Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/11475/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 February 2019	**On 08 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

NOOR MOHMED QURAISHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondents

Representation:
For the Appellant: Miss P Heidar of AA Immigration Lawyers
For the Respondent: Mr S Kotas of the Specialist Appeals Team

ERROR OF LAW DECISION AND REASONS

The Appellant

1. The Appellant, Noor Mohamed Quraishi, is a citizen of Afghanistan born on 26 March 1956. On 28 November 2013 his wife died in Kabul. On 7 February 2018 he applied for settlement as an adult dependent relative of his only son, Fiaz, who is a naturalised British citizen and resident in the United Kingdom. The Appellant has four daughters, one in the United Kingdom, two in Germany and one in Sweden. He is said to be frail and in need of extensive nursing and personal care.

The Entry Clearance Officer's Decision

2. On 1 May 2018 the Respondent refused the application for settlement under reference SHEFO/807306 because the Respondent did not accept that the Appellant was not in a subsisting relationship with a partner; that notwithstanding medical evidence, the Appellant did not require extensive nursing care and that there were no suitable facilities on a long-term basis for such care in Afghanistan. Further, the Respondent did not accept there were any exceptional circumstances justifying a grant of entry clearance by way of reference to the Appellant's right to respect for his private and family life protected by Article 8 of the European Convention.

3. On 21 May 2018 the Appellant lodged notice of appeal under s.82 Nationality, Immigration and Asylum Act 2002 as amended. The grounds are prolix. Essentially, they amount to a disagreement with and challenge to the Respondent's decision.

Proceedings in the First-tier Tribunal

4. On 10 October 2018 Judge of the First-tier Tribunal O' Callaghan promulgated his decision dismissing the appeal because he found the Appellant's son was able to afford to continue to pay for care for the Appellant in Afghanistan; that the Appellant could undertake various day-to-day tasks for himself and is not completely confined to a wheelchair. Further, the evidence did not disclose a degree of dependency sufficient within the ambit described in *Kugathas v SSHD [2003] EWCA Civ.31* to make it disproportionate to exclude the Appellant.

5. The Appellant sought permission to appeal. The grounds refer to several instances in which it is asserted the Judge mis-understood the evidence, challenge the Judge's assessment of the Appellant's independence at the date of the hearing and his treatment of the evidence about the Appellant's carer. There was also a challenge that the Judge had erred in his finding the relevant date for consideration of the evidence to be the date of the Respondent's decision. On 16 October 2018 Judge of the First-tier Tribunal Mark Davies refused the Appellant permission to appeal. The permission application was renewed on a similar basis. On 14 January 2019 Upper Tribunal Kekic granted permission because it was arguable the Judge had not considered all the evidence when reaching his conclusions.

Hearing in the Upper Tribunal

6. The Appellant's son, his Sponsor, attended the hearing. The Sponsor confirmed his current address and I explained the purpose of an error of law hearing and the procedure to be adopted. He did not take any active part in the hearing._

7. I noted the Respondent's response under Procedure Rule 24 in which it was accepted that the Judge erred in finding the relevant date for

consideration of the evidence was the date of the Respondent's decision. The response went on to note that the Judge had in fact taken account of evidence of matters subsequent to the decision and that there was a lack of evidence of any material deterioration in the Appellant's condition in the five-month period between the date of the decision and the date of the hearing. Consequently, the Respondent submitted that the error, such as it might be, was not material.

Submissions for the Applicant

8. Miss Heidar acknowledged the Appellant did not seek to submit any new evidence. She relied on the grounds for appeal. She referred to the error in taking the date of the decision as the date for assessment of evidence and submitted that this was a material error in relation to paragraphs 55, 59, 65, 66 and 70 of the Judge's decision. The evidence for the Appellant was that there had been a change in the way in which care was provided for him and the Judge had not considered this development.

9. The Judge had erred at paragraph 60 of his decision when stating that the evidence of the Sponsor was that he paid the Appellant's carer a monthly sum of $200. This did not accord with what the Sponsor had said at paragraph 12 of his statement that he sent the money to his father. I do not propose to take an issue whether the amount of money sent was in dollars or sterling. Whatever the Sponsor may have averred in his statement, he is recorded as answering affirmatively at the hearing at page 3 of the Record of Proceedings to the question: "Are you paying Mr Ayubi for his (referring to the Appellant) care?" The Appellant at paragraph 3 of his witness statement states the Sponsor "has been financially supporting" him. Miss Heidar who had appeared in the First-tier Tribunal did not have her Record of Proceedings with her. The same or a similar issue is found in the Judge's treatment of evidence from the one of the Appellant's daughters in Germany at paragraph 64 of his decision.

10. She referred me to paragraph 6 of the Appellant's statement in which he asserts he had not mentioned to the Sponsor the lack of assistance for washing and going to the toilet at night. She submitted the Sponsor had not known of this abuse until only a few days before the hearing. There was no evidence before the Upper Tribunal of the circumstances when and how the statement had been prepared or precisely when and how the Sponsor had learned of this. She also referred me to paragraph 4 of the statement of the Appellant's daughter who had travelled with her children to Afghanistan where she remained in order to look after the Appellant. This was corroborated by paragraph 4 of the statement of Mr Ayubi, the Appellant's carer.

11. Miss Heidar concluded the Judge had accepted at paragraph 60 of his decision that the Appellant's daughter resident in the United Kingdom had travelled to look after the Appellant and this finding was inconsistent with his finding that there was sufficient care otherwise available for the Appellant in Afghanistan. The Judge had given insufficient weight to the

medical evidence at paragraph 64 of his decision and failed to apply the jurisprudence about adult dependent relatives articulated in *Ribeli v SSHD [2018] EWCA Civ.611*. I noted that the Judge had set out at some length what would appear to be the crucial test whether care required by a person such as the Appellant can be reasonably provided and to the required level in his home country. This is re-produced at paragraph 40 of *Ribeli* which in fact simply quotes what was said at paragraph 59 of *R (Britcits) v SSHD [2017] EWCA Civ.368* and which the Judge in turn set out at paragraph 52 of his decision and of which the Judge reminded himself, by way of case citation, in the penultimate paragraph of his decision.

12. At paragraph 65 the Judge had accepted the Appellant required long-term-care. At paragraphs 12 and 15 he had noted the independent medical evidence as required under Appendix FM-SE but concluded it added little weight.

13. The Judge should have considered the post-decision evidence of the Appellant's medical condition. The decision was unsafe and should be set aside.

Submissions for the Respondent

14. Mr Kotas submitted the key issue was whether the Appellant required long-term care and if so whether it was available in Afghanistan. The appeal had been expedited so that there had been barely five months between the date of the decision and the hearing in the First-tier Tribunal. The Judge had taken into account post-decision evidence of the Appellant's medical condition at paragraphs 61, 63, and 65. The Appellant had failed to show that the Judge had misdirected himself as to fact or had irrationally reached any conclusion.

15. At paragraph 60 the Judge had explained why he did not accept all the evidence relating to the claimed abuse inflicted on the Appellant and why he had not accepted at face value the Sponsor's claimed ignorance of the abuse.

16. At paragraph 62 he had explained why he considered the evidence given by the Appellant and his witnesses to be inconsistent and reached the sustainable conclusion that Mr Ayubi remains the Appellant's carer and an adverse finding in respect of the claims made that the Appellant had been abused.

17. At paragraph 64 he had rejected the parts of Mr Ayubi's statement about him not being able to care for the Appellant and after analysis of the evidence had concluded there had been no real change in the Appellant's condition over the previous 12 months.

18. At paragraphs 63 and 64 the Judge had noted the evidence from the Sponsor at paragraph 9 of his statement that one of the Appellant's daughters in Germany "had rented a room for my father in a house and

arrange the tenant living in that house to assist my father until we can bring him in the UK". The Sponsor was funding, in one way or another, the rent. The daughter had visited the property in October or November 2017 and been satisfied it was suitable. He had considered that in the circumstances a proper explanation of the claimed deterioration in the Appellant's condition between late 2017 and May 2018 so that the property no longer was suitable needed to be given and had not.

19. The Judge's conclusions were rationally open to him and the appeal was simply an attempt by the Appellant to re-argue the case. The Judge in his decision had taken account of evidence of matters subsequent to the Respondent's decision. There was no material error of law in the decision.

Response for the Appellant

20. Miss Heidar referred again to paragraph 64 of the Judge's decision. It had never been argued for the Appellant that it was not intended to bring him to the United Kingdom after receipt of the medical reports of 8 February and 7 September 2018 at pages 31-33 of the Appellant' that s bundle. The 8 February 2018 report was prepared subsequent to a telephone consultation in October 2017 with the Sponsor. I noted the application is recorded as having been submitted online on 7 February 2018. She concluded the decision should be set aside.

Findings and Consideration

21. I reserved my decision on the error of law question and both parties agreed that if I found there was an error of law in the Judge's decision I might proceed to deal with the substantive appeal in the same decision since there was no further evidence to be considered.

22. I shall deal first with the ground that the Judge erred in law by failing to consider evidence of matters subsequent to the date of the Respondent's decision. The Judge made extensive reference to evidence of such subsequent matters at paragraphs 60, 61 and 64-66. As was conceded in the Respondent's Rule 24 response, the Judge erred, particularly at paragraph 66, when he stated he had made his finding of fact as at the date of the Respondent's decision. This was not a material error of law in the light of his extensive consideration of the post-decision evidence and what the Judge said at paragraph 67.

23. The standard of proof is the civil standard and the burden is on the Appellant. As to the transmission the funds whether to the Appellant or to Mr Ayubi, there was no documentary evidence, for example money transmission receipts and no explanation for the absence of such evidence. The evidence was inconsistent and the Judge was entitled to the conclusion he reached. There was no documentary evidence to explain precisely on what basis the Appellant occupied the property where he lived with Mr Ayubi which no doubt might have explained the apparent

inconsistency identified paragraph 64. There is no indication that any explanation for the absence of such evidence was proffered.

24. The Judge had real concerns about the reliability of evidence from the Appellant's family, as explained in the latter parts of paragraphs 60 and 64 and for which he gave sustainable reasons. He identified in the middle of paragraph 61 and the first half of paragraph 62 inconsistencies in the evidence about the claimed inadequacy of care given by Mr Ayubi. In this light he had sustainable reasons for his conclusions at the end of paragraph 65 and at paragraphs 66 and 67.

25. The Judge was fully aware of the relevant criteria to be applied, as noted in the latter part of paragraph 8 above. Given the finding at paragraph 64 that there was a declared intention to bring the Appellant to the United Kingdom in October or November 2017, it was incumbent on the Appellant to establish his medical condition with adequate medical evidence, not a report of 8 February 2018 based on a telephone conversation in October 2017 with the Appellant's son in London and to provide evidence about the Appellant's care arrangements which could be found to be credible.

26. For these reasons, I am satisfied the Judge's decision does not contain any error of law of sufficient materiality to justify setting it aside. It shall therefore stand and the appeal is dismissed.

Anonymity

No application for an anonymity direction has been made and having heard this appeal I find none is warranted.

SUMMARY OF DECISION

The decision of the First-tier Tribunal did not contain an error of law such that it should be set aside.

The appeal is dismissed

No anonymity direction.

Signed/Official Crest Date 27. iii. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal