



IAC-TH-LW-V2

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

Appeal Number: IA/39005/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3 August 2015**

**Decision & Reasons Promulgated
On 10 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

**MISS SABBYHA KHANAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Shaw

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant's appeal against a decision to remove her to Pakistan was dismissed by a Judge of the First-tier Tribunal in a decision promulgated on 30 January 2015. That decision was set aside by the Upper Tribunal in a decision made on 28 May 2015, on the basis that it contained an error of law.
2. The appellant's case was advanced on the basis that her removal to Pakistan would breach her human rights, in the light of family ties established here and the absence

of family life in Pakistan. Permission to appeal against the decision of the First-tier Tribunal was sought on the basis that there was no finding regarding Regulation 7(1)(c) of the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”), the evidence which emerged having in effect required the judge to take into account community law in the assessment of the proportionality of the removal decision.

3. In the remaking of the decision, the appellant relied upon the bundle of documents prepared in January 2015 for the First-tier Tribunal hearing, including witness statements made by her and by her son and his wife, a Dutch national. Ms Shaw handed up country information and guidance on the position of women in Pakistan, in the particular context of the ability of single women to live alone there. Mr Tufan handed up a copy of the decision of the Upper Tribunal in Jaff [2012] UKUT 396 and a short note indicating that the Secretary of State's appeal has been allowed in Lim, case number C5/13/3184, although the judgment of the Court of Appeal has not yet entered the public domain.
4. There is no need to rehearse the detail of the appellant's case. She arrived here as a visitor in July 2006 and has remained since then. As noted above, her case was advanced on the basis that she has substantial family and private life ties in the United Kingdom and that Article 8 of the Human Rights Convention is engaged. The Secretary of State found that the requirements of the Immigration Rules were not met.
5. In the usual way, the Secretary of State served a notice under section 120 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) in form IS.76. This required a response by 30 April 2014. Seven days before the deadline, the appellant's solicitors provided a Statement of Additional Grounds which appears at page 52 of the appellant's bundle. The second paragraph of the statement is of great importance in this appeal, as will become clear. It was relied upon by Ms Shaw as showing that the appellant was entitled to rely on the 2006 Regulations, even though she had not applied for leave on this basis, as paragraph 2 of the Statement of Additional Grounds met the minimum requirements identified in Jaff. Mr Tufan argued that paragraph 2 did not meet those requirements and was insufficient, the appellant being left with the availability of a further application expressly made under the 2006 Regulations, should she wish to assert a right to remain on this basis.

The Evidence

6. Having arrived here in 2006 as a visitor, the appellant has remained since then in premises at 225 [-], Slough, owned by her daughter and son-in-law. She has four grandchildren who were at a young age when she arrived. These close relatives are British citizens. Also forming part of the household are her son Omer and his Dutch national wife, Ms Hena Syed. Ms Syed has been present in the United Kingdom exercising treaty rights since 2009. It is not entirely clear when the appellant's son and daughter-in-law moved into the premises but the presence of Ms Syed as an EEA national was first drawn to the respondent's attention, through Capita, in October

2013 in a “current circumstances pro-forma” sent on that date and it is not in dispute that the couple have remained in the household since they joined it.

7. The appellant is not required to pay for her accommodation and she argued before the First-tier Tribunal and in the remaking of the decision that all of her needs are met by her children.
8. The appellant gave evidence and adopted the witness statement which appeared in her bundle. She is now 64 years of age and will be 65 in October. In cross-examination, she said that she came to the United Kingdom in 2006 to attend her cousin's child's wedding and to see her children. She decided to stay and has nobody in Pakistan. She has two sons and a daughter. Her daughter is here with her four children. Her eldest son lives in Ireland. Her younger son married in Holland and he and his Dutch wife live in Slough now. This son, Omer, applied for leave to enter in 2006 at the same time as the appellant but his application was refused. He married his Dutch wife and then came to the United Kingdom. The house the appellant lives in is owned by her daughter and son-in-law.
9. The appellant said that she is dependent upon her daughter and son-in-law and also her son and they all live together as a family. Her son-in-law owns a pizza restaurant, a takeaway establishment. Mr Tufan asked whether her son-in-law was in a position to take care of her and house her. The appellant replied that they live as a family and are very close.
10. Her son Omer has a security job in a court. His earnings are about £1,500 or £1,600 per month. Omer gives her £100 per month and her daughter also gives her £100. She spends the money on the children because she is provided with all her food and clothing by her children. Omer's wife works at weekends and in the evenings and she has training for a job at present. The appellant said that she is able to spend the money she is given on the children because she has no special needs. She is provided with everything.
11. Omer Aseef gave evidence. He adopted his witness statement and confirmed that he applied for leave at the same time as his mother, in 2006. He came to the United Kingdom subsequently, having won an appeal in 2012, on the basis of his marriage to Ms Syed. The house they live in is owned by his sister and his brother-in-law, who have a mortgage together. They all live together as a family and Omer pays bills, as does his wife. He works as a security officer at Maidenhead Magistrates' Court.
12. Bank statements and a letter regarding Omer's employment were produced, showing receipt of his wages from his employer, a company called Mitie, in June and July 2015 (the sums being £1,349 and £1,162 in those respective months). Omer said that his wife works in a pizza parlour, the restaurant being owned by his brother-in-law. She is part-time there and has also started a new part-time job as well. She is being trained at present. Mr Tufan asked whether she has been in the United Kingdom throughout. Omer replied that she has although she went to Holland for two days

for Eid, to be with her mother and then her mother, father, sister and the children came to the United Kingdom for a visit, before returning to Holland.

13. Mr Aseef said that he helped his mother make the application for leave to remain. Mr Tufan asked why the application was made only on an Article 8 basis and not on the basis of the 2006 Regulations. Mr Aseef replied that at the time, the family was advised that there might be a better chance if the case were based on his sister's British nationality. He said that his brother-in-law's business was successful. Mr Tufan asked whether the appellant could depend on Omer's brother-in-law, rather than on Omer himself and his wife. He replied that they managed as a family and it would not be fair if everything fell on his sister and brother-in-law.
14. In re-examination, in answer to a question from Ms Shaw regarding whether money might be sent back to Pakistan if his mother had to return there, Omer said that the appellant could not return. There were no family members there and things were dangerous for single ladies in Pakistan.
15. Ms Hena Syed then gave evidence. She too adopted her witness statement. She said that she is a Dutch national, working part-time at a pizza restaurant at weekends. She has also started another job, working two days a week, for a distribution company and is a receptionist there. She will be paid weekly. Her wages at the pizza parlour are paid weekly, directly into her bank account. She has a joint account with her husband and her wages appear there, as monthly credits of £520.
16. Mr Tufan asked whether and if so, precisely how the appellant is dependent upon Ms Syed. She replied that she takes care of her mother-in-law, taking her to the doctor and looking after her if she is ill. The appellant asks Ms Syed to do things, concerning groceries and things to wear. She asks for help when making things in the kitchen. She and her husband give the appellant £100, sometimes weekly or monthly. Her new job would pay her £250 to £300 per month. She was able to support her mother-in-law.
17. Ms Syed said that the house she lives in is owned by her sister-in-law and her brother-in-law. The pizza parlour is owned by her brother-in-law, her husband's brother. This makes good money but she does not know precisely how much. Mr Tufan asked what difference would be made if £100 were not given to the appellant by Ms Syed and her husband. Ms Syed replied that they gave her something for her pocket so that she is able to go out. Everything is provided to her and so she can spend the money on the children.

Submissions

18. Mr Tufan submitted that the appellant could not succeed under Appendix FM or paragraph 276ADE. The application she made for leave to remain was based on Article 8 of the Human Rights Convention. In the light of recent authorities, compelling circumstances are required to be shown before a freestanding Article 8 assessment is made. There were no such circumstances here. Much was made of the appellant's daughter-in-law's status as an EEA national but the recourse the

appellant had was to make a correct application under the 2006 Regulations. It was clear from Jaff that if EEA issues are not raised in response to a notice under section 120 of the 2002 Act, they cannot be considered in an appeal. In the present case, there was no express reliance on the 2006 Regulations, although paragraph 2 of the Statement of Additional Grounds made mention of a family member of an EEA national. This was not sufficient. In any event, there was no evidence of dependency meeting the requirements of the 2006 Regulations. So far as proportionality was concerned, the appellant had a remedy available and could make an application.

19. Even if the 2006 Regulations were required to be considered, the evidence did not show that the appellant was, in reality, dependent upon her son and daughter in law. The accommodation she occupied was owned by her son and daughter-in-law and they were the real earners. If the £100 claimed to be paid to the appellant by her son and daughter-in-law were taken out altogether, nothing would change in substance. The appellant's own evidence was that the money was spent on the children. It appeared that the Upper Tribunal decision in Lim had been overturned although the Court of Appeal's judgment was not in play yet.
20. Ms Shaw said that reliance was placed upon the evidence, including the documents in the appellant's bundle. Judgment had not yet been handed down in Lim. The appellant had all her close family here, including four grandchildren. She had played a role in their lives for nine years. Her daughter and son-in-law were both British citizens and her son and daughter in law were entitled to remain here under the 2006 Regulations. Her son in Ireland also had rights, as an EEA national. She had no husband. If she were to return, she would be a single woman in imperfect health, soon to be 65 years old, the point at which statistics suggested that life expectancy reduced substantially in Pakistan. The country guidance on single women showed that it was next to impossible for them to live alone. All of this amounted to compelling reasons, requiring an Article 8 assessment outside the rules. If the appellant were to return, with the benefit of funds sent to her thereafter, this would make her even more vulnerable as she would become a target.
21. Even though she could not meet the requirements of Appendix FM, she could still put her case on the basis of paragraph 276ADE(1)(vi). If she returned to Pakistan, she might then be able to meet the dependent relative requirements of the rules but the principle identified in Chikwamba fell to be applied.
22. So far as dependency was concerned, the appellant was clearly funded by the whole family. The Secretary of State's IDIs made it clear that it does not matter if a claimant has income from another source, so long as there is dependence on an EEA national for essentials. The evidence was clear in this regard, the appellant relying upon her son and daughter-in-law for help with essential items. Ms Syed was an EEA national exercising treaty rights and the appellant fell within scope as the family member of her spouse, under Regulation 7(1)(c) of the 2006 Regulations. It was clear that dependency had been raised before the First-tier Tribunal, as paragraphs 10 and 17 of the decision showed, where the evidence adduced by and on behalf of the appellant was set out.

23. The appellant relied on Jaff. Paragraph 2 of the Statement of Additional Grounds showed that the case under the 2006 Regulations was set out in substance. The appellant was entitled to succeed on this basis as the removal decision would breach community law. Even if the Statement of Additional Grounds fell short of the requirements identified in Jaff, community law was still a factor in the proportionality assessment. It would be disproportionate to require the appellant to leave in order to apply on a community law basis, to return. So far as section 117B of the 2002 Act was concerned, there was no public interest of any real substance in the appellant's removal to Pakistan.

Findings and Conclusions

24. In this appeal, the burden lies with the appellant to prove the facts and matters she relies upon and the standard of proof is that of a balance of probabilities.
25. The first important issue to resolve is whether the appellant is entitled to rely on the 2006 Regulations, in her claim to fall within Regulation 7(1)(c) as a person to be treated as the family member of another person, within the category of "dependent direct relatives in his ascending line or that of his spouse ..." It is not in dispute that the appellant's daughter-in-law, Ms Syed, is an EEA national present here exercising treaty rights. The critical question, if she can rely on the 2006 Regulations, is whether the appellant is "dependent".
26. The 2006 Regulations did not feature in the application for leave to remain made by the appellant, which gave rise to the removal decision. However, the Secretary of State served a notice under section 120 of the 2002 Act and in response to that, the appellant provided a Statement of Additional Grounds through her solicitors. Paragraph 2 is, in summary, as follows:-
- "The applicant's entire family is residing in the UK. The family includes a daughter and her family as stated in the original application, son namely Mr Omer Aseef ... who has leave to remain in the UK as the family member of an EEA national who is exercising treaty rights in the UK. ... Furthermore the applicant's other son, namely Mr Ali Aseef Khan ... is also residing in the UK with his wife who is a British citizen. ... The applicant's children are providing necessary financial assistance and care, including residence, to her."
27. In order to rely upon the 2006 Regulations, the appellant must show that her statement sets out with some particularity the ground relied upon by her as a foundation for remaining in the United Kingdom and upon which reliance has not previously been placed. The additional ground must be "stated" in substance. Merely setting out evidence regarding a claimed relationship with someone, without any reference to her EEA status and a claimed right to reside will fall short, as is clear from paragraph 24 of the decision in Jaff.
28. Paragraph 2 of the Statement of Additional Grounds expressly refers to the appellant's son as the family member of an EEA national exercising treaty rights here. The appellant's other son, a British citizen, is also mentioned. Critical, in my judgement, is the final sentence of paragraph 2, where the appellant's "children",

which must include Mr Omer, are described as providing financial assistance, care and accommodation. I think this is just sufficient to set out a case in which dependency as a relative in the ascending line is stated. The essential components of Regulation 7(1)(c) of the 2006 Regulations are set out.

29. Mr Tufan was perfectly entitled to raise as an issue the absence of reliance upon the 2006 Regulations when the application for leave was made and he is absolutely right to say that an application may still be made. Nonetheless, I conclude that the 2006 Regulations may be relied upon in this appeal.
30. The evidence shows that a consistent case has been put by the appellant regarding dependency. She has no income of her own and no substantial resources. She has been provided with accommodation which is owned by her son and daughter-in-law. The evidence of the support given by the appellant's son Omer and his Dutch wife was substantially the same as given in the First-tier Tribunal. Although they arrived in the household only in about 2013, Omer and his wife both earn and make financial contributions to the overall costs of running the household. Ms Syed said, and I accept, that she helps her mother-in-law by caring for her, taking her to the doctor when necessary, helping her with groceries and day-to-day tasks, including preparing food in the kitchen. As she works part-time, she is in a position to provide this assistance. She and her husband contribute £100, usually per month, given to the appellant directly, a similar sum being given by the appellant's son and daughter-in-law.
31. The evidence shows, I find, that the household is jointly run, with all the earners making a contribution. Although it may very well be the case that the appellant's daughter and son-in-law earn more than Omer and his wife, the evidence does not show that they provide all the care that the appellant requires, or that the financial and practical assistance given by Omer and Ms Syed is negligible or of no real substance. The practical assistance Ms Syed provides is sufficient, as Ms Shaw submitted, to be described as support regarding the "essentials" of the appellant's life, including her health, sustenance and general day-to-day welfare.
32. The judgment of the Court of Appeal in Lim appears not to be available yet. There is no need to show that the appellant is "wholly" dependent upon her son and daughter-in-law. Moreover, as the evidence shows that the appellant has no independent means at all, her dependency is not appropriately described as one of choice. Overall, the evidence shows that the appellant can bring herself within Regulation 7(1)(c) of the 2006 Regulations and so the decision to remove her is unlawful in the light of community law.
33. There is no need to consider Article 8 of the Human Rights Convention separately in any detail but in the light of my finding that the appellant can rely upon community law, the weight to be given to the state's case that she should be removed to Pakistan is very substantially reduced. On the altogether artificial basis that community law is put to one side, the appellant cannot meet the requirements of the Immigration Rules in relation to Article 8 and the evidence falls far short of showing that her children

and close relatives would be unable to support her in Pakistan, to the extent that there would be no need for her to live alone. However, as the appellant has shown that she is a dependent direct relative in the ascending line of her daughter-in-law, the appeal is allowed.

DECISION: appeal allowed

ANONYMITY

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

TO THE RESPONDENT

FEE AWARD

As no fee has been paid or is payable, no fee award may be made.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell