Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/32335/2014
IA/32337/2014
IA/32341/2014
IA/32343/2014

THE IMMIGRATION ACTS

Heard in the Upper Tribunal at Taylor House	**Decision & Reasons Promulgated**
On 12th October 2015	**On 3rd December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

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~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: None
For the Respondents: Mr Norton, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Pakistan, the first appellant being the mother born on 21 March 1972 and the three other appellants are her sons and dependants, born on 13 May 2011, 22 February 2005 and 21

April 2002 respectively. They are now aged 4 years, 10 years and 13 years old.

2. The first appellant arrived in the UK on a visit visa with her two older children on about 10 August 2008. She stated her husband was in Pakistan and she claimed asylum which was refused. Her appeal against that decision was dismissed on 24 March 2009 by Designated Judge Shaerf and her appeal rights were exhausted in April 2009. Her third son was born in the United Kingdom in 2011. She claims her husband is not the father.

3. On 18 June 2014 the first appellant made an application for leave to remain and this was refused on 21 July 2014 on the basis that there was "nothing remotely exceptional" in the circumstances of the family that would justify a grant of leave outside the Rules.

4. The matter came before First-tier Tribunal Judge Eldridge on 12 December 2014 and he allowed the appeals on human rights grounds on 30 December 2014.

5. At paragraph 42 of the decision he wrote:

> "42. Almost all factors of public interest are very strong. I find, however, that I cannot conclude as the Respondent did that there is 'nothing remotely exceptional' in the circumstances of these Appellants. The Appellants represent a strong set of factors which taken together are unusually difficult. No one of them may be determinative but aggregating the mother's health, the likely impact of her health on the children, their best interests and the unprotected status of all of them in Pakistan leads me to conclude that, on balance, the very strong public interest is outweighed by the private interests of these four Appellants. I do not ignore the poor immigration history of the mother. I have considered carefully all the provisions of s.117B of the 2002 Act. Nevertheless, I conclude that the decisions taken in respect of each was disproportionate. The circumstances of the Appellants are compelling and are not encompassed within the Rules."

6. An application for permission to appeal was made by the respondent on the basis that the judge set out all the factors with respect to Section 117B, particularly that the appellant did not speak English, was not financially independent and her private life was accrued at a time when she had been here unlawfully. The judge then proceeded to place significant weight on the appellant's private life and that of her children to conclude that removal would be a disproportionate breach of their Article 8 rights. It was submitted that the judge failed to give adequate reasons for then failing to place little weight on the appellants' private life.

7. It was submitted that the correct question when considering Article 8 applications outside the Rules was whether or not there were exceptional

circumstances which would result in unjustifiably harsh consequences for the appellant and her sons in removing them to Pakistan.

8. At "40" the judge speculated as to the availability of treatment in Pakistan and this error was compounded by the acknowledgment of a lack of prognosis in the UK. In placing great weight on the mother's health whilst failing to acknowledge that she is taking NHS treatment, to which she was not entitled, and which, effectively, was a burden on the taxpayer the judge erred in concluding in favour of the appellant when all the factors were considered and without adequately explaining why the public interest factor was outweighed.

9. An error of law was found on the basis that the judge erred in failing to give adequate reasons, having found the public interest factors to be very strong, as to why they were outweighed by the private life of the appellants. There was no prognosis of the appellant's condition and the finding was based in part on speculation as to the availability of medical treatment in Pakistan. Further to **SS (Congo) v SSHD [2015] EWCA Civ 317,** it was important to first identify the relevant Immigration Rule and secondly whether there were circumstances which took the matter outside Article 8 and then thirdly balance the relevant factors.

10. The appellants only put their case on the basis of private life and the judge at paragraph 40 had made speculative findings about treatment in Pakistan and failed to engage with the balancing exercise. The judge had not identified that Judge Shaerf had previously found the appellant not credible as to her circumstances. The matter was adjourned for a resumed hearing before the Upper Tribunal and for evidence to be submitted on the matter of the paternity of the youngest child.

Conclusions

11. The appellant was aware of the date time and venue of the hearing and did not attend. I considered whether to adjourn the matter but as she submitted a statement without giving any reason for her failure to attend, and specifically she did not claim any illness, I concluded that the matter, in accordance with the overriding objective should proceed. There was no indication that the appellant would appear on any further occasion. She submitted that it was prejudicial to her interests to have the matter returned to the First tier Tribunal before the same judge. In fact the matter was being heard in the Upper Tribunal and the matter had been adjourned to allow the appellant produce further evidence which she chose not to do.

