Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13744/2017

THE IMMIGRATION ACT

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd November 2018	**On 10th December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

Ms Widad Husain Hamoody Al Ghazali
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr McKenzie, Counsel instructed by Chris Raja Solicitors
For the Respondent: Ms Isherwood, Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Mackintosh promulgated on the 5th September whereby the judge dismissed the appellant's appeal. The appeal was against the decision of the respondent to refuse the appellant's human rights claim under article 8 of the ECHR. The appellant was seeking entry clearance to the UK to join her son and his family in the UK.

2. I have considered whether or not it is appropriate to make an anonymity direction. Having considered all the circumstances I do not consider it necessary to make an anonymity direction.

3. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Chohan on 1st October 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

4. The grant of leave raises the issue that the judge in dealing with the appeal only considered whether the appellant met the requirements of the Immigration Rules and therefore only considered Article 8 under the rules. Having found that the appellant did not met the requirements of the rules, the judge allegedly did not consider Article 8 otherwise, including Article 8 outside the rules. The grounds of appeal claim that the judge has failed to consider article 8 properly.

5. Whilst the case under the immigration rules was not conceded before me, the focus of the appeal was on Article 8 outside the rules and the alleged family life established between the appellant and her son, Mr S G S Mahdi, and his family, who live in the UK.

Factual background

6. The appellant, a national of Iraq, had left Iraq during the time of Saddam Hussein. The appellant initially settled in the United Kingdom with her family in 1983. At that time the family consisted of the appellant, her husband and materially her son [the present sponsor] and his older brother.

7. In 1992 the appellant left the United Kingdom to take up a position in Dubai. Her husband remained in the United Kingdom with the sponsor and his brother. By reason of their residence in the United Kingdom they ultimately qualified on the basis of long residence for British citizenship.

8. Having obtained British citizenship the father of the family travelled to Dubai to be with the appellant. The sponsor and his elder brother remained in the United Kingdom to complete vocational training. The elder brother ultimately qualified as a dentist and emigrated to America.

9. In 1997 the appellant divorced her husband. There is no further contact between the appellant and former husband. In the meantime the appellant had been working in Dubai working initially at the state hospital. From January 2008 onwards she commenced work in the Medicare Hospital in Dubai.

10. In 2006 the sponsor and his family joined the appellant in Dubai. Whilst the sponsor and his family were in Dubai the appellant rented out her apartment and moved in to live with the sponsor and his wife

and their eldest daughter. It appears that the sponsor and his wife had two further children. It is the relationship between the appellant and her son and family that developed at that time that was central to the assertion that there was a family life between the appellant on the one side and her son, her daughter-in-law and grandchildren on the other.

11. In 2015 the sponsor and his wife decided to return to the United Kingdom. By September 2016 the sponsor's wife and children were in in London, the children being enrolled settled in schools in the London area. Once the sponsor and his family left Dubai, the appellant returned to live in her own flat and continued working as before.

12. The appellant by reason of her age reduced the number of hours that she was working.

13. It is put in terms that now reaching the age of 81 the appellant faces the prospect of ceasing working in Dubai and having to return to Iraq, a country with which she has had no contact for over 35 years. It is the country of her nationality. Her residence in Dubai is dependent on her working. If she ceases to work, her resident permit in Dubai will not be renewed.

14. Whilst much is made in the grounds of appeal of the fact that the appellant's status in Dubai is dependent upon her employment, the judge has taken that into account in paragraph 27 of the decision. Indeed as part of the documentation submitted there is reference to the fact that her current residence permit in Dubai was renewed on 5 April 2017 and is valid until 4 April 2019. There is reference in the submissions made by the appellant's representative to the fact that she has been in employment as a senior radiologist but of late has had to cut down her workload to 3 days per week.

15. On 3 July 2017 the appellant applied for settlement in the United Kingdom to join her son and his family. The problem with regard to the position of the appellant is that she has been separated from the sponsor and the grandchildren for a significant period of time of over 9 months at the time of the application and over a year at the time of the hearing. of nine months or more

16. I would note in the submissions made that there is reference to the fact that the Current Immigration Rules in the USA prevent the appellant from going to live with her elder son due to the fact of her Iraqi passport. It is to be noted also in the statement of the sponsor there is reference to the fact that the appellant sought to go and settle in the USA with her eldest son but by reasons of the matters set out that was refused.

Submissions

17. Firstly it was submitted that the judge has failed to consider the guidance in the case of Charles (human rights appeal: Scope) [2018] UKUT 000809. Further the judge has failed to take account of the case law submitted by the appellant's representatives. Specifically the judge has failed to consider the guidance in the cases of BRITCITS v SSHD [2017] EWCA Civ 368 and Dasgupta [2016] UKUT 00028 (IAC).

18. It was asserted that the cases identify circumstances in which grandparent and grandchild can be considered to have a family life together.

19. It is asserted that the judge has failed to consider that the relationship with grandparent and grandchild can constitute family life. In the present case it is alleged that the judge has failed to consider the relationship of the grandchildren to the appellant. It is asserted that the case law identifies that there can be a family life between grandparent and grandchild and accordingly that the decision by the judges flawed in failing to consider that relationship has erred in the assessment of Article 8.

20. In failing to consider the relationships it is claimed that the judge has failed to properly assess the family life rights and has therefore erred in law.

21. On behalf of the respondent it was submitted that the judge had not merely considered Article 8 under the rules but had gone on to consider whether the facts warranted consideration of Article 8 outside the rules. From paragraph 52 onwards the judge having found that the appellant did not meet the requirements of the rules determined whether there were circumstances which warranted consideration of Article 8 outside the rules. The approach of the judge was consistent with the case law dealing with Entry Clearance and Leave to Enter.

Consideration

22. The judge has clearly made findings with regard to article 8 under the Immigration Rules. There were no challenges to the findings made. The issue was whether the judge had considered Article 8 outside the rules. The appellant was seeking to rely upon her relationship to her son and to her grandchildren in the United Kingdom.

23. Whilst it has to be acknowledged that family life can exist between grandparents and grandchildren I draw attention to para 61 of Britcits wherein it is stated by the Master of the Rolls:-

> *61 Nor do I accept the submission that there is always family life which engages Article 8 of the convention whenever a UK citizen with an elderly parent resident outside the UK wishes to bring the parent to the UK to look*

> *after the parent. Whether or not there is family life at the moment of the application will depend on all the facts as to the relationship between parent and child and its history; Kugathas v SSHD [2003] EWCA Civ 170 at [19]; Huang at [18; Jitendra v ECO New Delhi [2017] EWCA Civ 320.*

24. I also draw attention to SS (Congo) & others [2015] EWCA Civ 387 wherein LJ Richards drew a distinction between an in-country appeal and out-of-country appeal. In the case a distinction was drawn between an in country case and an out of country case. In an out of country appeal consideration is being given to creating a closer family unit in the UK than exists at present. Whereas in an in-country cases the close unit basis for family life in the UK already exists. As in the present case family life in the UK does not exist and an assessment has to be made whether the positive obligation under Article 8 to promote family life and whether the pre-existing "family life" in Dubai given the facts was sufficient to justify consideration of article 8 outside the rules. With the circumstances such that family life should be allowed to be re-established in the United Kingdom.

25. In paragraph 40 of SS (Congo) LJ Richards states:-)

> *40 In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.*

26. The case indicates that compelling circumstances have to exist to justify promoting a family life that requires a grant of entry clearance or leave to enter.

27. I take account of paragraphs 18 and 60 of Huang 2007 UKHL11.

> *18 … Human beings are social animals. They depend on others. Their family, or extended family, is the group on*

which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment.

60 It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above.

28. In that respect guidance was given in the case of Kugathas 2003 INLR 170 to help in determine whether there is family life. An assessment

has to be made of dependency to establish whether there is real, committed and/or effective support or relationship between the family members. In the case the normal relationship between a mother and an adult son without more was not sufficient to establish family life in the context of Article 8 even where the parties might be living together. [see paragraph 25 judgment of LJ Arden].

29. The case law speaks in terms of real, committed and/or effective support or relationship between the family members in order to establish the family life exists and where one is dealing with entry clearance or leave to enter there have to be compelling circumstances.

30. In part the judge has looked at the issues and determined certainly that there is no financial dependency between the appellant and her sponsor and the grandchildren in the United Kingdom [see paragraphs of the decision 48 and 49].

31. The parties have been living separately and apart. The sponsor and his family made a decision that they wished to return to the United Kingdom for the benefit of their children. That was a matter of choice made by them. Once that choice had been made the appellant continued to live in Dubai; continued to work; continued to occupy her own apartment. Clearly the age of the appellant is a material consideration but the judge took that into account. However the sponsor and his family have made a choice that they wished to come to the United Kingdom without any certainty that the appellant could join in the United Kingdom. It appears to be accepted that the appellant could not meet the requirements of the rules. It is material that the reasons for the family being in the United Kingdom was a matter of choice made by the sponsor and his family.

32. There was no guarantee at that stage that there would be a right to bring the appellant into the United Kingdom. The immigration rules provided criteria by which an elderly relative can enter the United Kingdom but the appellant does not meet that criteria.

33. The judge considered the Immigration Rules and has given valid reasons for finding that the appellant did not met the rules.

34. In looking otherwise whether or not there were compelling factors justifying considering article 8 outside the rules, the judge has considered whether there are compelling circumstances in paragraph 52. The judge took account of the grandchildren. The judge concluded taking account of all the facts that there were no circumstances or no factors warranting consideration of Article 8 outside the rules. That was a conclusion on the facts, which the judge was entitled to make on the facts as presented and is consistent with the case law set out. The judge has considered whether consideration

of Article 8 outside the rules was warranted and concluded that it was not.

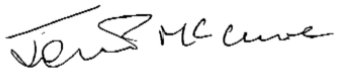
35. In the circumstances there had to be factors which justified considering article 8 outside the rules and on the basis of the evidence the judge was entitled to conclude that there were no such circumstances.

36. Accordingly there is no material error of law.

Notice of Decision

37. I dismiss the appeal.

38. I do not make an anonymity direction



Signed

Date 5th December 2018

Deputy Upper Tribunal Judge McClure