Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/20126/2019 (V)
HU/20409/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 September 2020	**On 29 September 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS FARHAT ZAFFAR (FIRST RESPONDENT)
MR ZAFAR IQBAL (SECOND RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms M. Vidal, Counsel, instructed by Haris Ali Solicitors
For the Respondents: Ms J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's application. I shall refer to the Respondents as the Appellants as they were known before the First-tier Tribunal.

2. The Appellants are citizens of Pakistan. They are husband and wife. Mrs Zaffar's date of birth is 1 September 1953. The First-tier Tribunal referred to her as the first

Appellant. Mr Zafar Iqbal's (the second Appellant) date of birth is 24 September 1953.

3. The second Appellant came to the UK on 30 June 2005 having been granted a work permit was joined by the first Appellant in 2006. They have not had lawful leave since 13 November 2007. They have made various unsuccessful applications. On 4 July 2016 they made an application to remain on Article 8 grounds. This was refused. Their appeal was dismissed by First-tier Tribunal Judge Harris in a decision that was promulgated on 12 October 2018.

4. The Appellants made a further application for leave to remain on human rights grounds on 27 June 2019. That application was refused. They appealed against the decision of the Secretary of State and their appeal were allowed by Judge of the First-tier Tribunal D Lemer. Permission was granted to the Secretary of State by First-tier Tribunal Judge Fisher on 15 June 2020. Thus, the matter came before me on 22 September to determine whether the First-tier Tribunal erred when allowing the appeal.

The Hearing Before the First-tier Tribunal

5. The judge heard evidence from both Appellants through an Urdu interpreter. Their son (Osama Zafar), daughter (Mrs Ramiza Zafar) and daughter-in-law (Mrs Noor-Us-Saher Kayni) gave evidence.

6. The Appellants' adult children are married to British citizens. They reside in the UK. The Appellants have five grandchildren, AZ (born 15 June 2015), AZF (born 21 April 2017), SRI (born 30 November 2013), SI (born 7 November 2017) and SII (born 23 October 2018). The children are British citizens.

7. The second Appellant's evidence was that he and the first Appellant live with their son. They moved into the family home in 2018. Before they lived in their own property. They continue to own the property from which is rented out. They do not have property in Pakistan. He worked as a structural engineer in Pakistan and he has a structure and design company here in the UK which his son looks after. He had a stroke on 6 January 2020. As a result of which he is not able to live independently. The left side of his body is weak and he does not have much use of his left hand. He is unable to drive or take a bath unassisted. He is unable to go shopping or to cook. He is unable to make key decisions. He finds it difficult to process simple information. His children take him to hospital appointments. His daughter-in-law does most of the cooking. His wife serves food to him and helps him administer medication. His relationship with his grandchildren is close. He described the biggest obstacle to returning in Pakistan would be to not having the love and support of his children and grandchildren. He does not have the courage to return. A carer in Pakistan would not be able to provide the emotional support that his family in the UK provide. He has not thought about going into a care home. He feels depressed, hopeless and suffers with high blood pressure.

8. He accepted that he had continued to work in the United Kingdom unlawfully until August 2015. He had no choice because his family needed his support.

9. The first Appellant gave evidence. She suffers from deteriorating memory, depression, insomnia, cholesterol, thyroid and stomach ulcers. Her husband would not be able to look after them should they return to Pakistan. He does not have the full function of his hands and he sometimes falls over. He can bath himself, but she must remain outside the bathroom. She is unable to cook because of her failing memory. She attends appointments at the memory centre. Her son and daughter-in-law help with her husband's private chores. They are dependent upon them for cooking, laundry, shopping, taking medication and for assisting them in attending appointments. There is little that she can now do to help her husband and most of the support is provided by her children. She has a special bond with her grandchildren and a different but loving relationship with each child. In their culture they live with their sons in old age. They do not go to an old people's home. They have family in Pakistan but they have not seen each other for twelve years. They are not close and they would not be able to replace what they have in the United Kingdom. Her sister lives in the UK with her husband. She has a brother in Pakistan but he has limited resources and a family to care for. She has become dependent on her son and daughter-in-law.

10. The Appellants' son gave evidence. He works in the UK as a structural engineer. He earns £60,000 per annum. His wife works as a tutor and earns just over £20,000 per annum. His children are attached to his parents. He has a very close relationship with them. His parents treat his wife as their own daughter. She takes care of their diet, washing, health, medication, and other requirements. Separating his parents from his children and their other grandchildren would affect not just his parents but the children. His mother has severe depression and she is under investigation for dementia. She has been allocated a community mental health nurse. She is completely reliant on him, his wife, and his sister. She cannot be trusted to cook and turn off the cooker. She has become disorientated. She is incapable of looking after herself or anyone else. Since his father had a stroke he has been depressed because he is now physically dependent on other people and because of the stress of his immigration case. His parents are in no state to live on their own.

11. The Appellants' daughter also gave evidence. It was broadly consistent with her brother's. The Appellants' daughter-in-law gave evidence that the second Appellant is "disturbed and unstable". He is dependent on her and her husband for toilet visits and feeding. He cannot walk around the house without feeling dizzy and out of breath. His anxiety and depression are obvious to visitors because he starts crying like a child in front of everyone.

12. The judge recorded the closing submissions made by the Respondent who relied on the Reasons for Refusal Letter acknowledging that the second Appellant's stroke had taken place since the refusal but that there had been no post-operative complications. It was accepted that he may have weakness in his left-hand side but that there was no evidence of a significant weakness. There was, according to the Presenting

Officer, no evidence that normal everyday tasks could not be undertaken without the assistance. There is no evidence confirming that the first Appellant has specific problems with her memory. Emotional ties were addressed in the previous determination by Judge Harris. Medical treatment would be available in Pakistan and there is no issue in relation to affordability.

13. The Appellants' submissions included the acceptance that the documentary evidence relating to the second Appellant's condition post-stroke did not assist in terms of assessing his level of incapacity, however, Counsel contended that he had a left side weakness. She conceded that on a day-to-day basis he could do limited things for himself. She submitted that he needed care from his wife and daughter-in-law, and he needed assistance to walk and sit down.

14. The judge's attention was drawn to the 2018 determination. The parties agreed that that should be the judge's starting point. The Appellants' representative drew the judge's attention to a report of 15 May 2019 from consultant psychiatrist Andrew Margo which postdates the decision of Judge Harris. Ms Vidal conceded that there were care homes in Pakistan but that she had not come across any assessments as to their quality and in any event the emotional care for the Appellants could not be addressed in such a setting.

15. Before going on to make findings the judge considered the decision of Judge Harris in 2018 and he recorded the material findings of the judge as being as follows:-

    (i) the length of time spent away from Pakistan by the Appellants does not add great weight to the claim of there being very significant obstacles to integration;

    (ii) it is not accepted that the Appellants have no continued connection with Pakistan. They have clear cultural, linguistic and historic ties to the country;

    (iii) it is accepted that the Appellants' son and his wife are the main breadwinners in the family. It is not accepted, however, that such financial support could not be continued if the Appellants were to be returned to Pakistan;

    (iv) the Appellants' house in the United Kingdom is an asset which through rental or sale could pay for accommodation costs in Pakistan;

    (v) there was no medical evidence indicating that the second Appellant could not function on return to Pakistan. The medical and other evidence did not show that his physical or mental health conditions, whether individually or cumulatively, would prevent him from re-establishing a life in Pakistan;

    (vi) there was equally no medical evidence that the first Appellant's medical conditions would prevent or significantly hinder her reintegration into Pakistan;

    (vii) having considered Dr Margo's report of 29 April 2016 it was not accepted that the first Appellant would be suicidal on return;

    (viii) it was accepted that the absence of family in Pakistan would be a major factor in the recurrence of a more significant depressive illness, but there was no

reference, in Dr Margo's report to the impairment that that would have on the first Appellant's ability to function on return to Pakistan;

(ix) no evidence had been provided as to the availability of medical care and treatment in Pakistan;

(x) family life, engaging Article 8 ECHR existed between the Appellants and their children;

(xi) the Appellants and their grandchildren were emotionally attached to one another but were not in a parental relationship. The children have parents to care for and supervise them. This was in accordance with their best interests;

(xii) the inevitable diminishment in the relationship between the Appellants and grandchildren would not so damage the best interests of the children so as to amount to compelling circumstances justifying the Appellants remaining in the United Kingdom.

16. The judge said that the Appellants' case had been advanced predominantly on the basis of the degeneration of their medical conditions since the hearing before Judge Harris and that reliance continues to be placed upon the strength of their emotional connections with their family.

