



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/27004/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 June 2018

Decision & Reasons Promulgated
On 09 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

INDER KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Wilford, instructed by Braitch RB solicitors

For the Respondent: Ms Z Kiss, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 20 May 1937. She is appealing against the decision of First-tier Tribunal Judge Broe promulgated on 18 September 2017 to dismiss her appeal against the decision of the respondent on 11 November 2016 to refuse her application for entry clearance as the dependent relative of her son ("the sponsor"). Entry clearance was refused on the basis that the requirements of Appendix FM as an adult dependent relative were not satisfied and there were not exceptional circumstances to warrant allowing the appeal under Article 8 outside the Immigration Rules.

Decision of the First-tier Tribunal

2. The appellant appealed to the First-tier Tribunal where her appeal was heard by Judge Broe. The judge firstly considered whether the requirements for entry clearance as an adult dependent relative under Section EC-DR of Appendix FM of the Immigration Rules were satisfied. The judge found that they were not. At paragraphs 19-20 he stated:-

“19. I note that the Appellant has been living alone since her daughter in law and grandchildren left in 2013, four years ago. I note that she is 80 years old and that she has pains in her lower back, leg and knees. There is no evidence of how she currently copes without assistance although I note that she lives alone. I accept that her life would be made easier if she was living with a relative who would help and also provide the emotional support and interaction that she desires. I am not however persuaded on what is before me that, as a result of age, illness or disability she requires long-term personal care to perform everyday tasks.

20. In the event that I am wrong about that I have given careful consideration to whether she can obtain the required level of care in India. In his most recent letter her doctor says: *“There are many care homes and old age homes in Punjab. Many are in the city of Jalandhar where my patient Inder Kaur resides. The care home may claim that the elderly people are living in full comfort and care in the care home. But the emotions of the elder people are attached to their loved ones ... Even though the are (sic) homes obtain high standers (sic) in care and hygiene but they will not be able to support Inder Kaur in the way her loved ones will and it may not be possible to comfort Inder Kaur emotionally”*. He said that if she was in a care home she might feel neglected and hurt emotionally.”
3. The judge then turned to consider whether the appeal should be allowed outside the Immigration Rules.
4. At paragraph 23 he concluded that the family life between the appellant and her son (who was the sponsor) did not engage Article 8 ECHR. He stated:-

“I have noted the findings in R (Britcits) v SSHD (2017) EWCA Civ 368 in which the Master of the Rolls rejected the submission that there was always family life that engaged Article 8 whenever a UK citizen with an elderly parent resident outside the United Kingdom wished to bring that parent to this country to look after them. Whether or not there was family life at the time of the application depended on the facts. I have given careful consideration to the relationship between the Appellant and Sponsor in this case and am not persuaded there is a relationship beyond the normal bonds that would be expected between a parent and an adult child.”
5. The judge then proceeded to assess, in the alternative, the proportionality of refusing entry clearance. At paragraph 24 he cited *Agyarko* [2017] UKSC 11 and noted the finding of the European Court in *Jeunesse* about precarious family life. At paragraph 26 the judge stated that in cases where there is “precarious family life” there must be strong or compelling to outweigh the public interest in immigration control.
6. The judge concluded that if he was wrong about Article 8 being engaged then, in any event, he was satisfied that the interference with Article 8 rights would be lawful for

the legitimate purpose of maintaining immigration control and would be proportionate.

Grounds of appeal and submissions

7. The grounds of appeal raise a number of issues with the decision.
8. First, it is argued that the judge erred in respect of the application of the Immigration Rules concerning adult dependent relatives because there had been an inadequate assessment of whether care could reasonably be provided to the required level in India.
9. Second, the grounds argued that the judge failed to give adequate reasons for finding that Article 8 was not engaged between the sponsor and appellant and failed to engage with the issue of whether family life was engaged between the appellant and the sponsor's wife and children, with whom she had lived in India until 2014.
10. Third, the grounds argue that the judge erred by considering cases involving precarious family life when this had no relevance to this matter.
11. Fourth, the grounds argue that the judge failed to apply a balance sheet approach to the proportionality assessment and did not identify factors of significant weight that supported the appellant's application such as her health.
12. Before me, Mr Wilford elaborated on the grounds. He placed particular emphasis on the failure to consider the relationship between the appellant and his granddaughter noting that no reference to her witness statement was made in the decision. He also stated that the case law on precariousness had no bearing on the case. In respect of the Immigration Rules concerning adult dependent relatives he argued that the judge failed to have proper regard to the medical evidence which established the need for family support and thereby brought this case within the ambit of the Rules.
13. Ms Kiss responded by arguing firstly that the medical evidence that Mr Wilford sought to rely on could not be given substantial weight as it is written by an orthopaedic doctor yet purports to give medical advice on psychological issues relating to care and family support. She also noted that the evidence is framed in terms of "may" rather than "will". She also observed that the evidence shows the family travelled together in 2014 to Germany which suggests a level of independence and ability greater than that being proposed by the appellant and which is consistent with the findings of the judge. She also argued that the evidence of the medical condition and medication required does not suggest a particularly high need. With regard to whether Article 8 was engaged, she argued that the test in *Kugathas v SSHD* [2003] EWCA Civ 31 had been properly applied with the judge correctly directing himself as to the test and applying it appropriately in the circumstances. She acknowledged that the granddaughter had not been referred to in the decision but did not consider this material.

Analysis

14. The decision is in two parts. Firstly, at paragraphs 18 – 21, the judge assessed whether the appellant met the requirements of section EC-DR of Appendix FM of the Immigration Rules to be granted entry clearance as an adult dependent relative of the

sponsor. Secondly, after finding that the conditions of section EC-DR were not satisfied, at paragraphs 22 – 29 the judge considered whether refusing entry clearance to the appellant would be contrary to article 8 ECHR.

Section EC-DR

15. In order to satisfy the requirements under section EC-DR an applicant must establish, inter alia, both that she requires long-term personal care to perform everyday tasks (E-ECDR 2.4) and that she is unable, even with the support of the sponsor, to obtain the required level of care in the country in which is living because it is either not available or not affordable (E-ECDR 2.5).
16. The judge found that neither E-ECDR 2.4 nor E-ECDR 2.5 were satisfied as he did not accept that long-term personal care was required or that it could not be obtained in India. The first ground of appeal only challenges the judge's findings in respect of E-ECDR 2.5 (availability of care) and does not contain any challenge to the judge's finding at paragraph 19 of the decision that long-term personal care is not required. Accordingly, even if the first ground of appeal is sustainable and the judge erred by finding care would be available, this is not material as there has been no challenge to the judge's finding that the appellant does not require long-term personal care to perform everyday tasks, such that E-ECDR 2.4 is not satisfied.
17. In any event, the judge was entitled to find, on the evidence before him, that the appellant did not require long-term care within the meaning of E-ECDR 2.4. As argued by Ms Kiss, the burden of proof was on the appellant and the evidence adduced did not point to a particularly high level of need. The judge was entitled to give weight to his finding, at paragraph 19, that the appellant lives alone and that there was no evidence of how she copes without assistance. I am therefore satisfied that it was open to the judge, based on the evidence before him, to conclude that the requirements of section EC-DR of Appendix FM were not met.

Article 8 ECHR

18. At paragraph 22, the judge stated that it was necessary to consider whether article 8 ECHR was engaged and that "family life" entailed consideration of each affected family member. However, despite correctly directing himself that the family life of all family members was relevant, the decision does not contain any consideration of the family life between the appellant and her daughter-in-law and grandchildren. The witness evidence of the appellant's granddaughter was that she saw the appellant as a mother figure because of their previous cohabitation and it was not in dispute that the appellant had lived with this granddaughter, as well as her son's wife, before they came to the UK in 2013. Given this background, it was incumbent on the judge to make a finding, and assess the evidence, in respect of the claimed family life between the appellant and her daughter-in-law and grandchildren. The absence of this constitutes an error of law.
19. A further error of law arises from the judge's assessment of whether family life existed between the appellant and the sponsor. At paragraph 23 the judge stated that he was not persuaded that the relationship between the appellant and sponsor went beyond the normal bonds that would be expected between a parent and an adult

child. This conclusion by the judge demonstrates that he had in mind the correct legal test (the wording reflects the language used in *Kugathas v SSHD* [2003] EWCA Civ 31). However, the judge has not given any reasons to explain why he has concluded that the relationship does not go beyond “normal bonds”. The appellant’s case was that the sponsor provides her with real, effective and committed financial and emotional support. The decision does not contain an evaluation of these claims, or the evidence put forward to support them, and it is not discernible from the decision why the judge concluded that the relationship did not go beyond normal bonds.

20. Having found that family life was not engaged, the judge proceeded (in the alternative, in case he was wrong) to evaluate whether refusing entry clearance would be disproportionate. The judge directed himself in paragraphs 24 and 26 that there needs to be compelling/exceptional circumstances to allow an appeal “in cases concerned with precarious family life” and he referred to *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11, which concerned appellants who formed relationships whilst in the UK unlawfully. Reading paragraph 24 to 26 together, the clear impression is formed that the judge took into account, when assessing the proportionality of entry clearance being refused, the case law which establishes that little weight should be given to relationships formed when an immigration status is unlawful or precarious. However, these considerations were irrelevant in this case, which concerned the relationship between an elderly parent and her son (and his family) that was formed long before any issue of immigration status arose. Therefore, it would be an error of law to weigh against the appellant in the article 8 proportionality balancing exercise that the relationship was formed when her (or the sponsor’s) immigration status was “precarious.”
21. For the reasons given above, I find that the decision contains material errors of law and consequently cannot stand. Given the extent of further fact-finding that will be necessary for the decision to be remade, I find that the appeal should be remitted to the First-tier Tribunal to be heard afresh.

Decision

22. The appeal is allowed.
23. The decision of the First-tier Tribunal contains a material error of law and is set aside.
24. The appeal is remitted to the First-tier Tribunal to be heard by a different judge.
25. No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 5 July 2018