Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05563/2018
HU/05569/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 December 2018	**On 7 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

ALI [Q] AND SAKNA [A]
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood (Home Office Specialist Appeals Team)
For the Respondent: Ms S Anzani (counsel for Connaughts)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 27 July 2018 to allow the appeals of Mr [Q] and Mrs [A] against the refusal of their human rights claim as adult dependent relatives on 23 February 2018.

2. Mr [Q] and Mrs [A] came to the UK as visitors on 5 June 2016 and applied for leave to remain on 25 November 2016. As explained in the representations supporting their application, it had not been their intention to apply for long-term leave when they entered the UK in 2016; however Mr [Q] had had a mental breakdown on 20 November 2016, which the history provided by a psychiatrist placed in the context of a series of bereavements, and was no longer able to administer his wife's care. They had previously had servants to care for them but the last one had attempted to murder them. They had relatives in the UK by way of their children, grandchildren, and daughters-in-law, all of whom were settled here. Their son financed their care whilst their daughters-in-law provided the physical and emotional support. They had previously visited the UK on five occasions.

3. In evidence before the First-tier Tribunal, Mr [Q] stated his three brothers had passed away; he and Mrs [A] remained in contact with his daughters in Pakistan but they were not able to cooperate in providing care for him and his wife. Before coming to the UK, he and Mrs [A] had lived together in Islamabad, relying on money from his elder son and Mr [Q]'s pension. They had received help from Zafar, a carer who did their cleaning and shopping, and who worked for them for under a year, until January 2016. There had then been an incident of theft, following which the police visited their house, though the officers demanded money rather than showing any interest in solving the crime. The Respondents had paid for their health treatment in the UK via the health surcharge paid on their immigration application.

4. Mrs [A] gave evidence, confirming that she and her husband's daughters remained in touch though could speak only on the telephone when their in-laws were absent. Their servant had taken good care of her until he came to their home one night resulting in them calling the police, who had advised them not to hire servants; they did not hire another home help. Nobody lived in their home now.

5. The First-tier Tribunal made findings of fact, observing that Mr [Q] had attended the hearing in a wheelchair and was plainly unwell, and had had cancer treatment including an operation in March 2016; he had other medical conditions including osteoarthritis, limited mobility, and could not travel long distances. Ms [A] suffered from anxiety, depression, dementia and other health conditions, and had a history of suicidal ideation. The evidence regarding the servant Zafar was considered somewhat vague.

6. The Judge applied the legal regime to those factual findings. He noted that their counsel accepted that the couple could not meet the requirements of the Rules. The Respondents were in poor physical health and needed the help of their family members in the UK. Their married daughters in Pakistan were unable to maintain any physical contact with them because of the strictness of the families they had joined. They had close family ties with the UK family members and that the support network and medical services available to them in the UK were sufficient.

In the light of these considerations, the First-tier Tribunal allowed the appeal on the basis that there would be very significant obstacles to the couple's return to Pakistan, and additionally "outside the Immigration Rules under Article 8 ECHR".

7. The Judge found that the failure to apply under the entry clearance route was explained by the fact they had repeatedly made arrangements to leave the country which had been frustrated by health arrangements.

8. The Secretary of State appealed, on the basis that

   (a) The supposed "very significant obstacles to integration" in Pakistan had not been detailed;

   (b) No consideration had been given as to why the UK-based family could not relocate to Pakistan;

   (c) The high test in *Kugathas* had not been applied.

9. Permission to appeal was granted by the First-tier Tribunal on 10 October 2018 on the basis that all those grounds were arguable.

10. Before me, Ms Isherwood submitted that relevant considerations had been overlooked. There was no consideration of whether family life was established, applying the appropriate case law. As per *Ribeli,* it was necessary to consider whether the Sponsor could relocate to the country of origin where the appeal was put under Article 8 which did not protect a simple preference for living in one country rather than another. The Judge had failed to assess the case in the context of the adult dependent route under the Immigration Rules, which featured particularly strong strictures vis-á-vis care needs and availability.

11. Ms Anzani submitted that the Judge was entitled to reach the findings he had made, given that he had heard live evidence. Reference was made in her skeleton below as to the availability of medical treatment.

Findings and reasons

12. It is appropriate to address the family life ground of appeal first. It is true that the First-tier Tribunal did not in terms address the appropriate test for family life, which, for adult family members, is that set out in *Advic v UK* (1995) 20 EHRR CD 125: i.e. the normal emotional ties between a parent and an adult son or daughter will not, without more, suffice to constitute family life: *Kugathas* [2003] EWCA Civ 31. Buxton LJ emphasised in *MT (Zimbabwe)* [2007] EWCA Civ 455 at [11] that *Advic*, "whilst stressing the need for an element of dependency over and above the normal between that of a parent or parent figure and adult child, also stresses that everything depends on the circumstances of each case". The Upper Tribunal President wrote in *Lama* [2017] UKUT 16 (IAC) §32 that "at its heart, family life denotes real or committed personal support between or among the persons concerned."

13. Health problems may of course be highly relevant to the degree of dependency a migrant has upon their family here, and thus may contribute towards satisfaction of the *Advic/Kugathas* test. In such cases the claim does not have to pass the high threshold for "health" cases which are wholly dependent on the differential between treatment in the UK and abroad. As noted by Underhill LJ in *GS India* [2015] EWCA Civ 40 §111, "where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the "no obligation to treat" principle." Alongside him, Laws LJ wrote §86: "If the Article 3 claim fails … Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm."

14. A mixed family and private life claim, as where a parent is heavily dependent on their adult children for emotional as well as physical support, *might* satisfy that threshold: as was noted in *MM (Zimbabwe)* [2012] EWCA Civ 279 at [23], where "the appellant ha[s] established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, [may] together establish 'private life' under Article 8 … Such a finding would not offend the principle … that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

15. It would plainly be open to a decision maker to find that elderly parents with a combination of physical and mental health dependency on their UK resident children enjoyed family life with them. However, no reasoned finding to such effect was made here. That is an error of law. It is doubtful that that would have necessarily been a material error, given that, on the evidence here, any other finding would have been surprising. However, there are more significant difficulties.

16. In so far as the appeal was considered within the Immigration Rules, the only available route was Rule 276ADE(vi), which the Judge concluded was satisfied. That Rule focusses on the question of whether there are very significant obstacles to integration in the country of origin. However, there is minimal reasoning on this issue; virtually everything stated in the material part of the decision relates to UK connections rather than to circumstances in Pakistan. Once again, it is self-evident that it might not be a great leap from the premise of serious health problems for elderly relatives to a conclusion that they could not integrate abroad; but here the parents had lived in Pakistan until relatively recently, and had clearly been able to survive there notwithstanding that they were estranged from their adult daughters resident there. The evidence regarding the problems with the carer were described as "vague" by the First-tier Tribunal, understandably given the differing accounts summarised above as to the circumstances leading to the

servant's discharge. There needs to be a rather full consideration of the facts before a lawful finding on obstacles to integration can be made.

17. The appeal was also allowed outside the scope of the Immigration Rules. As stated by Lord Carnwath and Lady Hale in *MM (Lebanon)* [2017] UKSC 10 §66, it is now generally accepted that Article 8 considerations cannot be "fitted into a rigid template provided by the rules, so as in effect to exclude consideration by the tribunal of special cases outside the rules … this would be a negation of the evaluative exercise required in assessing the proportionality of a measure under article 8 of the Convention which excludes any 'hard-edged or bright-line rule to be applied to the generality of cases'".

18. However, the ability of a case to succeed outside the Rules' rigid template does not mean that there is not a certain minimum threshold to reach: hence the shorthand requirement for something "compelling", and it is necessary to follow through a structured assessment in order to come to a lawful conclusion to such effect. One notable feature of the decision below is the extreme brevity of the treatment of section 117B. The Upper Tribunal stated in *Forman* [2015] UKUT 412 (IAC) that:

> "In cases where the provisions of sections 117B-117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect."

19. In *Rhuppiah* [2016] EWCA Civ 803 §45, Sales LJ noted that "the starting point for consideration of the proper construction of Part 5A of the 2002 Act is that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with, and not in violation of, Article 8."

20. The key considerations identified by section 117B are language proficiency, precariousness of immigration status, and financial independence. The First-tier Tribunal addressed the second of these factors, but had very little regard to the other two. There was no detailed analysis of whether there was cogent evidence to demonstrate an absence of threat to the public purse regarding the medical expenses; given the case was apparently put below on the basis that there had been no net cost to public funds as the Immigration Health Surcharge had been paid, there was clearly some possibility of further public expense, given the extensive health problems of the Respondents, that might not be adequately covered by a relatively modest upfront payment to the UK authorities. No evidence was referred to regarding English language proficiency in the Tribunal's conclusions.

21. The correct approach in a health case, as shown by *Akhalu* [2013] UKUT 400 (IAC) addressing questions of Article 8, proportionality and health, is not to leave out of account the financial dimension of such a case: it is essential to recognise that the countervailing public interest in removal will outweigh the consequences for the

health of the claimant because of a disparity of health care facilities in all but a very few rare cases.

22. The statutory public interest factors are not the only considerations relevant to proportionality. There are of course Immigration Rules which address the circumstances of dependent relatives. An application made from abroad in the Respondents' circumstances would, had it been duly made under the Rules, have had to demonstrate that they required "long-term personal care to perform everyday tasks" due to "age, illness or disability"; and that such care must not be available "in the country where they are living" because it is not available in the sense that there is nobody who can reasonably be expected to provide it, or it is unaffordable. The latter aspects of that enquiry were dealt with very scantily here: it is unclear what healthcare would be available in Pakistan or indeed whether there are relatives there who might help the Respondent access it. Ms Anzani indubitably referenced these factors in her admirably concise skeleton argument for the hearing below (though the Appellant's bundle index does not seem to identify the underlying country evidence); however, that material was nevertheless not addressed by the First-tier Tribunal, whose duty it was to assess the issue.

23. The strictures of the adult dependent relative route are an important reference point in assessing the difference between the care arrangements in this country and abroad. Those strictures are not insurmountable, but require objective assessment, as explained by Sir Terence Etherton MR in *Britcits* [2017] EWCA Civ 368 §59, who pointed out that it would be necessary to weigh the accessibility and geographical location of the provision of care and its standard, having regard to its emotional and psychological elements, verified by appropriate medical evidence.

24. Finally, there is the *Ribeli* point. Singh LJ stated in *Ribeli* [2018] EWCA Civ 611:

> "69. The crucial point (and it is a powerful point as a matter of common sense as well as a matter of law) is that the Appellant's daughter could reasonably be expected to go back to South Africa to provide the emotional support her mother needs as well as to provide practical support. For example, if the concern is that the Appellant may be cared for in her home by people who may turn out not to be trustworthy, there is no reason why her daughter cannot live and work in South Africa to supervise the care arrangements made for her mother.
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> 70. As the UT Judge observed, at the end of the day, what this case is about is the choice which Ms Steenkamp has exercised and wishes to be able to continue to exercise of living and working in a major international centre like London rather than in South Africa, which is her own country of origin. She is entitled to exercise that choice. But, in those circumstances, the UT cannot be faulted for having come to the

> conclusion that any interference with the Appellant's right to respect for family life conforms to the principle of proportionality."

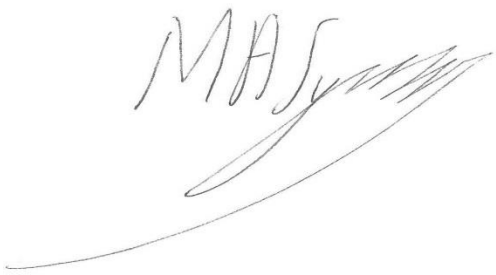
25. It must be appreciated that the ruling there is a fact-sensitive one, and what is reasonable for one family may not be reasonable for another. Here there may well be extensive ties between the various family members and the UK that represent a different backdrop to circumstances in *Ribeli*. However, that was a matter with which the First-tier Tribunal ought to have engaged.

26. I accordingly find that the decision of the First-tier Tribunal cannot stand. Given that all the issues in the appeal require re-determination, the matter must be remitted for re-hearing afresh.

Decision:

The appeal is allowed to the extent that the appeal is remitted for re-hearing afresh, with no preserved findings.

Signed: Date: 3 December 2018



Deputy Upper Tribunal Judge Symes