Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01432/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 September 2017	**On 10 October 2017**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

KHADIJA AL WADI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Moran, Alex Moran Immigration & Asylum
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Buckwell promulgated on 1 June 2017. It is not in dispute that the appellant is a citizen of Syria, who at the date of the hearing, resident in the Zaatari Refugee Camp in Jordan. She applied for entry clearance to join her daughter Aysha Al-Wadi, who was referred to in the decision of Judge Buckwell as the sponsor. It is accepted by both parties that the appellant cannot meet the requirements of the Immigration Rules as she has insufficient documentary evidence in order to comply with the requirements set out in Appendix FM-SE.

2. The judge heard evidence from the sponsor. He also had a bundle of material before him which relates in part to the conditions which currently exist in the Zaatari Camp. The judge concluded, having directed himself as to the law at paragraph 31 and 32, that in this case it was not a disproportionate interference with what he accepted was an existing family life between the appellant and sponsor to refuse entry clearance.

3. The appellant sought permission to appeal on what have broadly fallen into three grounds that the judge had erred:,

   (i) In misapplying the law in that he had impermissibly applied the test of exceptionality contrary to what he should have done which is to ask whether there were compelling circumstances;

   (ii) In failing to take into account relevant considerations specifically in this case the guidance given in **Britcits v The Secretary of State [2017] Court of Appeal Civ 368** paragraphs 59 onwards; and,

   (iii) In making findings of fact which are perverse in the light of the evidence presented, specifically in this case the findings of 39 that the appellant was able to reside in the camp with appropriate dignity and respect shown to her.

4. The judge, at paragraph [37] stated:

   "In the absence of any detailed medical report I am unable to find that the appellant suffers from ailments to a particular degree of extremity which might distinguish her from other individuals who have medical conditions which are the same as those of the Appellant."

5. Mr Moran submitted that this is indicative that the judge incorrectly applied a test of exceptionality, that is, that the position of the appellant had to be worse than others in her position.

6. Mr Clarke for the Secretary of State submitted this was not a misdirection and the judge is not applying a test of exceptionality which would not be permitted by the law. He submitted that the judge was permissibly making findings that the evidence was insufficient to meet a particular standard.

7. In response, Mr Moran submitted that that ignores the second part of the sentence.

8. I agree with Mr Moran on this issue. The judge has impermissibly applied a test of exceptionality. That is notable not only from the sentence quoted but it is also apparent that he has done so when considering the remainder of his decision.

9. The second issue and second ground of appeal is that the judge failed to take into account relevant considerations, specifically those set out or identified in paragraph 59, in particular of the **Britcits** decision.

10. The submission is that the judge failed to have proper regard to what is meant by "permanent care". The difficulty I have with this argument is that as Mr Clarke submitted, what is being talked about here is the specific evidence which is required to meet the requirements of the Immigration Rules, which it is accepted are not provided here. In that sense Mr Clarke does have a point, but I consider that in this case, albeit for good reasons because of course the **Britcits** decision had not yet been handed down, that the judge appears to have limited himself in consideration of the Article 8 considerations as whole, in that although focusing as he was bound to do on whether the Rules were met, he did fail, as Mr Moran submitted, to have proper regard to the purpose of the Rules and the fact that of course once when he is going outside the Rules, one must consider other aspects and factors.

11. Turning to the third ground of appeal, whilst I note Mr Clarke's submissions that the judge did have regard to the evidence of how the appellant is able to live in the camp in Jordan and that this is detailed in particular at paragraph [14]of the decision, equally I consider that there is significant merit in Mr Moran's submission that the judge has not had proper regard to the exact difficulties which are identified in that and which the judge accepted and second that there appears to be no proper consideration of the quite significant difficulties which exist in the camp, which are again drawn out at paragraph 23 of the grounds of appeal.

12. Whilst I note also Mr Clarke's submission that what the judge has done here is within the range of accepted outcomes, in that it would have to be perverse for a proportionality finding to be overturned, I consider that in this case the judge has not properly considered or made proper findings of fact which led up to that exercise.

13. It is in my view perverse for a judge to make improper findings of fact and then to use those improper findings of fact, which in this case are failing to have proper regard to the evidence of the difficulties that the appellant has in accessing facilities in the camp and the difficulties that actually exist in the camp and the fact that he is able to say, in the light of all of this, that she has appropriate dignity, is in my view a clear indication that the judge has not properly engaged with the evidence and had made impermissible findings of fact which vitiate the findings on proportionality.

