rules

43. As set out above, the appellant's application for leave so far as relevant to this appeal was not made under either of the above routes, but rather outside the Immigration Rules on the basis of Article 8 which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

44. The relevant principles relating to family life in the case of adults have been explored in a line of well-known authorities including *Kugathas*; *Singh v ECO New Delhi* [2004] EWCA Civ 1075 ("*Singh* 1"); *ZB (Pakistan) v SSHD* [2009] EWCA Civ 834 ("*ZB*"); *Singh v SSHD* [2015] EWCA Civ 630 ("*Singh* 2"); *Britcits*; *AU v SSHD* [2020] EWCA Civ 338 ("*AU*"). The position can be summarised as follows.

45. Whether or not family life exists is a fact-sensitive enquiry which requires a careful assessment of all the relevant facts in the round. Thus it is important not to be overly prescriptive as to what is required and comparison with the outcomes on the facts in different cases is unlikely to be of any material assistance.

46. However, the case law establishes clearly that love and affection between family members are not of themselves sufficient. There has to be something more. Normal emotional ties will not usually be enough; further elements of emotional and/or financial dependency are necessary, albeit that there is no requirement to prove exceptional dependency. The formal relationship(s) between the relevant parties will be relevant, although ultimately it is the substance and not the form of the relationship(s) that matters. The existence of effective, real or committed support is an indicator of family life. Co-habitation is generally a strong pointer towards the existence of family life. The extent and nature of any support from other family members will be relevant, as will the existence of any relevant cultural or social traditions. Indeed, in a case where the focus is on the parent, the issue is the extent of the dependency of the older relative on the younger ones in the UK and whether or not that dependency creates something more than the normal emotional ties.

47. The ultimate question has been described as being whether or not this is a case of "effective, real or committed support" (see *AU* at [40]) or whether there is "the real existence in practice of close personal ties" (see *Singh 1* at [20]).

48. Assuming that family life is established and Article 8 thus engaged, the relevant question (when dealing with the application of Article 8 to the removal of non-settled migrants who have developed a family life with someone while residing unlawfully in the host state) can be put in one of two ways, one positive and one negative:

    i) Whether or not the applicant's right to respect for his/her family life under Article 8 imposes on the host country an obligation to permit him/her to continue to reside there (a positive obligation); or

    ii) Whether or not removal would be a disproportionate interference (a negative obligation).

    As was remarked in *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 (by Lord Reed at [32]), however, the mode of analysis is unlikely in practice to make any difference to the outcome. One is essentially asking the same question and considerations of onus of proof are unlikely to be important where the relevant facts have been established. Ultimately, whether the case is considered to concern a positive or negative obligation, the question is whether a fair balance between the relevant competing interests has been struck.

49. A central consideration when assessing the proportionality of the removal of non-settled migrants from a contracting state in which they have family life is whether the family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be "precarious". In such cases, it is likely only to be in exceptional circumstances the removal of the non-national family member will constitute a violation of Article 8 (see *Agyarko* at [49] approving *Jeunesse* (at [108])).

50. What was meant by "exceptional circumstances" was made clear at [54] to [60] in *Agyarko*, namely circumstances in which a refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate. This is to be assessed in the context of a proportionality exercise which gives appropriate weight to the policy in the Immigration Rules, considers all factors relevant to the specific case in question, and ultimately assesses whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

<u>The interplay between the Immigration Rules and Article 8</u>

51. The interplay between the Immigration Rules and Article 8 has been considered in a number of authorities, including *R (MM) Lebanon v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 771 and *Agyarko*. In *Agyarko* Lord Reed stated:

> "46…it is important to appreciate that the Rules are not simply the product of a legal analysis: they are not intended to be a summary of the Strasbourg case law on article 8…they are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to

> how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases. The Secretary of State is in principle entitled to have a policy of the kind which underpins the Rules….Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.
>
> 47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case..."

52. Thus, in considering the question of proportionality, the courts must, albeit at a general level, take the SSHD's policy (as reflected in the Immigration Rules) into account and give it considerable weight, alongside a consideration of the relevant facts of the case in question.

Discussion and analysis

53. Given the approach of the UT Judge, which was essentially to uphold the FtT Judge's findings, the focus on this appeal must be on the decision of the FtT. In practical terms, the appeal stands or falls by the correctness of that first decision.

<u>The finding on family life</u>

54. Some of the criticisms that have been levelled at the FtT's decision are misplaced. Thus, for example, it is wrong to suggest that the FtT Judge failed to consider the witness statements, to which he expressly referred, or the medical evidence before him, to which he referred either indirectly or expressly.

55. However, whilst making all due allowance for the advantages that he enjoyed as a result of having seen and heard the Appellant and her children give evidence, the FtT Judge's conclusion that family life did not exist is unsustainable as a matter of principle. That family life existed is apparent on the basis of the FtT Judge's own findings of fact, with which there is no need to interfere for this purpose.

56. In reaching his conclusion that the Appellant had not established family life for the purpose of Article 8, the FtT Judge appears to have been influenced by his view that, were the Appellant to be in Pakistan, her children could still provide for her, house her, pay for carers, check that she had taken her medication and "in effect either

directly or indirectly do all of the things they currently do". But that puts the cart before the horse: the question of whether or not arrangements would be the same or similar in Pakistan, whilst potentially relevant to the question of proportionality, was immaterial to the question of whether or not family life in the UK existed in the first place.

57. Further, whilst in [42] the FtT Judge recognised the practical support provided by her children, he appears to have failed to take proper account of additional key features, in particular:

    i) the fact that the appellant had co-habited with her son (and younger daughter) in the UK since 2014. This is not necessarily sufficient to establish family life of itself but it is certainly a very powerful factor;

    ii) the fact that the appellant's children provided not just practical and financial support but also emotional support in circumstances where the appellant, already widowed, had recently lost her family home in Pakistan to fire;

    iii) the fact that the appellant provided support to Haya and care for her grandson.

58. These were all matters which, at least cumulatively, went beyond the existence of normal emotional ties; they provided clear grounds for a finding that the appellant's children provided their mother with real and effective support and that she in turn had a real dependency on them. Thus, the FtT Judge was wrong to hold that family life did not exist, and the UT Judge, who was clearly troubled by that finding, was wrong to uphold the FtT Judge's decision to this effect. To this extent, I would allow the appeal.

<u>The finding on proportionality and the balancing exercise</u>

59. I turn then to the key issue on this appeal, namely the question of whether or not the UT Judge was wrong to uphold the FtT Judge's conclusion on proportionality, despite the FtT Judge's error on the question of family life.

60. The flaw in the appellant's approach is to ignore the fact that the FtT Judge's consideration of proportionality proceeded (necessarily) on the express premise that he was wrong in his conclusion on family life and that, contrary to his earlier finding, family life existed.

61. I do not consider that his approach or conclusion on proportionality was flawed, or as it was put by Mr Gill "infected", by his incorrect finding on family life.

62. The FtT Judge considered and identified the law accurately. (It is not fair to say that he misunderstood the meaning of the exceptionality test: he stated correctly (at [46]) that the issue was ultimately one of proportionality in all the circumstances.)

63. As to the weight to be attached to the appellant's family life, the FtT Judge had read the evidence founding the existence of family life and relating to the appellant's circumstances in the UK, including as to her health, dependence on her children, relationship with her grandson and pastimes. He also heard and saw the appellant and two of her children give evidence; as set out above, he set out and assessed the reliability of that evidence carefully. He was also aware of the death of the appellant's

husband, the loss of the family home in a fire, and the appellant's broader family circumstances in Pakistan. There is no reason to think that these were not all matters that he properly weighed in the balance when considering proportionality.

