



IAC-AH-LEM-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/30435/2014
IA/30436/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 28 July 2015**

**Decision & Reasons Promulgated
On 17 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MUHAMMAD RIZWAN (FIRST CLAIMANT)
MS SHAZIA ZEB (SECOND CLAIMANT)
(ANONYMITY DIRECTION NOT MADE)**

Claimants

Representation:

For the Appellants: Mr L Tarlow (Home Office Presenting Officer)
For the Claimants: Mr S Sharma (Counsel instructed by H M Solicitors)

DECISION AND REASONS

1. This is an error of law hearing. The appellant is the Secretary of State and I shall refer to the respondents in this matter as "the claimants".

2. The claimants are husband and wife, citizens of Pakistan and their respective dates of birth are 4 February 1988 and 8 April 1986. On 11th September 2012 the first claimant applied for leave outside of the rules with the second claimant as his dependent.
3. In a decision and reasons before First-tier Tribunal (Judge Eames) (FtT) promulgated on 19 March 2015 the second claimant's appeal was allowed on immigration grounds under paragraph 276ADE(1)(vi) and both appeals were allowed on Article 8 grounds outside the Rules. No issue has been taken on the decision that Article 3 ECHR did not apply.
4. In a lengthy, detailed and considered determination the FtT considered family and private life under the Immigration Rules at Appendix FM and paragraph 276ADE and outside of the Rules under Article 8. Both claimants entered the UK separately as students on different dates; the first claimant arrived in 2005 with valid leave until September 2009 and thereafter his application for further leave was refused. The second claimant arrived in 2011 also with a student visa valid until August 2014 and her leave was curtailed on 11 May 2012. The couple intended to celebrate a traditional Islamic marriage shortly after the second claimant's arrival. In the event they cohabited for a short period. Then the second claimant was admitted to hospital on 9 May 2011 with a headache and following a sudden deterioration in her health she suffered irreversible brain damage from tuberculosis and is in a comatose vegetative state. She now resides in a nursing home where she has highly restricted power of movement, is bed bound and cannot swallow and the prognosis is poor, there being no likely change in her current condition. It was accepted that the parties had only lived together in a relationship akin to marriage for one month prior to the illness.
5. At [31-32] the FtT set out facts relating to the immigration history, relationship, marriage and medical situation. The second claimant's care needs were listed at [32e] and the FtT found that she required 24-hour care and supervision, was immobile and needed the assistance of two people for all transfers, repositioning and all activities of daily living, was at risk of chest infections and aspiration and had no distinguishable communication, was unable to maintain her own safe environment and was extremely vulnerable. It was accepted that the brain damage was irreversible.
6. At (32J) the FtT found that the claimant's health care arrangements were being funded by the NHS and the cost was some £913 per week.
7. At (32K) the FtT accepted that the cost of an air ambulance from the UK to Islamabad was in the region of £103,000 and found that it would be technically possible for the claimant to travel to Pakistan with medical assistance as indicated in a GP report by Dr Shah. The FtT further found having regard to the claimant's care needs and the first claimant's evidence, that travel to Pakistan would entail considerable pain, indignity, distress and difficulty.

