Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/01621/2013
OA/01624/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 November 2013	**On 25 November 2013**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ROSE NJERI KIRUJU

First Appellant

FRED KIRUJU MATIRI

Second Appellant

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:
For the Appellants: Mr F Kodagoda, Counsel instructed by Harrison Morgan Solicitors
For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are married to each other. The first appellant was born on 25 December 1960 and so is now 52 years old. The second appellant was born on 10 December 1937 and so is now 75 years old. They each appealed to the First-tier Tribunal decisions of the respondent refusing them entry clearance as adult dependant relatives of persons present and settled in the United Kingdom.

2. Permission to appeal to the Upper Tribunal was granted solely because, arguably, the First-tier Tribunal had not considered the appellants' contention that the decision contravened their rights under Article 8 of the European Convention on Human Rights and therefore the United Kingdom's obligations under the Convention. By letter dated 27 August

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2013 the respondent formally conceded that the First-tier Tribunal had erred and said:

> "The respondent does not oppose the appellants' application for permission to appeal on the Article 8 point and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the decision would be a disproportionate breach of the appellants' Article 8 rights."

3. Before me Mr Kodagoda confirmed that his case was limited to arguing that the appeal should be allowed with reference to Article 8.

4. It is for the appellants to prove their cases and, there being no international protection element in this case, the appellants must prove their cases on a balance of probabilities and I direct my mind to facts appertaining at the date of decision. It remains for the respondent to justify any interference with the appellants' private and family lives consequent on the decision complained of (see for example **Naz (subsisting marriage – standard of proof) Pakistan [2012] UKUT 00040 (IAC)**.

5. In order to follow this Determination I outline in extreme summary form the nature of the appellants' cases. The second appellant has suffered from cancer and as a result has undergone a laryngectomy. He wishes to have further surgery with a view to his regaining the ability to speak. The proposed treatment is not yet widely available and will involve putting an artificial voice box into an opening in the second appellant's throat. Such a voice box would have limited life and the valves would have to be changed frequently. The life of the valve depends on a variety of circumstances but it can be as short as a few weeks. The person managing the artificial voice box must maintain high standards of hygiene and there is an ever present risk of the voice box dislodging into the lung. This would always be serious and would be extremely serious, and probably fatal, if the patient was not able to get high quality medical treatment quickly.

6. The appellants live in a rural part of Kenya but have to travel to Nairobi for expert medical treatment. Even then the medical expertise is not as specialised as is available in the United Kingdom. Travel to Nairobi involves a long journey by public transport that is more suited to travel on rough roads than it is to the needs of sick person and, in any event, can only be accessed after a long walk.

7. Ms Margaret Newland, the second appellant's sister, gave evidence before me. She is a qualified nurse and a director of a successful care home. I found her to be an entirely truthful witness.

8. Nearly all of the second appellant's medical treatment has been provided in the United Kingdom at Mrs Newland's expense. At every stage the appellant or appellants, have had appropriate permission to be in the United Kingdom and the costs have not come from public funds.

9. Mrs Newland was very cautious in answering questions about her sister-in-law, the first appellant, but when I suggested to her that she was trying to tell me, without being offensive to her sister-in-law, that the first appellant

was willing but not competent to help her husband manage an artificial voice box her relief that I had understood her evidence was palpable.

10. The appellants would like to live in the United Kingdom so that the second appellant could have treatment that would lead to his being able to speak and also benefit from the follow-up care that would be readily available in the United Kingdom and which is necessary for the procedure to be successful.

11. The First-tier Tribunal agreed with the respondent that the second appellant did not “require long-term personal care to perform everyday tasks” within the meaning of E-ECDR 2.4 and so could not come within the terms of the Rules. The second appellant plainly does not require help with everyday tasks. What he wants is frequent help with highly specialised tasks. The rules do not provide for this, or at least not as a basis for settlement.

12. I appreciate that the Entry Clearance Manager’s review speculates that the second appellant expected the National Health Service to meet the cost of his treatment. Unlike the respondent, the First-tier Tribunal, with the benefit of better evidence, was satisfied that the costs of maintaining and accommodating the appellants as well as the treatment would be met by Mrs Newland.

13. The “refusal of entry clearance” used to support the immigration decision did not deal directly with the human rights of either appellant but did suggest that the kind of care that was needed to manage the artificial voice box could be paid for in Kenya, possibly by a domestic worker.

14. The second appellant’s daughter, Ms Caroline Gardner, gave evidence before me. She adopted her statement of 21 May 2013. She confirmed her willingness and ability to accommodate the appellants, her parents, at her four bed-roomed home.

15. I have read the bundle dated 23 May 2013. I do not think it necessary to go through each item in that bundle because many of the points made lend themselves to easy summary or agreement.

16. Having considered the evidence as a whole, including the evidence from medical experts, I find it unlikely that the second appellant will go ahead with the treatment in the United Kingdom if he would have to return to Kenya. I accept that he lives a long way from Nairobi and that managing his condition without access to good quality medical care creates risks that are likely to be unacceptable to him. I accept that the second appellant has no realistic way of living in Nairobi and in any event I am satisfied that the kind of treatment available in Nairobi is not the kind that he seeks.

17. Mr Kodagoda put his case very simply. He said the respondent’s objections stem from an unfounded and remote suspicion that the second appellant might become a burden on public funds. Since 2004 his sister had been spending considerable sums on his health and there was no reason to think that would not continue.

18. He reminded me that Article 8 is about respecting a person's physical and moral integrity and should not be reduced to a picky analysis about whether something is an interference of a person's private life or family life. He suggested there were few things more basic to a human being than the desire to communicate by speaking. The evidence was that this second appellant would be able to speak again if he was able to come to the United Kingdom and have treatment but that he should not embark on that treatment unless he could be confident of the kind of ancillary care that would not be available practically, if at all, in Kenya. The decision clearly interfered with his private and family life. Further, denying the first appellant entry clearance was a failure to promote both her and the second appellant's private and family life and the respondent had failed to justify the decision on human rights grounds.

19. Although neither party placed it before me I have reminded myself of the considerable difficulty created for this argument by the decision of the Tribunal in **Sun Myung Moon v Entry Clearance Officer (Seoul) [2005] UKIAT 00112**. This decides that the obligation under the Convention to respect a person's private and family life, sometimes expressed as a person's "physical or moral integrity", does not exist in the case of persons outside the jurisdiction except is so far as it bears on the rights (usually thought of as family life) of persons within the jurisdiction. That decision is not "starred" and so I am not obliged to follow it. It is plain from Naik, R (on the application of) v Secretary of State for the Home Department [2011] EWCA Civ 1546 that this area of jurisprudence is ripe for development. Nevertheless I have decided that article 8 is only relevant at all to the extent that the decision complained of interferes with the private and family life (really the family life) of the second appellant's close relatives in the United Kingdom who want to provide for him. I find that article 8 does not establish a general right of a foreign national to enter the United Kingdom for the purpose of medical treatment even if such a "right" was tempered with many restrictions and caveats.

20. Nevertheless I recognise that the human desire to protect family members is sometimes very strong. Mrs Newland in particular is keen to use the profits of her endeavours to assist her brother whose cancer has cost him the ability to speak. She wants to help him and has created a state of affairs where she could help him, and his wife, without their being a burden on the state. I am satisfied that excluding the appellant's is a decision that comes within the scope of article 8(1) because it interferes with a strong human desire to take care of needy family members. This is not as weighty a point as, for example, the duty to promote a person's marriage or the relationship between a minor child and a parent but it is certainly within the scope of a person's private and family life that has to be respected.

21. Nevertheless, I find the decision to refuse the applications made is a proportionate interference with the right to private and family life. The appellants applied for permission to settle in the United Kingdom. If they had been successful then they would have accrued rights far beyond the right to visit for the purposes of medical treatment. Many people want to settle in the United Kingdom. It is not fair to them to give others permission

to settle outside the ordinary rules. Refusing the applications protects the rights and freedoms of others.

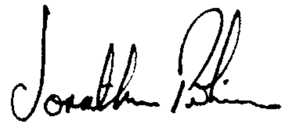
22. Further, settlement might create demands on the public resources in the future. The appellants cannot come within the rules relevant for the purposes of settlement and so excluding them protects the economic well being of the United Kingdom even though their admission would clearly not create and immediately foreseeable risk.

23. It follows that although I set aside the decision of the First-tier Tribunal in so far as it was incomplete because it did not deal with the human rights of the people involved I dismiss the appeal having considered the grounds not determined by the First-tier Tribunal.

24. However I think it is necessary to say more. The appellants have not done anything to their discredit in the conduct of these proceedings. At worst, they have made an inappropriate application. The appellants do not satisfy the rules for admission. It may well be that they will make a further application for entry clearance under the rules relating to medical treatment and it may well be that the appellants with say that they expect that they would have to seek to extend their stay within the rules. These are things to consider if a further application is made. Nothing has emerged in the course of these appeals that should be seen as undermining the credibility of a more appropriate application.

25. Nevertheless, in the circumstances I dismiss these appeals.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 21 November 2013