



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-000191
First-tier Tribunal No:
HU/60308/2022

THE IMMIGRATION ACTS

Decision & Reasons
Issued:
On the 13 June 2024

Before

Upper Tribunal Judge BLUNDELL
Deputy Upper Tribunal Judge MANUELL

Between

MR SABARI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Papasotiriou, Counsel
(Richmond Chambers)

For the Respondent: Mr D Clarke, Senior Home Office Presenting
Officer

Heard at Field House on 7 June 2024

DECISION AND REASONS

Introduction

1. The Appellant is a national of India born on 29 January 1981, i.e., 42 years of age at the date of the hearing. He is profoundly disabled. With the assistance of his brother, his sponsor, he appealed against the decision of First-tier Tribunal Judge Khurram who had dismissed his appeal against the refusal of his human rights claim for settlement in the United Kingdom made as an adult dependent relative. The decision and reasons was promulgated on 14 November 2023.
2. Judge Khurram found that the Immigration Rules (paragraph E-ECDR.2.5) were not met and that Article 8.1 ECHR family life was not engaged, in that order. The Judge recorded that the appeal bundle extended to 1289 pages. The Appellant's medical condition and his inability to perform everyday tasks and his dependency on others was not disputed. The Judge found that the Appellant did not require professional carers (which he had not previously had) and that affordable help could be obtained in India, with supervision from the Appellant's mother.
3. Permission to appeal was initially refused in the First-tier Tribunal but Upper Tribunal Judge Owens granted permission to appeal on 8 April 2024. Upper Tribunal Judge Owens considered that it was arguable that the Judge Khurram had erred (a) in finding that the Appellant did not need professionally trained carers; (b) in failing to have regard to the expert and additional evidence as to the availability of home care [in India]; (c) in imposing an additional evidential requirement; and (d) in assessing whether Article 8 ECHR was engaged.

Submissions

4. Mr Clarke for the Respondent accepted that one error identified in the grounds of appeal (albeit somewhat imprecisely) had occurred. The Judge had not sufficiently or sufficiently clearly considered the reasonableness of the Appellant's elderly mother continuing to be his main or only carer, given the medical evidence concerning her own state of mental and physical health. This was a significant omission: see [59] of Britcits v Secretary of State for the Home Department EWCA Civ 368. (The remainder of the grounds were no more than disagreement with the Judge and an attempt to relitigate findings rationally open to

him.) The “reasonableness” error, Mr Clarke submitted, was not the end of the matter nor was it decisive of the appeal, because the Judge’s finding that there was no family life between the Appellant and his sponsor, his younger brother, was open to the Judge and was unimpeachable.

5. Mr Clarke submitted that the fact that an ADR application had been made in effect presumed that family life existed. That was the position in Britcits at [61] and [74]. IZ (Pakistan) EWCA Civ 1109 and Agyarko [2017] UKSC 11 were also relevant because the same approach had been taken. The Immigration Rules were a policy statement which indicated where the state’s margin of appreciation lay for Article 8 ECHR purposes. Meeting the Immigration Rules meant success for an applicant. The Judge’s consideration of Article 8 ECHR which came towards the end of the decision was of Article 8 ECHR outside the Immigration Rules. That was a permissible approach.
6. Mr Clarke was challenged by the panel as to his interpretation of Article 8 ECHR, which seemed to us doubtful at best and contradicted by Charles (human rights appeal – scope) [2018] UKUT 89. Our conclusions appear below.
7. At this point the panel retired to review whether it should accept the Respondent’s concession as to the law, and if so, the consequences. When the hearing resumed the panel indicated that it found that BritCits (above), although accurately summarised by the Judge, had not been clearly applied. The evidence about the reasonableness of the Appellant’s elderly mother remaining his only or his main carer had not been sufficiently examined and weighed. That was an error of law but materiality had still to be demonstrated.
8. Mr Papatiriu for the Appellant then made submissions as to the application of Article 8 ECHR. Counsel agreed with the panel that Article 8 ECHR was a jurisdictional issue. There had to be a finding that family life existed before the First-tier Tribunal had jurisdiction. The appeal was not under the Immigration Rules, which indicated where proportionality lay once the jurisdictional hurdle had been crossed.

9. Mr Papatiriou submitted that the threshold for engagement of family life was low, as shown in AG (Eritrea) [2007] EWCA Civ 89 per Sedley, LJ at [28] “while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the “minimum level”) is not a specially high one.” Counsel submitted that there was a form of family life and that was shown by the sponsor’s efforts to bring his brother to the United Kingdom. The Appellant’s mother’s ability to care for him had not been considered by the Judge and that had significantly affected the Article 8 ECHR assessment.
10. Mr Clarke indicated his continued dissent on the Article 8 ECHR issue. The consideration of the existence of family life did not come first. He submitted that Charles (above) was *per incuriam*, as Agyarko had not been cited or considered by the Upper Tribunal.
11. Mr Papatiriou submitted that the Judge had failed to consider the practical difficulties faced by the Appellant and his family. The Kugathas [2003] EWCA Civ 31 test had been met – real, committed and effective support was being provided by the sponsor. The Judge’s assessment of Article 8 ECHR had been deficient. The appeal should be allowed and remitted to the First-tier Tribunal for re-hearing

Material error of law finding

12. This appeal is far from straightforward and in our view the Judge made a careful and conscientious effort to reach properly reasoned conclusions. The facts are unusual. The Appellant, as noted above, is profoundly disabled. Nevertheless he has been successfully cared for in the family home by both his parents (latterly by his mother alone) without professional assistance for almost his entire life, as the Judge found. The Appellant and his parents have visited the sponsor twice in the United Kingdom. That situation has however changed because the Appellant’s father has died and the Appellant’s mother is now elderly and in failing health.
13. In our view the Judge should have begun by considering whether or not the First-tier Tribunal had jurisdiction, if

that were in issue. Section 82 of the Nationality, Immigration and Asylum Act provides, so far as is relevant:

“Right of appeal to the Tribunal

(1) A person (“P”) may appeal to the Tribunal where— ...

(b) the Secretary of State has decided to refuse a human rights claim made by P...

So far as relevant, section 84 (Grounds of appeal) provides:-

“(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.”

14. Charles (above) remains authoritative:

“[68] ... The basic limitation of a human rights appeal is that it can be determined only through the provisions of the ECHR; usually Article 8. A person whose human rights claim turns on Article 8 will not be able to advance any criticism of the Secretary of State’s decision-making under the Immigration Acts, including the immigration rules, unless that person’s circumstances are such as to engage Article 8(2).”

15. There was no issue in Agyarko or TZ (Pakistan) that family life existed and so a jurisdictional issue did not arise and those decisions were not directly relevant to the issues before the Upper Tribunal in Charles. The fact that an Adult Dependant Relative application has been made under Appendix FM of the Immigration Rules does not of itself mean that it must be accepted by the Respondent that there is family life beyond normal ties between adult siblings. The First-tier Tribunal has first to decide whether it has jurisdiction; it cannot proceed to consider the Immigration Rules without doing so. Properly understood, none of the authorities mentioned by Mr Clarke shed any doubt on the correctness of Charles.

16. In the present appeal, the Judge found that there was no family life. That meant that there was no jurisdiction and

was the end of the case. The Immigration Rules only became relevant if the stage of proportionality was reached, when the state's margin of appreciation required to be weighed.

17. In a small number of cases, an Article 8 ECHR claim may succeed outside the Immigration Rules, on the grounds of unjustifiable hardship. Perhaps that was what the Judge had in mind in his approach where he considered Article 8 ECHR last, because the existence of family life between the sponsor and the Appellant was only considered in any detail under the "Exceptional Circumstances" heading at page 3 of the reasons for refusal letter dated 9 December 2022. We suggest that an approach which reflected the legislation would have been better, i.e., to have determined jurisdiction first.
18. In our view, and only after careful reflection, the panel considers that the judge fell into material error when deciding that there was no family life between the adult siblings concerned. The reasons for refusal letter, as noted above, accepted under the "Exceptional Circumstances" heading that there was family life, albeit of a limited kind, which could continue in its present form, i.e., by visits as had happened in the past. Thus the Respondent's position was that the refusal did not amount to an interference.
19. As the undisputed evidence shows, the Appellant is permanently in a state of infancy as far as his mental development can be measured. As Judge Khurram noted at [21b] of his decision, "The Appellant's health makes it somewhat difficult to assess emotional dependency on the sponsor, however it would be safe to say that this would be limited in all the circumstances and would largely be with the Appellant's mother." The problem with this approach is that the sponsor's desire and willingness to support and assist his brother does not depend on reciprocity of feeling where none can be shown because of the Appellant's condition. Such emotional attachment cannot be measured by any objective or scientific means, although the sponsor believes that a bond exists between them. The sponsor has certainly demonstrated a desire for involvement.
20. The sponsor's evidence was that he had been asked by their late father, in effect as a dying wish, to take care of the Appellant. No doubt the father was acutely aware that

the mother would soon need help if she did not already need it. The evidence showed that the sponsor was making a significant financial contribution which showed a continuing commitment to the Appellant. The evidence suggested that the sponsor's involvement in the Appellant's care has increased – from afar – as their mother's ability to care for him has diminished. The judge's error in considering that point is as relevant to the assessment of Article 8(1) as it is to the evaluation required by the Immigration Rules. Despite the care which the judge took in other parts of the decision, we are not satisfied that he came to grips with that evidence in his consideration of Article 8(1) ECHR.

21. Prospective family life was also a relevant consideration. A connection had been maintained, despite the sponsor's move to the United Kingdom in 2009. It was obviously not possible for the sponsor to communicate with his brother by any of the usual or normal means. The sponsor was faced with an agonising situation, aware that his mother was worn out with the care of her son. The evidence showed that the sponsor was and is willing to take over the role of carer at a sacrificial level. Thus the existing level of family life would be developed further. We find that the family life issue needs to be reconsidered with these factors taken into account.
22. In this difficult and demanding case, we thus find that the Judge, conscientious as his decision undoubtedly was, fell into material error of law when finding that there was no family life because he had not taken account of the factors the panel has indicated. It therefore follows that we find that the decision is vitiated by two material errors of law. We consider that this was a case where a more detailed consideration of the evidence was needed than the succinct decision provided.
23. We consider that the Judge should have taken into account the factors we have indicated before reaching findings about whether or not there was family life sufficient to engage Article 8 ECHR and afford the First-tier Tribunal jurisdiction. If the decision was that Article 8 ECHR was engaged, the reasonableness of the elderly mother's future care for the Appellant then required consideration. That was not done. As stated in Britcits v Secretary of State for the Home Department [2017] EWCA Civ 368:

[59] Second, as is apparent from the Rules and the Guidance, the focus is on whether the care required by the ADR applicant can be "reasonably" provided and to "the required level" in their home country. As Mr Sheldon confirmed in his oral submissions, the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations, which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course, to be objectively assessed."

24. The appeal to the Upper Tribunal is accordingly allowed. It follows that the decision and reasons dated 14 November 2023 must be set aside, with no findings preserved.

25. We were invited by Mr Papatiriu to remake the decision on the appeal without a further hearing. He was concerned, on instructions, about the impact of further delay on the family. Whilst it was proper of him to raise that concern, we do not consider that this is a case in which we are able to make findings of fact without further oral evidence. It will be necessary for the Tribunal to consider whether it would be reasonable for the Appellant's mother to continue to provide his care. That will require consideration of the sponsor's oral evidence as to the appellant's current circumstances, and those of their mother. Given the errors into which the First-tier Tribunal fell, and given the scope of the issues which must be explored, the proper course is for the appeal to be remitted to be heard afresh.

Notice of decision

The appeal is allowed_

The making of the previous decision involved the making of a material error on a point of law. The decision is set aside with no findings preserved.

The appeal is remitted to the First-tier Tribunal, to be heard again by any judge except First-tier Tribunal Judge Khurram.

Signed R J Manuell **Dated** 11 June 2024
Deputy Upper Tribunal Judge Manuell