



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11795/2019

THE IMMIGRATION ACTS

Heard at Field House
On 20 November 2020

Decision & Reasons Promulgated
On 2 December 2020

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ENTRY CLEARANCE OFFICER, SHEFFIELD

Appellant

and

**RAJ KUMAR SHARMA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: The sponsor, Honey Sharma Bakshi

For the Respondent: Mr Tufan, Senior Presenting Officer.

DECISION AND REASONS

1. The Entry Clearance Officer ("the ECO") appeals, with permission granted by Judge Simpson, against a decision which was issued by Judge Adio ("the judge") on 31 March 2020. By that decision, the judge allowed Mr Sharma's appeal against the ECO's decision to refuse him entry clearance as the Adult Dependent Relative ("ADR") of his daughter, Ms Honey Sharma Bakshi ("the sponsor"). The appeal was allowed on the basis that Mr Sharma's ongoing exclusion from the UK was in breach of Article 8

ECHR, notwithstanding his inability to meet the ADR provisions of the Immigration Rules.

2. To avoid confusion, I shall refer to the parties as they were before the First-tier Tribunal: Mr Sharma as the appellant; the ECO as the respondent.

Background

3. The appellant is a seventy-year old Indian national. He was born on 22 December 1949. He has visited the United Kingdom in the past. He currently holds a multiple entry visit visa, valid until 2024, which would enable him to travel to the United Kingdom to visit the sponsor but they have both taken the view that his worsening health precludes any such visits. As long ago as April 2019, he made an application for entry clearance as an Adult Dependent Relative. He gave his address in Greater Nodia West, near Delhi, and her address in Sutton. He stated that he was a retired widower and that he lived alone. He said that the sponsor was his only child; that he was dependent upon her; and that he needed '24 hours care'. He had been advised by his doctor not to be alone and to have proper care from his relatives. Supporting evidence was provided with the application, including a sponsorship undertaking made by the sponsor and backed by HSBC bank statements showing significant credit balances; evidence of the appellant and the sponsor owning their own homes; and proof of the sponsor's employment for a company called Travelclick, at which she earns a salary of more than £70,000 per annum.
4. The respondent refused the application because: (i) the appellant had failed to provide a tuberculosis certificate; (ii) had not established that he required care which he could not receive in India; and (iii) had failed to establish that the sponsor's property in Sutton would not be overcrowded in the event that he moved in there. It was not accepted that the refusal of the application would involve a breach of Article 8 ECHR.
5. The appellant appealed to the FtT and his appeal was heard by the judge, sitting at Hatton Cross, on 9 March 2020. The sponsor attended without legal representation. The respondent was represented by a Presenting Officer. The judge received a quantity of evidence, including a number of medical documents, and he heard oral evidence from the sponsor. He found that the appellant was unable to meet the Immigration Rules but that the refusal of admission demonstrated a lack of respect for the appellant's family life with the sponsor. The appeal was accordingly allowed.
6. The respondent sought and was granted permission to appeal on a single ground. It is submitted by her that the judge's decision is inconsistent, in that he concluded in his assessment under the Immigration Rules that the appellant did not require 24 hour care, whereas he had decided that

Article 8 ECHR would be breached by the appellant's ongoing exclusion because he required 24 hour care. The judge's decision was said to be confused. Judge Simpson considered the single ground to be arguable.

7. In submissions before me, Mr Tufan relied upon the grounds of appeal. He submitted that the decision was inconsistent, as the grounds alleged. It had been accepted by the judge that there was a family life between the appellant and the sponsor and there was no challenge to that finding. The judge had found, in essence, that somebody needed to watch over the appellant but it was perfectly possible for somebody to be employed to do so. It was not clear why he needed to have a family member to watch over him, as had been suggested by the judge. The decision of the Court of Appeal in Britcits v SSHD [2017] EWCA Civ 368, [2017] 1 WLR 3345 was relevant. At [90] of his judgment in that case, Sales LJ (as he then was) had noted that in a significant number of cases where the ADR rules are applied the interference with Article 8 rights would be justified and proportionate.
8. In reply, the sponsor stated that her mother had died ten years ago and that her father had lived alone since her death. Her father was difficult man. They could arrange a helper but she would not be able to visit in the evening and it would only last for a few days. She calls her father two or three times per day and she was worried about him. His weight had fallen and he now weighed the same as her. She is his only relative and his last wish was to be able to die surrounded by his family. Her aunt had previously visited the appellant but she no longer did so due to the pandemic. The sponsor said that she and her father found it difficult to understand why he was not allowed to join her. She had enough money to ensure that he would not be a burden on the public purse. She worried constantly about him, particularly since there had been a murder reported in the area where he lived. He had a tourist visa but she could not expect him to travel to the UK on a temporary basis. They had no intention of breaking the law, and he had returned promptly when he had previously come to the UK. He owned his own home in the Greater Noida area and he had savings and interest from those savings. Her aunt who had previously visited lived about two hours away, the journey comprising tuk tuk and metro.
9. Mr Tufan did not seek to respond.

Analysis

10. It was accepted before the judge that the grounds of refusal relating to tuberculosis and accommodation had been addressed by the evidence submitted. The judge's sole focus under the Immigration Rules, therefore, was on the following paragraphs of Appendix FM:

'E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.

E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because-

(a) it is not available and there is no person in that country who can reasonably provide it;

or;

(b) it is not affordable.'

11. At [59] of Britcits v SSHD, the Master of the Rolls emphasised the import of the word 'reasonably' in paragraph E-ECDR 2.5:

"Second, as is apparent from the Rules and the Guidance, the focus is on whether the care required by the ADR applicant can be "reasonably" provided and to "the required level" in their home country. As Mr Sheldon confirmed in his oral submissions, the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations, which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course, to be objectively assessed."

12. Davis LJ agreed with the Master of the Rolls and with Sales LJ (as he then was), who added a short judgment of his own, in which he focused on Article 8 ECHR. At [90], Sales LJ rejected a submission that it should be assumed in any ADR case that there existed a protected family life between applicant and sponsor. He did so because, firstly, "in a significant number of cases where the ADR rules are applied the interference with Article 8 rights would be justified and proportionate" and, secondly, because he saw no warrant for assuming that Article 8 rights were engaged when proper legal analysis might show clearly that it did not.
13. At [12]-[13] of his decision, the judge found against the appellant under paragraphs E-ECDR 2.4 and 2.5. In relation to the former, he found that the appellant did not require '24 hours' medical care'. In relation to the

latter, he found that the appellant could afford his own medical care in India and that “[o]n the evidence it is not possible to come to the conclusion that there is no person available in the country to help the appellant”. He based that conclusion on the evidence that the appellant received some support from the sponsor’s maternal aunt and a housekeeper who helped on a daily basis. The judge also noted that the appellant could afford his own medical care, either on his own or in combination with his daughter in the UK.

14. The remaining analysis in the decision was focused on the appellant’s rights under Article 8 ECHR. The judge reminded himself of Razgar [2004] UKHL 27; [2004] 2 AC 368 at [14]. He noted that the appellant had suffered three heart attacks since 2011; that he continued to have a serious heart condition, with function in the region of 25%; that he had visited his daughter in the UK and that she had visited him in India, taking three weeks off work to spend time with him after his last heart attack. He accepted that they spoke two or three times per day. Taking all matters into account, the judge accepted that there was real and effective support and that there was a family life between the appellant and the sponsor. This finding of fact, underpinned by a clear appreciation of the test as expressed in Rai v ECO [2017] EWCA Civ 320, was not challenged by the respondent. Mr Tufan made no application to amend the grounds of appeal in order to challenge it. He was correct not to do so; the finding and the reasons for it were unarguably open to the judge on the sea of evidence presented to him.
15. The gravamen of the respondent’s challenge focuses on the judge’s assessment of proportionality, which appears at [17]-[20] of his decision. At [17], he set out the relevant sections of Part 5A of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). At [18], he noted that the appellant was unable to meet the requirements of the Immigration Rules and that this was a matter which militated in the respondent’s favour under s117B1(1). He then observed that the appellant had failed to meet the Rules which, he said, ‘[m]ainly that refers to medical care.’ Whilst the appellant did not need 24 hour medical care, the judge concluded that he needed someone to watch over him throughout the day. His helper attended in the morning and evening and the sponsor’s maternal aunt lived two hours away and had recently had difficulties with her own health. The judge continued, at [19] to explain why, on his analysis of the appellant’s family circumstances, he was ‘left with the only close member of the family who is his only daughter in the UK.’ He then found that the appellant and the sponsor could afford private medical care in the UK, thereby addressing the concern that he would represent a burden on the NHS if he was admitted to the UK. He accepted as credible the undertaking which had been provided with the application for entry clearance.

16. At [20], the judge returned to the appellant's health, noting that his weight had dropped to 56kg and that he needed help while walking and using the stairs. The judge found that the poor condition of the appellant's heart was such that 'he needs to be around close family members 24 hours' and that '[h]aving medication available and funds available is not sufficient without having close family members around him at this stage of his life and with his heart condition'. Taking into account the need for '24 hours family care' and the risk of a repetition of the last heart attack in 2018, the judge concluded that the respondent had failed to discharge the burden upon her of establishing that the appellant's continued exclusion was a proportionate course.
17. The single submission made by the respondent is that the judge's decision is confused and contradictory, in that he found in his assessment under the Immigration Rules that the appellant did not require 24 hour care, whereas he had reached the opposite conclusion when he came to allow the appeal on Article 8 ECHR grounds. On a proper reading of the judge's decision, however, there is no confusion or contradiction. The judge was careful, in his analysis under the Immigration Rules, to consider what care was *medically* necessary. He did not consider the appellant to require 24 hour medical care and he concluded, in any event, that he and the sponsor were sufficiently well-off that adequate medical care could be provided in the home if it was required.
18. The judge's analysis on Article 8 ECHR grounds demonstrably took place on a wider canvas, however. He found, as I have already noted, that there was a protected family life between this infirm appellant and his daughter in the UK. He then came to the conclusion that the appellant needed to be around the family members all the time, and that the only real candidate was his daughter. This did not represent a finding on the part of the judge that the appellant required the sponsor to tend to his medical needs. Had he made that finding, it would certainly have been inconsistent with the earlier part of his analysis. But he did not; his finding was based on the human predicament in which the appellant finds himself. As the judge noted, he has very poor heart function and has suffered three heart attacks. There is not only a risk that he will have another heart attack; there is a very real concern that there will be no close family members around in that event. To criticise the judge's reasoning in this regard would be to forget what was said by Lord Bingham at [18] of Huang v SSHD [2007] UKHL 11; [2007] 2 AC 167:

"Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the

applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment."

19. I consider the judge to have had those dicta in mind when he decided as he did. He did not base his decision on the appellant's need for medical care which might properly be sourced in India but on his assessment that the appellant's health is so precarious that he has reached the point where he requires the presence of family members lest he should fall significantly ill once again. (So much is clear from the part of [20] in which the judge noted that it did not suffice for the appellant to have access to medication and funds.) At that point in life, perhaps more than any other, the fact that human beings are social animals who depend upon one another comes to the fore. As the sponsor said in her considered observations before me, her greatest fear, and that of her father, is that there should be no family members around him when his life comes to an end. It was that consideration which the judge weighed against the public interest in the appellant's exclusion in the concluding paragraphs of his decision. He did not fall into legal error in reaching confused or inconsistent findings.
20. Mr Tufan also sought to submit (albeit without an application to amend the grounds) that the judge erred in failing to consider or apply what was said by Sales LJ at [90] of Britcits. In particular, Mr Tufan relied upon the observation that "in a significant number of cases where the ADR rules are applied the interference with Article 8 rights would be justified and proportionate." But Sales LJ was not suggesting in that sentence that there was a different proportionality test in a case which failed under the ADR Rules, he was merely stating the expectation that the number of cases which might properly succeed on Article 8 ECHR grounds after having failed under those Rules was likely to be small. That is no more and no less than was said in Razgar, which was clearly borne in mind by the judge. Mr Tufan's reliance on that part of Britcits takes matters no further.
21. In the circumstances, I hold that the respondent's grounds of appeal fail to disclose a legal error on the part of the judge and that her appeal must be dismissed.

Notice of Decision

The appeal to the Upper Tribunal is dismissed. The decision of the FtT, allowing the appeal on Article 8 ECHR grounds, shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 December 2020