



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 97

P237/20

OPINION OF LORD BRAILSFORD

In the petition of

FERDINAND PETRUS PIETERSE

Petitioner

for

Judicial Review of a decision of the Upper Tribunal (Immigration and Asylum Chamber)  
refusing permission to appeal to itself

**Petitioner: Winter; Drummond Miller LLP**

**Respondent: McKinlay; OAG**

4 December 2020

[1] The petitioner is a South African national. He seeks reduction of a decision of the Upper Tribunal (Immigration and Asylum Chamber) (“UT”) dated 16 December 2019 in terms of which the UT refused to grant the petitioner leave to appeal to the UT against a decision of the First-tier Tribunal (“FtT”) dated 12 August 2019. The respondent is the Secretary of State for the Home Department.

[2] There is no material dispute in relation to the background facts which may be summarised as follows. The petitioner is, as aforesaid, South African. His date of birth is 28 April 1975. He entered the UK on 12 April 2016 with a visitor’s visa valid until 23 September 2016. Since entering the UK he has been resident with his mother. On

21 September 2016 he made an application for further leave to remain in terms of article 8 of the European Convention on Human Rights (“ECHR”). The basis of this application was primarily the claim that the petitioner’s mother required care from him as a result of her suffering from various medical conditions. This application was refused by the Home Office on 28 February 2019. The petitioner appealed to the FtT. The FtT refused that appeal by decision dated 12 August 2019.<sup>1</sup> At paragraph 2 of the FtT decision is a record of the petitioner’s immigration history. The decision that the petitioner’s relationship with his mother cannot constitute family life is found at paragraph 21 of the FtT decision. In paragraph 24 of the said decision the FtT find that it is proportionate to remove the petitioner. The UT decision which is challenged<sup>2</sup> in refusing an application for permission to appeal to itself stated in its reasons that the judge of the FtT

“... unarguably approached a relationship between the appellant and his British citizen mother in a lawful manner, properly noting that, in order for article 8 to be engaged, the relationship must contain more than the normal emotional bonds between adult children and their parents ...”

[3] Having regard to the foregoing factual background it was common ground between the parties that the central issue in the present petition was whether the UT erred in law in holding that the petitioner’s grounds of appeal to the UT did not disclose any arguable material error of law in the FtT decision. A secondary question was if there was an error of law in the UT decision whether such error was material.<sup>3</sup>

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<sup>1</sup> Number 6/1 of process

<sup>2</sup> Number 6/5 of process

<sup>3</sup> The petitioner’s grounds of appeal to the UT were produced and constitute number 6/4 of process

## Submissions

### *(i) Petitioner*

[4] Counsel for the petitioner initially drew attention to the grounds of challenge stated before the UT.<sup>4</sup> Thereafter counsel drew the court's attention to the UT decision<sup>5</sup> drawing attention to that tribunal's findings that there was limited evidence of any emotional dependency between the petitioner and his mother, that the FtT was demonstrably aware of the mother's medical condition and that the FtT was entitled to find that the petitioner's mother would receive adequate assistance for her medical conditions from the British state. It was also observed that the UT stated that the FtT gave cogent and legally sustainable reasons for its findings and that the UT considered the FtT was entitled to find that the petitioner's mother could use her pension to relocate to South Africa if she wished to do so. It was finally noted that the UT stated that the grounds in the appeal before it disclosed no error on a point of law which would require the FtT decision to be set aside.

[5] Drawing attention to the petitioner's mother's health and dependency upon the petitioner the ground of challenge to the UT decision in this court was that the tribunal erred in law in concluding there was limited evidence of any emotional dependency between the petitioner and his mother. That decision was described as inadequate or a misapplication of the law, even if the evidence was limited. The factors which were relied upon in support of the submission were evidence that the petitioner was the only relative of his mother resident in Scotland, that his mother was in pain from previous surgery and still suffering from a frozen shoulder, that the petitioner ensured that his mother took prescribed medication, that the petitioner cooked for his mother, that he did washing for his mother when she was too

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<sup>4</sup> Number 6/4 of process