12. The starting point for this decision in accordance with **Devaseelen [2002] UKIAT 00702**, is the decision of Designated Judge Shaerf who found, in response the asylum and human rights claim of the appellant in 2009, that the appellant was neither credible nor reliable about core aspects of her account, namely domestic violence from her husband which

drove her to the United Kingdom. The appellant herself claimed that her husband frequently travelled to the UK on business or to visit family. In 2008 her husband obtained entry clearance for her to come to the UK but would not pay for her air fare. She then travelled to the UK in 2009 but then claimed she had an adulterous relationship with someone named A and she could not return to Pakistan because her husband would kill her. Her parents were deceased and she had no siblings but she had cousins in Lahore. In essence she would return as a single mother.

13. Judge Shaerf dismissed the appellant's appeal on 24th March 2009. He did not accept that

> "... the Appellant's husband would concur in and indeed be present when the appellant sold her wedding jewellery in order to fund her travel to the United Kingdom. Given that the appellant's husband and A are, according to the appellant, in touch with each other and A knows where the appellant is living in the United Kingdom, I do not find it plausible the appellant's husband has made no efforts which have come to the attention of the appellant to find out how his two sons are or to seek their return to his family home in Pakistan."

14. Judge Shaerf found on the one hand the husband would not allow her to leave home but on the other hand obtained entry clearance for her. Her claim with that of her then two children was dismissed on asylum and human rights grounds. That decision was not successfully challenged.

15. At the error of law hearing following Judge Eldridge's decision, the question was raised as to the legitimacy or otherwise of the last child of the appellant and it was confirmed that the Secretary of State did not accept the illegitimacy of the child or the findings in relation to that child. At this point Mr Wells submitted that the appellant wished to submit evidence on this point because of the protection issue which was a relevant factor in the Article 8 balancing exercise. The last child has two siblings who were fathered by the husband and evidence as to the degree of his relationship to his brothers could be discerned.

16. The Error of Law decision retained the findings of Judge Eldridge at paragraphs [27], [28], [30], [31], [34] and [36].

17. At [27] and [28] Judge Eldridge stated

> "27. In my judgment the respondent has addressed the issues raised on behalf of the applicants and given comprehensible reasons for reaching the conclusion she did. There has been no failure of process although whether she has reached the correct decisions is another matter and forms the crux of these four appeals'.
>
> 28. As I understand the position the appellants do not rely on their family life. As the proposal is to remove them together this is understandable. The family is not divided by the decision. The unit remains the same four as now with no father for the third child being identified and the father of the other two being in Pakistan. "

18. It was specifically the contention of the respondent at the error of law stage that the illegitimacy of the third child was not accepted. Despite a specific request to submit DNA evidence no evidence within the intervening period of the third child's paternity was produced.

19. I note the finding at [27] but would add to it that I do not accept because of the overall factors as they stood by the date of the hearing before me, that the father of the third child is unidentified. I do not accept that she is a single mother and I find that her husband is the father of the last child. This is on the basis that the appellant was disbelieved as to the core of her account, specifically that she left Pakistan because of domestic abuse and that she gave evidence in 2009 that her husband made frequent trips to the UK to visit family and on business. She gave no indication that he had made overtures to harass her in the UK and Judge Shaerf found it unbelievable that the father would make no attempt to see his sons in the UK. There was no evidence of any divorce or attempted divorce on either side. In passing, I also note that all of her children have the name of N which would appear to be unrelated to her own name.

20. At [30], [31], [34] and [36] Judge Eldridge wrote

> "[30]None of the children can successfully seek to remain under the Rules as a child in respect of family life. Their mother does not meet the relationship requirements –E.LTRC.1.6. Again, the financial requirements cannot be met either. Section EX cannot be engaged in respect of the appellant – her children have not resided here long enough'.
>
> [31] They also cannot succeed in respect of their private lives under paragraph 276ADE, the appellant has been here for about 6 years and does not meet the residence requirement. In this regard she plainly retains ties to Pakistan. This may not be in the form of useful family members but she lived in the country until she was aged 36 –that is 6/7ths of her life. She speaks Urdu and used that language at the hearing. She must be taken to be fully aware culturally of life in Pakistan. The three persons who wrote to support her may well share her own cultural background, although all are British citizens. None of the children qualifies under the Paragraph on the same as Appendix FM – the basis lack of 7 years' residence in this country'.
>
> [34] On the other hand the decision is certainly lawful [that of the Secretary of State] (subject of course to the resolution of this ground of appeal). The appellants cannot meet the requirements of the Rules for leave to remain and those Rules are justified in support of a legitimate aim – effective immigration control, not least to safeguard the economic interests of the country. The respondent has discharged the burden upon her.'
>
> [36] S.117B sets out a number of factors I must in particular have regard to S. 117B(1) establishes that maintenance of effective immigration control is in the interests of justice. Later provisions state that speaking English is in the public interest. It is undoubtedly true that the two older boys do but there is no evidence to show the appellant has any noticeable command of English. Financial independence is in the public interest and this family is not independent financially. Above all, however, I am to give little weight to private life established whilst any appellant has been here unlawfully. All of

> these four appellants have been here unlawfully – the youngest for the period since birth and the others for nearly all of the last six and half years. These are very strong factors in favour of removal."

21. Having preserved the findings of the First-tier Tribunal Judge, who found the appellants could not succeed under the Immigration rules (Appendix FM or Paragraph 276ADE and I note for clarity that the two older children had not been in the UK for seven years prior to their application in 2014 as they entered the UK in 2008), there are two essential questions which have not been considered within the Immigration Rules that of whether this is a single woman being returned to Pakistan with an illegitimate child and the best interests of the children. I have made a clear finding that I do not consider that the appellant is a single woman returning alone to Pakistan or that she is the mother of an illegitimate child. I am not persuaded that there are any compelling reasons to consider these matters outside the rules on those bases.

22. However the health of the mother was raised as a compelling factor and further to **Singh v SSHD [2015] EWCA Civ** it is important that all relevant matters be considered for Article 8 purposes. If the matter were to be considered outside the rules and in accordance with the five stage test in **Razgar v SSHD [2004] UKHL 27** there is no doubt that the appellant and moreover her children have established a private life. There is no finding of any family life in the United Kingdom. The threshold for the interference is low **AG (Eritrea) [2007] EWCA Civ 801** and would be reached by their removal. It has been found above that the decisions are in accordance with the law and necessary for the rights and freedoms of others.

23. When approaching the proportionality of the decision I must consider the welfare of the children in accordance with Section 55 of the Borders Citizenship and Immigration Act 2009. **ZH (Tanzania) v SSHD [2010] EWCA Civ 207** identifies that the best interests of the children must be established first and **Zoumbas [2013] UKSC 74** sets out that the best interests is an integral part of the proportionality assessment and they are a primary consideration but not paramount and can be outweighed by other factors. It is important to ask what are those interests prior to asking whether they are outweighed.

24. **Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)** established the following;

> (1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:
>
> > i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should

dependent children who form part of their household unless there are reasons to the contrary.

ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.

25. The children are now aged 13 years, 10 years and 4 years old. The eldest entered the UK in 2008 and has been at school here for 7 years. He was not born in the United Kingdom and as he came here at the age of 6 years, I find he must have been schooled in Pakistan and have knowledge of the language. At 13 years he will have entered secondary school but is not yet in the formal part of his education such as the public examination preparation. I find that as his mother speaks Urdu and there was no indication she could speak English that it is likely that he and his siblings can also speak Urdu and there would not be a linguistic barrier on their return. The second child was also born and has lived albeit as a very young child in Pakistan and came here when he was approximately three years old. He too has now been in the UK for approximately seven years. He is in primary school and has not yet entered secondary school. Both children can speak English. I note that they have been here for seven years and **Azimi-Moayed** stresses the importance of the seven years post the age of four. It is clear that these children, save for the youngest have been here for that length of time and during a developmental stage of their lives. I also take into account that they are doing well at school. That will stand them in good stead.

26. The best interests of the children, however, at their young age are to remain with their parents. I can accept that educational stability is important but there is no reason why they could not adapt. The best interests for these children are to remain in education, which they can do on their return in their own country. I do not, and nor did Judge Shaerf whose decision remains unchallenged, accept the evidence of the appellant with regard her circumstances and it is in the best interests of

these children to remain with both their parents. The father is said to be in Pakistan for most of the time. The social and cultural norms for the children are no doubt influenced by the mother who has lived for most of her life in Pakistan. I do not accept that they do not have contact with their father. The youngest child will of course be mostly dependent upon his mother. There is no indication that there is no education system in Pakistan to which the children might avail themselves. The children are Pakistan nationals and they will be deprived of much contact with their father and their own culture should they remain in the United Kingdom. The siblings are Pakistan nationals.

27. The school reports provided indicated no health issues for the children or special educational needs. Indeed the school reports, were positive with regards social interaction, such that the children would not appear to have difficulties in re-integrating in new schools and adapting to society in Pakistan. It is not the case that the children would be required to learn a second language as there was evidence given that Urdu was spoken at home. Indeed the mother needed an interpreter as her English was poor. I do not accept that she does not speak Urdu to the children at home.

28. I turn to the health of the mother which was another factor to be taken into account. **GS (India) and Others v SSHD [2015] EWCA Civ 40** held that foreign nationals may be removed from the United Kingdom even where, by reason of a lack of adequate healthcare in the destination state, their lives will be drastically shortened. I have noted **Akhalu (health claim: ECHR Article 8) Nigeria [2013] UKUT 00400 (IAC)** and taken the circumstances of the first appellant into account.

