Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02556/2017
HU/02558/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2019	**On 08 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

HASSENALLY [O]
HOOROONNAISHA [N]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Iengar, counsel
For the Respondent: Mrs S Jones, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellants against a decision of the First-tier Tribunal issued on 7 May 2018 dismissing their appeal against the respondent's decision of 25 January 2017 refusing them further leave to remain on human rights grounds.

Background

2. The appellants, who are husband and wife, are both citizens of Mauritius. The first appellant's date of birth is 9 January 1944 and the second appellant's 3 December 1955. They first came to the UK with entry clearance as visitors on 11 September 2003. On 2 February 2004 they applied for indefinite leave to remain as the parents of their daughter who is present and settled in the UK. This application was refused and an appeal dismissed on 22 August 2005. Their appeal rights were exhausted on 31 August 2005. On 9 December 2005 they made a further application for indefinite leave to remain on compassionate grounds outside the Rules. This was refused on 26 May 2009 and their appeal against that decision was dismissed on 29 July 2009.

3. On 14 February 2012 the appellants made a further application for leave to remain relying on article 8 which was refused on 19 March 2013 with no right of appeal. They took judicial review proceedings to challenge that refusal, leading the respondent to reconsider the application, which was again refused on 4 June 2014 but this time with a right of appeal. The appellants duly appealed but again unsuccessfully, their appeal being dismissed on 22 July 2015. The appellants made the application leading to the present appeal on 18 November 2016, which was refused on 25 January 2017.

4. The appellants initially came to the UK in September 2003 to support their daughter, whose marriage had broken down because of her husband's violent and harassing behaviour which continued into 2004 and 2005. The appellants remained in the UK to continue supporting their daughter, helping her to raise her children, their granddaughters, and becoming part of her household.

5. In recent years the first appellant's health has declined significantly. He has become confused, frustrated and violent at times and by 2017 he had been diagnosed with Alzheimer's disease. He also has inoperable lung cancer and receives regular hormone injections from his GP and remains under the care of the Oncology Department of the Royal Free Hospital. His day-to-day care needs are met by his wife and his children. Two of the appellant's sons, who were living in France, have now moved to the UK to live in the same household with their parents, their sister and her children.

6. The current application was refused by the respondent for the reasons set out in Annex A of the decision letter. In short, the respondent was not satisfied that the appellants could bring themselves within the Rules, that there were exceptional circumstances justifying the grant of leave outside the Rules or that returning them to Mauritius would breach the U.K.'s obligations under either article 3 or 8 of the ECHR.

The hearing before the First-tier Tribunal

7. The judge accepted the medical evidence produced that the first appellant had both lung cancer and dementia, and, in consequence, he needed day-to-day care at home. He found that family life for the purposes of article 8 continued between the appellants and their daughter and granddaughters. He also accepted that the appellant's two sons were now living with the appellants, a new development since the previous First-tier Tribunal decision in July 2015 and that they provided some of the care he needed and, to that extent, the second appellant relied on their assistance. He found that there were more than emotional ties between the appellants and their two sons but also a dependency giving rise to family life for the purposes of article 8.

8. The judge found that removing the appellants would amount to an interference with their existing family life so as to engage article 8, the decision was in accordance with the law and would be for a legitimate purpose within article 8(2). The judge then considered the issue of proportionality. He took into account the best interests of the children noting that this only related to the younger child who was 17, the older child being 19. The appellants had arrived in the UK when the younger child was only two and had lived in the same household with her ever since. In terms of maintaining the stability of the existing family relationships, he was satisfied it would be in the younger child's best interests for the appellants to remain in the UK. He also accepted that it would not be reasonable or proportionate to expect the appellant's daughter to relocate to Mauritius with her daughters to maintain the existing family life with the appellants.

9. He then considered the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002 noting that the appellants did not claim to be financially independent and were not fluent in English. They had been illegally present for the majority of their 15 years in the UK and had not made any attempt to leave, despite losing three previous appeals. He said that the appellants' long illegal residence further strengthened the public interest in their removal. However, he accepted that they had a private life here worthy of some weight in the proportionality exercise, but the majority of this time had been when they were here unlawfully and even when they did have leave, it was precarious.