17. The judge said that paragraph 276ADE(1)(vi) is directed at the position on return to Pakistan, rather than loss of connections based in the UK. He accepted that to the extent that the loss of United Kingdom based relationships inhibit the Appellants' ability to reintegrate in Pakistan is material to the assessment under the Immigration Rules.

18. The judge considered the medical evidence. He said that as far as the first Appellant is concerned and the evidence of memory loss, namely that she has become forgetful, leaving on the cooker and becoming disorientated, the judge said that the "mere absence of a medical diagnosis for those symptoms does not undermine the claim that the first Appellant has, in fact, suffered from those problems". He said on the balance of probabilities that the first Appellant has memory problems which has manifested itself in the manner described by the witnesses. He found the witnesses were consistent as regards this aspect of their evidence. In addition he took into account Dr Margo's evidence which referred to the first Appellant scoring within the dementia range in a memory test undertaken by Dr Henry Kinsler. He did find, however, that she was able physically to cook albeit that the cooking is undertaken in the presence of her daughter-in-law who is at home during the week. The judge found that that did not detract from the contention, which he accepted, that the first Appellant's memory problems could give rise to a dangerous situation if she were unattended and forgot that she had left the cooker on.

19. The judge referred to Dr Margo's being "quite shocked" at the change in the first Appellant's condition since he last saw her, arising from the traumatisation from immigration proceedings, as well as her developing memory problems. Dr Margo concluded that she continued to suffer from a major depressive illness which is

perpetrated by the terror of being forced back to Pakistan. Dr Margo referred to concerns about the potential for a suicide attempt.

20. Judge Lemer said at 32 as follows

> "Whilst Dr Margo has provided an updated report, referring to the deterioration in the first Appellant's condition, those conclusions continue to fall foul of the reservations expressed by FTT Harris in the 2018 determination, namely that:
>
> (i) the prognosis is not framed in the context of what level of impairment and more severe depressive illness would have on the first Appellant's ability to function in terms of daily life in Pakistan;
>
> (ii) the report does not address what level of care she would require to function on a daily basis in Pakistan;
>
> (iii) the report does not suggest that medical facilities and treatment would not be available to the first Appellant on return".

21. The judge went on to consider the second Appellant, noting that there was very limited medical evidence as to the continued physical and mental impact on him arising from a stroke in January 2020. The judge accepted that he has weakness on his left-hand side which has left him requiring a stick to walk and means that he shakes when he holds a cup of tea. He also found that the evidence of the various witnesses was consistent that the second Appellant is now able to take a bath but needs to be monitored to ensure nothing happens to him when he is in the bath. The judge said he had not, however, had his attention directed to any medical evidence as regards the second Appellant having developed any mental health problems or cognitive problems on account of his stroke. The judge concluded that it would be reasonably open to the Appellants and their families to have arranged a consultation with at least a GP to assess those aspects of the second Appellant's health in advance of the hearing. The judge said in the absence of such evidence whilst he was prepared to accept that the second Appellant suffers from depressed mood because of the ongoing physical impact of his stroke. However, he said that he is unable to conclude that he has any diagnosed mental health problem nor that he has developed cognitive issues as is suggested in his witness statement.

22. The judge took note that in the 2018 determination there was reference to there being no close family members in Pakistan. However, it was also accepted that the first Appellant's brother continued to live there, as did the second Appellant's brothers. The Appellants' evidence was that those relatives would not be able to provide practical support and/or accommodation. The judge noted that that evidence was unchallenged and he accepted that those relatives could not and would not support the Appellants in terms of the provision of support and accommodation on return.

23. The judge took into account that in 2018 Judge Harris found that the Appellants could be supported by their family in the UK on return who could finance their lives or they could finance their lives through the rental or sale of their UK property. The judge said it was clear to him that money was not an issue and recorded that he was

not asked to depart from those findings of the judge in 2018. Thus, he concluded that the Appellants would be able to financially support themselves on return.

24. The judge at [36] identified what he called the essential point, being the Appellants' deteriorating medical conditions and their inability to live independently in Pakistan without the support of their United Kingdom based family. The judge then said that the problem with that approach is that it fails to consider the extent to which the Appellants' difficulties could be ameliorated by the provision of a carer to assist them on return. He recorded that when that possibility was put to the second Appellant his response was "that it was not only about care but about emotional ties". The judge found as follows "that response is instructive, and consistent with Miss Vidal's observation, in closing submissions, it is the emotional care that cannot be replicated".

