Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/04241/2016**

HU/04236/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd November 2017	**On 22nd November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

HALKHOREE SEWSUINKUR
HALKHOREE SEEREEMATEE PRABHAWOOTEE
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr T Lay, Counsel instructed by Abbott Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Entry Clearance Officer appeals with permission against the decision of First-tier Tribunal Judge Hussain allowing the Appellants' appeals against the decision refusing to grant entry clearance, those appeals being allowed on human rights grounds. The judge's decision was promulgated on 23rd February 2017. The Entry Clearance Officer (hereafter "Respondent") appeals against that decision and was granted permission to appeal by Resident Judge Appleyard on the following grounds:

> "The Respondent's grounds seeking permission to appeal make particular reference to paragraph 21 of the Judge's decision where there is a finding that the Respondent's decision would have a disproportionate effect upon family life for the Appellants, Sponsor and their family. It is argued that the decision effectively does no more than maintain the status quo. Further that the potential breach is contrary to the findings that the Judge makes at paragraph 16 of his decision where he concludes that adequate care by other family members is available and affordable."

2. I was provided with a skeleton argument from Mr Lay on behalf of the Appellants (who are in theory the Respondents in the current appeal but whom I will continue to refer to as the Appellants for ease of comprehension). All parties had the opportunity to consider the skeleton argument before making their submissions.

Preliminary issue: permission to appeal on a new ground out of time

3. The Respondent originally sought to appeal against the decision of Judge Hussain, however only did so on the basis of the grounds outlined above.

4. Mr Clarke made an application for permission to appeal upon a further ground not raised thus far. He submitted that the drafter of the Grounds of Appeal did not have the benefit of the Court of Appeal's judgment in *Britcits v Secretary of State for the Home Department* [2017] EWCA Civ 368 when drafting Grounds of Appeal, those grounds being drafted on 28th February 2017 whereas the Court of Appeal delivered its judgment on 24th May 2017. Mr Clarke, in effect, submitted in his new putative ground that the First-tier Tribunal Judge had not given significant weight to the public interest and the Entry Clearance Officer's view. It was said in preliminary argument that there was no reason why the application to amend was not made any sooner after the judgment in *Britcits* but that the Entry Clearance Officer apologised for not doing so. I indicated after hearing submissions that I refused to give permission to adduce the further ground, primarily due to the fact that the *Britcits* judgment had been handed down from the Court of Appeal and had been in the public domain for almost six months at the date of hearing and that there was no previous notice by the Respondent to adduce the further ground other than it being raised this morning by Mr Clarke. My decision to refuse permission to adduce a further ground is governed by the terms and strictures of the Tribunal (Upper Tribunal) Procedure Rules 2008 and its time limit stipulated for bringing an appeal. There is a wealth of authority that makes clear that reasons must be given for every moment of delay that passes (see *BO & Others (extension of time for appealing) Nigeria* [2006] UKAIT 00035 and also see *Samir (FtT permission to appeal: time)* [2013] UKUT 00003 (IAC)). There are no such reasons given here.

5. Furthermore, in my view the ground is without sufficient merit as the First-tier Tribunal Judge's determination clearly reflects that weight was given to the public interest by virtue of reference to Section 117B of the 2002 Act, as amended and as the First-tier Tribunal Judge's determination at

paragraph 20 merely states that the judge was disinclined to give significant weight to the Entry Clearance Officer's view regarding *proportionality*, not that he was disinclined to give significant weight to the *public interest*. There is of course a distinction to be drawn between the judge's independent assessment of proportionality and the public interest which is largely a matter for statute pursuant to Section 117B of the 2002 Act; and historically, judges are charged with forming an independent assessment of proportionality in any appeal and are not bound by the view taken by the Respondent (see Huang v Secretary of State for the Home Department [2007] UKHL 11 for illustration). Thus, having refused permission to entertain the new ground, I proceeded to hear submissions on the existing two grounds.

Error of law

6. At the close of submissions I indicated that I would reserve my decision, which I shall now give. I do not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

7. Mr Clarke primarily relied upon Ground 2 of the extremely succinct and narrow grounds (drafted by a colleague). This ground argues that the First-tier Tribunal's findings at paragraph 21 conflict with paragraph 16 in that the Appellants can be adequately cared for by other members of the family, if necessary, and consequently there was no potential breach of Article 8 nor were the family required to live in Mauritius to care for the parents. I find that this ground does not hold merit in that whilst the judge has made findings of fact regarding the ability of the Appellants to meet the adult dependent relative ("ADR") Rules, that is quite apart from the assessment that the First-tier Tribunal Judge must perform under Article 8 from an independent standpoint. Although the judge found against the Appellants under the Immigration Rules, the Rules in relation to an ADR are, it is fair to say, strict and narrow in their requirement and as such the consideration under Article 8 is one which takes all factors into account and approaches the appeal assessing whether a fair balance has been struck between the competing interests of the state and the individual and whether the decision challenged is disproportionate as confirmed by the Supreme Court in the decision earlier this year of *R, (on the application of) Agyarko & Ikuga v Secretary of State for the Home Department* [2017] UKSC 11 (see in particular paragraph 60).

8. Thus, in my view the judge's findings are not inconsistent with paragraph 16 but reflect a balancing of the evidence heard, taking into account, for example, the evidence from the family members, the effect of potential separation and that in practical terms the Appellants' daughter had indicated she would relocate to Mauritius to care for her parents if they were not given leave to remain in the UK, the impact upon the Appellants' granddaughter (from whom evidence was heard at the First-tier Tribunal), the personal care needs of the Appellants whilst on the other and taking into account and having had regard to the public interest considerations as mandated by statute in the form of Section 117B of the 2002 Act.

9. In terms of Ground 1 and the complaint that the decision maintains the *status quo* of the Appellants being cared for by other members of the family in Mauritius at paragraph 16 and the consequent failure to explain how Article 8 rights would be interfered with or impacted if the Appellants are to remain where they are in Mauritius, in my view this ground is fundamentally flawed and has no merit whatsoever. This ground displays a misconception of the basis of an entry clearance appeal whereby family members challenge an ongoing disproportionate interference with their Article 8 rights. This must follow, given that the only Ground of Appeal available in entry clearance appeals is that a decision is inconsistent with the Respondent's obligations under Section 6 of the Human Rights Act 1998. As pointed out by Mr Lay, the approach to be taken towards Article 8 in entry clearance cases is reflected in the state's positive duty to secure respect for an individual's family life, the essential question remaining whether there is a disproportionate interference with that right (see *R, (on the application of Quila & Anor) v Secretary of State for the Home Department*) [2011] UKSC 45, in particular Lord Wilson's judgment at paragraph 43). It is also clear from the Court of Appeal's decision in *Britcits v Secretary of State for the Home Department* [2017] EWCA Civ 368 at paragraph 61 that "whether or not there is family life at the moment of the application will depend on all the facts as to the relationship... and its history". It is also noteworthy that the First-tier Tribunal can take into account prospective family life in its view (see *R, (on the application of Ahmadi & Anor) v Secretary of State for the Home Department* [2005] EWCA Civ 1721, in particular the judgment of Moses, LJ at paragraph 18).

10. Therefore, in light of the above, the Entry Clearance Officer's appeal against the findings of the First-tier Tribunal Judge do not reveal an error of law such that the decision should be set aside.

Notice of Decision

11. The appeal to the Upper Tribunal is dismissed.

12. The decision of the First-tier Tribunal is hereby affirmed.

13. No anonymity direction is made.

Signed Date 21 November 2017

Deputy Upper Tribunal Judge Saini