IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000303

First-tier Tribunal Nos:
HU/56153/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3rd of July 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

AAS
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr D Winter, instructed by Ali & Co Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

Heard at 52 Melville Street, Edinburgh on 26 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and her daughter are granted anonymity.

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. Failure to comply with this order could amount to a contempt of court.

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DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Doyle promulgated on 3 November 2023, dismissing her appeal against the decision of the Secretary of State of an Entry Clearance Officer in Sheffield to refuse her entry clearance as the adult dependent relative pursuant to Appendix FM of the Immigration Rules.

Background

2. The appellant is a Somali national born on 26 June 1951. She is a widow, suffers from type 2 diabetes, neuropathy, thyroid problems, hypertension and dementia. Her daughter ("the sponsor") came to the United Kingdom in 2001 and was granted citizenship in 2002. She lives with her daughter in Glasgow.

3. The sponsor suffers from kidney disease and underwent a kidney transplant in 2009. That was unsuccessful and she suffered kidney failure in 2018 and is now in receipt of dialysis every day. As a result, she is unable to travel to Somalia to visit her mother and she too suffers from type 2 diabetes. She is unable to work and is reliant on benefits. The sponsor's daughter is now at university studying nursing.

4. The sponsor sends up to £400 a month to the appellant to pay for her medication and accommodation in Hargeisa, Somaliland.

5. The appellant and sponsor speak every day by telephone and video calls and it is the sponsor who arranged for the appellant to live in the house of a carer. She has previously had some medical treatment in Uganda and the appellant needs help from the carer to wash and bathe and to feed herself.

6. The Entry Clearance Officer refused the application on the basis that she did not meet all the requirements of paragraph E-ECDR of the Immigration Rules. It was conceded on review the appellant meets the requirements of E-ECDR.2.4, E-ECDR.2.1 to 4 but not E-ECDR.2.5 absent a failure to demonstrate she required specific care to perform everyday tasks. In addition, it was stated that she did not meet E-ECDR.3.1 and 3.2 as the sponsor could not adequately maintain her in the United Kingdom without recourse to public funds or provide evidence that she could meet the requirements for a period of five years after the appellant entered the United Kingdom.

7. The Secretary of State did not consider either that there were anything which constitutes exceptional circumstances such that she should be allowed into the United Kingdom, having had regard to Appendix FM, GEN.3.1 and 3.2.

8. On appeal, judge to the First-tier Tribunal, Judge Doyle noted [11] that it was it accepted the appellant could meet the requirements of the

Immigration Rules as the sponsor was dependent on benefits and that thus the appeal was to proceed on Article 8 grounds alone.

9. Having directed himself according to the law [12] to [16] with particular regard to Kugathas v SSHD [2003] EWCA the judge found:-

   (i) that the sponsor had recreated family life within the meaning of Article 8, the appellant's deteriorating health and her daughter's protective reaction being sufficient to create a relationship of dependency [17] but [22] the respondent's decision is not an interference with family life that has been recreated as it has no impact on the family life created between the sponsor and appellant; and that the appeal falls at the second of the **Razgar** questions [23];

   (ii) the facts are not sufficient to demonstrate unjustifiably harsh consequences flowing from the respondent's decision [21];

   (iii) even if the determinative question were proportionality, the Tribunal was entitled to decide the public interest. The appellant could still not succeed [24] given the great weight to be attached to an inability to satisfy the Immigration Rules.

10. The appellant sought permission to appeal on the grounds that the judge had erred:-

   (i) in finding that although family life had been established there was no interference, failing to take into account relevant factors, particularly that the sponsor could not visit; and

   (ii) failing to consider whether it was reasonable for the appellant to remain in Somalia given the lack of support in her health issues and the sponsor's health issues and inability to travel and in failing to carry out a proper proportionality analysis.

11. On 9 February 2024 Deputy Upper Tribunal Judge Chapman granted permission noting that it was arguable that it was not possible to ascertain from the decision why the judge considered there was no interference with family life and that he failed to carry out a proper proportionality assessment.

Error of Law

12. I heard submissions from Mr Winter and Mr Diwnycz who did not resist Mr Winter's submission there was an error of law disclosed by the grounds.

13. I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law. Having concluded that family life existed, and that unusually between an adult child and a parent, that this was a sufficient family life to engage Article 8, it is unclear why he considered that there was no interference. It is established law that the degree of interference need not be great. It also failed to note that the family life recreated was when the sponsor was able to travel to Somalia. She was no longer able to do so owing to being on dialysis. In that context, what is

said at paragraph 22 makes little or no sense. And for that reason alone, the decision needs to be set aside. Accordingly, the conclusion is that the decision failed in the second of the **Razgar** questions is unsustainable.