64. At the same time, he was aware that the appellant was an educated person who could even now live independently in Pakistan where she had grown up, married, had children and spent all of her married life (and beyond). She would be financially supported and provided with accommodation by her children were she to return; she could also receive practical and emotional support from them (even if only from a distance). She had no significant health issues.

65. Further, as the authorities referred to above make clear, the FtT Judge was entitled to place considerable weight on the fact that the appellant's relevant family life (that is to say, her family life in the UK) was established at a time when her status here was precarious. She never had indefinite leave to remain in the UK (see *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536 at [44]), and from 23 July 2015 onwards had no right whatsoever to remain. The FtT Judge was entitled to conclude that a refusal to allow the appellant to remain would not result in unjustifiably harsh consequences for her and that, accordingly, exceptional circumstances had not been established.

66. As for the best interests of the appellant's grandson, it is right that the FtT Judge did not refer to them expressly in his written judgment, although it is to be noted that in the refusal decision the SSHD did. He was however aware (not least from the refusal decision and the witness statements that he confirmed that he had considered) of the grandson's position (and his importance to the appellant). Whilst the grandson's interests fell to be considered, it clear that they were not seen by the parties as being of material significance in the context of the proportionality exercise overall. Without underplaying the potential importance of a grandparental relationship, the facts here are far removed from those in *Jeunesse* for example[2], where the three children involved were the children of the applicant who was their "primary and constant carer". The FtT Judge's approach reflected the appellant's apparent position before him as to the weight to be attached to the grandson's interests in the balancing exercise to be carried out. This is borne out by the fact that no ground of appeal was raised either before the UT (in what were very lengthy grounds) or on appeal to this court by reference to any failure on the part of the FtT (or the UT) to consider adequately the grandson's best interests.

67. The ADR ECR fall next for consideration. The FtT Judge's failure to refer to these rules expressly may be understandable, given that the appellant had never applied for entry clearance under them, However, it is inconceivable that the (specialist) FtT Judge was unaware of the legal framework. He was self-evidently aware of the relevant context, namely that the appellant had not pursued an application under the ADR ECR and was applying outside the Immigration Rules under Article 8.

68. It is common ground that whether or not the appellant would have qualified for entry under the ADR ECR is not determinative of the question of whether or not the refusal decision was compatible with Article 8. However, as set out above, the fact that the

[2] See the discussion at [118] and [119].

SSHD, in the discharge of her statutory duty to regulate immigration, has set out a clear policy, reflected in the ADR ECR, as to the requirements to be met by ADRs seeking to settle in the UK will be a powerful factor in any Article 8 assessment of proportionality. This proposition is clearly established on the authorities (for example in *Agyarko* (at [47])).

69. Whilst Mr Gill was not in a position formally to concede the position, it cannot realistically be suggested that the appellant would have met the requirements in 2.4 and 2.5 of the ADR ECR. Her physical condition comes nowhere near the threshold (of requiring long-term personal care to perform everyday tasks) and she could obtain the required level of care in Pakistan. The fact that the appellant may not burden the UK taxpayer's purse because she can access private healthcare in the UK is no answer to the SSHD's position, in the sense that she would still not meet the relationship requirements of the ADR ECR. In any event, the appellant's reliance on the fact that her children are wealthy is at odds with the second limb of the SSHD's policy as identified in *Britcits* at [58], which is to avoid disparity between ADRs depending on their wealth.

70. The ADR ECR, reflecting the SSHD's policy as approved by Parliament and upheld as lawful in *Britcits*, provide the conventional pathway for entry to the UK as an ADR. Whether deliberately or otherwise, the appellant circumvented that route by coming as a visitor to the UK, overstaying and then applying for leave to remain outside the Immigration Rules. She presented the SSHD with the sort of "fait accompli" referred to by Lord Reed in *Agyarko* at [54]:

> "….the Convention is not intended to undermine [a state's right to control the entry of non-nationals into its territory and their residence there] by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-nationals family member by the authorities would be incompatible with article 8 only in exceptional circumstances": *Jeunesse*, para. 114."

71. In these circumstances, the FtT Judge's finding on proportionality was fully justified. Indeed, taking the strength of the family life at its highest on the facts, there was really only ever one realistic answer on the question of proportionality, namely that the refusal decision was not incompatible with the appellant's right to respect for her family life under Article 8. This is reflected in the consistent conclusions of the SSHD in the refusal decision (which appears to have proceeded on the premise that family life existed and recognised what the SSHD described as the "very close bond"), the FtT Judge and the UT Judge.

72. Further and finally, it is right to refer again to the evidence before the FtT Judge from which it could be concluded that this is a case where the appellant will be cared for in Pakistan by one or more of her children (who will move to live with her), were she to have to return to Pakistan. The appellant acknowledged that one or more of them would return to live with her and each child stated that he/she would do so (albeit reluctantly). *Ribeli* confirms that the willingness of a child to return abroad with the parent can be an important factor in favour of refusal of leave to remain. However, unlike the position in *Ribeli*, there has been no finding here that it would be reasonable for one or more of the appellant's children to return to join her in Pakistan

(even if, as a matter of fact, they would be prepared to do so). In these circumstances, I do not lay any material weight on what would in any event be only an additional factor in favour of an already justified refusal.

73. In summary, I would reject the challenge to the FtT Judge's conclusion on proportionality, and would uphold the UT Judge's dismissal of the appeal against it.

Conclusion

74. For these reasons, I would allow the appeal against the UT Judge's decision to uphold the FtT Judge's rejection of the existence of family life but would dismiss the appeal against the UT Judge's conclusion that the FtT Judge's decision on proportionality was in any event correct. The refusal decision would stand.

75. I would not wish to do so without again expressly recognising the strong family bonds that clearly exist between the Appellant and her children and grandson, and her children's obvious devotion to their mother. Nothing in this decision should be seen as minimising the importance and value of the family relationship for all concerned. However, the FtT Judge's decision on proportionality in all the circumstances, given in particular the appellant's immigration status here whilst the relevant family life was being established and set against the background of the ADR ECR, and the UT Judge's decision to uphold it, cannot be impugned.

Lord Justice Baker:

76. I agree that the appeal should be dismissed for the reasons given by Carr LJ.

Lord Justice Underhill:

77. I agree with Carr LJ's analysis and conclusion. Like her, I cannot accept the view of the Judge in the First-tier Tribunal that the return of the Appellant to Pakistan would not interfere with her family life in the UK; but, also like her, I believe that his alternative finding that any such interference would be proportionate is unimpeachable.

78. I have every sympathy with the Appellant's wish, and that of her children, that she should be able to live permanently in this country now that she is widowed and all her children are settled here – and all the more so now that she has a grandchild. I do not find it difficult to accept that if she has to return to Pakistan she will miss them very much. But I am afraid that that is not the test. When people from overseas choose to make a life in the UK they are not entitled to expect that they will later be able to bring their parents to join them. The Government has decided as a matter of considered policy that that right should generally be restricted to cases satisfying the strict criteria set out in the sections denoted EC-DR and ILR-DR under Appendix FM to the Immigration Rules; and in *Britcits* this Court has found that policy to be legitimate. The Appellant did not apply under those rules, no doubt because she could not on the evidence have satisfied their requirements. That is not in itself conclusive that the refusal of leave to remain would be proportionate; but, as Carr LJ explains, it is highly material, and like her I can see no error of law in the Judge's evaluation.

79. I should say that the Appellant has not assisted her cause by overstaying for almost two years between the expiry of her visitor's visa in July 2015 and her making of the present application. However, I do not regard that as the decisive feature in the case. Nor do I think that it would be right in the circumstances of the present case to attach significant weight to the evidence that if the Appellant has to return to Pakistan one of the children would give up their lives in the UK and return with her.