



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-000268

First-tier Tribunal No:
HU/05469/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 March 2023

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SANKUNG JATTA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr J Rene, Counsel, instructed by BlackWhite Solicitors Ltd

Heard at Field House on 25 January 2023

DECISION AND REASONS

1. This is a remaking of Mr Jatta's appeal brought under Article 8 of the European Convention on Human Rights (Article 8) against a decision of the respondent dated 24 February 2020 which refused further leave to remain.

2. For the purposes of this decision, we refer to the Secretary of State for the Home Department as the respondent and to Mr Jatta as the appellant, reflecting their positions before the First-tier Tribunal.

Background

3. The appellant is a national of Gambia, born on 4 October 1982.
4. The appellant came to the UK on 20 April 2009 as a student. He later claimed asylum and was granted refugee status on 4 February 2014, that period of leave expiring on 3 February 2019.
5. On 1 November 2018 the appellant lodged an application for indefinite leave to remain (ILR) under the protection route. On 3 January 2019, having withdrawn the previous application, he applied again for ILR under the protection route. On 28 January 2020 the respondent ceased the appellant's refugee status and on 24 February 2020 refused the application for leave to remain.

First-tier Tribunal Decision

6. The appellant appealed against the refusal of leave. His appeal was allowed under Article 8 by First-tier Tribunal Judge Moore in a decision dated 8 September 2021. The basis for Judge Moore's decision was his acceptance that the appellant had been the main carer for Mr Hisham Abdelaty since 2015. It is common ground that Mr Abdelaty has been diagnosed with spinal muscular atrophy type 2 which has left him with very significant physical difficulties for which he requires 24-hr care. As Mr Abdelaty is immunocompromised and susceptible to respiratory diseases the appellant's care became even more critical during the Covid-19 pandemic. Mr Abdelaty was studying at Imperial College at the time of the pandemic, supported by the appellant. In order to be as protected from infection as much as possible he returned to the family home in Lancashire, the appellant accompanying him and remaining there as his carer.
7. The First-tier Tribunal accepted that the practical and emotional care the appellant provided over an extended period of time was of an unusually significant level and found that the refusal of leave amounted to unjustifiably harsh consequences for the appellant and Mr Abdelaty. The core of Judge Moore's findings of fact on the private lives of the appellant and Mr Abdelaty were set out in paragraphs 19 to 21 of the First-tier Tribunal decision:

"19. I should now turn to the significant role that this appellant played in the life of Hisham Abdelaty. In so doing it would be pertinent to consider the medical condition and domestic circumstances of Hisham Abdelaty. He suffers from a spinal muscular atrophy type 2. This has left him wheelchair bound and needing to be hoisted when transferring from his wheelchair to bed, or from bed to wheelchair, He has difficulties with all movements, and needs

assistance with feeding, drinking, showering, dressing, taking medication and with all his daily activities. He also uses a non-invasive ventilator at night and needs close observation during night hours with a baby monitor. He had previously been studying at Imperial College in London but had relied on the appellant to accompany him home in Lancashire on numerous occasions. He was immunocompromised, and as a result was more susceptible to respiratory diseases. For this reason, though he had previously been living in London prior to the pandemic outbreak he had to move back home to Lancashire when Covid began. Upon return home it was a "real struggle" for his parents to find a suitable carer for him in Lancashire. As a result, Hisham and his family implored the appellant to assist Hisham and provide the 24 hour care for him at home in Lancashire.

20. Whilst I understand that it might reasonably be argued that an individual other than this appellant could provide the 24 hour care that Hisham needs, I bear in mind evidence given by Hisham and his father, who is a gynaecologist, at this hearing, with regard to all the previous efforts made to obtain and retain a carer who could provide the necessary 24 hour care provision. The father of the appellant gave evidence that whilst the appellant's mother lived in the family home, he was not at the home, and that it was essential that the mother was supported by a 24 hour carer since she was not physically able on her own to provide the necessary care for Hisham. For this reason in the past four or five carers had been employed on separate occasions. Unfortunately, none of these carers were able to provide the necessary 24 hour care required and none were able to stay for any reasonable period of time. The father added, that due to the physical condition of Hisham the NHS recommendation in London was for up to eight carers to share the 24 hour care provision needed.
21. In assessing the necessary 24 hour care I have also borne in mind the evidence of Hisham himself, and the relationship developed over time between him and the appellant, since I believe that this is of significance taking into account the special needs of Hisham. The appellant has acted as a carer for the appellant (sic) since 2015. He started accompanying Hisham from London to his home in Lancashire, and more recently has resided in Hisham's family home providing Hisham with 24 hour care. I am also satisfied that the appellant was only so employed after Hisham's family had previously tried to obtain and retain a suitable carer on approximately 4 occasions. I am further satisfied that none of these carers were able to provide the 24 hour care necessary and that as a result this appellant through a health care agency was employed to undertake the role. Hisham gave evidence that "had many healthcare assistants in (his) life", but that it was only this appellant who provided him with the care and compassion that he needed. In relying on his witness statement Hisham added "the appellant's care and support means the world to me and can not (be) overemphasised. My whole family loves him and sees him as a family and would do anything to see him continue his support for me". I asked Hisham, apart from the close relationship that he

has developed with the appellant, why couldn't he get another carer or carers to look after him. His response was "I've been trying since I've been alive but no one stays long". I am satisfied that aside from the 24 hour care provided by the appellant, over years a close bond has developed between the appellant and Hisham, and that certainly at the present time it would only be the appellant who could provide Hisham with the compassion, attention and care that Hisham would need in order that he could lead a more fulfilling life which clearly has been impacted on due to his physical/ medical condition."

8. The respondent appealed against the decision of First-tier Tribunal Judge Moore and permission was granted by the Upper Tribunal on 21 March 2022. In a decision issued on 14 December 2022 the First-tier Tribunal was found to have erred in the Article 8 proportionality assessment. The First-tier Tribunal had not made an assessment of whether the appellant could meet the requirements of paragraph 276ADE (vi) of the Immigration Rules and weighed any failure to do so in the balancing exercise. Further, the decision did not show that the "little weight" provisions of Section 117B(5) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) had been taken into account when assessing the proportionality of the decision to refuse leave. There was, however, no challenge to the findings of fact in paragraphs 19 to 21 of the First-tier Tribunal decision, set out above, and the error of law decision expressly upheld those findings.

The Hearing

9. The remaking of the appeal was considered at a further hearing on 25 January 2023. The appellant provided further evidence on his intentions if he were to be granted leave. He confirmed his evidence from the First-tier Tribunal hearing that he wished to complete his nursing studies. He clarified that he would be able to continue to care for Mr Abdelaty whilst he did so. He was a student when he had first cared for Mr Abdelaty and had managed his caring responsibilities around his studies. This is what would happen now if he were able to resume his studies and he would remain as Mr Abdelaty's main carer. After qualification he would continue to work as Mr Abdelaty's main carer and would be able to spend additional time with him. When the appellant could not be present, emergency cover was provided for Mr Abdelaty by his parents. Mr Abdelaty's mother was caring for him whilst the appellant attended the hearing. It remained very difficult to find care for Mr Abdelaty and when carers could be found, they did not remain with Mr Abdelaty for very long.
10. A further letter dated 18 January 2023 from Mr Abdelaty's father, a Consultant Gynaecologist, confirmed that the appellant remained Mr Abdelaty's main carer. His view on the refusal of leave was that:

"I am very concerned about this situation as it will have a devastating impact on both my son's life and my work. My son will be left without a carer which means that I will have to take unpaid time off work to look after him."

Dr Abdelaty also referred to a “severe national care worker shortage” and “implored” the Tribunal to allow the appeal.

Discussion

11. Mr Tufan accepted for the respondent that the circumstances of this case engaged Article 8. There was agreement that the core assessment that had to be made was whether the decision refusing leave amounted to a disproportionate breach of the private life of the appellant and Mr Abdelaty. That assessment required consideration of the provisions of paragraph 276ADE (vi) of the Immigration Rules and s.117B of the 2002 Act.
12. Paragraph 276ADE (vi) of the Immigration Rules provides that an Article 8 claim brought on private life grounds will not be made out unless there are “very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK”.
13. The relevant provisions of s.117B of the 2002 Act state:

117B Article 8: public interest considerations applicable in all cases

 - (1) The maintenance of effective immigration controls is in the public interest.
 - ...
 - (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
14. The appellant accepts that he cannot meet the paragraph 276ADE(vi). He will not face very significant obstacles to reintegration in Gambia given that he grew up there, lived there as an adult before coming to the UK and given that he has a wife and child there. There is no longer any issue of his being in need of protection given the regime change in Gambia in 2016. The fact that the appellant clearly does not meet paragraph 276ADE must weigh against him in the proportionality assessment following s.117B(1) as the maintenance of effective immigration controls as expressed in the Immigration Rules is in the public interest.
15. Even if the Article 8 private life provisions within the Immigration Rules are not met, however, if the refusal of leave would amount to unjustifiably harsh consequences such that it is not proportionate, the appellant can still succeed under Article 8; Agyarko v Secretary of State for the Home Department [2017] UKSC 11 applied.
16. Mr Tufan maintained that the public interest in the refusal of leave given that the appellant did not meet the Immigration Rules carried weight in the proportionality assessment following s.117B(1) and that the

appellant's private life attracted "little weight" in that assessment following s.117B(5). Where that was so, the accepted facts were not sufficient to show that the decision to refuse leave would lead to unjustifiably harsh consequences

17. We accepted that the appellant has only ever been in the UK with precarious leave and no expectation of remaining indefinitely; Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 applied.
18. We noted, however, that in paragraph 36 of Rhuppiah, the Supreme Court referred to the need for there to be a "provision for a degree, no doubt limited, of flexibility" when applying s.117B(5). The Court of Appeal in Alam v Secretary of State for the Home Department [2023] EWCA Civ 30 addressed the approach taken by the Supreme Court in Rhuppiah on this limited degree of flexibility, stating at paragraph 59:

"59. The Court's definition of 'precarious' meant section 117B(5) would apply to many applicants who relied on their private life, but section 117A(2)(a) 'necessarily enables their applications occasionally to succeed'. Lord Wilson quoted paragraph 53 of the judgment of Sales LJ. It is 'possible, without violence to the language to say' that the general guidance 'may be overridden in an exceptional case by particularly strong features of the private life in question'."
19. We considered the facts of this case in light of that guidance. We have set out the core preserved findings above. They are that in his role as carer, the appellant has become a "significant" part of Mr Abdelaty's private life, both practically and emotionally. It is accepted that the family has found it impossible over a number of years, including before the Covid-19 pandemic, to employ carers able to provide the consistent level of physical care that Mr Abdelaty needs or care equivalent to that which the appellant has been able to provide. The extent and quality of the care that the appellant provided over 7 years meant that a personal relationship developed which is now extremely significant to Mr Abdelaty and is not something that could be replicated even if the family were able to find carers able to provide the requisite level of practical care. The most recent evidence from Mr Abdelaty's father, consistent with that accepted by the First-tier Tribunal, was that it has continued to be impossible to find carers able to support the family to deal with Mr Abdelaty's complex requirements and that the appellant's relationship with has now become of such importance that his absence would have "a devastating impact" on Mr Abdelaty.
20. We reminded ourselves of the appellant's inability to meet the provisions of the Immigration Rules and that there can only be a limited degree of flexibility when assessing his private life, following s.117B(5) and the guidance in Rhuppiah and Alam. It remained our conclusion that the facts of this case were unusually strong because of the extent of the personal relationship and the emotional support that the appellant provides to Mr Abdelaty. The accepted facts are that it is has not been possible over a

period of years for the family to obtain adequate alternative practical care for Mr Abdelaty. Mr Abdelaty's parents are not able to provide sufficient care themselves, despite his father at times taking time off from his work as a Consultant in the health service to do so. The importance of the personal relationship between the appellant and Mr Abdelaty that has been established cannot be replicated by other carers. The appellant no longer being able to provide care would have a "devastating impact" on the private life of Mr Abdelaty. We accepted that ordinarily a relationship of employment or acting as a carer would be unlikely to amount to a basis for a grant of leave but are entirely persuaded that the very particular circumstances and bonds that have been established here are of a type and strength that are protected by Article 8.

21. We therefore concluded that notwithstanding the weight that attracted to the respondent's side of the balance where the Immigration Rules were not met and given the provisions of s.117B(5), that there were unusual and compelling facts here weighing on the appellant's side of the balance such that the decision to refuse leave amounted to a disproportionate interference with the private life of the appellant and Mr Abdelaty. We therefore allowed the appeal under Article 8.
22. It is now for the respondent to issue the appellant with the appropriate form of limited leave. It will be open to the respondent to re-assess any change of circumstances at the time of any future application for leave.

Notice of Decision

23. The appeal is remade as allowed under Article 8.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 3 February 2023