**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/12196/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
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| **On 27 June 2019** | **On 23rd July 2019** |

**Before**

**THE RT. HON. LORD BOYD OF DUNCANSBY**
**DEPUTY UPPER TRIBUNAL JUDGE FROOM**

**Between**

**MARYAM MOHAMAD KHIR ALMZAYEN**
(NO ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the Appellant: Mr N Howard, Solicitor
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS ON ERROR OF LAW**

1. The appellant appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Lodge, promulgated on 29 January 2019, dismissing her appeal against the refusal of entry clearance to join her daughter in the United Kingdom as her adult dependent relative.

2. The First-tier Tribunal had power to decide whether the decision was unlawful under section 6 of the Human Rights Act 1998 because the decision represented a

disproportionate interference with the right to family life, guaranteed by Article 8 of the Human Rights Convention. The notice of appeal raised Articles 2 and 3 of the Human Rights Convention in addition to Article 8 but, rightly in our view, the First-tier Tribunal only considered Article 8.

3. Judge Lodge accepted the appellant lives in Damascus, Syria, and that she suffers from a number of health conditions, including macular degeneration and "fibrillation" causing fluctuations in her blood pressure and fainting. He heard oral evidence from the appellant's daughter, the sponsor, who had recently met the appellant in Turkey. It was explained that the sponsor cannot return to Syria because she is a refugee. In terms of the Immigration Rules, the judge was satisfied the appellant met the requirements of paragraph E-ECDR.2.4 of Appendix FM[1].

4. The judge then turned to consider paragraph E-ECDR.2.5[2], which he considered to be the "crux of this appeal". He heard evidence that the appellant had been receiving care from the wife of the guard in her apartment block but that the arrangement could not continue due to the person concerned having a baby. The sponsor told the judge that she had tried to obtain care for the appellant but had been unsuccessful. Judge Lodge said at [33],

> "… Common sense tells me that is unlikely. The sponsor described $200 (which she gave her mother) as a very substantial sum of money in Syria and it is clear given the amount the grandson is sending from Saudi to the sponsor that the sponsor could … if she so desired financially support her mother."

5. The judge noted evidence from the sponsor's son that he is employed as an engineer in Saudi and he provided financial support to the sponsor in the order of £35,000 to £40,000 per year. He then continued,

> "35. I am satisfied the sponsor has the means available to her to pay for a carer in Syria. Her evidence was not to the effect that she could not pay for help, it was that no help was available. I have no reliable evidence that any attempts have been made to find carers for the appellant or indeed a care home for her. I appreciate that parts of Syria are in the throes of war, but I have no evidence that the war is having a direct impact on the provision of carers. Common sense tells me that employment must be in short supply and, in the absence of reliable evidence that there are no carers or care homes, I am not prepared to

[1] The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.

[2] The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because- (a) it is not available and there is no person in that country who can reasonably provide it; or (b) it is not affordable.

> accept that with the financial help of the sponsor the appellant could not obtain the required level of care in Syria.
>
> 36. I add that I have no independent evidence to support the assertion that without the supervision of a close relative she will not be able to care for herself. The care that she had up until recently was not care from a close relative but the wife of the apartment block's guard."

6. The judge, having found the rules were not met, turned briefly to Article 8 outside the rules at [38]. He limited himself to making the following assessment:

> "I am not satisfied that there are any exceptional circumstances in this case which require me to consider Article 8 outside the rules. I am satisfied that failing to meet the rules is sufficient in the circumstances of this case to mean that the decision of the Secretary of State (sic) is proportionate having regard to Article 8."

7. The appellant sought permission to appeal on three grounds which we shall briefly summarise. Firstly, the judge erred by not taking into account the support provided to the sponsor by her son in Saudi Arabia when considering whether there would be adequate financial support for the appellant in the United Kingdom. Secondly, the judge had erred by not finding that the required level of care would not be available in Syria, which is a war-torn country. Thirdly, the judge had failed to carry out a proportionality balancing exercise and had erred in finding there were not exceptional circumstances.

8. Permission was granted by the First-tier Tribunal on all grounds but with greater emphasis on the third ground. It was arguable that, given the circumstances of the case, the judge's assessment of Article 8 outside the rules was inadequate, although any error might prove to have been immaterial.

9. The respondent filed a rule 24 response opposing the appeal and arguing that the judge had not shown how Article 8.1 was engaged because there did not appear to be any family life between the appellant and the sponsor.

10. We heard oral submissions from the representatives as to whether the decision of Judge Lodge contains material errors of law so as to require us to set it aside.

11. Mr Howard placed most reliance on the third ground and the absence from paragraph [38] of Judge Lodge's decision of any semblance of a balancing exercise. He said the factors which should have been considered at that stage were that, (i) the sponsor is a refugee, (ii) the appellant is the sponsor's mother, (iii) it was accepted the appellant requires long term personal care to perform every day tasks due to age, illness or disability, (iv) the appellant is living in war-torn Syria, and (v) she would not be a burden on the taxpayer due to the financial support provided by her grandson.

12. Mr Howard sought to add to the grounds by arguing that the judge had erred by not considering the best interests of the appellant's minor grandchild, although he could not confirm that this point was argued before the judge or even that the appellant had met her grandchild.

13. We drew Mr Howard's attention to the comment made in the grant of permission to appeal and asked him to address the issue of materiality. We referred to the decision in Britcits v Secretary of State for the Home Department [2017] EWCA Civ 368, in which the decision of the Administrative Court was upheld, finding that the adult dependent relative rules were lawful. Mr Howard said the correct emphasis should be on the quality of care available and the psychological factors in this case. By the latter we understood him to be referring to appellant's need for emotional support, which is currently provided by the sponsor. He reiterated that the sponsor cannot visit the appeal is Syria because she is a refugee.

14. Mr Howard could not assist with our enquiry as to whether the appellant's grandson in Saudi Arabia is able to visit Damascus.

15. Mr Melvin argued there was no material error in the decision of Judge Lodge. The rules were not met and there were no exceptional circumstances to warrant a grant of leave outside the rules. Alternatively, he argued that any error was immaterial to the outcome of the appeal. He pointed out the rules provide for a high threshold for success.

16. Mr Melvin relied on his rule 24 response in which he argued that Article 8.1 was not engaged because there was no family life in this case. We understood this as being part of his argument that any error with regard to the application of the rules and Article 8.2 could not be material.

17. Mr Howard replied that the threshold for engaging Article 8.1 was low.

18. We reserved our decision as to whether the decision of Judge Lodge contains a material error of law.

19. Having carefully considered the decision and the submissions made to us, we find the judge's decision does not contain any arguable error of law and the appellant's appeal must therefore be dismissed. Our reasons are as follows.

20. We remind ourselves of the context. The Court of Appeal in the Britcits case explained the policy aims behind the new adult dependent relative rules. In his judgment, with which Davis LJ and Sales LJ agreed, the Master of the Rolls stated,

> "58. First, the policy intended to be implemented by the new ADR Rules, as appears from the evidence, the new ADR Rules themselves and the Guidance, and confirmed in the oral submissions of Mr Neil Sheldon, counsel for the SoS, is clear enough. It is twofold: firstly, to reduce the burden on the taxpayer for the provision of health and social care services to those ADRs whose needs

> can reasonably and adequately be met in their home country; and, secondly, to ensure that those ADRs whose needs can only be reasonably and adequately met in the UK are granted fully settled status and full access to the NHS and social care provided by local authorities. The latter is intended to avoid disparity between ADRs depending on their wealth and to avoid precariousness of status occasioned by changes in the financial circumstances of ADRs once settled here.
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> 59. Second, as is apparent from the Rules and the Guidance, the focus is on whether the care required by the ADR applicant can be "reasonably" provided and to "the required level" in their home country. As Mr Sheldon confirmed in his oral submissions, the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations, which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course, to be objectively assessed."

21. This echoes what Mitting J had said in the court below about the policy rationale behind the rule change[3]. It was explained to him by the senior civil servant responsible for the delivery of the policy that primary consideration was given to the impact of the new rules on the taxpayer and, in particular, the burden imposed on the taxpayer by the NHS.

22. Mr Howard made no mention of the first ground seeking permission to appeal, even though permission was given to argue all grounds, and we shall say no more about it other than that no error of law is found. The judge's findings in relation to the support provided by the appellant's grandson are clear.

23. The second ground seeks to reargue the point as to whether the E-ECDR.2.5 requirement was met. The judge was plainly conscious of the fact that Syria is afflicted by civil war. However, given the level of funds available from the appellant's grandson and the fact that care had already been accessed from the guard's wife, the judge was entitled to infer that there would be people willing and able to take a job looking after the appellant to a reasonable standard or, if there are such places, that the appellant could be cared for in a residential home.

24. We note the burden was on the appellant to show that the required level could not be obtained even with the practical and financial help of the sponsor and the judge recorded that there was no reliable evidence of attempts being made to find a suitable carer or care home. We also note the specified evidence rule found in

[3] Britcits, R (on the application of) v SSHD [2016] EWHC 956 (Admin)

paragraph 35 of Appendix FM-SE of the rules[4] places a burden on the appellant to provide independent evidence of the unavailability of care. We cannot see that any of the documents submitted with the appeal bundle makes any reference to this.

25. There is no error in the judge's assessment under the rules.

26. The third ground does, in our judgment, disclose an error of law. It was incumbent on the judge to conduct a proportionality balancing exercise. There is no threshold test for Article 8 to be engaged outside the rules. In R (on the application of Agyarko) v SSHD [2017] UKSC 11, the Supreme Court explained that the ultimate question in Article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test. The rules and IDIs do not depart from that position and are compatible with Article 8. Appendix FM is said to reflect how the balance will be struck under Article 8 so that if an applicant fails to meet the rules, it should only be in genuinely exceptional circumstances that there would be a breach of Article 8. In this context, 'exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual so would not be proportionate.

27. The brief paragraph devoted to Article 8 outside the rules by Judge Lodge does not fulfil these basic requirements. He appears to have treated 'exceptional circumstances' as a gateway test before Article 8 is engaged outside the rules, whereas the failure to meet the rules is simply the starting-point for a wider-ranging enquiry. He does not refer to the public interest factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002.

28. However, we do not consider the judge's error to have been material because we cannot conceive that a structured and detailed consideration of Article 8 outside the rules would have delivered a different result.

29. On the appellant's side of the scales are the circumstances mentioned by Mr Howard in his submissions, but it is entirely clear to us that the judge already had these matters at the front of his mind. He was aware the sponsor is a refugee and

[4] 35. Independent evidence that the applicant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in the country where they are living should be from:

(a) a central or local health authority;

(b) a local authority; or

(c) a doctor or other health professional.

cannot visit the appellant in Damascus. He recognised that Syria is afflicted by civil war but also that not all parts of the country are similarly affected. We are satisfied that all these matters were all taken into account.

30. Mr Howard raised the best interests of the appellant's grandchild in his submissions but this point was not raised in the First-tier Tribunal and we do not consider the judge erred by failing to set out reasons for not giving the issue weight. As said, it has not even been shown that the appellant has met this grandchild but, even if she did meet him during her visit to Turkey, there is no legally sound basis on which it could be said the decision has any bearing on his best interests, which are presumably to continue residing in the United Kingdom with his mother.

31. We cannot see how, had the judge considered the public interest side of the scales, he could have come to any other conclusion on the facts found than that the decision was a proportionate one. Paragraph E-ECDR.2.5 reflects the public policy aim of reducing the categories of dependent relatives entitled to come to the United Kingdom so as to cut the cost of providing medical and social care services to them. The rule was not met and the finding that it was more probable than not that suitable care could be purchased in Syria meant there were no unjustifiably harsh consequences arising from the decision. Should circumstances change and the appellant be able to show she can meet all the requirements of the rules, both substantive and evidential, then a fresh application can be made.

32. We do not need to address Mr Melvin's point about whether Article 8.1 was engaged in this case.

33. The appellant's appeal is dismissed.

**NOTICE OF DECISION**

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeal on Article 8 grounds is upheld.

Signed Date 11 July 2019

**Deputy Upper Tribunal Judge Froom**