IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004818
First-tier Tribunal No: HU/57424/2021
IA/17808/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 April 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JOHN PHILIP CULBERTSON
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETATY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Hussain instructed by Rks Solicitors (Dewsbury).
For the Respondent: Ms Young, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 31 March 2023

DECISION AND REASONS

1. The appellant, a citizen of the United States of America (USA), born on 7 December 1966, appeals with permission a decision of First-tier Tribunal Judge Saffer ('the Judge') promulgated following a hearing at Bradford on 10 August 2022, in which the Judge dismissed the appellant's appeal against the refusal of his application for leave to remain as the spouse of a British citizen.
2. The Judge noted the appellant only had leave to enter the United Kingdom as a visitor, that he only intended to enter the UK as a visitor at that time, that he had never met the person he subsequently married, and that he decided to stay as the relationship developed.
3. The Judge accepted that Mrs Culbertson's medical complaints were managed by medication and an impending operation and that none of them were life-threatening although they do impact on her ability to manage. The Judge did not accept that Mrs Culbertson required round-the-clock care and found she had local family support from her son and church members who could provide additional support if needed.

4. The Judge was not satisfied there are significant obstacles to the appellant's integration into the USA or that unjustifiably harsh consequences in requiring him to return had been made out. The appellant had only lived in the UK for five years compared to 50 years in America, he spoke English, plainly understood the culture, had worked before in the USA, and it was not made out he could not do so again to produce an income to pay for his needs such as accommodation.
5. The Judge finds it is reasonable in all the circumstances for the appellant to return to make an application for entry clearance which can be supported by Mrs Culbertson, if required.
6. The Judge finds the respondent's decision proportionate and includes in such an assessment the best interests of Mrs Culbertson's granddaughter, of whom Mrs Culbertson's son is the father, and that with the support provided by the child's father and others Mrs Culbertson could continue to live as she has to date.
7. The appellant relies on six grounds seeking permission to appeal.
8. Ground 1 asserts an error in the Judge's finding the appellant is in the United Kingdom without valid leave. It is asserted the Judge failed to consider when assessing the timeline relevant concessions being put in place as a result of the COVID-19 pandemic.
9. The Judge considered the COVID-19 pandemic but finds that it was not of relevance to the application. The concession set out in the Home Office guidance at that time read:

> **If you have overstayed your leave**
>
> If your visa or leave expired between 24 January 2020 and 31 August 2020 there will be no future adverse immigration consequences if you didn't make an application to regularise your stay during this period. However, if you have not applied to regularise your stay you must make arrangements to leave the UK.

10. The Judge noted the appellant entered the United Kingdom lawfully as a visitor on 29 May 2017 and made an application for leave to remain, following his marriage to Mrs Culbertson on 25th July 2017, on 26 November 2017, which was refused on 30 August 2018, at which point he became an overstay. The appellant's leave therefore expired before 24 January 2020 which means the appellant was not entitled to benefit from the COVID-19 policy in force set out in the guidance. Although the appellant made subsequent applications they did not have the effect of extending his leave pursuant to section 3C Immigration Act 1971.
11. The grounds refer to the situation in the United States of America claiming at the date of application things had not returned to normal in either the UK or the USA, but that is not relevant to the question of whether the appellant overstayed in law. A second issue is that there was insufficient evidence before the Judge to show that a citizen of the USA such as the appellant would have been denied entry to his home county. Entry to the USA currently requires proof of Covid vaccination. A third point is that even if the situation in relation to the pandemic was as it was when the application was made on 2 June 2021, as the Judge finds the appellant has no claim under the Immigration Rules and went on to consider the matter outside the Rules pursuant to Article 8 ECHR, the relevant date for an ECHR appeal is the date of the hearing by which time the situation had returned to that which prevails today. No legal error is made out.
12. Ground 2 asserts what is described as a failure to transmit the facts. It is claimed the Judge erred at [7] referring to an application being made on 16 September 2021 when it was actually made on 2 September 2021.
13. Paragraph [7] does not contain any findings made by the Judge but forms part of the section of the determination in which the Judge is setting out a summary

of the appellant's case. The Judge was referring to communication through the appellant's solicitors dated 16 September 2021. Even if that date is incorrect by 14 days the grounds do not establish that, even if it can be classified as an error of fact, it made any material difference to the decision. The appellant in this ground claims he was advised by the Home Office that if they were in receipt of the benefits to which Mrs Culbertson was entitled they would meet the requirements of the Immigration Rules. Even if true in relation to the income calculation it does not bind the Judge who clearly took into account the evidence that had been provided in accordance with the directions. The fee waiver is an administrative procedure not involving the Judge.

14. The refusal under the Immigration Rules is based upon an inability to prove the appellant can satisfy the eligibility criteria. It was accepted the appellant met the English language and financial requirements of Appendix FM.

15. Communication with the relevant MPs office and being in contact with the Home Office to submit a fresh application with the change in circumstances, income, evidence of a genuine relationship and the effect of COVID-19 are all matters that were considered by the Judge. The Judge was not required to set out each and every aspect in the evidence in the decision and the fact the appellant disagrees with the outcome does not mean the material provided was not properly factored into the decision-making process. I do not find it made out that the Judge failed to apply the relevant legal principles. No legal error is made out.

16. Ground 3 asserts the appellant does not accept the inference in the Judge's finding that he had only lived in the UK for five years. The grounds express the appellant's disagreement with this finding but that finding is factually correct. It is a finding supported by the chronology. Whilst the ground repeats the fact that a lot could be done within such a period of time and seeks to reargue the appellant's case in relation to the nature of the relationship, and claiming such a period of time is more than sufficient for the appellant to break or lose contact with the social ties he had in America, all that material was considered by the Judge. Disagreement with the Judge's assessment on that basis does not establish legal error.

17. The reference to [8] in the determination is another reference to the section of the decision in which the Judge sets out the appellant's evidence. It is not clear that the Judge made any mistake in recording these facts even though the appellant claims they were taken out of context. The assertion in this ground that the Judge had erred in the application of Article 8 ECHR has no merit. The Judge clearly considered whether the appellant had established the existence of a protected right on the basis of family or private life and then went on to consider whether any interference with his private or family life was proportionate. That is the correct process in accordance with case law. No legal error is made out.

18. The grounds also assert contradictory comments referring to [11] of the decision which, again, is in the section of the decision in which the Judge sets out the appellant's case. The grounds challenge the finding at [16] in which it is stated the Judge wrote "..is no independent report from a suitably qualified professional who has carried out an assessment saying that…". It is settled law that an individual who wishes to refer to a finding should set out that finding in full. The Judge was aware that Mrs Culbertson had been deemed entitled to the higher rate of disability benefits but no copy of an assessment relating to the same had been provided in the evidence. The full text of [16] reads:

> 16. I am satisfied that Mrs Culberson has ailments of age which are managed by medication and an impending operation. None of them are life threatening. I accept that they impact on her ability to

> manage. The high grade attendance allowance means she has been assessed as needing help or supervision throughout the day and night – not that she needs round the clock care. It has not been established she needs round the clock care as there is no independent report from a suitably qualified professional who has carried out a home assessment saying that. I am satisfied she has local family support, namely her son and Church members who wrote letters of support, as that is what members of the Church do. I am satisfied that if Mrs Culberson needs additional support, that can be provided by her son and Church members with such support from social services as is required.

19. The finding of the Judge is therefore very specific. The Judge notes that Mrs Culbertson has the claimed medical elements, accepts they impact on her ability to manage and that she had been assessed as being entitled to the high grade attendance allowance meaning she has been assessed as needing help or supervision throughout the day and night. The letter from the DWP dated 8 February 2019 states the award has been made as Mrs Culbertson heed help with her personal care several times right through the day and more than once , for 20 minutes or so, a night.
20. What was not before the Judge was a specific assessment that she needed care around the clock care on a 24-hour basis. The full text of the sentence referred to in the grounds is that "*it has not been established she needs round-the-clock care as there is no independent report from suitably qualified professional who has carried out a home assessment saying that*". That is factually correct. The appellant's assertion that the assessment for the purposes of entitlement to the higher grade attendance allowance should somehow be sufficient does not mean that the Judge's finding on this point is outside the range of those reasonably available to the Judge on the evidence. The ground is a challenge to the Judge's interpretation of the evidence on this point which has not been shown to be irrational or one not available to the Judge on the evidence. The Judge specifically refers to Bradford City Council have an Adult Social Care team from whom the appellant could request an assessment. They also have a Support Options team who assist individuals that wish to carry on living in their own home either by providing services an individual requires from their own resources or through the direct payment service enabling the person in need to direct their own support by buying assistance or service needed. A lack of such is the basis of the Judge's finding. Mrs Culbertson receives an additional sum by way of the higher rate attendance allowance payments to meet any additional costs relating to her needs. On the evidence available to the Judge no legal error is made out.
21. The Judge is also criticised for finding the appellant has local support namely her son and Church members and from social services. The grounds claim there was no evidence from the appellant or her son to support this finding.
22. It is important to look at the specific terms of the Judge's findings. The Judge had in evidence within the appellant's bundle letters from members of the congregation including a Miles and Susan Lawson who referred to the fact that support was given to Mr and Mrs Culbertson when they encountered accommodation difficulties earlier. The Judge refers to the Christian obligation of followers of the church in question, which was not shown to be irrational on the evidence, and/or that support could be made available from social services if required. There was no evidence before the Judge that the appellant's son or other sources of support would not be willing to assist if so required. It is not made out that if the appellant has to leave the UK and an unmet exists that this could not be provided for Mrs Culbertson through other means.

