



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: **UI-2022-005145**
FtT No: HU/57150/2021
IA/16402/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4 April 2023

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

G L

(no anonymity order)

Appellant

and

SSHD

Respondent

Heard at Edinburgh on 22 February 2023

For the Appellant: Mr I Halliday, Advocate, instructed by Norman Lawson & Co, Solicitors, Glasgow

For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of South Africa. He applied to remain in the UK based on his family life with his wife, who is a UK citizen, his adult child, and his daughter-in-law. The crux of his claim was that he could not leave his wife in the UK because she needs his mental and physical support.
2. The SSHD refused the application on 1 November 2021, because the requirements of appendix FM, paragraphs R-LTRP.1.1.(a), (b) and (d), of the immigration rules were not met; the appellant was not exempt from the eligibility requirements under paragraph EX.1; the requirements of paragraph 276ADE(1)(iii) - (vi) (private life) were not met; paragraph GEN

3.2 did not apply; and there were no circumstances that warranted the grant of leave outside the rules.

3. FtT Judge M Byrne dismissed the appellant's appeal by a decision dated 24 August 2022. Under the heading, "findings of fact", the decision at [32] accepts the medical diagnosis of the appellant's wife; at [33], gives limited weight to evidence of her care needs, and finds those not established; at [34], finds alternatively that it has not been established that any needs could not be met by someone other than the appellant, that medical care has been available in South Africa in the past and a lack of evidence that would not be available in the future; and at [35], finds a lack of evidence that medical or legal requirements prevent her return to South Africa.
4. Under the heading, "conclusions", the decision holds that the requirements of the rules are not met; considers article 8 ECHR outside the rules; applies part 5A of the 2002 Act; and finds the outcome of the SSHD's decision to be proportionate.
5. The appellant's grounds of appeal to the UT allege error in concluding at [33] that there was insufficient evidence of care needs, as there was no reason to assume that a medical report on which a DWP decision was based was not independent; error at [33] in saying there was no evidence to support her claimed needs, as detailed evidence was left out of account; and error at [34] in saying there was no evidence the appellant was the only person who could provide care.
6. On 20 October 2022 FtT Judge Hatton granted permission:

The appellant's first ground is that the Judge erred in concluding the DWP's letter constituted insufficient evidence of his wife's care needs. I note the letter expressly confirms the decision that the appellant's wife is entitled to financial help with personal care was based on consideration of a medical report [AB, p.50]. Correspondingly, I am mindful that eligibility for DWP support is assessed via an independent health assessment with the Health Assessment Advisory Service. Accordingly, I consider it arguable that the Judge erred in finding at [33] that the appellant's wife's "purported" care needs had not been assessed by any independent third party with medical expertise. On the contrary, I am satisfied that the DWP's eligibility assessment process entails precisely that. By the same token, I am satisfied the Judge arguably erred in regarding the DWP's letter as insufficient to demonstrate there was medical evidence that the Appellant's wife has care needs, given the DWP's eligibility decision was expressly based on such an assessment having taken place. The Judge's arguable error in this regard may also have infected their subsequent finding at [37] that

paragraph EX.2 of Appendix FM was not engaged in the Appellant's favour, especially because said finding was expressly based, in part at least, on the Judge's assertion that there was insufficient evidence the appellant's wife had care needs arising from her medical condition. Permission is granted on all grounds.

7. Mr Diwyncz, fairly and correctly, accepted at the outset of the hearing that the DWP letter was based on an independent medical assessment and should have been taken as probative of the appellant's wife's condition; and so, ground 1 was made out.
8. Mr Halliday submitted that the grounds all overlap; the error went also to grounds 2 and 3; and having taken the wrong turn which it did, the decision was fatally flawed.
9. Mr Diwyncz had nothing to add by way of resisting a finding that the error was material.
10. The FtT made a clear and well-structured decision. Unfortunately, however, it erred on a matter so material that sustainable conclusions cannot safely be extricated from what remains.
11. In a rehearing, the appellant and his wife expect to offer their evidence again orally, tendering themselves for cross-examination. Mr Halliday indicated that there has been further deterioration in the condition of the appellant's wife. A further medical examination is due soon, after which an updated report is likely to be provided.
12. The case reverts for a primary decision which is apt to take place in the FtT.
13. The FtT's decision is set aside. It stands only as a record. The case is remitted for a fresh hearing, not before Judge Byrne.
14. An anonymity order is retained at this stage.
15. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and his wife are granted anonymity.
16. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and his wife. Failure to comply with this order could amount to a contempt of court.

Hugh Macleman

Judge of the Upper Tribunal, Immigration and Asylum Chamber
22 February 2023