



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/23006/2016
HU/27068/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 August 2018

Decision & Reasons Promulgated
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR M L A

and

MRS S K
(Anonymity Directions Made)

Respondents

Representation:

For the Appellant: Mr Toufan, Home Office Presenting Officer
For the Respondent: Mr Symes, Counsel for Farani Taylor, Solicitors, London

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.

2. The appellants are citizens of Syria and are husband and wife. Their dates of birth are 9 January 1946 and 25 May 1959. They appealed the Entry Clearance Officer's decision of 10 July 2016 refusing them entry clearance to the United Kingdom as adult dependent relatives under the provisions contained in Appendix FM to the Immigration Rules. Their appeals were heard by Judge of the First-Tier Tribunal Cockrill on 16 January 2018 and were allowed on human rights grounds in a decision promulgated on 31 January 2018.
3. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal McCarthy on 21 May 2018. The permission states that the Judge has given an explanation of why he finds the appellants cannot be expected to return to Syria and cannot live with their daughter in Qatar and why they cannot relocate to their country of nationality, St Kitts and Nevis, finding it would not be reasonable to expect them to maintain family life by regular visits from St Kitts and Nevis. The permission then refers to public interest suggesting that public interest is reduced by the Home Office's delay in considering the applications for leave to remain and that it is arguable that the Judge failed to properly assess the public interest in expelling the appellants. He gave no weight to the fact that the appellants could not meet any provision of the Immigration Rules particularly the adult dependent relative route in Appendix FM, and as per Section 117B of the 2002 Act there is a statutory requirement to consider this public interest point which the Judge did not do. The permission states that it is arguable that the Judge failed to properly apply case law regarding delay in decision making and the fact that it does not reduce the public interest in the circumstances described by the appellants. The permission finishes by stating that it is arguable that instead of carrying out the necessary balancing exercise, the Judge focussed solely on the personal circumstances of the appellants, so he had not determined what he was required to determine and this is an arguable legal error.
4. There is no Rule 24 response.

The Hearing

5. The Presenting Officer submitted that he is relying on the grounds which are self-explanatory. He submitted that at paragraph 57 of the Judge's decision it is clear that the Judge's conclusion that there is existing family life between the appellants and their adult sons in the United Kingdom is flawed. He submitted that their adult children in the United Kingdom both have good jobs and the appellants are both wealthy and he submitted that there is no dependency and this is not something that the Judge considers at all. He submitted that there is no implication in the evidence that there is dependency.
6. The Presenting Officer referred me to the case of *EB (Kosovo)* [2008] UKHL 41 relating to delay. The appellants in that case were asylum seekers. The appellants in this case are not. This is an entry clearance matter and I was referred to a previous decision in this claim by Judge of the First-Tier Tribunal Paul promulgated on 2 December 2014 in which that Judge allowed the appeal to the limited extent that it be remitted back for consideration under Article 8 of ECHR outside the Rules. I was referred to

paragraphs 14 to 16 of the said case of *EB (Kosovo)* regarding delay and the Presenting Officer submitted that the delay in this case in no way affected the Article 8 outcome. The outcome did not affect the appellant's close, personal and social ties in the United Kingdom. The delay did not leave the appellants without leave to enter or remain in a very precarious situation liable to be removed at any time, and the delay was not the result of a dysfunctional system. He submitted therefore that the delay in this claim is not relevant when proportionality is assessed and when the appellants' rights are weighed against fair and firm immigration control in the United Kingdom.