14. With regard to the issue of proportionality, it is unclear why the judge stated, "The finding that there are no insurmountable obstacles to family life abroad is a further powerful factor militating against the article 8 claims" arose in this case given the sponsor's inability to travel, a matter which he failed to address. Further, the finding at [25] that although family life exists, the appellant cannot demonstrate there is interference, makes little sense in this context.

15. The observation at [26] that after considering the evidence the appellant had failed to establish the component parts of Article 8 ECHR private life, make no sense in the context of this appeal nor indeed do the references at [27] to Thakrar (Cart JR; Art 8: value to community) [2018] UKUT 00336. Similarly, the observation at [28] that "The appellant fails to establish that she has created article 8 private life within the United Kingdom" makes no sense on the facts of this case. It appears that some or all of these paragraphs appear to have been copied from another decision without proper thought being given as to whether they were applicable.

16. Accordingly, for these reasons, I consider that the decision with regard to proportionality, is fundamentally flawed and that must be set aside also.

17. Having announced this, I found errors of law as pleaded, it was agreed that I would proceed to remake the appeal, having heard further evidence from the sponsor and her daughter.

Remaking the decision

18. The sponsor adopted her witness statement adding that although she had previously been receiving dialysis three times a week, she was now undergoing peritoneal dialysis overnight every night and at times during the day. Her current accommodation consists of a living room, and she is about to get a new flat with three bedrooms to permit one room to be used for dialysis, a bedroom for herself and one for her daughter. She submits she said, that this would be adequate were her mother to stay with her as she could sleep in the room with the dialysis equipment.

19. The sponsor said that she receives various different benefits including adult disability benefit, ESA, housing benefit and council tax benefit totalling some £1,300 to £1,4000 a month. She said that she sends roughly £400 a month to her mother which is collected by the carer who accompanies her mother to the place where the money is handed out. She said that the carer has difficulty looking after the appellant as she has five children of her own. She confirmed that she continues to be in contact with her mother every day by telephone, sometimes several times a day. She said that her mother does recall her name but is confused and that she is worried for her. There was no cross-examination.

20. In response to my questions, the sponsor said that her mother does not recall her daughter's name and calls almost everyone by her name. She said that she believed that her mental health would be improved were her mother to join her in the United Kingdom but that the mother does have difficulty in looking after herself.

21. I then heard evidence from the sponsor's daughter who adopted her witness statement. She said that she is just about to finish her first year at university, continues to work part-time earning £100 a month and that she gets a bursary of £780 a month. She said that she does speak to her grandmother (the appellant) at the same time as her mother, when she speaks to her mother. But that the appellant has difficulty in remembering who she is. She said that she failed to help care for her grandmother when she arrived.

22. In submissions, Mr Diwnycz explained that he was unable to concede anything given that this was an entry clearance appeal but that he wished to commend both witness' evidence as clear and persuasive.

23. In response, Mr Winter submitted that the sponsor recognises this is a difficult case with a high threshold, given not least that great weight must be attached to the filure to meet the requirements of the Immigration Rules. He accepted that Section 117B was of relevance here given that the sponsor is reliant on benefits and the appellant does not speak English. He submitted the main points in this case were that there is no other family to look after the appellant in Somalia. She is isolated, the care arrangements are precarious and that the sponsor's health is not good, she cannot travel and is unable to make a difference. In response to additional questions, the sponsor confirmed that although she is able in travel in Europe as reciprocal arrangements exist, she cannot travel beyond that.

The Law

24. It is for the appellant to demonstrate that the refusal to issue her with entry clearance is a breach of her rights under the Human Rights Convention, in this case article 8 of that Convention. The proper approach in such cases is to determine if the appellant qualifies under the Immigration Rules and then to consider where, outside the Rules to refusal of entry clearance would amount to a breach of article 8, that is whether the refusal would result in unjustifiably harsh consequences for the appellant or (in this case) her mother, applying in particular the principles set out in Agyarko [2017] UKSC 11 at [47]. I note also what was held in I note what was held in TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109] at [28];

> 28. The consideration of article 8 outside the Rules is a proportionality evaluation i.e. a balance of public interest factors. Some factors are heavily weighted. The most obvious example is the public policy in immigration control. The weight depends on the legislative and factual context. Whether someone is in the UK unlawfully or temporarily and the reason for that

circumstance will affect the weight to be given to the public interest in his or her removal and the weight to be given to family and/or private life (see the examples given in *Agyarko* at [51] and [52] which include the distinction between being in the UK unlawfully and temporarily). Decisions such as those in *Chikwamba* and *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] AC 1159 describe examples of how the weight or cogency of the public interest is affected. It is accordingly appropriate for the court to give weight when considering the proportionality of interference with article 8 outside of the Rules to factors that have been identified by the Strasbourg court, for example, the effect of protracted delay, the rights of a British partner who has always lived here and whether it can reasonably be expected that s/he will follow the removed person to keep their relationship intact: that is, by way of example, the circumstances identified in *EB (Kosovo)* or the circumstance described in *Chikwamba* where the removal of an appellant who is the spouse of a British citizen could be followed by a right of re-entry.