10. The appellants had said that they had no home to return to in Mauritius and insufficient resources to support themselves. He noted that in a previous decision it was accepted that they no longer had a home in Mauritius, but he found that they had not shown that they could not obtain suitable accommodation or were without sufficient resources to do so. He had not been given a complete picture of the finances that might be available to help them from their children in the UK.

11. The judge considered the first appellant's health to be an element of his physical and moral integrity for the purpose of his private life under article 8 but found that it did not any material weight to the arguments in the appeal. No evidence had been produced to show that there was any

material disparity between the medical treatment available in Mauritius and that which he was presently receiving in the UK. He said that there were at least two ways in which elementary on-line research into the healthcare system in Mauritius could have been carried out, yet no such evidence had been filed. It was argued that even if such services were available in Mauritius, the first appellant would prefer to be cared for by his family in surroundings he was familiar with. Whilst the judge understood why he would have that preference, he did not find that it added much to the proportionality exercise, if sufficient quality care was otherwise available.

12. He noted that s. 117B(4)(b) provided that little weight should be given to the arguably closer family life established with a qualifying partner by a person when in the UK illegally and said that the family life in the present appeal could not be afforded greater weight, even allowing for the dependency that existed. He did not accept the argument that the first appellant would be unduly affected by moving away from his daughter's home to accommodation in Mauritius, saying that there was no expert medical evidence on this point.

13. He referred to the Court of Appeal judgment in Ribeli v Entry Clearance Officer, Pretoria [2018] EWCA Civ 611. Whilst he accepted that it would not be reasonable for the appellant's daughter to go to Mauritius because she was needed here by her children, it would not be unreasonable for either or both of the appellants' sons to go there as neither claimed to have any dependants in the UK. He regarded their situation as entirely analogous to that of the sponsor in Ribeli. They had a choice to make about where they wished to live and work.

14. In summary, the judge found that it would be proportionate for the appellants to return to Mauritius, their sons could accompany them if necessary whether on a short-term or more permanent basis and the appellants had access to resources to re-establish themselves there. For the sake of completion, he considered para 276ADE(1)(vi) of the Rules and found, for the reasons already given, that there were no very significant obstacles to the appellants' re-integration into Mauritius.

Grounds of appeal and Submissions

15. In the grounds of appeal, ground 1 argues that the judge made a flawed assessment of the importance of the first appellant being cared for by his immediate family and in particular by reference to the specialist’s letter from the Royal Free Hospital cited at [55] which referred to a significant fear factor if the first appellant was outside the confines of his immediate family. It is argued that the first appellant's immediate family has consisted of his wife, his daughter, his two granddaughters and his two sons and that the medical evidence specific to the first appellant stressed the support provided by his immediate family and his great reluctance to leave the house and his unwillingness to consider a day centre. It is further argued that the judge erred in law by speculating at [85] that it

might be that being back in Mauritius where he had lived all his life to the age of 61 would be of some comfort to the first appellant.

16. Ground 2 argues that the judge misdirected himself in his consideration of s.117B(4)(b), which stipulated that little weight should be given to a relationship formed with a qualifying partner when residence was unlawful by saying that family life in the present appeal could not be afforded greater weight than that, even allowing for the dependency that existed. It argues that the factors listed in s.117 do not purport to cater for every instance of private and family life and that it is well established in European as well as domestic case law that the knowledge of an appellant's unlawful immigration status was a relevant matter in the balancing exercise when assessing an interference with that appellant's family life with a qualifying partner but there was no such principle established in cases where a dependency had been shown between family members due to mental and health reasons.

17. In ground 3 it is argued that the judge ‘s application of the Court of Appeal judgment in Ribeli was flawed. The Court was concerned with an entry clearance appeal where the sponsor was not already caring for the applicant. In the present appeal, the judge found that there was an element of dependency, the parties concerned did not live in different countries and the sponsor had not exercised a choice in remaining in the UK while their father developed his medical conditions and the ensuing caring needs in Mauritius. The comparison in approach drawn by the judge was inappropriate and, so it is argued, amounted to a material error of law.