25. The judge at [37] said that ultimately the burden of proof lies with the Appellants and that it was not disputed that homecare is available in Pakistan and that there are private care homes, however he said that he accepted that provision in Pakistan will not address the Appellants' emotional needs. He found that the failure to address their emotional needs would not have such an impact on their ability to integrate so as they could satisfy paragraph 276ADE(1)(vi) of the Rules. The judge found that there was no reason to depart from the finding of Judge Harris in respect of that issue

26. The judge went on to consider proportionality outside of the Immigration Rules. With reference to the 2018 decision he found as did Judge Harris that there would be an interference with Article 8 ECHR family rights of the Appellants on return to Pakistan. The judge reminded himself that the Appellants cannot meet the requirements of the Immigration Rules. He turned to proportionality.

27. At [47] he said "in assessing the public interest under Article 8(2), I apply the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) as amended by Section 19 of the Immigration Act 2014".

28. He went on at paragraph 48 to say

> "In the present case the factors set out in s.117B must be considered in the context of my conclusion, set out above, that the Appellants cannot satisfy the relevant provisions of the Immigration Rules. I further note, with regard to s.117B(2) and (3) that the Appellants have not demonstrated that they can speak English to any significant degree, and that they are not, themselves, financially dependent".

The judge went on to identify the test to be applied as that in R (on the application of Agyarko and Ikuga) and Secretary of State for the Home Department [2017] UKSC 11, namely that the Appellants need to demonstrate something very compelling. The judge at paragraph 50 said as follows

> "Other than the Appellants' deteriorating medical conditions, and the fact the Appellants now live with their son and daughter-in-law, the Appellants have not

> relied upon any further matters which have substantively changed since the 2018 determination".

The judge said that reliance was placed upon the close relationship that the Appellants have with their children and grandchildren, and that he was bound to consider the strength of those relationships and the extent to which the seventeen to eighteen months that have passed since the 2018 decision those ties have been strengthened further, particularly in the light of the fact that the Appellants have cohabitated with their son, daughter-in-law and children. The judge went on at paragraph 52 to apply ZH Tanzania and SSHD [2011] UKSC 11. He observed that the Appellants are not in a parental relationship with their grandchildren however he accepted as did Judge Harris that the relationships between the Appellants, their children, daughter-in-law and grandchildren will inevitably be diminished by the Appellants' relocation. He said as follows at paragraph 53

> "… whilst Judge Harris concluded that that disruption and diminishing of family life did not amount to sufficiently compelling circumstances to allow the Appellants to remain in the United Kingdom, I have to take into account the passing of a further seventeen/eighteen months in which the Appellants have cohabited with their son and his family, together with the recent and accepted significant deterioration in the Appellants' health".

The judge reached the following conclusion at paragraph 54

> "In my judgment, drawing all those matters together and considering them cumulatively, whilst I have accepted that there would not be very significant obstacles to the Appellants' practical relocation to Pakistan, given that they could pay for homecare assistance, the Appellants' significantly increased dependency upon their children in the United Kingdom, both emotionally and physically, with the corresponding intensifying of bonds between the Appellants and their family members in the United Kingdom, do constitute compelling circumstances which would render the Appellants' departure from the United Kingdom a disproportionate breach of the family life rights of the Appellants and their United Kingdom based family".

The Grounds of Appeal

29. Ground 1 of the written grounds is characterised as "inadequate reasons/misdirection in law/conflict of fact or opinion". In this ground it is asserted that the Appellants' circumstances do not meet the higher tests of exceptionality or compelling circumstances. It is asserted that there is a lack of sufficient detail in the Appellants' claimed medical psychological needs and the strength of claimed family bonds and ties which the judge noted. However the judge at paragraph 37 found no evidence of a lack of emotional care in Pakistan that would be of detriment to the Appellants and that cumulatively the accepted deterioration in the Appellants' medical conditions was not sufficient grounds to depart from the findings of the 2018 decision. It is asserted that the findings at paragraph 37 and 38 are contradictory to those at paragraphs 51 and 54. It is asserted that there is no emotional or financial dependency which is sufficient to engage Article 8 with reference to Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31.

30. Ground 2 is characterised as "inadequate reasons/misdirection in law". It is asserted that the judge has justified "rather weakly" that the apparent strength of the Appellants' bonds with their grandchildren, children in the UK is a relevant and significant factor in assessing proportionality. It is submitted that there is inadequate evidence of these claimed bonds and the judge's reasons are "utterly insufficient to show anything exceptional in the Appellants' interests or that of the best interests of their grandchildren or children in the UK". Even with the Appellants deterioration in health which was in any event insufficiently evidenced, there is nothing sufficiently exceptional or compelling. The test in Agyarko and Others is not met on the evidence.

31. The third ground is characterised as inadequate reasons/misdirection of the law and relates to the proportionality assessment. It is asserted that there are no compelling or exceptional reasons for the Appellants to remain in the UK and the errors identified in grounds 1 and 2 have infected the assessment of proportionality. The final point made is that the judge failed to properly assess the mandatory public interest considerations under Section 117B of the 2002 Act in light of the Appellants' precarious stay for a considerable period since 2007 nor against the public interest in the economic and social welfare of the UK given that the Appellants are not financially independent or able to speak English and they have clearly made use of NHS resources.

32. Ms Isherwood developed the ground of appeal in oral submissions relaying primarily on what she said was the failure by the judge to weigh into the balance the public interest.

33. Ms Vidal said that the judge weighed everything up including the Appellants' medical conditions. She drew my attention to [47] and urged me to consider the decision as a whole.

The Law

34. Section 117A and 117B of the 2002 Act

> **117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

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.

The case of Agyarko sets out the correct approach to determining proportionality:-

> "54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is "likely" only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting

state is unlawful or precarious. The court has repeatedly acknowledged that "a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there" (*Jeunesse*, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances" (*Jeunesse*, para 114).

55. That statement reflects the strength of the claim which will normally be required, if the contracting state's interest in immigration control is to be outweighed. In the *Jeunesse* case, for example, the Dutch authorities' tolerance of the applicant's unlawful presence in that country for a very prolonged period, during which she developed strong family and social ties there, led the court to conclude that the circumstances were exceptional and that a fair balance had not been struck (paras 121-122). As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state (para 121).

56. The European court's use of the phrase "exceptional circumstances" in this context was considered by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544. Lord Dyson MR, giving the judgment of the court, said:

> "In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal." (para 42)

Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*.

57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give

appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

58. The expression "exceptional circumstances" appears in a number of places in the Rules and the Instructions. Its use in the part of the Rules concerned with the deportation of foreign offenders was considered in *Hesham Ali*. In the present context, as has been explained, it appears in the Instructions dealing with the grant of leave to remain in the UK outside the Rules. Its use is challenged on the basis that the Secretary of State cannot lawfully impose a requirement that there should be "exceptional circumstances", having regard to the opinion of the Appellate Committee of the House of Lords in *Huang*.

59. As was explained in para 8 above, the case of *Huang* was decided at a time when the Rules had not been revised to reflect the requirements of article 8. Instead, the Secretary of State operated arrangements under which effect was given to article 8 outside the Rules. Lord Bingham, giving the opinion of the Committee, observed that the ultimate question for the appellate immigration authority was whether the refusal of leave to enter or remain, in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8. If the answer to that question was affirmative, then the refusal was unlawful. He added:

> "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. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* [*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368], para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test." (para 20)

60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord

> Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above.

Error of law

35. I accept Ms Vidal's submissions as regards the decision generally. The judge in my view made findings of fact on the evidence that are adequately reasoned. He was entitled to accept the oral evidence of the witnesses. The grounds in so far as they challenge the findings of fact amount to a disagreement with the finding of the judge. The judge was entitled to conclude there was family life. The Appellants are living with their son and although they depend to an extent on him.

36. However, there is a complete absence of regard to the public interest. The judge was bound to have regard to this (s.117(A)(2)(a)) when assessing whether the interference with the Appellant's right to family life is justified (s.117(A)(3)). The maintenance of immigration control is in the public interest (s117B(1)). In this case the Appellants are overstayers. They have no right to be in the United Kingdom and decided to remain after their appeal was dismissed by Judge Harris in 2018. Furthermore, the second Appellant unlawfully worked in the United Kingdom. While the judge says at [47] that he applies the provisions of s117B of the 2002 Act, at no part in the decision does he identify the public interest and the decision fails to disclose that he assessed proportionality taking proper account of the Appellants' immigration history or that he considered whether the interference was proportionate in the light of the public interest. This is a materially error. I set aside the decision of the judge to allow the appeal.