25. While this is a case which concerns Entry Clearance, the importance of the maintenance of immigration control remains the same. In this case, the applicable rules are those relating to adult dependent relatives. It is not, however, submitted that those requirements are met in their entirety.

26. In Mobeen v SSHD [2021] EWCA Civ 886 Carr LJ (as she then was) recognised that the test is “rigorous and demanding” [41]. She observed also [68] that the requirement to be met by an adult dependent relative seeking to settle in the United Kingdom will be a powerful factor in any Article 8 assessment of proportionality.

27. I have no reason to doubt the evidence given by the sponsor and her daughter. Indeed, not only was there no challenge to it on the part of the Secretary of State, but it was commended as clear and persuasive.

28. It is conceded that the Immigration Rules are not met. That is in respect of the financial aspects at E-ECDR 3. It is accepted that other parts are met, but not E-ECDR.2.5.

29. I am satisfied that a family life exists between the appellant and sponsor. I am satisfied that it came back into being at a time when the sponsor’s health was better. She was able, at that point, to travel to visit her mother, but her health failed, and she now requires dialysis, which makes it impossible for her to travel outside of Europe and only then once arrangements for her to access that treatment in the host country have been made. I accept that the family life is a strong one despite the distance. The appellant is a widow; she has no relatives left other than the sponsor and her granddaughter; she is suffering increasingly from dementia and has a number of other health issues which are in the care of an informal carer paid for by the sponsor. There are also issues regarding her mobility and ability to wash and bathe. It is inevitable that the situation will deteriorate given the nature of dementia.

30. I accept the evidence that this situation impinges on the sponsor’s mental health. She herself has significant health difficulties, as shown by

the letter from her GP's, which explains that she has end stage chronic kidney failure and is on dialysis pending another kidney transplant.

31. I accept the unchallenged evidence that the sponsor will be moved to larger accommodation to take account of her needs to undergo dialysis at home. I accept the three-bedroom flat, together with the living room would be adequate accommodation for the family and that, in itself is unlikely to increase the costs of accommodation beyond what is already provided by the state. I accept that the sponsor is able to save some money from her benefits but these are benefits which are paid for her to cover her costs. There will inevitably be a significant increase in public funds being necessary to support the appellant were she to arrive in the United Kingdom, not least because of her deteriorating health.

32. I accept that the granddaughter has a relationship with the appellant and that she will, as a training nurse, be able to assist.

33. On the particular facts of this case there has been a supervening event, the sponsor's inability to travel with no realistic prospect of her ever being able to travel to visit her mother or of the mother being able to visit her in some third country. I am satisfied that this amounts to an interference with family life and that the interference is likely to get worse, given the lack of physical contact between the sponsor and the appellant, which is likely to become more important as the dementia worsens. I accept that the appellant's position looked after by an informal carer is precarious. To a significant extent, the decision is not in relation to a status quo, as the result of the supervening inability of the sponsor to travel.

34. Weighing significantly against the appellant in this case is the fact that she does not comply with the Immigration Rules. As noted in Mobeen, this is a significant and weighty factor, particularly in the case of adult dependent relatives. Further, as particularly relevant to this case, is the significant cost there is likely to be to public funds. The sponsor is in receipt of benefits and it there is no real prospect of her not being so in the near future. The appellant does not speak English and given her dementia it is unlikely she will ever be able to communicate in English and again, in combination with her lack of public funds, these are weighty matters in favour of the Secretary of State. That said, she will be looked after by family.

35. That said, each case must be viewed on its own merits and the consequences of the continued separation must be considered. In this case, the realistic situation is that the appellant will cease to be able to have any meaningful contact with the appellant and on the balance of probabilities it is unlikely on the evidence before me that they would be able to meet again. Given the significant number of factors weighing in favour of the appellant in this case, taken cumulatively, I consider that it would, on the particular and factors of this case, be unduly harsh, given the level of suffering to all concerned, and the inability otherwise for family life with the daily, physical contact that implies, to be maintained. I

am therefore satisfied that it would be disproportionate to refuse the appellant entry clearance. I therefore allow the appeal on human rights grounds.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law.

(2) I remake the appeal by allowing the appeal on human rights grounds.

Signed　　　　　　　　　　　　Date: 2 July 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal