



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00975/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Microsoft Teams*
On the 2nd September 2021

Decision & Reasons Promulgated
On the 11th October 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

B A T
(ANONYMITY DIRECTION MADE)

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Appellant

Respondent

Representation:

For the Appellant: Mr. D Lemer, Counsel, instructed by Axion Stone Solicitors
For the Respondent: Mr. T Melvin, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal G Clarke ('the Judge'), sent to the parties on 24 February 2021, by which the appellant's

appeal against a decision of the respondent to refuse his entry clearance application was refused.

2. Upper Tribunal Judge Pitt granted the appellant permission to appeal on all grounds.

Remote Hearing

3. The hearing before me was a Microsoft Teams hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same manner as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

4. No anonymity order was issued by the Judge.
5. I observe that this appeal is concerned with an application for entry clearance. The sponsor, the appellant's father, is a recognised refugee residing in this country. By means of his witness statement the appellant identifies ongoing fears as to his safety in Iraq because people have threatened him whilst they continue to look for his sponsor. In the circumstances, I find that the common law right permitting the public to know about court proceedings in this matter, a right further protected by article 10 ECHR, is outweighed by the appellant's rights under article 8 ECHR.
6. I therefore grant the appellant anonymity and my order is detailed at the conclusion of this decision.

Background

7. The appellant is a national of Iraq and is presently aged 31. He sought entry clearance under the Immigration Rules ('the Rules') as a dependent of a refugee, but his application was considered under the provision concerned with adult dependent relatives. An entry clearance officer refused his application for entry clearance on 19 December 2019. An entry clearance manager maintained the decision on 7 April 2020.

Hearing before the FtT

8. The appeal came before the Judge sitting at Hatton Cross on 9 February 2021.

9. The appellant conceded that he could not satisfy the substantive requirements of the adult dependent route under the Rules but he submitted that he could satisfy paragraph 319V(i)(f) of the Rules, namely that he is the son of a refugee living alone outside the United Kingdom in the most exceptional compassionate circumstances.
10. The Judge concluded that the appellant could not meet the requirements of paragraph 319V(i)(f) and (iii). Further, at §60 of the decision, the Judge found that no family life existed between the appellant and sponsor.

Grounds of Appeal

11. The grounds of appeal raise one ground of challenge, namely that the Judge applied an unlawful test in the determination of whether family life exists between the appellant and his sponsor.

12. Paras. 13-14 of the grounds of appeal detail:

‘13. In the present appeal whilst it is acknowledged that the Judge correctly self-directed himself in relation to the case of [*Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630], it is contended that:

- a) The Judge erred in law by focusing solely on the question as to whether the appellant was financially dependent upon his UK sponsor and family, in concluding that article 8 ECHR was not engaged;
- b) The jurisprudence as summarised in [*Rai v. Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320], makes clear that the test is the existence of real, committed or effective support. Whilst such support could entail financial support, it is plainly not a requirement. Emotional support would, for example, potentially suffice.
- c) The Judge failed to address the factors set out at paragraph 21 of the appellant’s skeleton argument, which were relied upon in support of the contention that the ties of love and affection between the appellant and his parents were more than the normal ties that one would expect between adults and their parents. Those were, materially, that:
 - (a) The appellant would be a genuine refugee, were he outside his country of origin, and that his life was in danger in Iraq;
 - (b) That the appellant’s parents and all of his siblings (save for his USA-based sister) all lived in the United Kingdom; meaning that his family life was predominantly in the United Kingdom;

- (c) That the appellant's situation engaged the principle of protection for a refugee's family and therefore fell within the family reunion principle of Refugee Convention.
14. It is recognised that decisions as to whether the relationship between adult family members engages article 8 ECHR are highly fact specific. It is contended, however, that:
- a) It remains incumbent upon a Judge to apply the correct legal test;
 - b) A Judge is, equally, required to ensure that all relevant factors have been considered in reaching that fact-specific determination.'
13. In granting permission to appeal UTJ Pitt reasoned, *inter alia*:
- '2. It is arguable that the First-tier Tribunal took an incorrect approach to the question of whether the appellant has a family life with his father and other relatives in the UK for the purposes of article 8 ECHR.'

Decision on Error of Law

14. The respondent filed and served a rule 24 response, dated 18 June 2021. It is authored by Mr. Bates, Senior Presenting Officer. The respondent confirmed that she does not oppose the appellant's appeal at the error of law stage and invited this Tribunal to determine the appeal at a resumed hearing.
15. The respondent observes at paras. 3 to 6:
- '3. The crux of the challenge is the FTTJ's finding (para. 60) that family life was not engaged, therefore the FTTJ failed to consider the further *Razgar* questions and general proportionality (para. 62).
 - 4. The FTTJ recorded the SSHD's refusal in summary (para. 7/8). This clearly indicates the SSHD's challenge was not to the existence of family life but that when assessing proportionality of the refusal no 'unjustifiably harsh consequences' were identified.
 - 5. The FTTJ, therefore, appears to have gone behind a concession of the SSHD without adequate reasoning. The author notes reference to the HOPO submissions (para. 33) that Art 8 was not engaged but no explanation for this is referenced or considered by the FTTJ as to whether it amounted to the withdrawal of the apparent concession made by the ECO/ECM on that point ...
 - 6. Consequently, the SSHD accepts that material error is disclosed either through procedural unfairness or inadequacy or reasoning as regards the finding of fact at para. 60.'
16. Before me Mr. Melvin did not seek to go behind the rule 24 response, though he observed that he could not read such concession into the respondent's decision.

17. On its face, the respondent's position before me is upon initial consideration contradictory. However, the representatives before me agreed that the issue as to whether a concession was made should properly have been addressed as a preliminary matter. Though I have much sympathy for the Judge, the parties having not addressed this issue before him, the existence or otherwise of a concession was properly to be considered as a preliminary issue and the failure to do so is a material error of law.
18. The issue as to whether a concession was actually made was not argued before me and so I make no finding of fact on the issue. I observe that the decision letter may possibly be read as being contradictory. The section entitled 'eligibility relationship requirement' appears to identify a lack of dependency in respect of family life as considered in *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ 31, [2003] I.N.L.R. 170. However, when considering 'exceptional circumstances and compassionate factors' the decision refers to family life being 'maintained' by visitors, 'with no indication this could not continue for you' [Emphasis added]. I proceed no further on this matter as both representatives agreed before me that the issue as to the existence, or otherwise, of a concession can properly be addressed as a preliminary issue at the resumed hearing.

Resumed hearing

19. As to remaking the decision both Mr. Lemer and Mr. Melvin were in agreement that the matter should properly be remitted to the First-tier Tribunal. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal, and in particular to para. 7.2, and conclude that the effect of the identified error has been to deprive a party before the First-tier Tribunal of a fair hearing.
20. I therefore conclude that it is just in all of the circumstances that this matter be remitted to the First-tier Tribunal for a decision on all matters.
21. Mr. Lemer requested on behalf of the appellant that this matter be transferred to Taylor House. Mr. Melvin did not object and so I direct that this matter be heard by the First-tier Tribunal sitting at Taylor House.

Notice of decision

22. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 24 February 2021 pursuant to section 12(2)(a) of the Tribunal Courts and Enforcement Act 2007.

23. This matter is remitted to the First-tier Tribunal for a fresh hearing before any judge other than Judge of the First-tier Tribunal G Clarke.
24. This matter is transferred to the First-tier Tribunal sitting at Taylor House.
25. No findings of fact are preserved.
26. An anonymity order is made.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 2 September 2021