



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/01334/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 8<sup>th</sup> January 2018 and 6<sup>th</sup> July 2018

Determination Promulgated  
On 02<sup>nd</sup> August 2018

Before

**UPPER TRIBUNAL JUDGE COKER**

Between

**HUKAM ZADGAI**

Appellant

And

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Mackenzie (on 8<sup>th</sup> January 2018) and Ms L Hooper (on 6<sup>th</sup> July 2018), instructed by Legal Rights Partnership  
For the Respondent: Ms A Fijiwala (on 8<sup>th</sup> January 2018) and Mr T Melvin (on 6<sup>th</sup> July 2018), Senior Home Office Presenting Officers

**DECISION AND REASONS**

1. On 8<sup>th</sup> January 2018, I found the First-tier Tribunal had erred in law in its decision for the following reasons and I set aside the decision to be remade:
  - (i) The respondent refused Ms Zadgai's human rights application for leave to remain based on her family and private life for reasons set out in a decision dated 24 February 2016. Her appeal was heard by First-tier Tribunal Judge Hawden-Beal who, for reasons set out in a decision promulgated on 20 April 2017, dismissed her appeal.

- (ii) Ms Zadgai sought, and was granted permission to appeal because it was arguable:
  - (i) That the judge misdirected herself in law in finding the appellant needed to show that her case is exceptional when compared to others in her situation;
  - (ii) that the judge did not engage with the level of dependency shown within the family unit or whether it was proportionate, given the length of time in the UK, to separate the family;
  - (iii) that the judge failed, in assessing whether there were “very significant obstacles” to the appellant’s integration on return to her home country, to take into account her age, gender, disabilities and medical condition.
  - (iv) There is an overlap between the grounds which, when considered in the round, submit that the judge has failed to apply the correct test to the evidence before him in concluding that the decision is proportionate.

#### Error of law

- (iii) In assessing the appellant’s case the judge, in paragraph 13, states that he has had regard to *Razgar* [2004] UKHL 27 and *Hesham Ali* [2016] UKSC 60. He refers in paragraph 24 to *Jeunesse* (2014) ECHR 1014 and that removal of a person whose family life had been established when it was known that their status was precarious would only be a breach where there were exceptional circumstances. In paragraph 27 the judge says the appellant has to show that “it would be very harsh” for her to go back to Pakistan and that she has to show “that her case is exceptional when compared to others in her situation and they have not done so”.
- (iv) The use of the word “exceptional” does not of itself render a decision infected by material errors of law, provided the judge has in fact applied the correct test, using the words as a form of short hand. The difficulty here is that the judge repeats the concept of exceptional circumstances. The judge refers to the appellant’s current medical problems but has not assessed whether, given the time that has elapsed, these could have an adverse impact on her return to Pakistan. Although he has not dislodged the finding that two sons remain in Pakistan, the judge has not made a finding on whether there retains some contact. This impacts on her proposed return and requires a decision. Although the appellant has been unlawfully in the UK for a considerable period and although this does of course have an impact on the decision, there remains an obligation to consider the circumstances as they are on the date of the hearing and that includes factoring in the lack of contact, her deteriorated health and that she is a part of a family unit now in the UK.
- (v) The respondent submitted that even if there was an error of law in the decision by the First-tier Tribunal judge in the test applied in assessing proportionality, any such error is not material. There has been no challenge to the findings of fact and the outcome would be the same, namely the appeal would be dismissed.
- (vi) There has been no challenge to the findings of fact made by the judge but the judge has not considered all the evidence that was before him in reaching his decision on proportionality. It may be a finely balanced decision and it may be that the outcome will be the same, namely the appeal will be dismissed, but, as Mr Mackenzie said, that is a far cry from saying that the error is not material.
- (vii) I am satisfied the judge has erred in law in applying the wrong test to the assessment of proportionality and I set aside the decision to be remade.
- (viii) The findings of fact that the appellant has two sons in Pakistan, that she has previously accessed a telephone in Pakistan and had access to a driver and has accommodation in Pakistan are preserved.
- (ix) Although Mr Mackenzie sought to remit this appeal to the First-tier Tribunal to be remade, there has been no challenge to the evidence as recorded, the challenge has been to the application of that evidence to the jurisprudence. I therefore do not remit the appeal to the First-tier Tribunal.

