



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No:
HU/02779/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29th February 2024

Before

UPPER TRIBUNAL JUDGE LANE

Between

RB
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Murphy
For the Respondent: Mr Clarke, Senior Presenting Officer

Heard at Field House on 22 January 2024

DECISION AND REASONS

1. By a decision dated 5 September 2020, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

The appellant, a female citizen of Pakistan, was born on 1 January 1952. By a decision dated 12 September 2018, the respondent refused the appellant's application for leave to remain on human rights grounds and certified the decision as clearly unfounded. Subsequent to proceedings for judicial review, the respondent issued a fresh refusal dated 28 January 2019 granting a right of appeal. The First-tier tribunal, in a decision promulgated on 20 December 2019, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

Granting permission, First-tier Tribunal Judge Kelly wrote:

The grounds assert that (a) the tribunal erred by confining itself to considering the engagement of Article 8 ... on private life grounds and thereby failed to consider whether it also engaged on family life grounds by reason of the appellant's relationship with the son and other members of his family in the UK; (b) made findings relating to the appellant's mental health problems without proper regard to the supporting expert medical evidence; and; (c) did not have regard the totality the of the evidence concerning the obstacles to the appellant's integration on return to Pakistan. These grounds are arguable. Permission to appeal is accordingly granted.

Directions were issued by the Upper Tribunal on 3 July 2020. The Upper Tribunal directed that the parties should indicate any objection to the matter of error of law being determined without a hearing. Both parties have responded to those directions. The Secretary of State stated by letter dated 7 July 2020 that she does not 'oppose the appellant's application for permission to appeal and agrees the First-tier Tribunal judge should have made findings in respect of family life. The relevant case law that the First-tier Tribunal judge should have considered is *Britcits* and *Ribeli*.'

In the light of the response of the Secretary of State (with which I agree), I set aside the decision of the First-tier Tribunal. None of the findings of fact shall stand. The decision will be remade in the Upper Tribunal at following a resumed hearing on a date to be fixed.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The decision will be remade in the Upper Tribunal at following a resumed hearing on a date to be fixed. Both parties may adduce fresh evidence provided copies of any documentary evidence (including witness statements) are sent to the Upper Tribunal and the other party no less than 10 days prior to the resumed hearing.

2. The standard of proof in the Article 8 ECHR appeal is the balance of probabilities. At the resumed hearing at Field House on 22 January 2024, I heard oral evidence from the sponsor who adopted his four witness statements as his evidence in chief. He was cross examined by Mr Clarke. Having heard the submissions of both representatives, I reserved my decision.
3. The sponsor's evidence was not impressive and there is force in Mr Clarke's submissions that evidence which could easily have been adduced in the appeal is missing. Mr Clarke's cross examination of the sponsor focussed on the whereabouts and circumstances of family members other than the sponsor and his wife who could reasonably be expected to care for the appellant outside the United Kingdom. The sponsor claims that he has four brothers and a sister. One brother is in Dubai and another, who has broken off contact the rest of the of the family, appears to be residing illegally in Turkey. In an appeal on Article 8 ECHR grounds such as this, detailed evidence regarding the circumstances of other family members

who could care for an elderly, sick appellant is vital. The remedy of a grant of Article 8 ECHR leave to remain will normally be available when it is feasible and, in all the circumstances, reasonable for family members to care for the appellant outside the United Kingdom. As the Court of Appeal held in *Ribeli* [2018] EWCA Civ 611 at [69-71]:

- (a) The crucial point (and it is a powerful point as a matter of common sense as well as a matter of law) is that the Appellant's daughter could reasonably be expected to go back to South Africa to provide the emotional support her mother needs as well as to provide practical support. For example, if the concern is that the Appellant may be cared for in her home by people who may turn out not to be trustworthy, there is no reason why her daughter cannot live and work in South Africa to supervise the care arrangements made for her mother.
 - (b) As the UT Judge observed, at the end of the day, what this case is about is the *choice* which Ms Steenkamp has exercised and wishes to be able to continue to exercise of living and working in a major international centre like London rather than in South Africa, which is her own country of origin. She is entitled to exercise that choice. But, in those circumstances, the UT cannot be faulted for having come to the conclusion that any interference with the Appellant's right to respect for family life conforms to the principle of proportionality.
 - (c) This is especially so in a context where, as Mr Sheldon has submitted, "appropriate" or "due" weight must be given on the other side of the balance to the assessment by the Secretary of State and by Parliament (which has approved the Secretary of State's changes to the Immigration Rules) of what the public interest requires. Depending on the context the weight which is appropriate or due may be "considerable" weight: see *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, para. 44 (Lord Reed JSC), citing *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para. 16 (Lord Bingham of Cornhill); and also paras. 46 and 50; and *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823, para. 47 (Lord Reed JSC).
4. Therefore, in an Article 8 ECHR appeal involving the care of a family member by other family members, a proper evaluation of the public interest requires that all reasonable solutions which might avoid a appellant, who otherwise has no right to remain in the United Kingdom, continuing to reside here must be thoroughly examined. The burden of proof in the appeal rests on the appellant and the Tribunal cannot simply default to acceptance of the *status quo* of care, no matter that it be longstanding, as it is in this appeal. It may well be the case that the appellant, now suffering from dementia as both parties agree, can only reasonably receive care from the sponsor and his wife; however, the

evidence before the Tribunal did not prove that to the required standard of proof.

5. Mr Clarke's cross examination exposed a failure on the part of those representing the appellant to bring the necessary evidence before the Tribunal. There was nothing beyond the evidence of the sponsor himself to show where and what circumstances his siblings are currently living and that evidence was seriously lacking in detail. Whilst I accept that it may have been difficult to obtain evidence from Juma Gul, the brother who is ostracised from the rest of the family, that was not the case with the other siblings. Mr Clarke urged me to draw an adverse inference from the absence of evidence which could have been obtained (see *TK (Burundi)* [2009] EWCA Civ 40). I shall not go as far as that; I found that the sponsor was genuinely perplexed by his growing awareness during cross examination that much more evidence could have been adduced. I do not find that the sponsor came to the Tribunal in order to lie. Having said that, I find that the appellant has not discharged the burden of proof upon her. In short, there may be other family members who can reasonably be expected to care for the appellant; the Tribunal will not simply assume, without proper evidence, that such individuals will not do so.
6. For the reasons I have given, I dismiss the appeal. However, I emphasise that I have not found the sponsor to be an untruthful witness. I accept what he says regarding the daily care which he and his wife provide for the appellant. The appellant may seek to make a further application, although that is a matter for her and her advisers. If she does so, she should consider exactly what evidence she needs to put before any decision maker.

Notice of Decision

The appeal is dismissed

C. N. Lane

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 20 February 2024