18. Permission to appeal was granted by the Upper Tribunal on the basis that it was arguable that to remove the first appellant from the care of his children would negatively impact on his physical and moral integrity.

19. Ms Ienger adopted the grounds in her submissions. She argued that the judge had erred in law in his approach to the assessment of the medical evidence by failing to take proper account of the evidence referred to at [55] and had been wrong to say at [80] that the first appellant's physical and moral integrity would not be interfered with by him returning to Mauritius. She argued that the judge’s approach to the medical evidence was fatally flawed and undermined his assessment of proportionality. The judge, so she argued, had misapplied the judgment in Ribeli. In the present appeal the family were living together in the UK, whereas in Ribeli the sponsor was in the UK and the dependent relative in South Africa.

20. Mrs Jones submitted that there was no substance in ground 1. The judge had taken into account all the evidence and reached a decision properly open to him. He was entitled to note that there was a lack of evidence which could reasonably have been provided about the availability and quality of medical and social care in Mauritius. Further, the judge was entitled to conclude that the first appellant would not be unduly affected by moving away from his daughter's home to accommodation in Mauritius

and to make the point that there was no expert medical evidence on this point. So far as ground 2 was concerned, it was simply not arguable, so she submitted, that the issue of unlawful immigration status would not be relevant in the assessment of proportionality in cases where dependency had been established between family members due to medical and health reasons. She submitted that the judge had not erred in his application Ribeli. It was open to him to take the view that the situation of the appellants in this appeal was entirely analogous to that of the sponsor in Ribeli and that the first appellant's sons had a choice of to make about whether they would return to Mauritius with their parents.

Consideration of whether the First-tier Tribunal erred in law.

21. Ground 1 argues that the judge made a flawed assessment of the importance of the first appellant being cared for by his immediate family which undermines his findings that there would be no material interference with the first appellant's physical and moral integrity by returning him to Mauritius. The passage in the medical evidence relied on is from the letter from the Royal Free Hospital dated 28 March 2018 where the consultant refers to the first appellant having a significant fear factor if he is outside the confines of his immediate family. That comment appears in the following context:

> "the main issue is unfortunately his progressive Alzheimer's disease with memory loss and there is now a significant fear factor if he is outside the confines of his immediate family".

22. The judge accepted the medical evidence provided that the first appellant had both inoperable lung cancer and Alzheimer's disease and that the treatment for each was limited to managing the symptoms. He also accepted that article 8 was engaged on both family and private life grounds. The issue he had to assess was whether removal was proportionate balancing the public interest and the impact of removal on the family and private life of the appellants and their family.

23. He dealt with the issues arising from the proposed removal to Mauritius in [75]-[81]. He accepted that the appellants no longer had a home in Mauritius but found that they had not proved they could not obtain suitable accommodation and did not have sufficient resources. He said at [76] that he had seen some bank statements for the appellants' two sons in the UK, but their daughter had not disclosed any such statements. He was, therefore, entitled to comment that he had not seen a complete picture of the finances that might be available from the children in the UK to assist their parents. He also commented at [77] that he had not been provided with reliable evidence of other financial resources that might be available. He also noted at [78] that the evidence of financial support from other quarters had been inconsistent, referring to a previous tribunal decision in which the judge had recorded that there was written evidence from the second appellant's four brothers who lived in France that they

were supporting the appellants both financially and morally and the judge had held that there was no reason why such financial support could not continue for the appellant in Mauritius [79].

24. The judge was also entitled to take into account the fact that the appellants had not produced any country background evidence to show any material disparity between the available medical assistance in Mauritius and the treatment he was receiving at present and that there was no evidence to show that he could not access suitable treatment if returned to Mauritius. There had been references to unsuccessful attempts to access the Mauritius Alzheimer's Society website but the judge was entitled to comment that this was not the only source from which evidence could reasonably be obtained. Further, there was no evidence of the availability of social care in Mauritius, whether provided privately or through the state, to assist the second appellant to care for the first appellant in his day-to-day life.

25. He took into account the claim that the first appellant preferred to be cared for by his family and in surroundings he was familiar with, but he was entitled to take the view that this preference did not add much to the proportionality exercise, if sufficient quality care was otherwise available from others. The judge also commented at [85] that being in Mauritius might be of comfort to the first appellant and that comment is understandable in the light of his previously expressed wish not to die in the UK.

26. The judge also considered the extent to which the appellants' family and in particular their children could reasonably be expected to continue providing care. Whilst he accepted that it would not be reasonable for the appellants' daughter to go to Mauritius, he found that it would be reasonable for either or both of their sons to do so. Neither claimed to have any dependents in the UK, the strongest ties were that they had business here and their relationship to their sister and their daughters but there was no claim of dependency in those relationships. If they did return to Mauritius with their parents, the first appellant would continue to be with members of his immediate family, even if not all of them.

27. I am satisfied that when considering private life, the judge took into account the first appellant's physical and moral integrity, specifically considering which members of his family could reasonably be expected to return with him to Mauritius, the medical evidence of the significant fear factor if the first appellant was outside the confines of his immediate family and the importance of being cared for by his family but, when assessing proportionality, these were factors to be balanced with the public interest factors in the context of the evidence as a whole. In summary, I am not satisfied that ground 1 is made out.

28. Ground 2 argues that whilst unlawful immigration status would be relevant when assessing an interference with family life with a qualifying partner, no such principle has been established in cases where the dependency

arose due to medical and health reasons. There is no substance in this ground. The fact that a dependency arises for medical and health reasons as opposed to arising because of a marriage or partnership and is not specified in S 117B does not mean that unlawful residence cannot properly be taken into account. The fact that the provisions of s.117 are not exhaustive does not mean that factors relevant to the public interest such as unlawful and precarious residence are to be left out of account: Rajendran (s117B – family life) [2016] UKUT 88.

29. Ground 3 argues that the judge erred in his assessment of Ribeli and was wrong to regard the position between the parties in that and the present case as entirely analogous. There are factual distinctions between the two cases: Ribeli is an entry clearance case where the dependent relative lived in South Africa and the sponsor in the UK, whereas in the present appeal the sponsors and the appellants are currently living in the UK. However, it is clear that the judge was not seeking to rely on Ribeli as a factual precedent but as identifying and confirming the relevant principles and illustrating their application in that particular appeal.

30. In Ribeli, the Court of Appeal at [68] repeated the well-established principle that in a family relationship between two adults there had to be something more than normal emotional ties in order to engage article 8. The judge accepted that that was the situation in this appeal. In [69] the Court then identified as a crucial point that in that case the applicant's daughter could reasonably be expected to go back to South Africa to provide the emotional support her mother needed as well as practical support and that whether she went back or not was a matter of choice. She was entitled to exercise that choice but, in those circumstances, the Upper Tribunal could not be faulted for having found on the facts of the case that the decision was proportionate [70].

31. The judge in the present case was entitled to consider, as he did, whether it would be reasonable for the appellants' children to return with him to Mauritius. He accepted that it would not be reasonable for the appellant's daughter to return but reasonable to expect one or both of his sons to do so. He took account of the principles and approach set out in Ribeli and applied them to the facts of the present case. It was for him to assess whether removal would be proportionate in the light of the appellants' particular circumstances and I am not satisfied that he misunderstood or misapplied Ribeli.

32. This is a case where there are considerable compassionate circumstances arising from the first appellant's mental and physical condition. However, those factors had to be balanced against the public interest. The judge was entitled to take account of the fact that the appellants had not only been precarious residents during the time of their visit visa but, subsequently for some 14 years, had been unlawfully resident. He accepted that the first appellant's mental and physical condition was as set out in the medical evidence and he took into account the fear factor of being outside the confines of his immediate family, but he would be

returning with his wife and the judge found that it would be reasonable to expect one or both of his sons to return with them. I am satisfied that the judge's finding on proportionality was properly open to him.

33. The grounds do not satisfy me that the judge erred in law in his approach to and assessment of this difficult case. He considered all relevant matters and reached a decision properly open to him on the evidence for the reasons he gave.

Decision

34. The First-tier Tribunal did not err in law and the decision to dismiss the appeal stands.

Signed: H J E Latter Dated: 17 January 2019

Deputy Upper Tribunal Judge Latter