8. At [32I] the FtT found that the second claimant had commenced a medical negligence case against health care providers and that the likely timeline for completion would be two to three years and that the second claimant's presence was likely to be required.
9. At [32M] the FtT found that in the light of the prognosis there were fairly fine differences in the quality of care as between the UK and Pakistan and as such this would not make any difference to her life expectancy.
10. At [32N] the FtT found that the claimants cohabited following a religious ceremony for a number of weeks after the second claimant's arrival. The first claimant had since regularly and consistently attended to and visited his wife, showing commitment to her.
11. At [33] the FtT considered private life under paragraph 276ADE(vi). Reference was made to **Ogundimu (Article 8 - new Rules) Nigeria [2013] UKUT 60 IAC** and emphasis was placed on the word "ties" as involving a connection to life in the home country and involving a rounded assessment not limited to social, cultural and family ties.
12. At [42] onwards the FtT found a strong emotional family link with the second claimant's parents living in Pakistan. At [47] the FtT found the second claimant had no ties in Pakistan in light of "the exceptional fact of her calamitous medical history puts the analysis of ties under a very different spotlight than normal. It did not just weaken her ties to Pakistan; it effectively guillotined them."
13. At [48] the FtT considered Article 8 private life and found family life with the first claimant. The FtT set out the factors weighing in favour of the second claimant and the public interest factors [54-55].
14. The FtT considered **Akhalu (Health claim: ECHR Article 8) [2013] UKUT 00400 IAC** and referred to aspects of the judgment in **JA (Ivory Coast) ES (Tanzania) v SSHD [2009] EWCA Civ 1353** considering the proportionality balance to be carried out in respect of Article 8 claims in health cases where the public interest arguments include the cost of providing health care treatment [54/55]. The court in **JA** identified the existence of an obligation to weigh the moral duty to help others in need and the fact that the UK has found it morally compelling and economically possible until recently to extend such help without detriment to the settled population.
15. The FtT found the case was exceptional and engaged the moral duty identified in **JA** [60]. It found there would be a significant interference with the second claimant's physical integrity in the act of moving her to Pakistan. The high cost to the UK was mitigated by the fact the NHS decided to provide her with treatment and there was the possibility of a successful medical negligence claim. Her condition arose whilst in the UK lawfully and the fact of her remaining in the UK unlawfully was "unavoidable". The FtT considered that the effect of Section 117B(4) and (5) was diminished. The FtT found, despite her condition, a level of private life that was

“very robust” in that there was a network of care provided by the NHS and of love and attention provided by her husband.

16. The FtT found family life for the first claimant that was exceptionally strong. The claimant spoke English, was self-supporting and the marriage entered into when he was lawfully present in the UK.

Grounds of Application

Ground 1

17. The Secretary of State contends that the FtT made perverse findings to the degree that they were irrational. The decision that the second claimant satisfied paragraph 276ADE was an error. The FtT misdirected itself in finding the appellant had no ties in Pakistan by virtue of her vegetative state. The FtT adopted the role of medical expert. It cannot be presumed that the claimant has no elements of awareness at all such that her ties to Pakistan are severed.
18. Alternatively, the findings were irrational given the claimant’s condition, her integration into UK society ceased at the point of her illness together with any enjoyment of private life.
19. Further, perversity occurred to the extent that the FtT found an exceptionally strong family life with the first claimant yet no ties in Pakistan due to her vegetative state.

Ground 2

20. The FtT erred in its proportionality assessment under Article 8 ECHR. It made a factual error as to the length of residence in the UK and inappropriate weight was attached to that period of time.

Ground 3

21. The FtT erred in allowing the second claimant’s appeal on the basis of her Article 8 private life by way of a material misdirection of law. The FtT failed to have regard to the precarious nature of the second claimant’s status and gave insufficient weight to the effects of Section 117B(4) and (5) 2002 Act as amended. The FtT concluded that the continued illegal stay in the UK of the second claimant was unavoidable. Private life accrued while present in the UK with precarious immigration status should be awarded little weight in the overall proportionality assessment. The cost of NHS care was a weighty consideration in light of the finding that the quality of the care as between the UK and Pakistan would make no difference to her life expectancy. The FtT failed to follow the correct approach in **N v Secretary of State** and **Akhalu**. The public interest ought to have outweighed the appellant’s rights to private life.

Ground 4

22. The FtT failed to give adequate reasons for finding that the appellant would suffer acute interference with her integrity due to the process of removal to Pakistan. The

finding contradicted the claimants' medical evidence. Removal was possible with appropriate medical evidence which the Secretary of State agreed to provide and to fund.

23. The errors made by the FtT in respect of the second claimant were relied on as errors the decision made for the first claimant's.

Permission to Appeal

24. Permission to appeal was granted by First-tier Tribunal Judge Foudy on 22 May 2015, who stated that it was arguable that the FtT failed to attach sufficient weight to public interest factors in allowing the appeal.

Claimants' Skeleton Argument

25. Mr Sharma produced a skeleton argument submitting that the Secretary of State's complaints amount to a disagreement with the FtT's findings and were limited to challenges to factual findings rather than misdirection in law. Reliance was placed on **SSHD v AH (Sudan) and Others [2007] UKHL 49, MA (Somalia) v SSHD [2010] UKSC 49** (paras 44 & 45) and **Shizad (Sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 IAC, Budhathoki (Reasons for decisions) [2014] UKUT 341 IAC**.

Error of Law Hearing

Submissions

26. Mr Tarlow relied on the detailed grounds of appeal, expanded on the same and relied **Akhalu** (cited above). Mr Sharma made a preliminary submission that the grant of permission was limited to ground 3 as regards public interest factors.
27. Mr Sharma argued that there was no perversity in the two findings made namely that the second claimant had no ties in the UK and the finding of a strong family life. The FtT gave cogent reasons as to why her ties were meaningless. The family relationship was found for the first appellant and was only relevant to the second claimant in that context. The second claimant did not need to establish strong family life given the conclusion reached by the Tribunal under paragraph 276ADE.
28. As to ground 2 Mr Sharma accepted that the FtT referred to a period of residence in the UK that was inaccurate and incorrect. This was not a material error as the FtT's decision was not based on the length of residence but on cumulative factors.
29. Mr Sharma submitted that ground 3, focussing on Section 117B, was the only ground on which permission was given. The Tribunal had carried out a detailed consideration of public interest factors and made a rational decision in concluding that the public interest was outweighed by exceptional and compassionate circumstances.
30. As to ground 4 Mr Sharma submitted that this was a disagreement on the evidence. The FtT considered the evidence of Dr Shah, Professor Ormorod and the first

claimant's in making findings that were sustainable to support the conclusion that the second claimant would suffer acute interference by the process of removal.

Discussion and Decision

31. I am satisfied that all four grounds of appeal are made out such that the approach adopted by the FtT was flawed and amounts to a material error of law. I reject Mr Sharma's submission that the permitting Judge only granted leave in respect of the third ground, no such limitation was made.
32. I consider first the decision under paragraph 276ADE. The FtT proceeded correctly on the basis that this was not a "medical case". It was common ground that in Pakistan the second claimant would have medical care together with the support of her family, the support of the first claimant and that there would be no foreseeably adverse consequences to her health, life or prognosis as compared with the UK. The FtT followed **Ogundimu** to the extent that it emphasised the need for real and meaningful ties in the home country. The FtT found "no meaningful ties" in Pakistan because the second Claimant was, by reason of her vegetative state, incapable of having real ties or connections. I am satisfied that this approach amounts to a misdirection in law. The FtT failed to consider "ties" in the context of what ties there are and would they provide support for the claimant (**YM(Uganda) SSHD C5/2013/1864**). In other words whether there is any continued connection with life such that the second claimant would be supported on return, notwithstanding her vegetative state. The FtT considered the ties only from the Claimant's subjective perspective. It is manifestly clear on the evidence that the Claimant has family ties and connections in Pakistan where she lived for the majority of her life and where she would be supported. The FtT failed to make a rounded assessment of the familial, social and cultural ties and connections in light of her condition and more importantly the level of support available to her. Furthermore it was perverse for the FtT to discount "ties" by reason her vegetative state but yet to find that there was family life in the UK with the first claimant.
33. Ground 2 is also made out. It was common ground that the FtT made a factual error as to the length of residence which was in fact 2 years rather than 9 years. The length of residence was material as it was taken into account in the assessment of proportionality.
34. I consider the Article 8 private life outside of the rules and the contention under ground 4 that inadequate reasons were given. As stated above the FtT clearly found that this was not a "medical" case. The FtT [32m] found that the quality, availability and level of care in the UK and in Pakistan would make no difference to the claimant's prognosis, life or life expectancy following to **Akhalu** (45). The focal issue for the FtT was whether or not the actual removal of the second claimant to Pakistan amounted to a disproportionate in interference with her private life in terms of personal integrity. The question is whether removal has sufficiently adverse effect on the second claimant and a direct bearing on the prognosis. The FtT also considered

that the UK was under a moral duty to help others in need. It cannot be argued that the FtT did not conduct a balancing exercise of the competing factors. But where it erred was in reaching a finding and giving reasons in support that there would be a significant interference with private life, that was not sustainable on the evidence. The FtT imposed its own view in the absence of any expert medical evidence to counter the GP's opinion that the second claimant could be removed with the assistance of a medical team. The evidence as to her continuing care needs on a daily basis can be presumed to have been taken into account by her GP. I consider that the FtT failed to place weight on the clear and unambiguous report of Dr Shah and wrongly relied on the evidence from the first claimant that the journey would involve pain and indignity (32K) (absent any medical evidence). The fact that the NHS assumed responsibility for the care of the Claimant is a neutral factor, but the indefinite cost of care is a relevant factor in considering the public interest. The FtT clearly accepted the medical evidence as to the claimant's vegetative state and there was simply no evidence to show that an acute interference with her moral or personal integrity would arise from a medically assisted removal. Accordingly the approach adopted by the FtT in purporting to follow **JA** as regards the moral duty upon the UK to provide care for others, is in my view flawed. The FtT made no clear or specific findings of fact as to the nature and effect of the removal on the Claimant in terms of any decline or suffering. For those reasons and the very considerable cost to the UK, I am satisfied that the FtT erred in finding that the individuals interests outweighed the strong public interest factors. Added to which there was no evidence that family or private life for the first claimant could not be continued in Pakistan and the failure to properly consider section 117(4) and (5). Whilst it was unavoidable that the claimant became ill, the FtT ought to have taken into account the immigration history of both parties and its precarious nature. There was no proper consideration of the fact that both claimants entered as students, for temporary purposes, the first claimant was unlawfully in the UK since May 2010.

35. Although the FtT regarded medical negligence proceedings as a lesser factor, the need for the second Claimant's continued presence in the UK was not established in evidence before the FtT. There was no evidence from her solicitors to that effect. Furthermore there was full and detailed expert evidence of her care needs now and in future. There was no evidential basis for the findings that the second claimant's presence was likely to be required for the purposes of pursuing her medical negligence claim.
36. As regards the first claimant's family life, I find that the FtT erred by failing to follow the **Razgar** stages. The FtT gave no reasons for finding that there would be either interference or a disproportionate interference in the first claimant's family life. There was no consideration of the fact that both claimants entered as students, for temporary purposes, the first claimant was unlawfully in the UK since May 2010 and the second claimant ceased to be able to study because of her illness from 2011 and her leave expired, but she had no further leave granted. There was no evidence that the first claimant would not be able to return to Pakistan where he could continue to enjoy family life with his wife. There was no evidence to show any

reason why the first claimant's family life or indeed private life had to be in the UK rather than Pakistan.

37. I find material errors of law in the decision and reasons which shall be set aside.

Remaking decision

38. In remaking the decision I have regard to all the evidence before the FtT and in particular the agreed facts as presented in the decision and reasons. I see no argument for any further arguments or hearing in this Tribunal as the matters have been fully argued. I conclude that the appeals of both claimants stand to be dismissed on immigration and human rights grounds.

Notice of Decision

39. The Secretary of State's appeal is allowed.

The appeals of the first and second claimant are dismissed on immigration and human rights grounds.

No anonymity direction is made.

Signed

Date 12.8.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 12.8.2015

Deputy Upper Tribunal Judge G A Black