14. For these reasons I consider that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

15. In remaking the decision I heard submissions from both representatives. Mr Moran relied on his skeleton argument submitting that what was available in terms of the medical evidence set out at pages 62 to 64 of the applicant's bundle, whilst just a diagnosis, was the best evidence available. Although he accepted it did not fall within the terms of Appendix FM-SE, he submitted that this does fall within the exception set out in **SS (Congo)** at [53]. He submitted that in assessing the difficulties that the appellant herself faces, the accepted evidence of the sponsor whose credibility was not challenged should be taken into account as indeed should the evidence of the situation in the camp, again condoned by the documents set out in the bundle. He submitted further that this is not a case in which there was any

likely change in the long term nor indeed were a fresh application to be made, was there any realistic chance of a fear of the documentary requirements for Appendix FM-SE being met given the particular circumstances of this case. He drew my attention to the evidence that the appellant had only been able to obtain medical help when she had been treated as an emergency. Whilst she is receiving drug treatment, there does not appear to be other treatment in the camp.

16. Mr Moran submitted also that whilst the appellant is apparently able to walk ten or fifteen minutes to get food or to wash, she requires someone to assist her to do so due to the dizziness she faces and that she requires assistance during washing and also getting to and from where she eats. (See paragraph 14 of Judge Buckwell's decision).

17. Mr Moran submitted also that the distress caused to the appellant and indeed to the sponsor are factors which can be taken into account.

18. Mr Clarke submitted that the starting point in this case was the Rules which could not be met and that even taking the slightly wider interpretation of Rules as set out in the **BRITCITS** case, nonetheless it was still clear that the evidential requirements in terms of medical evidence could not be met. He submitted that there was no good reason why the appellant could not get the necessary medical treatment or references in Jordan. He submitted that the fact that she could not meet the requirements of the Immigration Rules was a significant factor in assessing the public interest and that in the facts of this case, although the appellant's circumstances were severe, the public interest was not outweighed. He submitted also that it was evident the appellant was able to visit to seek medical attention.

19. In response, Mr Moran submitted that there was no realistic prospect of the sponsor being able to visit as, irrespective of whether she would be able to travel there using a refugee travel document, visits would only be short term as she has five dependent children living with her in the United Kingdom.

20. Although the appeal in this case is against the refusal of entry clearance the sole basis on which an appeal can be allowed is on the ground that the decision is unlawful pursuant to Section 6 of the Human Rights Act 1998, in this case the submission being that it would be a breach of the appellant's rights pursuant to Article 8.

21. Although the appeal is not under the Immigration Rules, it is I consider a necessary and important starting point to consider these. In this case the relevant provisions are set out in EC-DR. In addition, Appendix FM-SE must also be considered given that it is an express requirement of the Immigration Rules that the necessary documentation is provided.

22. It is accepted in this case that as the documentation is not available but it is submitted that on the facts of this case as established, there is a good reason for that. See SSHD v SS (Congo) [2015] EWCA Civ 387 at [53]. I am satisfied that is so in this case, given that the appellant is in a refugee camp with little or no access to a treating physician.

23. The findings of fact by Judge Buckwell are preserved. These include the fact that he found that the entirety of the appellant's account was accepted and he found the sponsor to be a credible witness. I note in particular what was recorded at paragraphs [14] and [15].

24. It is also of note that the sponsor sends money to pay for meals and that the appellant is widowed and that there are no other family members in the same camp.

25. I accept, as did the First-tier Tribunal, that the appellant enjoys a family life with her daughter on whom she is dependent. That is in her particular circumstances entirely understandable. It is also a factor to be borne in mind as indeed is the fact that that family life could not exist in Syria, the country of nationality of the appellant and the sponsor and given the current situation there and that there would be significant difficulties in it existing in Jordan given that there is no indication that the sponsor who has five children would be able to relocate there but to do anything other than a visit which, given that she has five children established in the United Kingdom would of necessity have to be short.

26. Equally, I bear in mind that the status quo is that they are in separate countries ordinarily that would be a factor militating in favour of the current situation continuing. The situation is, however that both the appellant and sponsor were forced from their country of origin owing to the current well documented situation in Syria. Further it is not in dispute that the appellant lives in a refugee camp where there are as is noted in the evidence, significant difficulties. This is not a situation where the appellant has a home available to her.

27. In addition it has to be borne in mind that it is not disputed that the sponsor is able to maintain and accommodate the appellant.

28. I am satisfied that there are in addition to these observations compassionate matters to be taken into account. I am satisfied that as is stated by both the appellant and sponsor that the current situation causes them significant distress. That is hardly surprising.

29. I consider that the distress caused to the appellant and to the sponsor is exacerbated by the difficulties that the appellant has owing to her infirmity. Whilst I accept that there has been no medical diagnosis of the various ailments in any detailed form, there is some evidence that she suffers from a number of complaints including diabetes, high blood pressure, ischemic heart disease and, it would appear, osteoporosis. I am satisfied that she suffers from these illnesses on the balance of probabilities; I am also satisfied by the evidence that she requires assistance both to walk owing to the dizziness and her heart condition and that she also requires assistance both to travel to and from places where she can eat and to wash herself.

30. I am satisfied also that at present the care given to the appellant other than that in the form of medication is delivered by strangers. I accept that that may be difficult for her even if by its nature the help is intimate and there is no guarantee that it will continue to be offered in the context of a refugee camp.

31. The requirements of EC-DR are not met because of the lack of medical evidence. That much is clear. I am, however for the reasons set above satisfied that the appellant does suffer from numerous illnesses which must be considered as a whole. Whilst there is no evidence as to the nature of the care she requires, equally it is difficult to see how such medical evidence could be obtained in any way. This is not a situation where there is any treating physician or nurse; nor is there any prospect of that arising in the circumstances where the appellant is in a refugee camp. It is difficult to see how any evaluation could be carried out even were it possible to obtain the medical report given that there is no indication that any doctor would be able to visit the appellant in her camp and conduct the necessary review.

32. It is established law that where an individual does not meet the requirements of the Immigration Rules there has to be something of significant and a compelling nature such that the requirements of the Immigration Rules which primarily set out the basis to be struck in assessing proportionality in a family life case are overcome.

33. The public interest in this case is significant and very weighty. That much is discussed in the **BRITCITS** case. That said, the circumstances here are very far from the paradigm considered in either the **BRITCITS** case or the Immigration Rules; this is not a situation where an elderly relative is living in her home or, in this case, even in her own country.

34. In assessing the public interest I bear in mind also the provisions of Section 117A and B of the 2002 Act. I consider that significant weight is to be attached to the maintenance of immigration control and also in this case that there is a public interest in the applicant not being permitted to enter given that she does not speak English. That said, it is to be noted that although she is not financially independent, again a matter which weighs against her, she is nonetheless supported and is not likely to be a burden on taxpayers as she is supported by her daughter. Sub-Sections 4 and 5 are not relevant as the applicant is outside the United Kingdom it could not be said that the relationship of mother and daughter or indeed her private life were established and her situation here was precarious.

35. On the basis of the decision in Hesham Ali [2016] UKSC 60 I consider that it is appropriate to draw up a list of the factors for and against the appellant.

36. In terms of the factors in favour of the appellant are:-

    (a) The family life between her and her daughter.

    (b) The fact that it cannot be exercised except in the United Kingdom.

    (c) She would be financially supported the United Kingdom.

    (d) For the reasons given above her purpose of entry is similar to that set out in EC-DR.

(e) She is currently in extremely difficult situations owing to her health and lack of resources.

37. In terms of the factors militating against the appellant, she does not speak English, she is unlikely to be able to work, she does not meet the requirements of the Immigration Rules.

38. I bear in mind the very strong weight to be attached to the maintenance of immigration control and also that that weight has been emphasised and accordingly exacts great and significant weight as it has been endorsed by parliament in Section 117B(1) of the 2002 Act. Nonetheless it is correct that there are cases in which that can be outweighed where there are, as I have found, very compelling circumstances.

39. I am satisfied that on the particular facts of this case, viewing the factors set out cumulatively that it would, extraordinarily, be a disproportionate interference with her right to family life to exclude the appellant from the United Kingdom. She is a widow; she has a number of health complaints; she is not living in her own country and cannot conceivably return there in the near future; she has no means of support but is in fact dependent on the assistance of UNHCR and other similar agencies whilst living in a refugee camp; the only relative on whom she can rely and with whom she has a protected family life is in the United Kingdom. The sponsor cannot travel to be with her mother without leaving her five children in the United Kingdom. Whilst it could be argued that refusing entry clearance is maintaining the status quo, that is not an accurate reflection of the circumstances where the appellant has had to flee from her home owing to the conflict in Syria.

40. Taking these factors together, and attaching significant and very great weight to the public interest, I consider that, viewed as a whole, there are very compelling circumstances specific to this case, such that I am satisfied that the decision taken was unlawful pursuant in terms of Section 6 of the Human Rights Act 1998 as it constituted a disproportionate interference with the appellant's right to respect for her family life.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law, and I set it aside. I remake the decision by allowing the appeal on human rights grounds.

2. No anonymity direction is made.

Signed Date 9 October 2017

Upper Tribunal Judge Rintoul

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140 as I am satisfied that there has been no real change in the material adduced from that put to the respondent.

Signed Date: 9 October 2017

Upper Tribunal Judge Rintoul