29. The appellant has had the misfortune to have had breast cancer but this has been treated extensively on the NHS and there was no current report to indicate that it is not in remission or that there are now on-going significant issues with her health. There was no evidence that the appellant would not be able to obtain treatment in Pakistan. Indeed the Secretary of State cited the Country of Origin Information Report Pakistan 2014, which confirmed that there was cancer care offering modern treatment and techniques. The standard may be reduced compared with that in the United Kingdom but medical care for breast cancer is available. The last letter on file dated 30th April 2014 regarding her breast cancer care dated from over one year ago and refers to a 'Breast Care Follow Up' from St Barts Hospital. There was no indication that this complaint had resurfaced and no up to date report.

30. The appellant also claimed that she had mental health issues. The evidence of 28th May 2014 indicated that she had been offered appointments for counselling which she did not attend and I note that she is able to ensure that all 3 of her children attend school or nursery school. There was no up to date specialist evidence to indicate that the appellant suffered with significant mental health issues. The latest evidence was

that of the GP in December 2014 who asserted that she had severe depression but I note that she was only taking a very low dose of antidepressants and it did not appear from the current evidence that she was receiving specialist care albeit she was said to have been referred to Newham Psychological Services. No up to date report was presented. The Country of Origin Information Report confirms that there is also treatment available for mental health issues although this may need to be self funded. This however does not indicate that it is not available. I do not find the appellant's mental or physical health of such significance that it would prevent her removal or care for her children. To date she has been able to care for them and get them to school. The attendance rate of the children at school was very high. I do not accept this would be possible for such young children if the mother's mental health was significantly affected.

31. The appellants are all Pakistan nationals and have all been in the UK unlawfully. As indicated above the first appellant has availed herself of extensive treatment on the NHS and the children have been state educated. The mother has known since at least the determination of Judge Shaerf in 2009 that she has no right to remain and that her children have no right to remain in the United Kingdom. **Zoumbas** confirms that the children should not be blamed for the parent's conduct but there are no significant obstacles to the appellants' return.

32. I re-emphasise one further point. In her evidence before Judge Shaerf she claimed her husband visited the UK on a regular basis. If, as she stated, she had left her husband and he was abusive, and that her husband had ready access to the United Kingdom, Judge Shaerf did not accept that he would not have made strenuous efforts to find and contact his children. I agree. Indeed it was the husband who was said to have assisted in making the arrangements for her travel. In all the circumstances I find that it is more than likely she remains in contact with the husband. In other words I do not accept that she will be returning alone as a single mother with an illegitimate child.

33. **EV (Philippines) [2014] EWCA Civ 874** demonstrates that any further Article 8 analysis would not assist the appellants. As stated by LJ Lewison at [60]

> "In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

34. Although mentioned above in the findings of Judge Eldridge I have taken into account Section 117B of the Nationality Immigration and Asylum Act 2002 when assessing the weight to be accorded to the public interest and the proportionality of the Secretary of State's decision as follows:

> 'Section 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to -
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.'

35. The appellant had interpreters, at court and thus I find she has not shown that she can speak English to a standard to integrate. There was no indication that she had been paying any tax. It was the case that all the children were at maintained school or nursery school and it would appear

that the family are accessing care from the NHS. Thus, although the two older children can no doubt speak English, I conclude that the family are a burden on the tax payer. At all times the appellant has remained in the United Kingdom unlawfully and I do give little weight to the private life of the appellants bearing in mind they have all been here unlawfully. I take these factors into account.

36. Section 117B(6) specifically states

> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, **and**
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

37. I have explored the reasonability of whether the children should be expected to return to Pakistan and found that it is reasonable for all of them, including the eldest to do so for the reasons outlined and despite the length of time they have spent in the United Kingdom.

38. The question I must ask in relation to Article 8 is most succinctly set out in **Huang v SSHD [2007] UKHL 11**

> "In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality."

39. I do not accept that there would be significant difficulties in the appellant's return. The appellant cannot have had any expectation of being able to remain in the United Kingdom. She was given an unfavourable decision in 2009 by DJ Shaerf and yet she failed to return to Pakistan and proceeded to have another child here. I can accept that the children are not to blame for the actions of the parent but the mother has had ample time to prepare the children for their return. Having been found not credible as long ago as 2009, and, until the most recent decision, which was promptly challenged by the Home Office, she cannot have had an expectation of remaining here. She has a poor immigration history and this I take into account. That is not in the control of the children. This decision specifically focussed on the interests of the children and an assessment of the reasonableness of their return and, in the

circumstances, I find that the decision of the Secretary of State was a lawful and proportionate decision.

Notice of Decision

The appeals are dismissed under the Immigration Rules and on Human Rights grounds.

Signed Date 24th November 2015

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal there are no fee orders.

Signed Date 24th November 2015

Deputy Upper Tribunal Judge Rimington