



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

Appeal Number: HU/01336/2016

HU/01342/2016

HU/01344/2016

HU/01348/2016

HU/01351/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 18 January 2018**

**Decision & Reasons Promulgated
On 26 January 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RIZWAN [G]

SHUMALIA [R]

[W R]

[YI F]

[Yn F]

Respondents

Representation:

For the Appellant:

Mr. P. Duffy, Home Office Presenting Officer

For the Respondent:

Mr. O. Sobowale of counsel, instructed by Marks &
Marks Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The 1st Respondent was born on 6 November 1976 and the 2nd Respondent was born on 23 June 1982. Their three children were born on [] 2007, [] 2010 and [] 2014. They are all nationals of Pakistan.
2. The 1st Respondent entered the United Kingdom as a Tier 4 (General) Student Migrant on 12 September 2010. The 2nd, 3rd and 4th Respondents entered the United Kingdom as his dependents on 12 August 2012, when he had been granted further leave to remain as a Tier 1 (Post-study) Migrant. The 5th Respondent was born here.
3. The Respondents made a human rights application on 24 August 2015 but their application was refused on 7 January 2016. They appealed and First-tier Tribunal Judge Phillips allowed their appeals in a decision, promulgated on 24 April 2017. The Appellant appealed against her decision on 5 May 2017 and First-tier Tribunal Judge Osborne granted the Appellant permission to appeal on 16 November 2017.

ERROR OF LAW HEARING

4. Both the Home Office Presenting Officer and counsel for the Respondents made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

5. At paragraph 26 of her decision First-tier Tribunal Judge Phillips found that the Secretary of State had not provided sufficient information in her refusal letter to support the assertion that suitable medical treatment was available for the 5th Respondent in Pakistan. When granting permission to appeal First-tier Tribunal Judge Osborne found that First-tier Tribunal Judge

Phillips had arguably erred in law. In particular, he found that “in an otherwise careful and focused decision it was nonetheless arguable that First-tier Tribunal Judge Phillips had reversed the burden of proof in paragraph 26. He also went on to find that it was for the Respondents to establish that appropriate care is unavailable in Pakistan and/or that it would be unreasonable to expect the 5th Respondent to rely upon the healthcare that is available in Pakistan”.

7. As submitted by the Home Office Presenting Officer, First-tier Tribunal Judge Phillips had ended her decision by merely saying that she allowed the appeal because the Appellant’s decision had been unlawful under section 6 of the Human Rights Act 1998. However, it was clear from her decision that the breach concerned the medical treatment required by the 5th Respondent.
8. The medical evidence provided by the Royal London Hospital and Newham University Hospital confirmed that the 5th Respondent had been born prematurely and had suffered from chronic lung disease, necrotising enterocolitis, gastro oesophageal reflux, group B meningitis and that she was now suffering from a hole in her heart, which may require surgery.
9. In his letter, dated 9 February 2017, Dr. Ali, a consultant paediatrician at Newham University Hospital, stated that her “need can be categorised as complex need which can only be provided in well-established Multidisciplinary team effort, which cannot be provided in Pakistan”. This evidence was not challenged by the Appellant.
10. In the refusal letter the Appellant had noted that “according to a Country of Origin Information Report, treatment and specialist paediatric care is available in Pakistan. Consideration has been given to the difference in the standard of medical facilities in Pakistan compared with that available here”. She then went on to state that “although it is accepted that the health care systems in the United Kingdom and in Pakistan are unlikely to be equivalent, this does not mean that [the 5th Defendant’s] case is exceptional and” entitles her to remain here.

11. In paragraph 25 First-tier Tribunal Judge Phillips implicitly found that this was not sufficient and relied upon the decision by the Grand Chamber of the European Court of Human Rights *Paposhvili v Belgium* (Application No. 41738/10) where it held that:

“... the definition of “very exceptional needs to be clarified. The Court determines that Article 3 is triggered in these cases where “the absence of appropriate treatment in the receiving country or the lack of access to such treatment, exposes the individual to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy”.
12. In paragraph 28 First-tier Tribunal Judge Phillips also noted that the Grand Chamber “highlighted that appropriate procedures need to be put in place which allow the individual to adduce evidence of the potential risk upon return to the country of origin and for the State to examine the foreseeable consequences of return with regard to both the general situation and the individual’s circumstances”.
13. In paragraph 30 she also found that there was “sufficient evidence to make it necessary for the [Appellant] to examine the foreseeable consequences of return”.
14. First-tier Tribunal Judge Phillips did not make an explicit finding in relation to Article 3 but implicitly found that the [Appellant] had not followed the judgment in *Paposhvili*. This amounted to an error of law because, although she was obliged to take into account decisions of the Grand Chamber, she had to follow the precedent established by the House of Lords in *N v Secretary of State for the Home Department* [2005] UKHL31, which imposes a much higher test for a breach of Article 3 of the European Convention on Human Rights in medical cases and does not suggest that the Secretary of State for the Home Department bears the burden of proof. It was not simply a case of he who asserted bearing the burden of proof.
15. She also erred in law in so far as she relied on *Paposhvili* when she went on to find that, if the 5th Respondent had to go to Pakistan, this would amount to a disproportionate breach of Article 8 of the European Convention on Human Rights. She also failed to take into account

the Upper Tribunal's decision in *Akhalu (health claim: ECHR Article 8)* [2013] UKUT 00400 (IAC) or give adequate reasons for finding a breach of Article 8.

16. As a consequence, I find that First-tier Tribunal Judge Phillips did err in law in her decision.

DECISION

- (1) The Appellant's appeal is allowed.
- (2) The appeal is remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge Phillips.

Nadine Finch

Signed

Date 18 January 2018

Upper Tribunal Judge Finch