



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001384
First-tier Tribunal No:
HU/04156/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 March 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

BAYRAM SURFOOUNISSA EMRITH
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gokhool, solicitor of SG Law
For the Respondent: Mr Clarke, Senior Presenting Officer

Heard at Field House on 16 January 2023

DECISION AND REASONS

1. The appellant is a Mauritian national who was born on 21 April 1949. She appeals, with permission given by Upper Tribunal Judge Jackson, against the decision of First-tier Tribunal Judge Bart-Stewart (“the judge”).
2. Before I come to the grounds of appeal against the judge’s decision, it is necessary to set out the background to that decision. I have taken what follows from the front page of the respondent’s bundle before the FtT and from [3] of the judge’s decision although, as I will subsequently explain, neither of those documents apparently contains a full account of the appellant’s immigration applications.

Background

3. The appellant's first immigration application was for entry clearance as an Adult Dependent Relative, under Appendix FM of the Immigration Rules. She made that application in December 2015, seeking to join her daughter in the United Kingdom. The application was refused on 2 February 2016. The appellant had a right of appeal against that decision.
4. The appellant did not appeal. On 19 February 2016, she sought leave to enter at Heathrow Airport, claiming that she wished to visit her daughter. She was refused leave to enter. She sought judicial review of that decision but permission was refused on 20 February 2016.
5. Having returned to Mauritius, the appellant lodged an appeal against the refusal of entry clearance. The appeal was dismissed and permission to appeal against the FtT's decision was refused by the FtT and the Upper Tribunal. The appellant's appeal rights were accordingly exhausted on 3 April 2018¹. Copies of these decisions were not provided to the FtT or the Upper Tribunal in the context of this appeal.
6. On 19 April 2019, the appellant sought leave to enter from an Immigration Officer at Luton Airport. She was admitted as a visitor for six months, with leave to enter being granted until 1 October 2019.
7. On 10 September 2019, the appellant made an application for leave to remain on the basis of her Article 8 ECHR rights, relying principally on her relationships with her relatives in the United Kingdom. The application was made online, using the usual form, and was supported by a detailed letter from Mr Gokhool and by an expert report from a Consultant Psychiatrist, Dr Amir Bashir.
8. The respondent refused the appellant's application on 3 March 2020. She did not accept that the appellant was able to meet the requirements of paragraph 276ADE(1)(vi) or that there were exceptional circumstances which warranted a grant of leave to remain outside the Immigration Rules on Article 8 ECHR grounds.

The Appeal to the First-tier Tribunal

9. The appellant appealed against the respondent's decision and her appeal was heard by the judge, sitting at Yarlwood, on 9 September 2021. The appellant was represented by specialist counsel. The respondent was unrepresented. The judge heard oral evidence from the appellant and her grandson and a submission from counsel before reserving her decision.
10. In her reserved decision, the judge recorded that counsel had 'found it difficult to make submissions with regards to paragraph 276ADE(1)(vi). The case he sought to advance was based on the appellant's care needs and her vulnerability, which could not be addressed in Mauritius.
11. The judge began her analysis with consideration of the case under the Immigration Rules. She clearly took a dim view of the immigration history which I have set out above, remarking at [17] that the appellant would have known when

¹ The date is stated in the respondent's bundle and the decision of the FtT to be 3 April 2017 but that cannot be correct, since it pre-dates the dismissal of the appeal and the refusal of permission by the FtT.

she entered via Luton Airport that she was 'fully aware that she did not meet the requirements for entry as an adult dependent relative'. At [18], the judge noted counsel's concession that the appellant could not meet paragraph 276ADE(1)(vi). She noted that the appellant had income, relatives and friends in Mauritius and she expressed the view that there was nothing to suggest that the appellant would have 'any difficulty' in reintegrating to the country in which she had spent the majority of her life.

12. At [19], the judge considered the freestanding Article 8 ECHR claim. She noted that the appellant had been widowed in 2014 and that she had suffered from anxiety and depression since then. The appellant had stated that she had nowhere to stay in Mauritius and that she was unable to look after herself. The judge considered the appellant's evidence about being in debt since her husband's medical treatment to contradict what she had said before and to be an 'exaggeration'.
13. At [20], the judge noted that the appellant's claims were supported by statements made by the appellant's daughter and the appellant's grandson, who works as a personal trainer in the UK. He had painted a bleak picture of the appellant's circumstances in Mauritius but the judge noted that this failed to 'address the point made in the refusal letter that in her entry clearance application the appellant claimed to be living with her sister in Mauritius and had regular income from her savings and her pension.' His evidence did not tally with the appellant's own evidence as regards her ailments. Again, the judge found there to be exaggeration.
14. At [21], the judge noted the absence of evidence that the appellant had sold her property in Mauritius. She thought it unlikely that the appellant had fallen out with all of her four siblings. There was a reference to savings in the entry clearance application and that was inconsistent with the appellant's later assertion that she was in debt. This represented further exaggeration.
15. The judge considered the original psychiatric report and the updated report provided by Dr Bashir at [22]. She approached the report 'with caution as the narrative given is not reliable'. The judge noted that the history given to the doctor was inconsistent with the entry clearance application and, at [23], she stated that she attached little weight to the conclusions in the reports. There was, in any event, nothing in the report to show that the appellant was unable to look after herself. The report did not support the claim made by the appellant that she was suffering from dementia.
16. At [24], the judge rejected the claim that the appellant enjoyed a protected family life with her family in the UK. She considered that there was no element of dependency over and above the normal emotional ties expected between adult relatives. There was 'an element of private life' with which the respondent proposed to interfere and the real question, the judge stated, was one of proportionality. Given the appellant's short presence in the UK, the presence of a home and an income in Mauritius, the appellant's 'relatively good health', the support of her children from the UK, and the fact that she has friends and relatives in Mauritius, the judge concluded that there were 'no exceptional circumstances' in the appellant's case. She considered s117B of the Nationality, Immigration and Asylum Act 2002 militated to some extent against the appellant in the assessment of the appeal. She concluded that the respondent's decision was proportionate and she dismissed the appeal accordingly.

The Appeal to the Upper Tribunal

17. Permission to appeal was initially sought on the basis of grounds of appeal settled by counsel, Mr Swain, who had not represented the appellant before the FtT. Permission to appeal was refused, however, and the application was renewed. The application was supported not by grounds of appeal but by a skeleton argument settled by another member of the Bar, Ms Peters. This ten page document did not clearly identify the grounds of appeal which were sought to be advanced and it was a discourtesy to the Tribunal to provide a skeleton in place of grounds. As the Court of Appeal has explained on more than one occasion, the two documents serve different functions: MN (India) v ECO (New Delhi) & SSHD [2010] 2 FLR 87, for example.
18. The best summary of the grounds of appeal is found in UTJ Jackson's decision to grant permission to appeal, which states materially as follows:

From the skeleton argument, it appears that in summary, the grounds of appeal are that the First-tier Tribunal erred in law in (i) reaching conclusions as to the Appellant's circumstances against the weight of evidence, including failing to consider or attach sufficient weight to such evidence; and (ii) its assessment of whether family life existed for the purposes of Article 8 of the European Convention on Human Rights, again on the basis that the finding of no dependency over and above normal emotional ties was against the weight of evidence before the First-tier Tribunal.

It is just arguable that the First-tier Tribunal failed to take into account the Appellant's emotional needs and current emotional family support, as well as practical support. The other grounds are weak given the First-tier Tribunal has given cogent reasons for finding the evidence of family members to be exaggerated and inconsistent, together with arguably cogent reasons for attaching less weight to the medical report. I do not however restrict the grant of permission.

Submissions

19. On behalf of the appellant, Mr Gokhool submitted that the judge had given weight to immaterial matters, at [17], in that the appellant's state of mind when she arrived in the UK was an irrelevance. The judge had failed to take account of material matters at [18], in that the evidence of the witnesses had been overlooked. The contradiction upon which the judge relied at [19] had never been put to the appellant and her decision was procedurally unfair. The conclusion at [21] was contrary to the appellant's evidence, which had not been considered adequately or at all. There had been no challenge to the report from Dr Bashir and that report clearly showed an element of dependency, contrary to the judge's findings. The concern that the appellant's narrative was unreliable had not been put to the appellant or her grandson. Mr Gokhool invited me to find that the judge's decision was vitiated by legal error, to set it aside and to remit the appeal for hearing afresh.
20. For the Secretary of State, Mr Clarke submitted that there was no legal error in the decision of the judge. The context of her decision was supplied by the immigration history and by the appellant's application. UTJ Jackson had described the case as 'just arguable'. The ADR Rules were of no application and had not been considered by the Secretary of State for that reason. It was not for

the appellant to 'cherry pick' requirements in the Rules which she could meet. There were obviously 'real howlers' in the evidence and the judge had been entitled to approach it with scepticism. Counsel had conceded that the private life rules could not be met. The respondent had raised what had been said in a prior entry clearance application and that had placed the appellant properly on notice; it did not matter that there had been no HOPO before the judge. The appellant's narrative having been undermined, the judge was entitled to attach limited weight to the psychiatrist's report. The 'elephant in the room' was obviously the entry clearance application which had been made. Basing herself in part on that application, and in part on the unsatisfactory nature of the evidence, the judge had been entitled to dismiss the appeal for the reasons that she gave.

21. Having noted the significance which the judge had attached to an entry clearance application which was supposedly made by the appellant in 2018, and having noted Mr Clarke's submission that it was 'the elephant in the room' in this case, I asked him about that application. He was unable to say anything about it initially, since he needed to check a different computer system. On resuming, he stated initially that there had been no entry clearance application in 2018 but he then received a further communication, in which he was told that there had been an application for a visit visa in June 2018. Mr Clarke stated, on instructions, that the appellant had claimed in that application that she had a regular pension of 66,000 rupees and 3,000 rupees of outgoings, with £5000 of savings.
22. In reply, Mr Gokhool submitted that matters had obviously moved on since the visit visa application; the appellant was older and more frail and the pandemic had intervened. The interests of the appellant outweighed immigration control and she would not need to access state funds. (I suggested to Mr Gokhool that these were submissions on the merits, rather than submissions addressed to the question of whether the FtT had erred in law. He accepted that observation.) Mr Gokhool submitted, in summary, that the judge had erred in her treatment of the medical evidence. It had sufficed to establish that there were more than normal emotional ties and the judge had erred in refusing to accept it.
23. I reserved my decision at the conclusion of the submissions.

Analysis

24. This was a procedurally difficult case, even for this experienced judge of the First-tier Tribunal. The appeal was against the refusal of leave to remain on human rights grounds and there was said to have been a recent judicial decision reached in a human rights appeal against a refusal of entry clearance. That judicial decision was not provided to the judge and she was unable to know what the Devaseelan [2003] Imm AR 1 starting point for her decision should be.
25. The difficulty did not end there. The judge understandably took the appellant's immigration history from the front page of the respondent's bundle. The same chronology appeared under the sub-heading 'Immigration History' in the refusal letter. These chronologies showed that the appellant had previously made two unsuccessful applications, the first of which (for entry clearance as an ADR) was made in 2015, the second of which (for leave to enter as a visitor) was made in 2016.
26. At a later point in the respondent's decision, however, it was suggested that there was actually another application which preceded the appellant's entry to

the UK through Luton Airport in 2019. At the foot of page 5 of the refusal letter, there was the following paragraph:

You claim that you would face destitution upon return to your home country as you would have financial difficulties and have no home to return to however this is not accepted as an exceptional or compassionate circumstance and does not warrant you a grant of leave. It is also noted that in your entry clearance application of 22 June 2018 you told us that you have a regular income from your savings and your pension. You also told us that you lived with your sister in Mauritius and had done for three years. It is therefore accepted that you have not shown that you require any assistance in seeking accommodation, or that you are otherwise unable to support yourself. You are to be removed to a country where you have previously lived, and no acceptable explanation has been provided as to why you would be unable to support yourself on your return. Further, whilst the current economic situation in your country may not be equivalent, The Secretary of State is satisfied you would not suffer any greater hardship than other people of that nation. [emphasis added]

27. No copy of that application for entry clearance was provided to the judge. The respondent was unrepresented. Counsel before the judge seemingly said nothing about the absence of the application, possibly on one of the bases considered by Ouseley J in the second sentence of [28] of WN (DRC) v SSHD [2004] UKIAT 213; [2005] INLR 340². Mr Clarke submits with characteristic clarity that the appellant and her advisers therefore chose not to confront what he called the ‘elephant in the room’; they knew that the case against the appellant featured an allegation that she had previously made contrary assertions in the June 2018 application and they chose not to deal with it, with all the risks that this necessarily entailed.
28. With respect to Mr Clarke, I think that his submission overlooks the significance of the respondent’s failing. Although it might properly have been thought that both parties should have provided the judge with the previous judicial decisions in the appeal against the refusal of the ADR application, the obligation to provide the appellant’s entry clearance application from June 2018 was on the respondent. So much is clear from rule 13 of the Procedure Rules, the importance of which was emphasised by the Vice President in MH (Respondent’s bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC); [2010] Imm AR 658. The headnote to that decision is in the following terms:

Rule 13 of the First Tier Tribunal Rules requires an unpublished document to be supplied to the Tribunal if it is mentioned in the Notice of, or Reasons for Refusal or if the Respondent relies on it. Because the Notice of, or Reasons for Refusal form the statement of the Respondent’s case, however, the Tribunal is likely to assume that a document mentioned in either, but not supplied to the Tribunal, is no longer relied on.

29. The judge was therefore faced with something of a conundrum. There had been a wholesale failure on the part of the respondent to comply with rule 13 in respect of the 2018 application but nothing was said about that application in the

² “There may be tactical reasons why an Appellant and his advocate decide not to grapple with what might be thought to be a problem; they may hope that the Adjudicator will not see it as a significant point or indeed may not spot it at all...”

appellant's witness statement, or by counsel. Whilst I have every sympathy with the judge's approach, by which she held that the appellant had chosen not to address the problem presented by what was said in the refusal letter, I do not consider that to have been procedurally fair. The judge did not know what exactly had been said in the entry clearance application. She did not ask the appellant whether she accepted that the application had been made, or whether she accepted that she had said what she was alleged to have said in that application. As I have recorded above, it took some time for Mr Clarke to ascertain, at my request, that such an application had even been made. It is clear that it was, however, and it seems that the information provided in the application was at odds with the case subsequently presented by the appellant.

30. It is clear that the appellant's 2018 application played a very significant role in the judge's decision. It was what the respondent had said about that application which caused the judge to reject the psychiatrist's report and the evidence of the appellant and her grandson about the appellant's circumstances in Mauritius. She found that the claims made were exaggerated or flatly untrue, and she did not accept what was said about the appellant's mental health as a result. Although Mr Clarke was obviously correct to remind me of what was said in that latter connection in JL (medical reports-credibility) China [2013] UKUT 145 (IAC)³, the reality of this case is that the way in which the account given by the appellant was undermined by the respondent was not procedurally fair. The appellant was entitled to see that application and to respond to it with evidence. It was an unpublished document which was referenced in the refusal letter and the respondent was duty bound to provide her with a copy of it.
31. Had it not been for the judge's procedural error in this case, I would have accepted the submissions made by Mr Clarke that the grounds of appeal (or the appellant's skeleton argument, more accurately) represent nothing more than disagreement with the decision of the judge. The skeleton is often expressed in those terms, complaining at various stages that the judge placed insufficient weight on the appellant's evidence, for example.
32. Also, as Mr Clarke noted, the appellant has a mountain to climb in this case. There was every reason for the judge to conclude that she had thumbed her nose at immigration control when she entered as a visitor via Luton Airport in 2019, knowing full well that she had only recently been refused entry clearance as an Adult Dependent Relative. It was accepted before the judge - for good and proper reason - that the appellant was unable to meet the Immigration Rules. And there was no serious assertion that the appellant enjoyed a protected family life with her family in the UK. What she had, therefore, was a private life case which was to be balanced against a powerful interest in immigration control. On any view, this was not a strong Article 8 ECHR case, as Mr Clarke was at pains to show in his able submissions.
33. Even accepting all of those submissions, as I do, I am driven to conclude that Mr Gokhool's submission that the judge's decision was procedurally unfair is made out. The experienced judge was faced with a serious procedural difficulty which she failed to resolve fairly to the appellant, no doubt largely due to the lack of assistance she received on the point.

³ "The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it", from [2] of the judicial headnote

34. Given what was recently said by the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512, and given the nature of the error into which the FtT fell in this case, the proper course is to set the judge's decision aside and to remit the case for hearing before another judge of the FtT.
35. The directions which I may give in remitting the appeal are limited by s12(3)(b) of the Tribunals, Courts and Enforcement Act 2007 to 'procedural directions'. I do not construe that power so as to include directions about the filing and service of documents. Had I had the power to make any such direction, I would have directed the respondent to file and serve a copy of the June 2018 application for entry clearance and copies of the judicial decisions reached in the appellant's previous appeal. It will be for the Tribunal on remittal to consider whether to make such a direction although the respondent will wish to consider that a strict application of the guidance in MH (Pakistan) would obviously entitle the Tribunal to proceed on the basis that the contents of the 2018 application are no longer relied upon.

Notice of Decision

The decision of the FtT was vitiated by legal error and is set aside. The appeal is remitted to the FtT to be heard by a different judge.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 February 2023