2. In accordance with directions I made, the appellant filed a bundle of documents and a skeleton argument; the respondent filed written submissions. I heard oral evidence from the appellant's son Shahid Ali and oral submissions from both representatives.
3. Ms Hooper sought to re-open the finding that the appellant had two sons in Pakistan, relying on a letter from Niknam Hussain, an elected County Councillor for Buckinghamshire and former mayor of Aylesbury. He confirms that his ancestral village is an adjacent village to that of the appellant, is within easy walking distance and the area is well known to him and his family because the villages are quite small. He knows of the appellant and her family because she and part of her family live in his constituency. He says:

"... my family have known her family for very many years.

...

I was asked to visit Mrs Zadgai's home to ascertain various facts: namely the whereabouts of her sons Riaz and Sher and the situation as regards her home.

I visited the home and it was empty and locked, I couldn't find the relevant person to let me in the property but was told that as none of the family resided there it was permanently locked. I asked a number of people in the vicinity and the neighbours as to the whereabouts of Riaz and Sher, and no one could remember the last time they had seen them or where they would be now.

I personally have never met Riaz and Sher but know well the sons of Zadgai that live in Aylesbury, UK. So feel I would recognise them if I saw them.

The surrounding area, as is the tradition, is populated by family members of Mrs Zadgai, and the ones I talked to could not remember the last time the brothers were in Pakistan. Apparently a serious family dispute had riven the family and, it had never recovered."
4. Mr Hussain did not give oral evidence. The letter is inadequate evidence to dislodge the finding that the two brothers are in the Pakistan. They may not be in the village but there is nothing reliable in the letter to be able to conclude that they are not in Pakistan. Mr Hussain refers to there being other family members; he does not say who they are or how they would know whether the two brothers were in Pakistan or not. There is nothing in the letter to say that one or more of those relatives could not or would not be able to look after Mrs Zadgai's daily needs. I remain satisfied that Mrs Zadgai has two sons living in Pakistan.
5. There is no witness statement from Mrs Zadgai but she was interviewed by a social worker whose report dated 17<sup>th</sup> April 2017 was before me, and by an occupational therapist, whose report dated 7<sup>th</sup> June 2018 was before me. The social worker records Mrs Zadgai saying she has no extended family in Pakistan who could look after her. There is no indication what extended family she accepts she has in Pakistan or why they could not meet her needs. According to Mr Hussain there are family members there. There is no indication that enquiries have been made with any of them as to whether they would be able to assist Mrs Zadgai, paid or unpaid. There is no evidence how much contact they have with Mrs Zadgai or her family in the UK or how much contact they had when Mrs Zadgai lived there.