37. I communicated my decision to the parties. There was no further evidence produced in response to the directions of the Upper Tribunal. Ms Vidal asked for the matter to be remitted to the First-tier Tribunal and reheard. However, there was no new evidence submitted. The findings of fact are sustainable. It was my strong view that I could assess proportionality based on the evidence before the First-tier Tribunal in the absence of further evidence.

38. I asked Ms Vidal whether she was aware of any further evidence. She said that because of the pandemic, there may be, but that complying with directions had been difficult. The Appellants' adult children attended the hearing. I gave them the chance to address the Upper Tribunal to give an update as regards their parents' health. I took this into account when remaking the decision.

39. There was no reason for me not to accept the evidence that the second Appellant was diagnosed with Covid-19 on 11 August 2020. He was not hospitalised; however, I accept that he becomes breathless. Treatment for the Appellants has been limited because of the pandemic. If the Appellants are returned to Pakistan, their children will be worried about them. I accept that there will be no family to look after them. If they are on their own, they will have more medical problems.

40. To succeed the Appellants must identify compelling circumstances because they cannot meet the Rules. The starting point is that the maintenance of immigration control is in the public interest. The Appellants have breached immigrations laws. While they lawfully entered here, neither has had leave since 2007. To make matters worse the second Appellant accepts that he worked here unlawfully until 2015. Their appeals were dismissed under Article 8 in 2018. Judge Harris concluded that the decision did not breach the Appellants under Article 8. The Appellants remained here. These factors are weighty matters that support the Secretary of State's decision.

41. The First-tier Tribunal found that there were no very significant obstacles to integration. There is no cross appeal.

42. Since the decision of Judge Harris there has been a deterioration in the Appellants' health. The Appellants could be supported financially in Pakistan and that whilst their case is that they could not live independently in Pakistan, as the judge said that this does not address the extent to which this could be ameliorated by the provision of a carer. The first Appellant has memory problems and a major depressive illness. However, Dr Margo's evidence limited for the reasons he gave at [32] (see [27] above). There was little evidence of the physical or mental impact of a stroke on the second Appellant. He has weakness in his left hand and needs monitoring when in the bath. His mood is depressed. There is no family to support them in Pakistan. The care that they have here from their family would not be replicated in Pakistan. They would have to rely on paid carers or go into a care home.

43. The second Appellant has had Covid-19 and is as a result weaker. The Appellant's daughter said at the hearing before me that their health will deteriorate if they are to return. This is likely because of the aging process. There is an absence of evidence relating to the prognosis and level of care would be required on return to Pakistan. However, care would be affordable and available. Care would not be provided by their children with whom they have family life and a special bond. It is wholly understandable that the Appellant would wish that care to continue rather than to return to Pakistan where whatever level of care is needed would have to be provided by people outside of the family. There will be an interference with family life, but the bonds will not be broken. The Appellants have each other. I accept that the family here are anxious about their parents and do not want them to return. However, they will be able to help arrange care for their parents. There will be nothing preventing their children and grandchildren visiting them in Pakistan. The judge assessed the children's best interests; however, this must be considered in

context. The Appellants are not care givers. They are not responsible for their grandchildren. The children will be remaining in the United Kingdom with their parents who are responsible for them. The weight to attach to their best interests in this context is not as significant as it would be if the decision involved a parent.

44. The Appellants have family in Pakistan albeit they are not able to care for them. They are close to their family here. This explains why both Judge Harris and Judge Lemer found that there was family life. While separation will be upsetting for the family, this is not a case where the physical and medical needs of the Appellants cannot be met by others in Pakistan. While it is clear and understandable that the Appellants wish to stay here with their children and be looked after by them, in the absence of evidence of significant deterioration in their health as a result of returning to Pakistan and taking account of the strength of the family and private life, I am unable to identify any feature of this case, individually or cumulatively that outweighs the public interest.

45. It is open to the Appellants to make an application for entry clearance under the Immigration Rules as adult dependent relatives or on wider Article 8 grounds, if there is a deterioration in their health. There is no suggestion that they currently meet the requirements of the Immigration Rules. The evidence does not establish that there will be a material deterioration in their health on return because they will be able to access treatment and assistance. The Appellants do not rely on Article 3.

46. The interference in the family life will have a significant impact on the Appellants and all members of their family. However, I cannot identify any features of this case that amount to compelling circumstances that can outweigh the public interest in removal. The appeal is dismissed under Article 8.

Notice of Decision

The appeal is dismissed under Article 8.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 24 September 2020

Upper Tribunal Judge McWilliam