7. The Presenting Officer submitted that these appellants are citizens of St Kitts and Nevis. They paid money to that country to become citizens. The First-Tier Judge states that they have no connection to that country (paragraph 62) but they are nationals of that country so they clearly have a connection.
8. At paragraph 33 of the First-Tier Judge's decision it is mentioned that the appellants were denied entry to the United Kingdom in 2016 when they were en route from Paris travelling by Eurostar. The Judge in that paragraph states that in error, an officer in France had cancelled their visas and this has not been rectified by the United Kingdom officials. He submitted that it is not clear why the Judge found this to be an error and in any case this does not affect the claim.
9. He submitted that there are clearly errors of law in the Judge's decision.
10. Counsel submitted that the Judge has made clear factual findings. He referred to paragraph 54 of the decision submitting that the appellants' sons in the United Kingdom were staying with the appellants in Syria and this family was only split because of the unrest in Syria. He submitted that the Judge correctly states that culturally in Syria adult sons who are single remain with their parents. He submitted that relatives of the appellants disappeared or were killed and the appellants had to leave Syria.
11. He submitted that these appellants will not be a burden on public funds. They own two very expensive properties in London and are wealthy.
12. He submitted that at paragraph 60 onwards the Judge deals with proportionality. He refers to the first appellant being elderly and highly respected and the judge states that if they are not granted leave to remain with their sons in the United Kingdom their only alternative is to go to St Kitts and Nevis as although they have tried to stay in other countries, for example Lebanon, Egypt, Saudi Arabia and Turkey, they can only have temporary visits there and there are many countries which are hostile to Syrians.
13. Counsel submitted that the appellants have three adult children in the United Kingdom, one with indefinite leave to remain. They have always paid them regular visits but their visas were cancelled the last time they tried to visit. He submitted that with regard to St Kitts and Nevis, although they are nationals of that country they have never been there. They have ties to the United Kingdom and they have adequate money, which means that they will not have to rely on public funds.

14. Counsel submitted that at paragraph 65 the Judge refers to the significant delay in processing the cases. He submitted that although Judge Paul's decision was in 2014 the matters were not dealt with for two years. He submitted also that the Judge states that although the first appellant is elderly there are no serious health issues affecting either of the appellants and he submitted that an elderly couple should not have to live an itinerant lifestyle and the Entry Clearance Officer's refusal must be disproportionate.
15. Counsel submitted that family life has not been challenged in the grounds. He submitted that this claim is under Article 8 outside the Rules as the terms of the Rules cannot be satisfied and the war in Syria is why the appellants are not with their adult children at present.
16. The Presenting Officer referred to public interest and submitted that the respondent has considered Article 8 outside the Rules based on Judge Paul's decision. I was referred to paragraph 19 of the decision in which the Entry Clearance Officer concludes that there are no exceptional circumstances in these cases and I was referred to the case of *Razgar* [2004] UKHL 27. It was submitted that this has to be taken into account when proportionality is assessed. I was also asked to consider paragraphs 42 to 44 of the decision and the Presenting Officer submitted that the respondent believes there is no family life and with regard to private life the appellants can settle in St Kitts and Nevis where they have citizenship and can visit their family in the United Kingdom. The Judge also refers to the respondent finding that if indeed the appellants are afraid to return to Syria for protection reasons then an asylum claim should be made.
17. The Presenting Officer submitted that at paragraph 67 of the decision the Judge finds the appellants to be vulnerable but finds that there are no grave health issues. He submitted it is clear that the terms of the Immigration Rules as adult dependent relatives cannot be satisfied and therefore this decision has to be made outside the Rules. He submitted that the starting point is that the Rules cannot be satisfied and this is an important issue in the proportionality assessment.
18. He submitted that Section 117 of the 2002 Act has not been expressly cited There is no problem with the financial situation, the couple are well educated and they have a property in Bayswater in London where they can stay. The Presenting Officer submitted however that this couple are not present in the United Kingdom so Section 117B is irrelevant.
19. Counsel submitted that care for the appellants is not available in their country of origin. They should not be subjected to forced migration because of the armed conflict and they should not be separated from their family. He submitted that this is an elderly couple who cannot go to live in St Kitts and Nevis as they have never been there before.
20. Counsel submitted that the delay has to be taken into account in a proportionality exercise. I was referred again to the case of *EB (Kosovo)* at paragraphs 11 and 12 and

he submitted that the appellants have been left rootless for two years so the delay must be taken into account. He submitted that the cancellation of their visit visas has not been explained and based on all the evidence before me there are no material errors of law in the First-Tier Judge's decision and that decision should stand.

21. The Presenting Officer submitted that the case of *Kugathas* (2003) EWCA Civ 311 applies. This application cannot succeed under the Immigration Rules and Appendix FM and for it to succeed under Article 8 outside the Rules compelling factors are required. I was asked to consider the cases of *Agyarko and others (2017) UKSC 11* and *MM Sudan (2014) UKUT 00105 (IAC)*. He submitted that there are no compelling factors and the decision should be set aside.

Decision and Reasons

22. The appellants' claim cannot succeed under the Immigration Rules and this is accepted by the First-Tier Judge. The appellants are not adult dependent relatives of their children. No dependency has been shown. The claim therefore has to be on Article 8 outside the Rules.
23. In 2014 the appeals were allowed to the extent that Article 8 had to be considered by the respondent. After it was considered further refusals were issued. The First-Tier Judge then allowed the appeals because he found that it was disproportionate to refuse the applications based on the private and family life of the appellants. He found that family life was clearly established between the adult children in the United Kingdom and the appellants. They had only been separated by force of circumstances and the deteriorating security situation in Syria. The Judge found that the interference with private and family life was disproportionate, particularly as there is no public interest involved as there is no possibility of the appellants having recourse to public funds. The Judge makes reference to the fact that the appellants can only obtain short term visas for countries that they have gone to so there is no possibility of a stable residence but the Judge appears not to have taken into account properly their citizenship of St Kitts and Nevis in the Caribbean. The appellants' purchased this citizenship and are nationals of that country. If they go to stay there they can continue to visit the United Kingdom.
24. With regard to the delay, I find that this is not relevant in this case.
25. Counsel has referred to Immigration Judge Paul's decision and the fact that the claim was partially allowed in 2014 but it was only allowed to the limited extent that it had to be considered by the respondent under Article 8 outside the Rules. When the respondent considered it in this way he dismissed it.
26. Counsel submits that the appellants are vulnerable with some health issues but I find that these are not exceptional circumstances when Article 8 outside the Rules is considered.

27. There is no dependency and the appellants have citizenship of another country. There is no danger to them there and they can visit their family in the various countries they stay in if they live there instead of Syria and the situation there.
28. When proportionality is assessed maintenance of effective immigration control has to be taken into account. I accept that financially, public interest will not be affected by this couple coming to live in the United Kingdom but that is not enough. I do not find that the delay in making a decision demonstrates a failure of effective immigration control. To say that the couple were put in an unpredictable situation which was unfair cannot be correct, as they were aware that first of all their visas had been refused and secondly the applications cannot meet the terms of the Immigration Rules.
29. The appellants were forced out of their home country, they do have ties to the United Kingdom but they can visit the United Kingdom and can visit their other children in Canada and Qatar while they are living in St Kitts and Nevis where they have citizenship.
30. Because of the situation in Syria this couple require protection if they are going to be sent back there, however they are not going to be sent back there. If they make an asylum claim this will be considered. I am surprised that they have not made an asylum claim and I find that there are errors of law in the Judge's decision, particularly his statement that it is unrealistic to expect them to go to live in the Caribbean and his statement that they have family life with their adult children in the United Kingdom. He has not properly explained these statements and on the face of it these statements are wrong. The Judge states that had it not been for the fact of the desperate situation in Syria the appellants and their two unmarried sons in the United Kingdom would all still have been staying together but their sons came to the United Kingdom with Tier 1 Entrepreneur visas in 2013. I find therefore that it is unlikely that they would have remained staying with the appellants in Syria had there not been the war there.
31. There is nothing before me to indicate that they are closer to their two unmarried sons in the United Kingdom than they are to any of their other adult children. I have been shown no evidence of a greater than normal relationship with them than other parents have with their adult children. Because of this, family life cannot be said to exist between the appellants and their two unmarried sons.
32. When the proportionality assessment is considered by the First-Tier Judge the fact that the Rules cannot be satisfied has not properly been taken into account.
33. I find that there are material errors of law in the Judge's decision.

Notice of Decision

There are material errors of law in the First-Tier Judge's decision promulgated on 31 January 2018.

It is correct that the terms of the Immigration Rules cannot be satisfied.

There are no exceptional circumstances in this case and so the claims cannot succeed under Article 8 outside the Rules.

I am remaking the decision and I am dismissing this appeal under the Immigration Rules and on human rights grounds.

Anonymity has been directed.

Signed

Date 4 September 2018

A handwritten signature in black ink, appearing to read 'Deputy Upper Tribunal Judge Murray', with a long horizontal flourish extending to the right.

Deputy Upper Tribunal Judge Murray