23. The Secretary of State's review found there were no insurmountable obstacles to the appellant and Mrs Culbertson continuing their family life in the USA which, if so, means that the appellant will be able to continue to provide the help he currently does. The Judge however considered the situation on the basis that Mr Culbertson had not established on the evidence that it was necessary for him to remain in the UK for his wife to meet her needs, and the consequences of him having to leave the UK. No legal error is made out.
24. In relation to the grandchild, the Judge referred to an agreement dated 13 January 2017 that Mrs Culbertson's granddaughter should live with her as the child's father had a number of issues identified by the Judge. The evidence before the Judge was that Mrs Culbertson is still the guardian of her granddaughter although the evidence was that the child has been living back with her father for over a year. The Judge assessed the matrix of the appeal as presented to him, which is that whatever may have happened previously the child was now back with her father in his care. The Judge's assessment that the best interests of the child are to remain with her father is a finding within the range of those available to the Judge on the evidence. No legal error is made out.
25. Ground 5 asserts a failure to apply relevant Article 8 law. The ground refers to the evidence provided but this was clearly considered by the Judge. The grounds refer to a backlog in relation to spouse entry applications, claiming that as a result of recent developments due to the war in Ukraine decision time for spouse applications made by UKVI is over six months and sometimes 12 months. The Judge would have been aware of this.
26. The data published by UKVI on the Guv.uk website is that for applications to join family in the UK applicant should get a decision within 24 weeks once they attend their appointment at the visa application centre if they applied settle in the UK as the spouse partner or family member or someone who has British citizenship. It was not made out before the Judge that even if there is a delay it will be such as to make the decision disproportionate. No legal error is made out.
27. The grounds assert that the appellant must be given a fair opportunity within the UK to defend his case but that is precisely what the appellant had by way of an appeal against the Secretary of State's decision to refuse his application.
28. The grounds refer to [17] of the decision providing another extract from that determination in which the author of the grounds writes "I am not satisfied…. or unjustifiably harsh consequences by requiring him to return…" What the Judge actually writes in relation to this issue is "*I am not satisfied there are very significant obstacles to the Appellant integrating in the USA or unjustifiably harsh consequences by requiring him to return there for these reasons. He has only lived here for 5 years. He lived there for 50 years. He is American. He speaks English. He plainly understands the culture. He has worked before and there is no cogent evidence he cannot do so again. Through that income he can pay for accommodation. He can apply for entry clearance in the usual way. There is no suggestion Mrs Culberson cannot visit him if she wishes as I have no detail from the hospital that she is not fit to fly or when her operation will take place. It has not been established that any delay while an application for entry clearance was processed is excessive…*" The grounds claim that it will be unduly harsh on the sponsor if the appellant has to return to the USA but the reasons that argument is advanced are those put before the Judge and properly considered. It is argued that section 117 of the 2002 Act has not been lawfully applied but the Judge clearly takes into account issues of language and whether the appellant would be a burden upon the public purse and whether there are

circumstances in this appeal that would make refusal contrary to Article 8 ECHR. It is no merit in this ground.

29. Ground 6 asserts irrelevant laws were applied for the purposes of the appeal when concluding the final decision, which the challenges the finding at paragraph 20. In [20] the Judge writes:

> 20. Regarding proportionality, Mrs Culberson's granddaughter's best interest are for Mrs Culberson to stay here and give such support as is required. I do not accept that the Appellant is her primary support but it is in fact Mrs Culberson's son as that is who she lives with. I am satisfied that the secondary supporter is Mrs Culberson as she is her grandmother and was the carer identified by Kirklees when that was required. The lack of support for make-up has not in my judgement reduced the importance of Mrs Culberson to her granddaughter. The fact the Appellant speaks English and is not be a burden on public funds is a neutral factor. In my judgement the public interest in maintaining immigration control heavily outweighs his wish to remain where they have not shown that the rules are met.

30. Again the Judge took into account all the evidence and arguments that were put forward. It does not appear that it can be disputed that Mrs Culbertson is able to meet her needs, as they were then known, before the appellant came to the UK, and there was insufficient evidence that if the appellant was required to return to make a lawful application that her needs could not continue to be met. There was no evidence before the Judge that if Mrs Culbertson visited the appellant in the UK there would be any adverse impact on her granddaughter, as there was insufficient evidence to show that a short visit with the child remain in the carer of her father would have such an impact. The reference in the grounds to the case of Chickwamba is irrelevant, as this case bears no relationship to the specific facts of that case or establishes any principle that an individual in the circumstances of this appellant cannot be expected to return to their home states to make a lawful application to re-enter as a spouse if this is what they wish to do.

31. Article 8 ECHR does not give a person the right to choose whether they wish to live. Applications made by the appellant during the period of his leave and subsequent were all refused. The evidence did not establish the appellant is able to meet the requirements of the Immigration Rules as a spouse and the appellant was given ample opportunity to provide such documents as required and to give oral evidence in support of his case to the Judge. It is not made out the Judge failed to consider that evidence with the required degree of anxious scrutiny. The Judge clearly accepted that family life existed between the appellant and Mrs Culbertson and went on to assess the proportionality of any interference in that family life as he was required to do by virtue of Article 8(2). The Judge's findings are adequately reasoned and within the range of those reasonably available to the Judge on the evidence. Whilst the appellant does not like that decision and clearly would prefer a more favourable outcome to enable him to remain in the UK the grounds fail to establish that the Judge's conclusions on the proportionality of the decision are outside the range of those reasonably available to the Judge on the evidence.

Notice of Decision

32. There is no material legal error in the decision of the First-tier Tribunal. The decision shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 April 2023