IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005537
First-tier Tribunal No: HU/00581/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

Varalakshmi Sankaran
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M West, Counsel, instructed by Allied Law Chambers Solicitors Limited
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 12 September 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India, age 67, at the date of the appeal before the First-tier Tribunal. The appellant entered the UK on a visit visa on 25 October 2021 and applied for leave to remain on 6 February 2022. The respondent refused that application in a decision dated 20 December 2022. Her appeal against that decision was dismissed by First-tier Tribunal J Robertson on 24 July 2023, following a hearing on 21 June 2023.

2. Permission to appeal was granted by Upper Tribunal Judge Rintoul on the basis that it was arguable that the First-tier Judge had erred in law, in having found family life existed, the conclusion that there were no exceptional circumstances was arguably not properly reasoned. Judge Rintoul found there to be however, little or no merit in the other grounds. There was no finding of dishonesty, nor was there much evidence that the judge took into account as a negative factor

that the appellant had not intended to leave the UK when she last arrived, despite arriving using a visit visa. Similarly, it was difficult to see how the appellant's health was such that Article 3 was engaged.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and thus whether the decision should be set aside.

4. As a preliminary issue, it was agreed by both representatives that the further material in the consolidated bundle submitted, at pages 22 to 109 was new evidence. There was no Rule 15(2A) application, and such was not relevant to the error of law hearing.

Submissions – Error of Law

5. In the grounds of appeal and in oral submissions by Mr West, it was argued in summary for the appellant as follows:

6. Mr West accepted what Judge Rintoul had said in relation to the other grounds beyond the proportionality issue although he submitted that whilst the judge's findings on Article 3 were not a material error, as it was accepted she could not meet the threshold, the judge's failure to refer this or consider it in the determination was indicative in Mr West's submissions of a lack of care and attention to the facts in this appeal.

7. It was submitted that the judge had misdirected herself. At paragraph [6] the judge had found the appellant to be vulnerable and at [13] had found the witnesses to be credible. At [18] the judge accepted there was a close relationship but went on to state that it did not go "beyond normal family relationships". Then at [20], the judge accepted that there was family life established in the UK but did not find exceptional circumstances and also stated that the relationship with the children and grandchildren was not more than normal ties. Mr West submitted that the expression not more than normal ties was derived from the case of **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**. at paragraphs 17 and 25 and was the test for engagement of Article 8(1).

8. It was submitted that the judge had confused this test, and the appellant was entitled to understand what weight had been given to family life. At [18] and [20] the judge stated twice that the relationship was no more than normal family ties, but also found family life to be engaged, with the judge accepting family life at [20]. The judge had stated at [19] that "even if I am wrong" and it was submitted that the judge had simply got the Article 8(1) test wrong and the judge could not say that there is family life and then also say that it does not go beyond normal family ties. Mr West submitted that this was material; the whole point of proportionality is understanding what weight is given to family life and as the judge had misdirected herself as to this test, the Tribunal could not be satisfied that appropriate weight had been given to family life in the proportionality exercise.

9. It was submitted that the judge had erred in her consideration on section 55, Borders, Citizenship and Immigration Act 2009 ('section 55'). The judge had stated at [10] that she had given careful consideration to Section 55 and the best interests of the children. That was not a finding; it was submitted that findings commenced after those paragraphs. The best interests of the children are a

primary consideration, and the judge did not make a finding in the best interests of the five grandchildren. Even if there was a finding implicit or otherwise, there was no actual assessment of the best interests and paragraph 5 of the grounds of appeal to the First-tier Tribunal was relied on with reference to the witness statements of both the appellant and the sponsor, the appellant's daughter, which referenced the appellant's grandchildren at various points. It was submitted that it was a substantial plank of this case that the appellant had a very close relationship with her grandchildren, but there was no consideration of their best interests with the judge's consideration at [20] going on to find that it was no more than normal ties. However, the judge had accepted that they provide emotional support to the appellant. It was argued that these were contradictory findings including, as **Kugathas** reminds, that emotional support can be "real, effective or committed support" and the judge's findings at [20] were not a best interests' assessment.

10. It was further submitted that the finding at [20] that there was "nothing unique in their relationship" was perverse notwithstanding the threshold for perversity including that the witness statement evidence indicated that the granddaughter shared the same bed as the appellant due to her medical condition; the assessment under section 55 was wholly inadequate.

11. It was argued that the Article 8 findings were unsustainable, including as the judge had found that the witnesses were credible and the judge had noted on a couple of occasions the close emotional bond, including at [13] and [14] with the judge then misdirecting herself at [18] in stating that whilst she accepted the close bond, this did not go beyond normal family relationships. The judge made alternative findings at [19] and [20] and then considered proportionality. It was incumbent on the judge to get the family life engagement factor correct and without that the proportionality assessment cannot be done correctly.

12. Whilst the permission judge had indicated that there had noted that there was no finding of dishonesty, it was submitted that this issue does feature quite heavily in the judge's findings, including at [11] at [20] and [21]. It was submitted that Section 117B(1) the public interest in immigration control is not fixed and immutable. The question of intention to leave the UK was therefore important for a number of reasons: the judge did not consider a number of factors at all, including that the appellant had a visa when she applied on human rights grounds, and she was not in the UK unlawfully. The judge had made a mistake of fact. In the original grounds the First-tier Tribunal, at page 16, there was a record of the Counsel's record of hearing that the appellant stated that she intended to go back. The appellant had been lawfully returning and visiting using visit visas and] in relation to COVID, the judge got this wrong. It was wrong therefore for the judge to state that there was no intention to return when the basis of the visit visa changed during COVID. At [11], [20] and [21] of the decision, the judge improperly held this against the appellant, and this was fundamental to the assessment of the public interest. It was conceded however that there was no point taken in relation to the public benefit of the appellant's children working in the UK.

13. Although there was no Rule 24 response in oral submissions by Mr Wain for the respondent, it was argued in short summary as follows:

14. Mr Wain submitted that the submissions in relation to Article 8(1) were opposed and if the Tribunal was not with the respondent the proportionality test still had

to be considered. It was submitted that the judge's findings were that there was family life in this case but not for the legal purposes of Article 8(1). It was the judge's findings that the relationship did not go beyond normal emotional ties. Mr Wain relied on **Agyarko v SSHD [2017] UKSC 11** and the fact that the judge was looking at whether there would be unjustifiably harsh consequences by reason of the refusal. What the judge found at [25] was family life but no compelling factors which would outweigh the public interest. Article 8(1) is a broadbrush of all circumstances of the family and what the circumstances would be on return, and the judge clearly considered all of the factors. It was submitted that there appeared to be an acceptance that the judge looked at the correct **Kugathas** test with continual reference to whether or not the relationship went beyond normal ties, which the judge found did not, at [18] and [20].

15. Mr Wain indicated that there had been no challenge to the judge's findings on the expert reports, which considered the relationships. The judge at [16] considered the reports and noted that they were both written on the premise that there was no other support available. It was submitted that these were material to the assessment of whether the judge considered the relationship properly and that there was no challenge to the way that the judge had dealt with these reports. This was relevant to the judge's assessment that the relationships did not go beyond normal ties. The judge therefore reached this decision not just on the basis of the witness evidence before her but also the reports and properly came to the conclusion she did.

16. It was submitted there was no challenge made to the type of care available on return, which was part of why the judge based her findings and conclusions that there were not very compelling circumstances. The judge took into consideration the expert reports considered from [14] to [16] and rejected the conclusions of those reports. At [19] the judge was not satisfied that sufficient and adequate private care was not available to the appellant on return. The judge gave reasons for rejecting that evidence. At [23] there was nothing to suggest that treatment would not be available in India. Mr Wain noted that Article 3 was not being maintained but these factors were relevant to the assessment including as to whether the relationship went beyond normal family ties and the judge's assessment of that evidence was not challenged.

17. In addition, it was submitted that the judge properly applied the test in **Kugathas** and looked at the strength of the relationships: there was no discrepancy in there being family life between the appellant and her children and grandchildren but which did not meet the Article 8(1) test for family life, for the purposes of going beyond normal emotional ties.

18. In the alternative, it was submitted if the Tribunal was not with the respondent in relation to Article 8(1) it was submitted that the judge's alternative findings on proportionality were sustainable.

19. In terms of section 55, relying on **Zoumbas UKSC 74 [2013],** best interests are a primary but not a paramount consideration and the case was not prescriptive as to how best interests might be assessed. The judge self-directed at paragraph [10] in relation to section 55 that she considered it in the round and had taken into account section 55. It was submitted that the decision was peppered with an assessment of the impact on children including at [14] and the expert reports and the close bond being accepted, in [20]. Whilst Mr West had submitted that this did not come close to a best interests assessment, Mr Wain

submitted it did. The judge had taken everything into account and found that there was nothing unique in the **Kugathas** sense. The relationship had been maintained long distance before and that could continue. This was a best interests assessment. The judge had taken into account the expert reports and had assessed those reports. It was reiterated that there was no strict prescriptive way in which the best interests assessment had to be conducted**.**

20. It was submitted that the judge had weighed up all the necessary factors in proportionality. The judge clearly factored in the witness evidence which she accepted but gave reasons for rejecting that this amounted to anything beyond normal emotional ties.

21. In terms of the Section 117B assessment and whether the appellant had an intention to return, the point the judge was making at paragraphs [20] and [22] was that the appellant had travelled as a visitor with no legitimate expectation of remaining; the judge was considering whether there were any exceptional circumstances such that the appellant could jump the queue, where the appropriate application would be an adult dependant relative application. It was for the judge to consider under **Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129** and whether there would be unjustifiably harsh consequences in requiring the appellant to make an entry clearance application. It was open to the judge to consider the appellant's intention to return in this context. It was not the case that the judge was making adverse findings in relation to her immigration history, simply that she was not in the right category to make the application.

22. In relation to COVID, the judge considered this. The point the judge was making was that the applicant she made the decision to stay, not because of COVID, but because the appellant took that opportunity to make the application.

23. The judge at [14] referred to the fact that Article 8 rights are not a matter of choice, and this was relevant to both Article 8(1) findings and the proportionality assessment, and it was submitted that the judge had correctly conducted the proportionality assessment.

24. In reply, Mr West submitted in respect of the public interest point being made at [22], [21] and [20]: the judge stated that she chose not to return and there was a deliberate attempt to circumvent the immigration rules with no legitimate expectation of remaining. The appellant came as a visitor, but the point here was that because of the concessionary policy that allowed the appellant to remain on a different route, which she made the application to. It was submitted that it was wrong of the judge to say that this was some sort of attempt to circumvent the immigration rules. It was the appellant's original intention to return to India and that intention changed and the judge had made a mistake of fact at [11].

25. At paragraph [20] the judge had made contradictory findings in saying family life was established but then to say that it amounted to an "not more than normal emotional ties" the judge cannot have it both ways and the findings do not make sense.

26. In relation to the judge's findings on the expert reports, it was submitted that those findings do not make sense in the context of the family life findings including at [14] that there was a close bond between the appellant and the

family, [15]. Dr Junaid outlined the anxiety and the significant family support and [16] concludes that the appellant would be unable to live independently.

27. Reliance was placed on **BRITCITS [2017] EWCA Civ 368** at paragraph 59: when looking at care in the receiving home country, such is capable of embracing emotional/psychological requirements if this is verified by reports. Whilst the appellant did not challenge [14] to [16] of the decision of the First-tier Tribunal, at [15] the judge found that there was a significant effect on the appellant's wellbeing but then at [20] goes on to say that there is not more than emotional ties, which would be relevant to an adult dependent relative assessment which has to encompass emotional and psychological support.

28. It was submitted that the main point was the weight that was attached to family life was in error. Whilst at [20] the judge went on to consider exceptional circumstances, it was impossible to discern what weight had been given to family life and the judge's findings did not make sense if there was no family life.

29. In relation to section 55, Mr Wain had relied on the judge's findings at [20] that the "relationship not more than normal ties and not unique". That does not address the best interests assessment and paragraph 10(5) of **Zoumbas** provided that the circumstances of the children must be dealt with, and the judge had not done so.

30. Reliance was placed on **Gurdeep Kaur [2023] EWCA Civ 1353** at [23] Lord Justice Stuart-Smith; the mere fact that something is mentioned does not mean it has been taken into account in the assessment and whilst the judge had mentioned the children at [9] the judge's findings did not start until [13] and had not factored these elements into the findings.

Conclusions – Error of Law

31. Whilst the grounds in relation to Article 3 and the ground in relation to the adult children's essential NHS work (*Bakthaur Singh* principles) were rightly conceded, the judge's reasoning on family life is inadequately reasoned and at times muddled.

32. It was Mr Wain's contention that the judge, applying the **Kugathas** test found that the relationships did not go beyond normal family life for the purposes of Article 8(1) on grounds. The judge at paragraph [18] found that whilst she accepted that the appellant had a close relationship with her family that 'it is not beyond a normal family relationship.'

33. The judge did not provide adequate reasoning for finding that there was no family life in Article 8(1) terms, if indeed that was the finding made, particularly in light of her earlier findings including at [13] that the appellant and her daughter were credible witnesses and that there was a 'close emotional bond within the family' with 'mutual benefit'. It is not clear from the judge's reasoning whether she had in mind the test of real, or committed or effective support.

34. The judge's findings are inconsistent, as her earlier findings at [18] appear to be contradicted by a clear finding that 'I accept that there is family life established in the UK' at [20].

35. Whilst that error in itself might not be material, had the judge provided adequate reasons for her findings at [20] that there is family life established in the UK, those findings are, at essence, contradictory and inadequately reasoned.

36. The judge was required to decide whether there were exceptional circumstances which would render refusal of leave to remain a breach of Article 8, because it would result in unjustifiably harsh consequences for the appellant or another family member.

37. The judge accepted at [20] that family was established in the UK and then went on to find that there were no exceptional circumstances. The judge further found at [25] that ' I have found there to be family life' but found any interference to be proportionate. It is entirely unclear from the judge's findings why this was the case.

38. At [20] having found family life, the judge relies on her earlier finding of 'no more than normal ties' for reducing the weight she attaches to the relationship the appellant has with her children and grandchildren. That is lacking in adequate reasoning. Once the judge made a finding of family life, which she did, even if that finding was in the alternative (which is not entirely clear) it was incumbent on the judge to explain in cogent terms what weight was attached to that family life.

39. In this context the judge's reasoning for finding 'no exceptional circumstances' is inadequate, when considered in light of the (accepted) credible oral evidence and substantial documentary and expert evidence before her.

40. The absence of adequate reasoning in relation to both Article 8(1) and proportionality, is compounded by the lack of any findings in relation to section 55 and the best interests of the children (the appellant's grandchildren).

41. Whilst the judge mentions those best interests at [9], it cannot be properly said that the judge's repeated characterisation of the appellant's relationship with her children and grandchildren as 'no more than normal ties' represents adequate reasoning on the grandchildren's best interests, particularly in light of the weight of the evidence before the judge, including that one of her grandchildren shares a bed with her grandmother, due to her grandmother's medical condition.

42. The judge's consideration of the weight to be attached to the public interest is also problematic; the judge attached weight throughout her judgement to what she found to be the appellant's arrival in the UK with no intention to return.

43. Although the judge makes reference to oral evidence at [8] in relation to there being no intention to return, that conclusion is contradicted in the written evidence before the judge. At the very least, if it was the judge's finding that the appellant deliberately travelled to the UK with the intention of not returning and of circumventing immigration law, the judge was required to give adequate for those conclusions. This is particularly the case as the judge's consideration of the appellant's actions appears to weigh heavily in the weight she attached to the public interest.

44. The judge's errors considered cumulatively are material. For these reasons the making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law such that the decision must be set aside.

45. Given the nature of those errors, a remaking of the appellant's appeals is required. As to disposal, I have considered the Court of Appeal's decision in **AEB v SSHD [2022] EWCA Civ 1512,** the Upper Tribunal's decision in **Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC)** and 7.2 of the Senior President's Practice Statements. I am satisfied, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal de novo, not before judge J Robertson.

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and
Asylum Chamber

27 September 2024