<sup>5</sup> Number 6/5 of process

tired and breathless to undertake these tasks, that the petitioner's mother is an alcoholic who has put herself in danger and occasioned physical injury to herself as a result of that condition, that she has in the past left things on a stove and burned them and, lastly that the petitioner looked after his mother's general health. The submission was that such evidence was sufficient to show that the relationship between the petitioner and his mother was not merely based on fondness but was evidence of a real and committed tie. Reference was made in support of the proposition to *Kugathas v Secretary of State for the Home Department*<sup>6</sup>, *Ghising (family life - adults Gurkha policy)*<sup>7</sup>, *Gurung v Secretary of State for the Home Department*<sup>8</sup>. It was further submitted that the fact that the petitioner's mother as a British citizen was entitled to assistance from the British state was not an adequate reason for finding that family life was not engaged where she had not received any care assistance from the state and that at the date of the hearing the petitioner had been providing such support.

[6] It was further drawn to the court's attention that the respondent accepted that if the errors identified above were held by this court to be well-founded then the respondent conceded that the error would be material. Given this concession counsel for the petitioner's position was that there was no need to address the issue of proportionality.

## **(ii) Respondents**

[7] Counsel for the respondent commenced by reminding the court that its function was to determine whether the UT erred in law when refusing permission to appeal. The scope of the present proceedings did not extend to determining whether the FtT erred in law. The UT could only grant permission to appeal in relation to points of law arising from the FtT

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<sup>6</sup> [2003] EWCA Civ 31 at paragraphs 17 and 19

<sup>7</sup> [2012] UKUT 00160 (IAC) at paragraphs 48-62

<sup>8</sup> [2013] 1 WLR 2546 at paragraphs 44-46

decision.<sup>9</sup> In determining permission whether to appeal to itself the UT was not required to determine whether an alleged error of law was established. The test was whether the proposed ground of appeal was arguable.<sup>10</sup> Lastly counsel reminded the court that the UT should not give permission to appeal on the ground of an error of law that was immaterial.<sup>11</sup> An error in law in a tribunal decision would be immaterial if it was the only decision that the tribunal could rationally have made or if it was obvious from the rest of the tribunal's reasons, read as a whole, that the decision would have been the same but for the error.<sup>12</sup>

[8] Beyond those preliminary observations counsel's primary position was that the UT did not err in law. If that proposition was accepted by the court then no issue of materiality arose. There was an *esto* argument that if the court held that the UT decision did contain an error of law then the respondents contended that such error was immaterial.

[9] In relation to his primary argument counsel noted that the petitioner's contention was that the UT erred in law in finding that there was limited evidence of any emotional dependency between the petitioner and his mother; in relation to its treatment of the petitioner's mother's medical condition and the relevance of assistance being available to her from the state; in failing to give adequate reasons rejecting grounds of appeal before it relating to the petitioner's mothers return to South Africa and her private life.

[10] In relation to emotional dependency counsel drew the court's attention to para [21] of the FtT decision.<sup>13</sup> The submission was that the UT finding was plainly based upon this paragraph in the FtT decision. Consideration of the paragraph was said to illustrate that there was no merit in the petitioner's contention in relation to emotional dependency.

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<sup>9</sup> Tribunals, Courts and Enforcement Act 2007 section 11(1)

<sup>10</sup> *HH (Nigeria) v Secretary of State for the Home Department* 2015 SC 613 per Lord Brodie delivering the opinion of the court at para [15]

<sup>11</sup> *Ashiq v SSHD* 2015 SC 602 at para [63]

<sup>12</sup> *Holmes-Moorhouse v Richmond Upon Thames London Borough Council* [2009] 1 WLR 413

<sup>13</sup> Number 6/1 of process

[11] In relation to the argument that there was evidence available to the FtT sufficient to show that the relationship between the petitioner and his mother was based not just on fondness, citing in this regard that the petitioner was his mother's only family relative in Scotland, the petitioner's mother was alcohol dependent and put herself in danger, the submission was that in order for family life to exist for the purposes of article 8 ECHR a relationship must contain more than the normal emotional bonds between adult children and their parents.<sup>14</sup> It was said to be necessary to demonstrate real, committed or effective support in order to establish family life.<sup>15</sup> It was also noticed that there was no presumption of family life in the relationship between adult child and parent and it was incumbent on the person seeking to establish such a relationship to prove more than normal emotional ties.<sup>16</sup> In a final observation in relation to this chapter counsel submitted that the court only required to undertake a proportionately assessment when family life had been established.<sup>17</sup>