6. The social worker report sets out in considerable detail her conclusions that Mrs Zadgai will find it very difficult to adjust to life on return to Pakistan: she has been in the UK for over 11 years and between 2000 and 2006 (she has been an overstayer since then) she visited each year for at least 2 months and frequently between 3 and 5 months. The social worker comments on the benefits to grandchildren having a grandmother around and refers to the close bond that appears to exist between Mrs Zadgai and her grandchildren. She records that Shahid Ali feels it not only a duty but also something he actively wishes to do, to look after his mother in her advancing years. She refers to Mrs Zadgai's failing health and the likelihood that this will deteriorate further as she grows older. She refers to the emotional bond that Mrs Zadgai has with her family in the UK because of her frailty and the length of time she has lived with them and her increasing mental, emotional and physical dependence upon them.
7. The Occupational Therapist report sets out in detail Mrs Zadgai's physical health. He refers to Mrs Zadgai possibly being over cautious in her movements and to her "frailty and general deconditioning". He refers to her being incontinent maybe 3 or 4 times a week and that consideration would be given to using night time pads. Mr Ali in his oral evidence said she now (only a month after the occupational health report) wore night-time pads every night because she was now unable to get out of bed to the toilet. The Occupational Therapist noted that Mrs Zadgai walked slowly and took small steps because, according to Mrs Zadgai, she is fearful of falling. He suggested a rollator frame walker. Mr Ali confirmed they now had one for Mrs Zadgai but she does not like to use it because she finds walking too painful and is now (again only a month after the occupational health report) in a wheelchair nearly all the time. The report observed the dependence by Mrs Zadgai on her son and his wife, that she has been provided with meals drinks and snacks since her arrival in the UK (in 2006) and that she is with one of the family nearly all the time. He recommends physiotherapy to increase indoor and outdoor mobility and confidence. He does not believe that Mrs Zadgai could live in Pakistan on her own given the physical, emotional and psychological support she is receiving from her son and his family, including members of the extended family that visit her reasonably regularly. He concludes that continuity of care and quality of life will be compromised if she returns to Pakistan.
8. There was no evidence that Mr Ali had arranged physiotherapy for Mrs Zadgai. It seems likely that at the very least, Mrs Zadgai will continue to utilise the NHS – she has a pacemaker which requires checking, she has recently come out of hospital, she is receiving medication for various ailments and she has diabetes type 2 which requires monitoring, as an elderly lady who is frail and has lost mobility and is incontinent. That she suffers from anxiety and depression is recorded although to what extent that would increase if she were to return to Pakistan is not indicated. It is very likely that there will be recourse not only to the NHS but other social services if she is granted permission to remain in the UK.
9. Although Mr Melvin submitted that Mr Ali's credibility was damaged and that the evidence he gave that his mother was significantly more dependent upon him than was actually the case, should be disbelieved. Whilst it is correct that Mr Ali's evidence is tainted because of the previous adverse findings of credibility, the two reports confirm that Mrs Zadgai is a frail lady who would have considerable

difficulty physically living alone in Pakistan and would suffer considerable emotional distress if separated from her family here in the UK. I have no reason to disbelieve those accounts.

10. I take the view that Mr Ali and his family have enabled, if not encouraged, Mrs Zadgai to become physically and emotionally dependent upon them. There appears to have been a failure to enable her to even cook meals or prepare drinks and snacks from the time she arrived in 2006; she appears to have been waited upon hand and foot; although she has suffered from illness none have been permanently life threatening or would have required the development of such physical dependency. Nevertheless, she is now physically dependant. Physiotherapy has not been arranged; she was enabled to retire to a wheelchair rather than undertaking the recommended physical activity set out in the report. There is little evidence that she is seriously physically disabled to the extent that she could not recover with some intense physiotherapy input. But her emotional and psychological dependency on her UK family has resulted in this no longer being a practical option here in the UK. This enabled dependency is illustrated by the family pressing the buttons on a mobile phone for her to make a call, rather than enabling her to do this for herself even though she had a phone in Pakistan which, presumably, she managed to use by herself.
11. I am satisfied that Mr Ali and his family have cynically manipulated the failure of the respondent to enforce removal after Mrs Zadgai lost her appeal in 2008. Had that occurred I have little doubt that the family would have arranged for adequate care for her in Pakistan and such active medical input as she required could have been arranged. To claim that the delay is now somehow to her benefit is disingenuous. Even though the respondent did not enforce departure, no good reason has been given for Mrs Zadgai failing to leave the UK in 2008. Her remaining in the UK after 2008 combined with her now deteriorating physical activity leading to significantly reduced mobility, enabled by her family, the failure of the family to investigate the availability of care facilities in one of the cities in Pakistan and the failure of the family to investigate the possibility of relatives in the village, together with her access to NHS care without payment, all point to very significant public interest attracting considerable weight in assessing the proportionality of the decision to refuse her human rights claim.
12. Nevertheless, I do accept that she would find it exceptionally difficult to live in Pakistan without very considerable physical support. I do accept that her emotional dependence on her family in the UK is such that she would be emotionally distressed if separated from them. I am satisfied, given the two reports which have been prepared by independent professionals that Mrs Zadgai has a role in the family despite her frailty. She is cared for by all the members of the family who show significant compassion for her.
13. Although there is reference to her guidance and that the family, particularly the younger members of the family, would suffer if she were to leave the UK, I do not accept that her departure from the UK would be an unreasonable interference in their lives. They may suffer some distress at her departure but it is not credible that the loss of her in their day to day lives would be such that it would be disproportionate. There is no reason put forward why they could not visit her; that

they would prefer day to day contact does not render her departure a disproportionate interference in their family and private life; there is no dependency by them upon her. She does not play a significant role in their lives in terms of their upbringing, conduct or future.

### The Rules

14. Appendix FM of the Immigration Rules, read with the SSHD's guidance, requires:

Mrs Zadgai must, because of age, illness or disability require long term personal care to perform everyday tasks. This includes washing, dressing and cooking;

She must be unable, even with the practical and financial help of Mr Ali be able to obtain the required level of care because it is not available or is not affordable;

15. Appendix FM was introduced to enable, *inter alia*, the anticipated reduction of social care and NHS costs brought about by removing the route to settlement of elderly dependant relatives that existed prior to 2012 – see *BritCits v SSHD* [2017] EWCA Civ 368. The focus in the Rules and guidance is on whether the care required by Mrs Zadgai can be reasonably provided to the required level in Pakistan. Consideration of the “required level” includes consideration of the emotional and psychological needs of Mrs Zadgai.

16. According to the Occupational Therapist report, Mrs Zadgai can generally dress herself adequately although she has some difficulty for example in tying knots and adjusting her headscarf. She has not done any cooking since she last arrived in the UK but there is no evidence to suggest that arrangements could not be made for a housekeeper to provide such services in her village. Similarly, in terms of shopping and cleaning; when she was last in Pakistan she had a driver and there is no evidence that she would be unable to have a housekeeper. Mrs Zadgai has not provided evidence that family members in her village (or others) would not be prepared to undertake such tasks either through familial goodwill or for a fee. There was no evidence that family members here in the UK could not visit on a regular basis to ensure that she was being physically and emotionally well cared for. There was no evidence that Mrs Zadgai could not communicate with her family even though she had little memory of times and dates. Medical facilities are available in Pakistan. Whether they are to the same standard as in the UK probably depends on where those facilities are accessed but there was no evidence that such medical, psychological or associated treatment could not be obtained, albeit it would have to be paid for. Emergency arrangements could be made there, as here. The occupational therapist suggested an alarm and this is utilised frequently in the UK for elderly people who live alone. No reason was advanced why such a measure could not be adopted in Pakistan. There was reference to family members helping Mrs Zadgai take out and insert her hearing aid. There was no indication that she was physically unable to do this for herself although given the dependency she has now acquired, I accept that she would need assistance initially. There was no indication that family members could not travel to Pakistan on a regular and frequent basis, perhaps staying a few weeks at a time whilst she was reintegrated into her life in Pakistan.

17. Mrs Zadgai does not leave her home in the UK except with her son and then only for short drives or to the mosque. Family from the UK can visit her regularly and frequently. Her social life in the UK is, on the evidence, restricted to watching the TV with her family or having a family member in the house at the same time. There was no evidence that this could not continue in this way in Pakistan other than it would not be her immediate family as here in the UK. But again, no evidence was provided that it would be difficult for current UK based family members to travel to see her on a regular and frequent basis and/or that other extended family members in Pakistan would be unwilling to undertake a companionship role.
18. Mr Ali's evidence was that Mrs Zadgai is now incontinent at night and wears night pads every night. It is not clear from the evidence whether this is precautionary, whether she was provided with a commode as advised by the Occupational Therapist or whether there is a physical reason for such precautions. Mrs Zadgai requires some assistance with bathing but no other personal care. The extent of that assistance is not clear. There is no witness statement from Mrs Zadgai's daughter in law detailing exactly what assistance she provides – I assume it is her rather than Mr Ali or her grandson. It is therefore not possible to conclude that such assistance as is presently given could not be given by an extended family member or perhaps nursing or other care.
19. The family in the UK have simply not investigated what possible assistance could be available for Mrs Zadgai even though they must have known that there were extended family members in her village, that UK family members could visit her and that they appear to have funds available.
20. That Mrs Zadgai has some psychological issues seems incontestable. It does not appear that this is being treated other than by way of medication and there is no indication that such medication as she requires would not be available in Pakistan. It does not appear that her anxiety and depression is related to her status in the UK and the presence of her UK family does not appear to relieve the symptoms. She has been an overstayer for more than 11 years now and has been living with her family. Her immigration status has been precarious throughout that time and there is no indication that her mental health has become progressively worse as she has continued to flout immigration law. Given the level of dependency her family have enabled it is reasonable to conclude that her family have been protecting her from knowing the possible full extent of the consequences of failing to comply with immigration law.
21. This leaves her emotional dependence on her family. There is no doubt but that she has considerable emotional dependence which has arisen in part because of her frailty and physical dependence but also because of her age. It is trite to note that an elderly parent would wish to be with close family members, particularly where that close family member takes his responsibilities so seriously and with such a high degree of compassion. It is also plain that having lived with her family for the past 12 or so years during a period when she has come to depend more and more upon her family for her physical care and comfort that this would increase her emotional dependence.

22. I do not accept that it is not possible in her circumstances, that arrangements cannot be made for Mrs Zadgai's close family to visit her regularly and frequently and for the totality of her dependence to be accommodated and managed in the circumstances of her returning to live in her home in Pakistan. I am satisfied, based on the evidence before me, that reasonable arrangements can be made for her care in Pakistan. I am satisfied that she does not meet the Rules for leave to remain as a dependant relative.
23. Ms Hooper referred to paragraph 276ADE of the Immigration Rules. She submitted that there were very insurmountable obstacles to her returning to Pakistan. Of course, Mrs Zadgai is not claiming to remain in the UK based upon her private life but on her family life in the UK. Nevertheless, the test for very significant obstacles would, in the context of Mrs Zadgai be interpreted in accordance with Appendix FM and, as I have found above, I am not satisfied that reasonable care would not be available to her. She has extended family members in Pakistan with whom, prior to coming to the UK in 2006 it is reasonable to assume she was in contact. There is already a neighbour/extended family member who checks on her home. There was no evidence that she would not be able to re-establish contacts. As Mr Hussain said, his ancestral village and Mrs Zadgai's village were very close together and it cannot be that it is not possible for other people in her village to walk over to see her.

#### Article 8

24. It is of course very sad that Mrs Zadgai will have to uproot herself after so many years in her son's family home. She does not have any kind of life outside that home save for occasional visits to the mosque and she then goes with her son. Otherwise she rarely leaves the house. She does not meet the requirements of the Immigration Rules for leave to remain. There is great weight to be attached to her breaches of Immigration Rules and whilst she may not have actively pursued this, relying upon actions taken by her son, the public interest in her removal weighs heavily in the balance in determining the proportionality of the decision to refuse her human rights claim. For the reasons I have set out above, I am satisfied, on the evidence before me, that reasonable care can be provided in Pakistan.
25. I note that there is question raised over whether she will be able to travel the long distances to Pakistan particularly given the long flight and then the long journey by road to her village. I do not know what arrangements could be made for this – neither party has indicated these to me. Yet I am sure that the respondent will not make removal arrangements without having properly and fully considered Mrs Zadgai's medical and physical needs and any possible special arrangements that have to be made.
26. Taking full account of Mrs Zadgai's physical, psychological and emotional needs balanced against the public interest in maintaining immigration control, I am not satisfied that the decision to refuse her human rights claim is disproportionate.
27. I dismiss her appeal.



Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by dismissing it

A handwritten signature in black ink, appearing to read "Jme Coker". The signature is written in a cursive, slightly slanted style.

Date 27<sup>th</sup> July 2018

Upper Tribunal Judge Coker