



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004321

First-tier Tribunal No: HU/07949/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 August 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

PAUL BASSANT ESHUN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr S Hingora of Counsel, instructed by R Spio & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 17 July 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.
2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Moore promulgated on 25 February 2022, in which Mr Eshun's appeal against the decision to refuse his human rights claim dated 17 January 2020 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Eshun as the Appellant and the Secretary of State as the Respondent.
3. The Appellant is a national of Ghana, born on 31 October 1988, who made an application for entry clearance as an adult dependent relative under Appendix FM of the Immigration Rules on 15 November 2019. The Respondent refused the application on the basis that the Appellant did not satisfy the requirements of the rules, in particular there was insufficient evidence that the Appellant, due to age,

illness or disability, required long term personal care in the United Kingdom or such care was not obtainable in Ghana. It was accepted that the Appellant was in receipt of financial support from his mother in the United Kingdom, but there was no evidence at all of the Appellant's circumstances in Ghana. There were no exceptional or compassionate factors to warrant a grant of entry clearance outside of the Immigration Rules.

4. Judge Moore allowed the appeal in a decision promulgated on 25 February 2022 on the basis that the Appellant was financially dependent on his mother in the United Kingdom to meet all of his essential daily needs, therefore he met the requirements of the Immigration Rules and the appeal was allowed on human rights grounds.

The appeal

5. The Respondent appeals on the sole basis that the First-tier Tribunal materially erred in law in finding that the Appellant met the requirements of the Immigration Rules in circumstances where on the facts as found, he fell very far short of the requirement in paragraph E-ECDR-2.4 and 2.5 that a person must, as a result of age, illness or disability, require long-term personal care which must be unavailable or unaffordable in the country of origin. Financial support alone can not satisfy this requirement.
6. At the oral hearing, Counsel for the Appellant indicated that he did not oppose the appeal and accepted that the Appellant could not meet the requirements of the Immigration Rules. However, he submitted that there would need to be a remaking on Article 8 grounds as the First-tier Tribunal had not undertaken this assessment separately. It was suggested that there may be further relevant evidence, including that the Appellant has Asperger's Syndrome such that the appeal should be remitted for a fresh hearing in the First-tier Tribunal. There was however no application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to admit any further evidence and no copy of any such further evidence was available. In these circumstances and where standard directions are that the Upper Tribunal would, if an error of law was found, proceed to remake the appeal, there was no reason to remit the appeal nor was there any reason why submissions could not be made at the hearing for the appeal to be remade.
7. On behalf of the Respondent, Ms Everett referred to the First-tier Tribunal findings that there was financial support to the Appellant from his mother and regular contact but submitted that it was not sufficient to find that Article 8(1) was engaged in this case given that it is no more than would be expected between adult relations, particularly regular contact where there is financial support. In any event, the refusal of entry clearance would not be a disproportionate interference with the Appellant's right to respect for family life as this could continue as it has done since his mother moved to the United Kingdom in 2001.
8. On behalf of the Appellant, Mr Hingora relied on the findings in the First-tier Tribunal to show that Article 8(1) was engaged with family life established between the Appellant and his mother to the low threshold applicable, on the basis of regularity of contact and continuous financial support which went beyond normal emotional ties. On the basis of GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630, it was submitted that the combination of close contact, financial support and the Appellant's circumstances in Ghana that he was struggling to find employment and relied on the Sponsor was

sufficient to show that it was proportionate for the Appellant to reside in the United Kingdom. Mr Hingora accepted that there was no evidence before the Tribunal of any unduly harsh or adverse impact on either the Appellant or his mother by the refusal of entry clearance.

Findings and reasons

9. As accepted by both parties in this appeal, the First-tier Tribunal materially erred in law in finding that the Appellant met the requirements of the Immigration Rules and therefore in allowing the appeal on human rights grounds. The First-tier Tribunal had failed to have any regard to the actual requirements of paragraph E-ECDR-2.4 or 2.5 of Appendix FM to the Immigration Rules or the terms of the reasons for refusal letter under appeal which identified them sufficiently clearly. On no rational or lawful view could financial dependency satisfy the relevant requirements and there was no evidence whatsoever that the Appellant required long-term personal care, nor that any requirements were as a result of age, illness or disability. It is therefore necessary to set aside the decision of the First-tier Tribunal, although the factual findings as to the Appellant's relationship with his mother can be preserved.
10. For the reasons given at the oral hearing and above, submissions were heard as to the remaking of the Appellant's appeal on human rights grounds. In terms of Article 8 of the European Convention on Human Rights, I follow the five stage approach set out in Razgar v Secretary of State for the Home Department [2004] UKHL 27.
11. The legal position for cases such as these considering whether Article 8(1) is engaged, is summarised by the Court of Appeal in Rai v Entry Clearance Officer [2017] EWCA Civ 320, from paragraphs 17 onwards, as follows:

"17. In Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Sedley LJ said (in paragraph 17 of his judgement) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents... the irreducible minimum of what family life implies". Arden LJ said (in paragraph 24 of her judgement) that the "relevant factors... include identifying who are the relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or vice versa", but it was "not ... essential that the members of the family should be in the same country". In Patel and others v Entry Clearance Officer, Mumbai [2010] EWCA Civ 17, Sedley LJ said (in paragraph 14 of his judgement, with which Longmore and Aikens LJJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children... may still have a family life with parents who are now settled here not by leave or by force of circumstances but by long-delayed right".

18. In Ghising (family life - adults - Gurkha policy) the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgements in Kugathas had been

“interpreted to restrictively in the past in order to be read in light of subsequent decisions of the domestic and Strasbourg courts”, and (in paragraph 60) that “some of the [Strasbourg] Courts decisions indicate that family life between adult children and parents will more readily be found, without evidence of exceptional dependence”. It went on to say (in paragraph 61):

“61. Recently, the [European Court of Human Rights] has reviewed the case law, in [AA v United Kingdom [2012] Imm. A. R. 1), finding that a significant factor will be whether or not the adult child has founded a family of his own. If a child is still single living with his parents, he is likely to enjoy family life with them ...”.

The Upper Tribunal set out the relevant passage in the court’s judgement in AA v United Kingdom (in paragraphs 46 to 49), which ended with this (in paragraph 49):

“49. An examination of the Court case-law would tend to suggest that the applicant, a young adult 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having “family life”.”

19. Ultimately, as Lord Dyson M.R. emphasised when giving the judgement of the court in Gurung (at paragraph 45), “the question whether an individual enjoys family life is one of fact and depends on careful consideration of all the relevant facts of the particular case”. In some instances “an adult child (particularly one who does not have a partner or children of his own) may establish that he has a family life with his parents”. As Lord Dyson M.R. said, “[it] all depends on the facts”. The court expressly endorsed (at paragraph 46), as “useful” and as indicating “the correct approach to be adopted”, the Upper Tribunal’s review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in Ghising (family life - adults - Gurkha policy), including his observation (at paragraph 62) that “[the] different outcomes in cases that have superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive”.

20. To similar effect were these observations of Sir Stanley Burnton in Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 (in paragraph 24 of his judgement):

“24. I do not think that the judgements to which I have referred contain any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumptions as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in Kugathas did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings would not of itself justify finding of a family life. There has to be something more. The young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turned 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8.”

12. In essence, for family life to be established to engage Article 8(1) of the European Convention on Human Rights, there needs to be support between adult family members which is real, committed or effective and looking at the circumstances of the individuals involved. In this case, despite the Appellant's age (now in his mid-thirties) and length of physical separation from his mother (since she moved to the United Kingdom in 2001), I find that he just meets the threshold for engagement of family life based on regular contact and financial support from his mother meeting his essential needs, beyond basic housing as he lives in his late grand-parents home rent free. This is consistent with the findings made in the First-tier Tribunal as to the nature of the relationship between the Appellant and his mother and is sufficient to show support which is real, committed and effective.
13. The refusal of entry clearance would, only just, be an interference with the Appellant's family life with his mother given that it prevents their physical reunion in the United Kingdom but the relationship could otherwise continue as it has done for over twenty years since the Appellant's mother moved to the United Kingdom in 2001. There is no particular evidence of the impact of separation over this time or why the continuation of the current circumstances would cause any particular adverse consequences. The refusal of entry clearance is in accordance with the law and for the purpose of the maintenance of immigration control given that the Appellant does not meet any of the requirements for a grant of entry clearance under the Immigration Rules.
14. The final question is whether the refusal is a disproportionate interference with the right to respect for private life. On the limited evidence available in this appeal, I do not find that it is. The Appellant and his mother have been separated and living in different countries since 2001, since when they have maintained their relationship with regular contact and financial support. The refusal of the application does no more than continue the status quo where the family relationship can be maintained as it has been for a significant period of time. There is nothing to suggest any particular detriment or adverse impact on either the Appellant or his mother in a continuation of the relationship as it is now, particularly considering that the Appellant is now an adult and has spent all of his life in Ghana. On the contrary, there is significant public interest in the maintenance of immigration control in circumstances where the Appellant does not meet the requirements of the Immigration Rules and where there is also no evidence that the Appellant would be maintained and accommodated without public support in the United Kingdom, or that he speaks English to the required level. For these reasons, the Respondent's decision is not a disproportionate interference with the right to respect for family life and the appeal is therefore dismissed on human rights grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

The appeal is remade as follows:

The appeal is dismissed on human rights grounds.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30th July 2023