[12] The context in the present case was said to be that the petitioner had lived in South Africa for many years prior to 2016 during which period the petitioner's mother had been resident in the UK. The petitioner had maintained his relationship with his mother during that period. He had arrived in the UK in April 2016 on a 6 month visitor visa despite having no intention to return to South Africa.<sup>18</sup> Against that factual background the FtT's acceptance that there was "a degree of dependency caused by his mother's depression and excessive consumption of alcohol"<sup>19</sup> was justified and appropriate. The FtT's decision on that basis that the test for establishing family life for the purposes of article 8 had not been met was also justified. This rationale was accepted, in counsel's submission appropriately,

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<sup>14</sup> *Kugathas (supra)* at para [14]

<sup>15</sup> *Kugathas (supra)* at paras [16] and [17]

<sup>16</sup> *Kugathas (supra)* at paras [24] and [25]

<sup>17</sup> *Kugathas (supra)* at paras [8] and [13]

<sup>18</sup> FtT decision number 6/1 of process at para [20]

<sup>19</sup> FtT decision number 6/1 of process at paras [21] and [22]

in the first paragraph of the UT decision.<sup>20</sup> In relation to the petitioner's contention that the petitioner's mother's entitlement to assistance from the British state was not an adequate reason for saying family life in terms of article 8 ECHR was not engaged counsel for the respondent's submission was that this was one of several factors considered by the FtT in determining whether family life had been established. There was no suggestion in the FtT decision or the derivative UT decision that a factor in relation to availability of state assistance was decisive to the decision of the tribunals. The approach of the FtT was that the availability of support for the petitioner's mother was a relevant factor to consider in assessing the extent to which the petitioner's mother was dependent upon him to provide care and support. This was said to be a logically correct approach to evaluating this aspect of the evidence.

[13] For those reasons counsel submitted that the petition did not disclose any arguable error of law in the FtT decision. Further the FtT did not err in law in refusing permission to appeal. The UT provided proper and adequate reasons for refusing permission to appeal. The court was invited to sustain the respondent's third plea-in-law and refuse the orders sought in the petition.

### **Conclusion**

[14] It was accepted by both parties that the function of this court is to determine whether the UT erred in law when refusing permission. Whilst the UT decision is derivative from the FtT decision this court is not determining whether the FtT erred in law.

[15] In relation to the UT decision it is significant that in the submission of counsel for the petitioner there was no suggestion that the UT failed to have regard to the FtT decision.

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<sup>20</sup> Number 6/5 of process

There was no suggestion that the FtT failed to have regard to any material factors properly before it. Equally there was no suggestion that the FtT had regard to immaterial factors or information not properly before it. In a criticism of the FtT, for example in relation to the effect the petitioner's mother's medical conditions may have had on her relationship with the petitioner and of the significance of state assistance available in the UK to the petitioner's mother matters were approached on the basis of the weight which it was appropriate to attribute to these factors. Essentially the petitioner's submission was that the FtT failed to attach appropriate weight to these factors.

[16] The UT in considering the FtT decision, as it was bound to do, and having regard to the factors advanced in the grounds of appeal before it rejected those arguments concluding, expressly, that the FtT judge was entitled to reach the decision he did in relation to these factors.

[17] In my view the approach of the UT was correct in law. The grounds of appeal before the UT amounted, in essence, to no more than disagreements on the question of assessment of weight of certain aspects of evidence reached by the FtT judge. The same characterisation applies to the same criticisms raised again in this petition.

[18] In the foregoing circumstances I am not satisfied that any error of law in the UT decision has been demonstrated. I shall uphold the respondent's third plea-in-law and refuse the prayer of the petition.