IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30787/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 22nd October 2014	**On 28th November 2014**
Prepared 22nd October 2014	

Before

THE HON. MR JUSTICE DAVIS
UPPER TRIBUNAL JUDGE I A LEWIS

Between

FAZILAT SHAHZAD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Ahluwalia, Counsel instructed by Wimbledon Solicitors
For the Respondent: Ms L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 18th July 2014 Deputy Judge of the Upper Tribunal Lewis determined that the decision of the First-tier Tribunal which had dismissed the appellant's appeal against the decision of the Secretary of State for the Home Department to refuse her further leave to remain in this country contained an error of law and the Learned Deputy Judge ordered that the decision of the First-

tier Tribunal should be re-made by this Tribunal. This is our decision on the appellant's appeal.

2. The background is usefully and helpfully set out in the decision of Judge Lewis in relation to the error of law. The appellant is a national of Pakistan, born on 27th January 1986. She arrived in this country on 5th April 2011. She had a valid student visa which had commenced in March 2011 and ran until 26th February 2013. Her husband, Mr Shahzad Ahmed, born in 1980 arrived at the same time with the same entry clearance. On 15th June of the same year the appellant had her son, Ali Shahzad. As will become apparent she was pregnant when she arrived, albeit not anywhere near full term. Ali was born very prematurely at 25 weeks' gestation. There must be some clear doubt as to whether he would have survived at all but he did but with very significant medical complications and also, as subsequently transpired, concerns over developmental delay.

3. The First-tier Tribunal whose decision we are re-making had before it a substantial body of evidence by way of medical reports documenting Ali's medical history since birth and we have those same reports. The decision which we are reviewing arose from the appellant's application for further leave to remain which she made on 8th February 2013, so within time, and it included her husband and son as dependants. In the relevant section of her application form she set out the basis of her application which concentrated upon the medical condition of Ali. She said: "there is no such facility to care for the child if removed to his country". She said further, "if he is returned to Pakistan his quality and quantity of life would suffer".

4. The appellant's application to vary her leave to remain by extending it was refused by a letter dated 8th July 2013 and a notice of immigration decision was dated the same date and served in consequence thereby rendering the appellant and her dependants, including Ali of course, liable to be returned to Pakistan and that is the decision that was the subject of appeal.

5. The decision letter sets out in considerable detail all the reasons why the appellant and indeed her dependants did not come within any part of Appendix FM and there is no doubt that the letter was entirely accurate in excluding the appellant and her dependants.

6. The letter went on to consider the issue of the child and purported to consider the interests of the child. We quote:

> "It is noted that your child was aged 20 months at the date of your application. Your child will be returning with you to Pakistan. You and your child are citizens of Pakistan and will be able to enjoy the full rights of being citizens of that country. You have lived the majority of your life in Pakistan and as such will

be able to support your child by introducing him to a new culture while helping him to adjust to his new environment. Furthermore your child is considered young enough to adapt to life abroad. It is also reasonable to consider that having lived the majority of your life in Pakistan you will have extended family or networks of friends who you will be able to rely on for support to help with integration on your return. Therefore, it would be reasonable for your child to return to Pakistan with you to continue his family life and as a family unit you will be able to provide each other with the same level of support to ensure that your child will be able to adapt to his new environment. Whilst your child has been living in the United Kingdom, it is considered that at such a young age the nature of any family and private life he may have established will still be focused very firmly in the home. Your child has not yet started school and his family will remain her focal point (the child was in fact a boy) and any upheaval that he may experience in the short term will be outweighed by the support he receives from you and other family members t enable him to adapt to his transition in Pakistan. Although it is considered that your child may not receive the same quality of education that he receives in the United Kingdom, the education that he will receive in Pakistan is available and considered of a standard that will prepare him with his basic educational needs."

7. Since this case turns wholly on the medical condition of Ali it is, if we may respectfully say so, little less than extraordinary that the decision letter does not make a single reference to his medical condition. Were this decision being judicially reviewed it could doubtless impugned on public law grounds. However, that is not the exercise in which we are engaged but it is the case that the decision itself does not seek to address the medical position of this child at all.

8. We summarise the medical condition of the child as it appears to us as it doubtless appeared to the Tribunal below and to some extent at least was in the knowledge of the Home Secretary of State. There are seven heads of medical condition or disability identified by the appellant.

   (i) Long QT syndrome – that is a condition to which we shall return because it really is the centrepiece of the case.

   (ii) Global developmental delay, including delayed and disordered speech and language development leading to significant difficulties with social interaction and communication and delayed self-help skills.

   (iii) Hearing difficulties.

(iv) Visual difficulties.

(v) Behavioural difficulties including aggressive behaviour and self-harming.

(vi) Abnormal brain MRI scan with evidence of cerebral atrophy.

(vii) Respiratory tract infections which may require hospital admission for treatment.

9. We set out all seven points at which there are concerns over Ali's health in order to set out the background. Points (ii) to (vii) in that list are no more than relevant background, neither individually nor cumulatively would they provide a basis for any viable challenge on human rights grounds to the Secretary of State's decision. The facilities in this country to cope with those conditions or any one of them may well be better in the United Kingdom than in Pakistan but as the Secretary of State quite rightly observes, whilst treatment in Pakistan may not be as good as in this country in some particular respects, that does not justify the Secretary of State doing anything other than following the normal process.

10. It is the first condition that gives rise to the significant argument in this case. Long QT syndrome is, we are told and we have no reason to doubt this, a rare inherited heart condition. It apparently delays repolarisation of the heart following a heartbeat which means that there is a risk of irregular heartbeat and irregular heartbeats (or arrhythmia) may well lead to palpitations or fainting but more seriously to sudden death due to ventricular fibrillation.

11. The Learned Deputy Judge when giving directions upon his finding that there had been an error of law by the First-tier Tribunal ordered that the following should be lodged with the court:

- Up-to-date medical evidence in respect of Ali
- Details of the nature of emergency treatment that would be required and its nature and extent, and
- any further evidence as to the availability or non-availability of any comparable treatments in Pakistan.

12. In consequence of that direction we have been provided first with the evidence of Dr Kaski who is the clinical lead at the Inherited Cardiovascular Disease Unit at the Great Ormond Street Hospital for Children. He has been involved in the treatment of Ali. He confirms that there has been a confirmed diagnosis of long QT syndrome that is being treated with drugs but despite that drug treatment Ali continues to have episodes of loss of consciousness which could be related to potentially fatal ventricular arrhythmias. He reports that Ali has what is called an implantable loop recorder in situ, the

purpose of that being to try and elucidate why it is that he loses consciousness in the way that he does. Dr Kaski reports that the battery life of such a recorder is somewhere in the region of three to three and a half years. He would expect the device to remain fitted for at least that period of time. If in that time ventricular arrhythmias are identified then he would consider the implantation of a defibrillator. If nothing is detected over the next three years the implantation of a defibrillator is less likely but Dr Kaski indicates that at this time the precise nature of what is going to happen simply cannot be predicted. It may be seen that, notwithstanding the diagnosis, there is a sophisticated process of continuing investigation in an attempt to understand how for Ali the underlying condition causes the potentially life threatening fainting episodes. This is being done with a view to establishing the appropriate remedial treatment.

13. Dr Kaski very properly does not pretend to be able to report on the facilities for such investigation and treatment in Pakistan but his evidence does go on to deal with the issue of what kind of emergency treatment might be needed in Ali's case. He identifies three points.

14. First, should Ali experience an episode of fainting then he must be transferred by ambulance as an emergency to his local Accident and Emergency Department. En route there should be cardiac monitoring because it may be that Ali would require resuscitation en route by paramedics.

15. Second, essential medically trained staff must be present in the event of further fainting episodes. That is because further fainting episodes represent "a distinct possibility" of potentially fatal ventricular arrhythmias. It follows that once in hospital Ali must be under close medical supervision in order to enable appropriate treatment to be initiated when necessary.

16. Third, because there is a strong possibility that these fainting episodes are being caused by what Dr Kaski terms malignant ventricular arrhythmias which may well result in sudden cardiac death, it is vitally important for those fainting episodes to be monitored.

17. The evidence produced by the appellant as to what is available in Pakistan comes from a Professor Masood Sadiq who is the Head of the Department of Paediatric Cardiology at the Children's Hospital in Lahore. Although we have no detailed evidence on the topic, since Lahore is one of the major cities if not the major city in Pakistan and Professor Sadiq is the head of the relevant department, we must sensibly assume that his evidence is accurate and reliable in relation to the matters to which he speaks. He identifies that he is aware of the condition of long QT syndrome. He understands that a loop

recorder has been inserted and that is in order to see if an implantable cardiac defibrillator is necessary. Professor Sadiq goes on to say this:

> "I would like to confirm that in Pakistan there is no paediatric electrophysiology service anywhere in the country and facility of implantation of an implantable cardiac defibrillator at this age is not available".

18. Reference has been made to the nature of electrophysiology. The clear evidence is that neither proper monitoring of the loop recorder, still less implantation of a defibrillator, would be possible anywhere in Pakistan.

19. Evidence has been provided by the respondent to the appeal, the Secretary of State. She has provided us with the COIS Report of August 2013 first quoting the United States State Department's Consular Information Sheet on Pakistan. In relation to emergency medical care the brief passage quoted is as follows, "adequate basic non-emergency medical care is available in major Pakistani cities". Upon enquiry the Secretary of State's representative indicated that she had no evidence of access to emergency care of the type referred to by Dr Kaski as being available in Pakistan. The Secretary of State further, by reference to the same report, quoted the International Organisation for Migration's fact sheet for Pakistan in terms of more general medical care:

> "The National Institute of Cardiovascular Diseases was established to meet the increasing demand for the diagnosis, management and prevention of cardiovascular diseases as well as to keep up-to-date with the rapid technological advances in the field through research and development.... Healthcare services across the country have visibly increased. Basic health units, rural health centres and civil dispensaries have been created in the remote rural areas to meet the health needs of the local communities. In the cities there are both state and private hospitals with modern technologies to meet a variety of health needs."

20. The Secretary of State in her written submission submitted that given that evidence it was open to the appellant to use the facilities to have Ali's condition investigated with a view to diagnosis and possible future treatment. We are quite satisfied that this general evidence does not begin to address the direct evidence of Professor Sadiq and we cannot accept that the proposition put forward by the Secretary of State has any evidential foundation.

21. The other matter raised by the Secretary of State was that it would be open to the appellant to make an entry clearance application for Ali to return to the United Kingdom as a private patient. That is on

the assumption Ali had been removed from this country and returned to Pakistan and it was argued that the option was also open to the appellant in the event that any future diagnosis should identify treatment that is not available in Pakistan. Since the evidence demonstrates to us as clearly as it could do that the relevant treatment is not available in Pakistan it really is a case of us considering whether it is a sensible proposition that the appellant and her dependant should be removed merely in order for them then to make an entry clearance application for Ali to return to this country as a private patient. That would require the use of Rule 51 of the Immigration Rules which set out certain requirements. The requirements include necessity to show that any proposed course of treatment is of finite duration (which in this case it is not) and to produce satisfactory evidence of the estimated cost of the treatment, the likely duration of the visit required to undertake the treatment and sufficient funds being available in the United Kingdom to meet those costs. Although we do not have direct evidence on the topic we have sufficient information to enable us to identify that none of those conditions could be met. This is the sort of case where it would be quite impossible for the appellant to make a sensible entry clearance application of the type suggested under Rule 51 so that option in our judgment is simply not open. So that is the factual background.

22. The appellant argues that this is a case in which by reference to her child the Secretary of State should have recognised that removal of her and her dependants would be a disproportionate interference with her Article 8 rights. We have been referred to a number of authorities and I hope we will be excused if we refer only to those which seem to us to be most significant and on point for this decision.

23. First JA (Ivory Coast) and Secretary of State [2009] EWCA Civ 1353. That was a case in which the relevant appellant, that is JA, was an African woman who had entered the United Kingdom lawfully. Having so entered the United Kingdom she was then diagnosed for the first time as HIV positive. She was treated by the National Health Service with antiretroviral drugs which stabilised her condition and had kept it stable thereafter. The case made its way to the Court of Appeal and identified that the issue that the Tribunal below and the Court of Appeal in its turn had to consider was whether removal of JA would represent a disproportionate interference with her rights under Article 8 of the Convention, namely her right to respect for private and family life. It was recognised this was not a case in relation to which Article 3 applied but that Article 8 could and without turning in detail to the reasoning of the court (because it is not necessary in view of the later decision we are going to consider) the court identified that Article 8 rights were potentially engaged in such a case.

24. The subsequent decision which enables us to deal with the matter more fully is SQ (Pakistan) against the Upper Tribunal, Immigration and Asylum Chamber [2013] EWCA Civ 1251. The facts in SQ were a little different to those in JA (and to this case) because the individual in that case arrived in this country already suffering from the relevant serious medical condition. The similarity was that the person who had arrived with that serious medical condition was a child, albeit a rather older one than the child in this case. The Court of Appeal were invited to rule that to return the child to Pakistan as the Secretary of State sought to do (a) would be to subject him to inhuman treatment or (b) a point that is relevant to us, would unlawfully interfere with his right to respect for private life. The facts in that case meant that if he were to be returned he would probably die in his late teens or early 20s whereas in the United Kingdom he would have a much better and longer life.

25. Dealing with the Article claim Lord Justice Maurice Kay said this beginning at paragraph 20:

> "The FTT dealt with the Article 8 claim somewhat cursorily in the final four sentences of the passage which I have set out .... Having correctly observed that the appellants had only been in this country 'for a brief period' and that the treatment received by MQ was 'a good part of his private life' here, the judge simply concluded that he did not find 'the private lives of these appellants would be infringed upon their removal to Pakistan'. He then referred to *ZH (Tanzania)* and the best interests of MQ but found that his 'cultural, linguistic and family ties are best maintained in his country of origin', noting that 'there are no countervailing factors that militate against the removal of MQ in the context of Article 8 and section 55'. It is impossible to escape the conclusion that the Judge never considered MQ's medical conditions and treatment in the context of his best interests." (We interpose that has some relevance in this case given the terms of the decision letter).

26. Lord Justice Maurice Kay continued by reviewing the well-known jurisprudence emanating from ZH (Tanzania) and then at paragraph 26 said this:-

> "What this case demonstrates is that in some cases, particularly but not only in relation to children, Article 8 may raise issues separate from Article 3. In *JA (Ivory Coast) v Secretary of State for the Home Department* (supra), an adult succeeded under Article 8 but not Article 3 in a health case. Lord Justice Sedley emphasised that each of the two Articles has to be approached and applied in its own terms. The leading authorities of *D* and *N* (we interpose authorities in relation to Article 3) were distinguished on the basis that, in both of them, the appellants' presence and treatment in this country were owed entirely to

> unlawful entry. JA's appeal was allowed and her case remitted because of the potential significance of the fact that, following her lawful entry and subsequent diagnosis of HIV+, she had been granted further exceptional leave to remain for treatment. Although no separate Article 8 issue arose in *D* or *N*, it plainly did in *JA*."

27. The Learned Deputy Judge when identifying the error of law also identified the case of Bertha Joe-Okonkwo v Secretary of State for the Home Department [2013] UKUT 401, a decision of this Tribunal, which has the distinction of having as one of the panel members Mr Justice Blake the then President of this Chamber. In that case the relevant appellants had come to this country as students with leave. Having come into the country the appellant, an adult, was diagnosed as suffering from kidney disease. The disease progressed and became severe. She had a kidney transplant but even with that was going to need specialised medical care at tertiary level. The Secretary of State's decision was to remove her. In that case the Upper Tribunal was hamstrung by the fact that the arguments placed before the Lower Tribunal did not begin to address Article 8 at all so what the Upper Tribunal said in that case was, strictly speaking, obiter dicta but is plainly highly persuasive partly in view of what was said in JA and SQ and partly in view of the judge who was saying it. We quote from paragraph 38:

> "Lord Justice Sedley's remarks in JA were precisely directed at Article 8 and could have found the argument that where life saving medical treatment is provided during a period of lawful stay and such treatment cannot as a matter of financial practicality be replicated in the state of return the removal might well be a disproportionate interference with the physical and moral integrity aspects of the right to private life."

It follows from that brief review of the authorities that in medical cases the medical condition of the relevant applicant or in this case a dependant may be of very great significance indeed. Moreover the authorities demonstrate that whilst it is not a principle restricted to children it may be of particular significance in the case of children. That has particular resonance in this instance.

28. In the course of the hearing we invited the Secretary of State's representative to address what appeared to us to be the very deleterious effects that very possibly, if not probably, would result were this child to be returned to Pakistan. The submissions made by the Secretary of State were first of all that the costs to the public purse of this exercise, that is continuing to treat this child in the United Kingdom, would be very great indeed. It is not disputed that that is the case. We have no detailed evidence as to the precise cost but Mr Ahluwalia who appears for the appellant is able to give some sensible estimate that it would be in the hundreds of thousands of

pounds. We plainly do not ignore that factor but we do not accept the submission that was made which is that the cost of the treatment is crucial to the proportionality exercise. It is important and it is significant that it is not crucial; it is but part of it.

29. The Secretary of State also invited a distinction to be drawn between the case of JA and Okonkwo because in this case the appellant arrived in this country already pregnant. With great respect to the representations of the Secretary of State it seems to us that that is of limited or no relevance. When the appellant arrived in this country she was pregnant but she might reasonably have assumed that she would give birth to a healthy child. A healthy child could perfectly sensibly return to Pakistan. The appellant would have had absolutely no argument about being required to return to Pakistan at the conclusion of her leave unless there were some other reasons for her to have an extension simply because she had a child born here. It is a matter of profound regret to all concerned that this child has been born so very seriously ill and continues to be very seriously ill and genuinely disabled. That is an unusual and extraordinary event and is not one which in any way can be put at the door of the appellant. In any event the distinction drawn by the Secretary of State would presumably apply also to the appellant in SQ. The Court of Appeal did not see the fact that the individual had arrived in this country with the illness was determinative of the case.

30. Finally the Secretary of State argues that there is no obligation or was no obligation on her to await a diagnosis. As has already been made apparent from our rehearsal of the facts the child in this case is the subject of ongoing diagnostic and investigative treatment. Although what he is suffering from may be apparent, the outcome of the medical investigation far from apparent. The Learned Deputy Judge when giving directions identified that this Tribunal might be assisted by reference to those cases in which the Tribunal and the Court of Appeal had had to consider the position of those who were subject to removal being also party to family proceedings. We can do no better than cite the introductory head note from MH (Morocco) [2010] UKUT 439:

> "*1. In MS (Ivory Coast) [2007] EWCA Civ 133 it was accepted that a decision to remove an applicant in the process of seeking a contact order may violate Article 8 of the Convention on the basis that removal of an applicant during contact order proceedings would be unlawful because it prejudged the outcome of the contact proceedings and, more importantly, denied the applicant all possibility of any further meaningful involvement in the proceedings.....*
>
> *Where an application for contact is successful a parent or party may make application for further leave to remain in the UK. If unsuccessful, then it will be for the Secretary of State to consider what steps to take in relation to that individual.*"

31. By analogy here is a case in which on the evidence there is ongoing diagnostic and investigative treatment which if interrupted will entirely lose its useful effect: if it is not interrupted it may result in some at least reasonable resolution of the child's medical issues. Therefore, we do not accept that there was no obligation on the Secretary of State to await a diagnosis; it was something which she sensibly should and could have given some credence to.

32. Finally by reference to Section 117A and 117B of the Nationality, Immigration and Asylum Act 2002 as inserted by the Immigration Act 2014 we must when considering the public interest question in respect of any human rights claim consider the matters set out in Section 117B. We must consider the maintenance of effective immigration controls and that that is in the public interest. In the context of this case of course we do. Here the appellant arrived lawfully and it is only because of what happened after her arrival, entirely without fault on her part, that the issue of her and her dependant's Article 8 rights arise. This is not a case in which invoking Article 8 in any way will undermine effective immigration controls. Of the other public interest considerations it is in our view only necessary and relevant to consider sub-Section (3), namely the financial independence of those who enter the United Kingdom, those persons not being a burden on the taxpayer. As we have already noted the costs of the treatment of the child in this case will be very very substantial and we do of course give due weight to those costs. They are not, for the reasons already indicated, crucial or determinative in relation to the public interest exercise.

33. Dealing with the issues that must be dealt with in any Article 8 case there is no dispute that the removal of the appellant and therefore her dependant child will be an interference with his private life. As we have established by the authorities, medical treatment is private life or can be.

34. Second, that interference plainly will have consequences of the kind of gravity which may engage the operation of Article 8. We anticipate we have already rehearsed sufficiently the factual background to this case and the consequences involved in removal such that no further discussion of that question is necessary. The interference with the appellant's and her dependant's private life was plainly in accordance with the law in the sense it was in accordance with the Immigration Rules. It is certainly arguable that it was unlawful because no adequate consideration was given to the best interests of the child in relation to his medical condition. It seems better to us to combine that consideration with the issue of proportionality to which we come in a moment. The interference was necessary in the sense of maintaining immigration controls but, bearing in mind the best interests of the child and bearing in mind the enormous consequences upon the child if he is returned to Pakistan, we conclude that the interference with his Article 8 rights

were not proportionate to the legitimate public end sought to be achieved i.e. removing him from this country. In those circumstances we rule that the decision of the Secretary of State was an interference with his Article 8 rights and therefore was unlawful.

Signed Date: **27th November 2014**
The Honourable Mr Justice Davis
(Sitting as a Judge of the Upper Tribunal)