Upper Tribunal
(Immigration and Asylum Chamber) PA/05400/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 18 July 2019

Decision & Reasons Promulgated
On 24 July 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Q

Respondent

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr K Forrest, Advocate, instructed by Maguire, Solicitors

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this decision refers to them as they were in the FtT.

2. The SSHD appeals against a decision by First-tier Tribunal Judge Kempton, promulgated on 27 November 2018, allowing the appellant's appeal "on asylum grounds and human rights grounds".

3. The SSHD's grounds are set out in the application dated and filed on 10 December 2018.

4. It is very difficult, or even impossible, to distinguish in the FtT's decision between the asylum or protection aspects of the case and the human rights aspects.

5. The protection element of the claim was that the appellant's brothers wanted the appellant to divorce his wife, due to her mental illness, and one brother threatened to kill her.

6. The judge does not say whether this allegation is established. At paragraph 23, she suspects it is a fabrication. At paragraph 33, for example, she mentions the allegation without resolving it.

7. The decision does not consider whether, if there is any such risk, legal sufficiency of protection is available in Pakistan.

8. There was nothing in the evidence by which it might realistically have been held that the risk, if there was one, extended more than locally; and Pakistan is a large and populous country.

9. The grounds at paragraph 9 say that internal relocation was not considered. I note a possible allusion at paragraph 34 of the decision, but if the case had reached that stage, what is said there would not construe into a finding of undue harshness.

10. Mr Forrest accepted that the decision did not make it clear why the appeal had succeeded on asylum grounds, and had nothing further to say on that aspect.

11. I indicated that the FtT decision on asylum was unsustainable, for the reasons above.

12. Mr Forrest submitted that the human rights case could be extricated and that part of the outcome should be preserved. The main points which I noted from him were these:

    (i) The judge correctly directed herself, at paragraph 9, on *Razgar*.

    (ii) There is family life among the appellant, his wife, and their two children, and their return involves interference not only with private life, but with that family life.

    (iii) Alternatively, this is a case where distinction between family and private life is immaterial.

    (iv) The judge correctly gave considerable significance to three factors: the mental health problems of the appellant's wife, even although short of the criteria for a case on article 3 health grounds; the best interests of the two children, in particular the older child, who has a diagnosis of autism; and the contribution the appellant and his wife might make to the UK through their qualifications and professional status.

(v) Given those factors, the decision was justified by reference to *GS (India) v SSHD* [2015] EWCA Civ 40 at paragraph 86, cited by the FtT judge at paragraph 35.

13. On the human rights grounds, I reserved my decision.

14. The judge did cite *Razgar* early in her decision, but as Mr Whitwell pointed out in his reply, she did not adopt its structure when coming to formulate her conclusions.

15. The judge engaged in a free ranging discussion, not organised by reference to the immigration rules. It is now thoroughly established that those are the correct starting point, even in a case which can succeed only outside the rules. There was, unfortunately, a more logical legal structure in the decision of the SSHD (from paragraph 70 onwards) than in the decision of the FtT. If the judge had adopted that structure, and answered the questions so raised in similar order, she might have arrived at a comprehensible answer to the case. As it is, she has allowed her understandable but generalised sympathy arising from the appellants' situation and the comparative disadvantages they might encounter in Pakistan (paragraph 32 is a prime example) to sway her into an outcome for which she has given no legally adequate explanation.

16. Mr Whitwell was also correct in submitting that *GS* does not support the decision. The principle there is that absence of medical treatment in the receiving country, short of article 3, may be relevant to article 8 as a factor *additional to* separation of family members. I do not see anything in *GS* which favours medical aspects adding to a private life case such as this, where the family returns or remains as a unit, and no separation of family members is involved. *GS* quotes from and agrees with *MM (Zimbabwe) v SSHD* [2012] EWCA Civ 279 at paragraph 23, which is to similar effect.

17. If the case had been on the asylum grounds only, the outcome might have been reversed. However, Mr Whitwell said that on human rights, clear findings of fact were required, and setting aside should be followed by a fresh hearing. That was also the fall-back position of the appellant.

18. It may be that further proceedings will focus on human rights only, but at this stage the decision of the FtT is simply set aside. It stands only as a record of what was said at the hearing.

19. Under section 12 of the 2007 Act, and under Practice Statement 7.2, the case is remitted to the FtT for a fresh hearing. The member(s) of the FtT chosen to consider the case are not to include Judge Kempton.

20. The FtT made an anonymity direction. The matter was not addressed in the UT. Anonymity is preserved herein.

19 July 2019
UT Judge Macleman