



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08182/2018

THE IMMIGRATION ACTS

Heard at Field House
On 9th April 2019

Decision & Reasons Promulgated
On 21st May 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR BASANT SINGH
(ANONYMITY DIRECTIONS NOT MADE)

Respondent

Representation:

For the appellant: Ms S Chuna, Senior Presenting Officer.

For the respondent: Mr J Walsh, Counsel, instructed by Victorimax Solicitors.

DECISION AND REASONS

Introduction

1. It is the Secretary of State who is appealing in these proceedings. However, for convenience I will continue to refer to the parties hereinafter as they were in the First-tier Tribunal.

2. The appellant is a national of India born on 3 June 1939. Over the years he was granted numerous visas to enter as a visitor. The refusal letter refers to an entry clearance being valid from 6 December 1998 until 6 June 1999. Thereafter, he was granted various leaves as a visitor, the last of which ended on 10 December 2015. He last entered the United Kingdom on this Visa on 10 June 2015 and then on 9 December 2015 he applied for leave to remain outside the rules. The application was refused and certified on 9 September 2016.
3. A further application was made outside the rules on 22 December 2016. In his application he referred to health issues. A decision was not made on his claim until 19 March 2018, when it was refused. Regard was had to paragraph 276 ADE of the immigration rules and his private life. It was felt he did not satisfy these requirements. The decision maker referred to a consideration of any exceptional circumstances. The appellant had indicated he suffered from amongst other things asthma, coronary heart and a disorder which could lead to excessive bruising or bleeding as well as depression and anxiety. However, the respondent did not see the health issues as reaching the necessary threshold to justify the grant of leave.
4. The grounds of appeal refer to the appellant's age and that he has a married son here and is dependent on him. It suggests that his application should be considered in relation to appendix FM and the adult dependent relative rule.
5. His appeal was heard by First-tier Tribunal Judge D Barker at Hatton Cross on 11 January 2019. The parties were represented. The judge heard from the appellant's son and daughter in law. His son, the sponsor, said he has been living here since 2004 and became a British citizen in 2011. He said he was the appellant's only son and that his mother had died in 1993. He referred to cultural expectations that the family would live together.
6. The judge sets out the evidence and the findings made. Reference was made to the section 117 B factors. The conclusion was that the appeal should be allowed.

The Upper Tribunal

7. Permission to appeal was granted on the basis it was arguable the judge did not properly consider the public interest factors in allowing the appeal. In particular, it was arguable the judge failed to take account of the fact that his family and private life was established at a time when his immigration status was precarious.
8. At the outset of the is provided with a copy of the decision of the Supreme Court in Rhuppiah -v- SSHD [2018] UKSC 58. The Court gave guidance on the meaning in section 117B(5) of someone with a precarious immigration status as being everyone who has leave to reside here other than indefinitely. There

was no need to consider degrees of precariousness. Section 117B(5) nevertheless permits a limited degree of flexibility, both by reference to “little weight” and by virtue of section 117A(2)(a) via the phrase “must (in particular) have regard”. This guidance may be overridden in an exceptional case by particularly strong features of the private life. It is important to note that section 117 B(5) is dealing with private life as opposed to family life when the person is here lawfully.

9. The presenting officer submitted that the judge erred at paragraph 33 in stating that his article 8 rights had not developed when he was either in the country illegally or with a precarious status. She pointed out that the appellant came to the United Kingdom in 2015 on a visit Visa and then overstayed. He had no settled status. She submitted that the judge did not adequately considered the public interest factors.
10. In response, Mr Walsh, who appeared in the First-tier Tribunal, submitted that the judge’s decision was comprehensive. I was referred to the rule 24 response which he had submitted and which he adopted. He pointed out at paragraph 8 that the most important element in the application was the appellant’s family life with his son and his family.

Consideration

11. I find that the decision of First-tier Tribunal Judge Barker clearly demonstrates the considerable care which has been taken by the judge in dealing with the appeal. The reasons for refusal letter is relatively brief. It does not consider family life nor as a comparator the adult dependent relative rules in appendix FM. Rather, the focus was upon private life as set out in paragraph 276 ADE. I find to look at the matter so in this way distorts the issues arising and deals with the claim in an artificial way. This point was noted by the appellant’s representatives who raised the adult dependent relative provisions in the grounds of appeal.
12. At paragraph 10 the judge records the evidence as being that the appellant’s son, his sponsor, has visited India every year since 2004. His evidence was that he has more recently been visiting his father several times a year, despite having substantial business commitments. His children also visit. The judge recorded the sponsor’s evidence that if his father had to return to India he could afford to pay for his care. Whilst his material needs may be catered for, his sponsor said the appellant would miss the love and care of his family. The sponsor said the issue had arisen out of necessity rather than any preference. He explained that he was an only son and that his mother died in 1993. He referred to the Indian tradition whereby the elderly are cared for within the family. He then refers to the appellant’s needs and refers to a deterioration since 2015. The sponsor said that he has respected the law and before the appellant’s visit visa expired he took advice and made an application. It was

only when this was refused that the family were placed in a dilemma. They did not simply ignore the issue but made a subsequent application.

13. In submissions, at paragraph 16 the judge refers to being addressed by the presenting officer on the public interest factors in section 117 B. Mr Walsh, in response, accepted that the appeal was not being argued on the basis of the article 3 threshold being met because of the appellant's medical needs. He emphasised the fact the family had visited the appellant regularly since 2004. He in turn had visited the United Kingdom and had complied with the terms of his leave until the very end. He referred to the leading decision of BRICITS -v- SSHD [2017] EWCA Civ 368. Paragraph 18 records there was no suggestion the appellant relies on public funds and commented on the sponsor's achievements.
14. In the Finding section, the judge clearly analyses the various issues arising and the evidence. At paragraph 22 the judge refers to the appellant's good immigration history. At paragraph 24 the judge considered the medical evidence about the appellant's mental state and concluded that was a degree of cognitive impairment and further assessment was required in relation to a possible diagnoses of dementia.
15. At paragraph 27 the judge addresses the adult dependent relative rules and makes the point that the principal obstacle for the appellant is that he is in country. The judge dealt with the relevant considerations in those rules. This would be relevant to the proportionality assessment. The judge was satisfied that he fulfilled E-ECDR 2.4 in that he needed long-term help with day-to-day tasks. The judge then faces up to the issue of alternative care and the possibility of the appellant living in a care home in India. The judge concluded that his physical needs could be met in this way. The judge also correctly said it was for the appellant to establish he met the rules and referred to a lack of evidence about the care facilities available. The judge concluded that it had not been established the required standard of care was unavailable in India. Clearly, the judge has addressed the background information submitted and was prepared to reach a clear conclusion on a difficult issue. This illustrated the even handed approach taken by the judge to the issues arising and a willingness to make difficult decisions. The judge did acknowledge that this proposition would have enormous impact upon the appellant.
16. At paragraph 31, having dealt with the relevant immigration rules the judge made the point that the respondent had considered his article 8 rights in the context solely of his private life. At paragraph 33 the judge found the circumstances were such that there was a need to consider the situation outside the rules. The judge referred to the totality of the circumstances and the impact of removal. The judge then referred to weighing this against the public interest and the need for effective immigration control. The judge

commented that the appellant has demonstrated he had complied with the law and that there is a close relationship within the family. Most significantly, the judge refers to there being a private and family life. Consequently, the judge is not restricting the scope of enquiry to the confines of private life.

17. In BRITCITS the Master of the Rolls said at 61:

61. Nor do I accept the submission that there is always family life which engages Article 8 of the Convention whenever a UK citizen with an elderly parent resident outside the UK wishes to bring the parent to the UK to look after the parent. Whether or not there is family life at the moment of the application will depend on all the facts as to the relationship between parent and adult child and its history: *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 170, [2003] INLR170, at [19], [25]

74.... I reject the appellant's submission that there is family life which engages Article 8 in every case where a UK sponsor wishes to bring their elderly parent to the UK to look after them. As Sedley LJ said in *Kugathas* at [18], [24] and [25] with regard to an adult, neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, enough to constitute family life; there is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise all the relevant factors. There must be something more than normal emotional ties. As Lord Bingham said in *Huang* at [18]:

"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."

18. Based on the history recorded, the finding of the existence of family life in the circumstance was one open to the judge on the evidence. The point made by the judge was that this family life did not suddenly come into existence during the short time when the appellant overstayed but had developed over many years. The judge refers to the ties developing in the course of visits in the United Kingdom and in India and Dubai. The judge referred to the sponsor having lived with the appellant from childhood until he came to the United Kingdom in 2004. Clearly, the judge was setting out the factors for the finding of family life in the circumstance.

19. At paragraph 33 the judge refers to public interest considerations in section 117 B. The judge acknowledges that effective immigration control is always in the public interest and that little weight should be given to a private life

established when the person's immigration status is precarious. The judge then goes on to make the point that the relationships have not been developed when he was in the country illegally or when his status was precarious because family relationships developed over a large number of years. I see nothing wrong with this statement .

20. The judge had earlier noted the sponsor's financial position, indicating the appellant could be adequately maintained. Given his age, he would be exempt from the English language requirement. The judge set out his immigration history and the period of overstaying was brief and the judge set out that the family have always tried to comply with the immigration rules.

21. I find this to be a carefully analysed decision in which the judge had due regard not only to the interests of the appellant but also the public interest considerations. In conclusion, I find no material error of law demonstrated.

Decision

I find no material error of law established in the decision of First-tier Tribunal Judge D Barker. Consequently, that decision allowing the appeal shall stand.

Deputy Upper Tribunal Judge Farrelly.

Date: 19 May 2018