Neutral Citation Number: [2019] EWCA Civ 268

Case No: C5/2016/3381

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UTIAC
Deputy Upper Tribunal Judge Zucker
IA/44519/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2019

Before:

LORD JUSTICE SIMON
and
LADY JUSTICE THIRLWALL DBE

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Between:

HS (Bangladesh)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

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Mr Riccardo Calzavara (instructed by **Pro Bono Unit**) for the **Appellant**
Mr Eric Metcalfe (instructed by **GLD**) for the **Respondent**

Hearing date: 1st November 2018

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Judgment Approved

LADY JUSTICE THIRLWALL :

1. The appellant is a national of Bangladesh. He is 55 (DoB 22.3.63). This is his appeal against a decision of the Upper Tribunal (UT) dismissing his appeal against the decision of the First tier Tribunal (FtT) dismissing his appeal against the refusal by the Home Office of his application for leave to remain in the UK on human rights grounds. It is agreed that he is not eligible for leave to remain under the Immigration Rules. He relies on his rights under Article 8 of the European Convention on Human Rights, namely his right to respect for his family and private life.

Chronology

2. The appellant first entered the UK on 18 July 1998 on a temporary visa. His wife and two sons had moved here without him in 1997. His sons were 4 and 5 respectively. The appellant visited his family, left the country and visited on two or three more occasions between 2000 and 2001, each time with a temporary visa to visit family. In 2001 he and his wife separated. The appellant issued proceedings for contact with his sons and returned to the UK in 2003 on a temporary visa. He was granted leave to remain (outside the Immigration Rules) until 30 September 2004 so that he could give evidence at the hearing of that application.

3. On 10 November 2004 the appellant was refused further leave to remain outside the Immigration Rules. His rights of appeal were exhausted in 2006. For the last 12 years he has remained in this country as an overstayer. He made a further application for leave to remain on human rights grounds in 2010. This was refused on 21 October 2010. There was no right of appeal.

4. On 22 July 2013 and again on 9 June 2014 the appellant applied for leave to remain outside the Rules on the grounds that his removal would place the UK in breach of its obligations under the Human Rights Act 1998. He said (and it is not disputed) that he suffered from clinical depression and type 2 diabetes for which he takes Citalopram and Metformin respectively. He said that he had lived outside of Bangladesh for many years and he had no one to return to there. He relied on the fact that he had been residing in the UK for many years, his close family is here and he asserted that he would suffer harshly if removed (see paragraph 4 of the FtT decision). Leave to remain was refused on 7 August 2014. The appellant appealed. FtTJ Clarke dismissed the appeal on 18 May 2015. The appeal to the Upper Tribunal was dismissed on 6 January 2016.

5. Permission to appeal from the Upper Tribunal decision was refused on 27 April 2016 by a judge of the Upper Tribunal. On 3 March 2017 an application for permission to appeal to the Court of Appeal was refused on the papers. A renewed application was heard on 14 February 2018. Permission was granted. Mr Metcalfe in his skeleton sought to argue that the second appeal test was not met. We did not permit oral argument on the point; permission having been granted we were required to consider the case on its merits.

6. Both advocates presented their arguments with commendable focus, Mr Calzavara acting pro bono. We are grateful to them both.

7. During the course of the hearing of the appeal Mr Calzavara informed us that the appellant's sons and the appellant now live in the same household. As we explained

then, we are concerned with the position as it was before the First tier Tribunal. The recent development is not relevant to the appeal.

The First tier Tribunal judge's findings of fact

8. In addition to the chronology which is set out above and does not need to be repeated the judge found that the appellant had spent his first 22 years in Bangladesh. He moved to Abu Dhabi in 1985 and worked there for years. By the time of the hearing the appellant had not lived with his sons since 1997. They were in their mid twenties, in work and supporting their father financially. The judge found that they visited him once or twice a week, generally separately. The appellant was living alone in East London, as he had done for years. The two sons lived in Luton.

9. The judge accepted that the appellant suffers from diabetes and depression and added that "these appear to be managed by medication". He found, unsurprisingly that the facts pertaining to the appellant's medical condition fell " far short of the Article 3 threshold." There is no complaint about that and we need not deal with it further.

10. Although in his statement in support of his application the appellant had said he had no relatives in Bangladesh it emerged in evidence (and is not disputed) that his brother and his wife and family live in Bangladesh; the appellant would be able to go and live with them, as the judge found [18]. The judge also found that his sons would have the funds to visit the appellant in Bangladesh and that they would continue to support him financially.

11. The judge concluded that on the facts there was no family life but there was private life within the meaning of Article 8 of the ECHR. He concluded "there is a private life which includes the close ties he shares with [his sons]… There would be interference to his private life and in particular to the sons". He had already considered the public interest and referred to section 117B of part 5A of the Nationality Immigration and Asylum Act 2002 which reads, under the heading Article 8: public interest considerations applicable in all cases:

> (1) The maintenance of effective immigration controls is in the public interest and
>
> (4) little weight should be given to-
> (a) a private life, or
> (b) …
> 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 that person's immigration status is precarious.

12. The judge referred only to Section 117B(5) but, as Mr Calzavara pointed out, subsection 4 was also applicable. At [20] he found " Looking at the evidence as a whole, including the period of delay from 2006, and the fact that it is accepted that he has been an overstayer, building up a private life further whilst his immigration status was precarious, and noting his clinical depression, which is managed by medication and the visits by his sons, I conclude that it is proportionate for the Appellant to be removed".

The Upper Tribunal judge's decision

13. Before the Upper Tribunal it was accepted that the FtT judge's findings were open to him except for his finding about the length of time the appellant had lived outside Bangladesh. The Deputy Upper Tribunal judge correctly considered that fact immaterial and there is no complaint about that. The grounds of appeal to the Upper Tribunal (so far as they are relevant to this appeal) were summarised by the judge thus [4] " it is submitted that … in considering the issue of family life it should have been accepted that the rather rigid approach in **Kugathas v SSHD [2003]** INLR 170 had been modified by the guidance in **Ghising [2012]** UKUT 00160."

14. At paragraph 3 of his decision the Deputy Upper Tribunal judge observed that "it was a very significant part of the appellant's case that he suffered and suffers from clinical depression and that in those circumstances he was dependent upon his sons for their support." He continued "The FtT judge considered the evidence and found there to be no family life with the sons, although reading the decision as a whole it is clear that what was meant was no sufficient family life within the context of the claim that was being brought rather than saying none at all."

15. At paragraph 7 the judge referred to the facts found by the First Tier judge and said "Those material facts are the extent to which there was family life, which I have already indicated is to be seen in the context of the claim, that is to say whether it is sufficient to engage Article 8 family life and whether it was open to the judge to find that the clinical depression relied upon was such that taken with other factors outweighed the public interest in removal. The judge quite properly made reference to section 117B." The judge then dealt with the argument under 276ADE of the Immigration Rules which was not pursued before us. He then considered whether the evidence about the appellant's medical condition met the threshold under Article 3 and concluded that it did not. This was not a point pursued before us. He went on to find that the medical condition did not of itself engage Article 8 either.

16. The Deputy Upper Tribunal judge observed that ultimately there was no error of law and no basis for finding that material issues had not been considered nor was there anything "perverse or irrational" in the way the judge had considered the public interest. He observed that there was evidence of a symbiotic relationship between the father and sons and expressed the view that the dependency by the sons on the father seemed greater than his dependency on them. He concluded that whether the relationship "was sufficient, was, I find, a matter that was open to the judge and the finding that he made was one that was open to him."

The appellant's case on appeal

The decision of the Upper Tribunal

17. The Deputy Upper Tribunal judge did not refer to the ground of appeal set out at paragraph 13 above and made no finding in respect of the appropriateness of the test applied by the FtT judge but that was not the focus of the appeal before us. The appellant submits that there was an error in law in the decision of the Deputy Upper Tribunal judge because i) he introduced into the evaluation of the question whether there was family life a threshold of sufficiency and ii) he erred in finding there was no material error in law in determining that there was no family life. In the grounds Mr

Calzavara relied on an extract from the judgment, "Appellant is now more than merely tied to them emotionally, but for financial support as well". This was a submission on behalf of the appellant and not a finding by the judge.

Sufficiency of family life

18. Mr Calzavara points to the two passages in the decision to which we refer above and repeat here for ease of reference:
at [3] "The judge considered the evidence and found there to be no family life with the sons, although reading the decision as a whole it is clear that what was meant was no sufficient family life within the context of the claim that was being brought rather than saying none at all."
at [7] "Those material facts are the extent to which there was family life, which I have already indicated is to be seen in the context of the claim, that is to say whether it is sufficient to engage Article 8 family life and whether it was open to the judge to find that the clinical depression relied upon was such that taken with other factors outweighed the public interest in removal. The judge quite properly made reference to section 117B."
The same appears at [12] where the judge considered that the question whether the relationship "was sufficient, was, I find, a matter that was open to the judge and the finding that he made was one that was open to him".

19. On behalf of the respondent Mr Metcalfe accepts that family life within the meaning of Article 8 either exists or it does not. We agree. If authority for this proposition is needed it is to be found in **Singh v Entry Clearance Officer New Delhi [2004]** EWCA Civ 1075. Mr Metcalfe also submits that the judge did not introduce such a threshold and that, in context, that is not the effect of his judgment.

20. In the course of argument Mr Calzavara accepted that had the Deputy Upper Tribunal judge said there was no family life for the purposes of Article 8 there could be no complaint. He submits that the judge did not say that and instead used the word 'sufficient' on three separate occasions. In doing so he impermissibly introduced a threshold requirement of sufficiency.

21. I do not accept that submission. It is plain from the context of the word in paragraphs 3, 7 and 12 of the judgment and of the arguments before him that the Deputy Upper Tribunal judge was saying that the FtT judge had found there was no family life for the purposes of Article 8. It would have been better had he said so in terms but his inapt use of 'sufficient' does not lead to the conclusion that he had introduced an impermissible test of sufficiency in order to uphold the decision of the FtT judge. The FtT judge did not introduce such a test either. There is nothing in this point.

Failure to find a material error of law in the First tier Tribunal Decision

22. At the heart of the appellant's case is the proposition that he depends upon his sons financially and emotionally. Mr Calzavara submits that the FtT's conclusion that there was no family life was not a conclusion that was lawfully reached. He points to paragraph 21 of the FtT judgment which reads, "Looking at the evidence as a whole, including the period of delay from 2006 and the fact that it is accepted that he has been an overstayer, building up a private life further whilst his immigration status was precarious, and noting his clinical depression, which is managed by medication and the visits by his sons I conclude that it is proportionate for the Appellant to be

removed". Mr Calzavara says this makes it clear that there was a relationship of dependency which goes beyond the normal family ties.

23. This paragraph too must be read in context. The judge is there dealing with the question of proportionality, having already come to his conclusion that there was no family life. Earlier in the judgment in his findings of fact he observed that the appellant's clinical depression and type 2 diabetes appeared "to be managed by medication." It was not seriously suggested that visits from the sons were managing his clinical depression, nor could it be. Medical evidence would have been required to that effect and there was none. It was open to him on the evidence to find that visits from his sons were good for the appellant's morale but that goes no further than normal emotional ties.

24. In any event it is not the appellant's case that the facts found by the FtT judge should have led, inevitably, to the conclusion that the appellant had family life within the meaning of Article 8 of the ECHR. Mr Calzavara does not put his case so high. He submits that the FtT judge failed to refer to the correct test for establishing family life for the purposes of Article 8. It follows that he did not apply the test. This error of law, he submits, undermines the judge's finding.

25. The test to which Mr Calzavara refers is set out in two places in **Kugathas v SSHD** EWCA Civ 31: in short the appellant must prove that something more exists between the appellant and his sons than "normal emotional ties".

26. It is instructive to consider the way the case was put to the Upper Tribunal (see paragraph 13 above). The grounds of appeal (so far as they are relevant to this appeal) were summarised by the judge thus [4] " it is submitted that … in considering the issue of family life it should have been accepted that the rather rigid approach in **Kugathas v SSHD [2003]** INLR 170 had been modified by the guidance in **Ghising [2012]** UKUT 00160." It was not there being submitted that there had been a failure to apply the **Kugathas** test. On the contrary the complaint was that it had been applied without sufficient account being taken of the approach in **Ghising**. The question of the **Kugathas** test was at the centre of the appellant's submissions before the FtT and the judge refers in terms to the authorities in his recitation of the material before him. He had also been provided with the decisions in **Singh** [2015] and **Ghising.** He dealt in terms with the submissions made in respect of **Ghising**. It is simply not arguable that he did not have the correct test in mind in coming to his view.

27. Given the evidence before him and applying the right test, the conclusion the judge came to was plainly open to him. The appeal to the Upper Tribunal rightly failed and, if My Lord agrees I would dismiss this appeal.

Lord Justice Simon

28. I agree.