Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14206/2013

THE IMMIGRATION ACTS

Determined at Field House	**Decision & Reasons Promulgated**
On 4 September 2019	**On 12 September 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ARUN DASGUPTA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER (New Delhi)

Respondent

Representation:

For the Appellant:	Mr R De Mello and Mr T Muman, both of Counsel, instructed by JM Wilson Solicitors
For the Respondent:	Mr N Sheldon, of Counsel, instructed by the Government Legal Department, and Mr A Henderson (in respect of the written submissions dated 11 January 2019)

DECISION AND REASONS

1. This appeal has an unfortunate procedural history and is tinged by the death of the appellant on 24 September 2018. The promulgation of this decision has been delayed due to the relative complexity of the issues and other professional commitments, for which I apologise.

Background

2. The appellant was a national of India, born in 1930. He was a retired businessman and widower, his wife having died in 2007. Since then he had visited his British citizen daughter (Dr [SD], hereafter 'the sponsor') and her family (her husband and two children) almost annually. He developed a strong relationship with his daughter and his grandchildren.

3. On 29 March 2013 the appellant applied for entry clearance to come to the UK as the Adult Dependent Relative (ADR) of his sponsor. The application was refused in a decision made by the Entry Clearance Officer of New Delhi (the respondent), dated 27 June 2013, under Appendix FM of the Immigration Rules. An appeal to the First-tier Tribunal was dismissed under the Immigration Rules but allowed on grounds that the decision breached Article 8 ECHR.

4. Both parties cross-appealed the decision of the Judge of the First-tier Tribunal R R Hopkins (FtJ), the respondent on the basis that the FtJ erred in law by allowing the appeal under Article 8, the appellant on the basis that the FtJ should have allowed the appeal under the Immigration Rules and decided that the ADR rule was, at least in part, not in accordance with the law and/or was incompatible with Article 8 ECHR. The grounds of appeal contended that the ADR rules were *ultra vires*, irrational, unlawful, and disproportionate and incompatible with Article 8, that they failed to provide for the best interests of children, that they were based on an inadequate consultation process, and that they led to discriminatory consequences based on race, religion, ethnic, cultural and national origins in respect of those culturally obliged to care for their adult dependent relatives.

5. In granting the appellant permission to appeal a First-tier Tribunal Judge stated,

> "It seems to me that the Appellant's submissions, in suggesting that the Upper Tribunal could deal simultaneously with the case as a judicial review (deploying a High Court Judge), has [*sic*] not only technical obstacles (no such application having been made) but overlooks that a challenge to the vires of the Rules is excluded by the Lord Chief Justice's Practice Direction governing UT judicial reviews. However, there is some authority for the proposition that in exercising its statutory 'in accordance with the law' jurisdiction … the Upper Tribunal in deciding appeals cannot exclude issues going to vires."

The appeal within the Upper Tribunal

6. The Upper Tribunal heard the appeal and cross-appeal on 3 December 2015. The parties' submissions on the appellant's cross-appeal were not completed and the Upper Tribunal was informed that another half day was required for this purpose. A further hearing date (21 January 2016) was chosen to enable the parties to complete their submissions.

7. By way of directions dated 7 December 2015 the Upper Tribunal informed the parties of its view that the respondent's appeal was severable from the appellant's appeal and that, while they were clearly inter-related, there was no inter-dependency. Having considered the overriding objective in the Tribunal Procedure (Upper Tribunal) Rules 2008 (the Procedure Rules), including the factor of delay, and having regard to the pending application for permission to proceed with a judicial review of the lawfulness of the ADR rules in the Administrative Court, and taking account of the appellant's advanced age, his deteriorating health and the ages of his grandchildren, the Upper Tribunal decided to determine the respondent's appeal first. The hearing listed for 21 January 2016 was converted into a Case Management Hearing and the 29 January 2016 was listed as the hearing date to complete the submissions on the appellant's cross-appeal.

8. Having heard full submissions in respect of the respondent's appeal, and having assessed those submissions, the Upper Tribunal was satisfied that the FtJ was entitled, on the particular facts of the case, to find the existence of Article 8 family life between the appellant and his daughter and grandchildren. The Upper Tribunal was also satisfied that the FtJ properly directed himself in accordance with the applicable legal principles, that his conclusion in respect of Article 8 was supported by adequate reasons, and that his finding that exceptional circumstances existed that rendered the entry clearance decision disproportionate under Article 8 was sustainable in law. The respondent's appeal was consequently dismissed in a decision promulgated on 11 December 2015. The respondent did not seek permission to appeal and the appellant was granted limited leave to enter the UK and did so.

9. On 16 December 2015 the Administrative Court granted permission to BritCits (a charity set up to represent the interests of sponsors and applicants affected by the Immigration Rules on family migration introduced in July 2012 and to campaign to revoke or alter them) to proceed with a judicial review in which it sought to quash the new ADR provisions of the Immigration Rules. In directions issued on 20 January 2016 the hearings listed for 21 and 29 January 2016 were vacated in light of the grant of permission in the BritCits judicial review. As the BritCits case also concerned a challenge to the lawfulness of the ADR Rules and the compatibility of the Immigration Rules with Article 8, the appellant's cross-appeal was stayed pending the handing down of judgment by the Administrative Court.

10. On 20 April 2016 Mr Justice Mitting gave an extempore judgment dismissing the judicial review claim on all grounds (**BritCits, R (on the application of) v Secretary of State for the Home Department** [2016] EWHC 956 (Admin)). Mr Justice Mitting however granted permission to appeal to the Court of Appeal. Following directions issued by the Upper Tribunal in September 2016 concerning the continued prosecution of the appeal, and in light of the parties' responses and the impending decisions of the Supreme Court in a trio of cases involving the status of the new Immigration Rules (**Hesham Ali** [2016] UKSC

60, **Agyarko** [2017] UKSC 11, and **MM (Lebanon)** [2017] UKSC 10), the Upper Tribunal directed that the cross-appeal would be listed after the handing down of the Supreme Court judgments. The directions also required the appellant's skeleton argument to include the precise formulation of his suggested interpretation of ECDR.2.5 by reference to s.3 of the Human Rights Act 1998.

11. Following the handing down of the Supreme Court decisions the cross-appeal was listed for 17 May 2017. The Court of Appeal however heard the appeal brought by **BritCits** in early May 2017. The hearing listed for 17 May 2017 was therefore vacated and, in directions issued on 9 May 2017, the Upper Tribunal indicated that the remaining cross-appeal would be listed for hearing on the first available date after the Court of Appeal handed down its judgement. The directions also noted that the appellant's skeleton argument was to include the appellant's precise formulation of his suggested interpretation of ECDR.2.5 by reference to s.3 of the Human Rights Act 1998.

12. The Court of Appeal handed down its judgment on 24 May 2017, dismissing BritCits's appeal on all grounds (**BritCits v The Secretary of State for the Home Department** [2017] EWCA Civ 368; hereafter '**BritCits**'). The appellant however requested that the cross-appeal before the Upper Tribunal be stayed as BritCits had lodged an application for permission to appeal with the Supreme Court. In directions issued on 1 August 2017 the parties were required to inform the Upper Tribunal when a decision was reached by the Supreme Court, and, if the Supreme Court refused permission, the appellant was to inform the Upper Tribunal within 14 days whether he wished to proceed with his appeal and, if so, to particularise in detail the grounds for so doing.

13. The Supreme Court refused permission to appeal in the BritCits case on 14 December 2017. By email dated 20 April 2018 the appellant's legal representative indicated that he wished to continue the appeal "… on the section 55 ground" (a reference to s.55 of the Borders, Citizenship and Immigration Act 2009, which requires decision-makers to take into account the welfare and best interests of children). The representatives wished to "… reserve [their] position in respect of the other grounds in respect of which BritCits lost." On 10 May 2018 the Upper Tribunal issued a notice for a Case Management Review Hearing (CMRH) to be held on 8 June 2018, directing that the parties were expected to identify in detail the issues in contention and to formulate with precision the arguments they intended to advance at the substantive hearing. The appellant's representative sought an adjournment of the CMRH citing the unavailability of counsel, but this was refused. There was no attendance by any representative on behalf of the appellant at the CMRH hearing. In response to directions issued by the Upper Tribunal following the CMRH, in which the Tribunal indicated that it was considering determining the appeal on the basis of written submissions, the appellant's counsel provided a Note formulating in outline the legal arguments to be advanced on the appellant's behalf and explaining why an oral hearing was necessary. The

Upper Tribunal consequently listed the appeal for hearing on 12 October 2018, but this was subsequently adjourned due to counsel's unavailability.

14. By letter dated 5 October 2018, the appellant's representatives informed the Upper Tribunal that the appellant passed away on 24 September 2018. The letter spoke of the "compelling" facts of the case and the representative's awareness of many applicants who were "shut out from accessing this Rule", and that, as the cross-appeal raised a number of important points of law, the appeal should not be considered academic. Although referring to the strength of feeling the case generated with the appellant's family there was no further evidence from the family and no details as to how instructions could be taken to continue the appeal given that the appellant had died.

15. In directions issued on 16 October 2018 the Upper Tribunal indicated that, in light of the appellant's death, it was again considering determining the appeal on the basis of written submissions to be provided by the parties. On the same day the appellant's representatives agreed to have the appeal determined on the basis of written submissions only, and the respondent agreed the same on 18 October 2018. In directions dated 7 November 2018, but issued on 13 November 2018, the Upper Tribunal directed that it would determine the appeal on the basis of written submissions as agreed by the parties, and set out a timetable requiring the appellant's representatives to serve their written submissions within 14 days of the sending of the directions, with the respondent serving its submissions within 14 days thereafter, and the appellant's representatives to file and response to the respondent's written submissions within 7 days of the respondent's deadline. The Upper Tribunal's directions also stated,

> "The written submissions from both parties must engage with and consider the relevance of the death of the appellant, the basis upon which the appellant's legal representative are able to take instructions and continue with the appeal, and any relevant provision of the Tribunal Procedure (Upper Tribunal) Rules 2008."

16. A request from the appellant's legal representatives to extend the time for serving their written submissions until 7 December 2018 was refused by the Upper Tribunal, and it was only on 17 December 2018 that the appellant's representatives filed the written submissions upon which they relied, which consisted of Mr Tony Muman's skeleton argument before the First-tier Tribunal dated 29 July 2014, the skeleton argument dated 15 October 2015 and the speaking Note dated 16 November 2015, both of which were prepared by Mr Ramby De Mello and Mr Muman for the Upper Tribunal hearing on 3 December 2015, and a document entitled 'Written Submissions on Behalf of the Cross-Appellant', dated 14 December 2018, prepared by Mr De Mello and Mr Muman.

17. Given the late service of the written submissions, the respondent was granted permission to lodge his response by 14 January 2019. The respondent's

submissions, drafted by Mr Alasdair Henderson, were lodged on 11 January 2019. There were no further submissions from the appellant's representatives.

The decision of the respondent, so far as material

18. The respondent noted that the appellant's application for clearance to enter the United Kingdom had been made as an adult dependant relative under Appendix FM of the Rules. The respondent considered the application under paragraph EC-DR.1.1 thereof, continuing:

> "You have applied to join your sponsor in the UK, [SD], and you have stated that she provides you with financial support in the form [*of*] providing you [*with*] accommodation here in India and payment of all of your utility bills and tax. However, you have not submitted any evidence of any financial support from your sponsor. You have also stated that you require care on a day to day basis due to both having medical conditions …
>
> You are aged 83 years and state that you have end stage macular degeneration in both eyes, Glaucoma and Ischemic heart disease …
>
> From the evidence I am not satisfied that these conditions are so severe that you would both require long term personal care to perform everyday tasks …
>
> I am … not satisfied that you require, due to either [*sic*] age, illness or disability, long term personal care to perform every day tasks. I therefore refuse your application under paragraph EC-DR1.1(d) of Appendix FM of the Immigration Rules."

The decision of the respondent continued:

> "Additionally you state that you have employed your domestic help … for several years and that she currently provides care for you; cooking for you and doing other daily chores. Although you state that only your daughter can provide the care you need, I am therefore not satisfied that you are unable to obtain the required level of care in India. I am also satisfied that the financial support you currently receive from your sponsor will continue and that any care if required could be provided through financial help from her."

Decision of the First-tier Tribunal, so far as material

19. The appeal to the First-tier Tribunal was pursued on three bases:

    (a) The appellant satisfied the age/illness/disability requirement enshrined in paragraph E-ECDR2.4/2.5 of the Rules.

    (b) In the alternative, the impugned decision infringed the appellant's right to respect for family life under Article 8 ECHR.

    (c) In the further alternative, the operative provisions of the Rules were incompatible with Article 8 ECHR.

20. The FtJ heard oral evidence from the sponsor. In summary, she maintained that a man called Chaitanya, who lived with the appellant in an apartment owned by the sponsor, provided daily help to the appellant. The sponsor described

how the appellant's health had deteriorated significantly. The sponsor was full of praise for Chaitanya, who had been able to provide 24-hour care. Chaitanya recently got married and wished to relinquish his employment. The sponsor had made enquiries but had not found anyone suitable to take over from Chaitanya. Although there were care homes in India the sponsor did not consider these would be a satisfactory option. The FtJ also considered a letter from the sponsor's daughter and letters from two couples who were friends of the sponsor and her husband. The FtJ also considered a statement from the appellant's carer, dated 10 April 2014, and a number of medical reports relating to the appellant.

21. The FtJ accurately set out the relevant legal provisions and noted the argument advanced by Mr Muman, who represented the appellant before the First-tier Tribunal. Mr Muman contended that the ADR Rules were not Article 8 compliant, and that the effect of the Rules was to virtually close the door for adult dependent relatives to settle in the UK with their children or grandchildren.

22. At [36] & [37] the FtJ stated,

> "In considering whether an immigration rule is unlawful, it is important to step aside from the Appellant's particular circumstances. The rule has to be looked at in the abstract. Further, I must recognise that material before me such as the reports of the All Party Parliamentary Group on Migration, and of JCWI are looking at the new rule with the benefit of hindsight when evidence of its impact is available. The Secretary of State, in promulgating the rule, does not have that advantage.
>
> I am not satisfied that the rule is discriminatory, manifestly unjust, made in bad faith involves an oppressive or gratuitous interference with people's rights. It is suggested that the rule has harsh consequences, but this is not the same thing. As far as the ECHR concerned, it is clear the Secretary of State thinks that the rule is not an inherently disproportionate interference with the rights to respect for family life."

23. At [38] the FtJ accepted that in many cases the Rule was likely to interfere with family life with a person in the UK and to a degree that potentially engaged and interfered with Article 8. The interference was however in accordance with the law as it was not suggested that the relevant changes had not been properly laid before Parliament, and the government's stated objective of reducing the burden on taxpayers and promoting integration and preventing and tackling abuse and contributing to reducing net migration were in the public interest and therefore a legitimate aim.

24. At [39] the FtJ stated,

> "… It is claimed that the rule does not recognise the position of minor children, whose welfare must, in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009, be taken into account. But in many adult dependent relatives there would be no minor children who would be

> affected by the decision. Even if there are, the effect of the decision upon their welfare may not always be great, either because the grandparents whose entry to the UK is being sought has not hitherto played a major part in the child's upbringing or because the child's parents have no thoughts of relocating the family to join the grandparents abroad in the event of leave to enter being refused."

25. The FtJ did not find that the relevant Rule was incapable of being proportionate.

26. The FtJ went on to consider whether the appellant met the requirements of E-ECDR.2.4 and E-ECDR.2.5. The judge was satisfied (at [44]) that the requirements of E-ECDR.2.4 were met and that the appellant was, at the date of the respondent's decision, in need of long-term personal care to perform everyday tasks.

27. At [45] the judge stated,

> "As regards the other requirement that is in issue, the Appellant has had the benefit of the support of Chaitanya Patra, who services the Sponsor is well able to pay for. The Sponsor states he wants to give up this role because he has got married. She says she has not found anyone who would be suitable to take over from him. However, I find it difficult to believe that there is no one in India who could continue to provide the level of care the Appellant has been receiving up until now. There is also the option of the Appellant going into a care home, although the Sponsor does not regard this as culturally acceptable. Mr Box, the Home Office Presenting Officer, placed before me some pages from the Internet referring to organisations offering care for the elderly in India, which, it seemed might be at a residential home or at the individual's own home. There is no indication as to the cost of such care, but as the Sponsor and her husband are quite well off, there is no reason to doubt that such services are affordable. In the circumstances I am not satisfied that the Sponsor [*sic*] is unable, with the practical and financial help of the Sponsor, to obtain the required level of care in India. I find he does not meet the requirement of E-ECDR.2.5. of Appendix FM."

28. At [47] the FtJ considered a report prepared by the Joint Council for the Welfare of Immigrants ("JWCI"), which he summarised thus:

> "The JCWI report refers to the culture in India of younger generations caring for elderly parents and grandparents under the same roof. Although there are care homes in the country, there are not enough of them providing good care and there is a stigma attached to the idea of formal care homes. The Appellant is, in my view, likely to be less vulnerable than many to the risk of being given inadequate care because he has children who would be in a position to pay for the best possible service. But this does not entirely remove the sponsor's anxiety about letting him go into a care home since, as long as she remains in the UK, she would have a very limited opportunity to monitor the level of care so as to give her reassurance that her father is well looked after. In considering the impact of the decision upon family life, it is appropriate to take into account the

> culture, which the sponsor refers to in her statement, that children are expected to take care of their parents when they are old and infirm. There is every reason to think that the sponsor would be in a position to continue to look after her father, if he is in the UK, for the foreseeable future without recourse to public funds."

29. The FtJ noted his duty to consider the welfare of the appellant's grandchildren as a primary consideration and found that the grandchildren, who were 13 and 15 at the date of the decision, did not have a remote relationship with the appellant given his frequent visits and that there was an emotional attachment between the grandchildren and the appellant. The FtJ accepted the evidence of the sponsor that if her father were unable to secure settlement in the United Kingdom she would leave and go to look after him in Delhi. The FtJ noted the further evidence on this issue emanating from the BMA. He continued:

> "The impact on family life upon the sponsor being forced to return to India after having spent many years in the UK is considerable. The welfare of the children would be particularly affected, as they would either be uprooted in order to live in a country which is very different from the one they have been brought up in or the family would be split while their mother is in India whilst they remained in the UK."

30. The FtJ concluded that the decision was a disproportionate interference with Article 8 and allowed the appeal on that basis.

Submissions on behalf of the appellant relating to his death

31. In their written submissions dated 14 December 2018 Mr de Mello and Mr Muman submit, in reliance on s.1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 ('the 1934 Act'), that the appellant's cause of action against the respondent survives for the benefit of his estate. Legislation provides for specific instances where an appeal is treated as discontinued or abandoned or excluded (e.g. s.104(4) of the Nationality, Immigration and Asylum Act 2002; rules 17 and 17A of the Procedure Rules; s.11(1) of the Tribunals, Courts and Enforcement Act 2007). The relevant legislation clearly and expressly state the limited circumstances where an appeal is automatically terminated and it is not permissible to imply any further circumstances when it can be said to be so. If the legislation intended to state that the appeal will be automatically terminated once an appellant dies it would have stated so. The appeal raises an extant point of law of general importance and wider interest and, combined with the fact that it is a pre-2014 Act appeal and the delays involved, the Upper Tribunal should continue to determine the cross-appeal notwithstanding the appellant's death.

32. It was submitted that the appeal was not rendered academic by the appellant's death. As this appeal was brought under the previous statutory appeals regime the "not in accordance with the law" ground was consigned to history save for this extant appeal. The Court of Appeal's decision in the **BritCits** case will invariably act as a block to any future challenge to the legality of the ADR rule.

The refusal of permission to appeal by the Supreme Court did not render the cross-appeal academic. The Supreme Court stated,

> "Permission to appeal be refused because the application does not raise an arguable point of law which ought to be considered at this time. This may well raise point which ought to come here on a particular set of facts (or sets of facts)."

33. The **BritCits** challenge was a judicial review and in the abstract. In the present appeal there was no question that the respondent's decision interfered with family life and was unjustified. The real challenge was to the underlying rule itself and it was highly probable that this was the only statutory appeal before the Upper Tribunal challenging the legality of the ADR rule *per se*. Whilst the appellant accepted that the Court of Appeal's decision in **BritCits** was binding on the Upper Tribunal, it was submitted that the Court of Appeal erred in dismissing the appeal. It was submitted that this was an issue that could only be determined by the Supreme Court and required conclusive determination. The current appeal was distinguishable from **BritCits** on the proven facts and the recognised unjustified interference with the appellant's family life rights and that of his British children and minor grandchildren.

Submissions on behalf of the respondent relating to the appellant's death

34. In the written submissions dated 11 January 2019 the respondent submitted that the Upper Tribunal did not have jurisdiction to determine the appellant's cross appeal, that the cross-appeal was bound to fail in light of the Court of Appeal's judgement in **BritCits**, that even if the cross-appeal were arguable it was academic as the appellant was granted entry clearance, and the fact that the appellant was now deceased meant that there was no cause of action and his estate could not continue the cross-appeal in his stead. There was no secondary beneficiary status that would change if the appellant were to succeed in his cross-appeal. With reference to the 1934 Act, for a cause of action to subsist (absent a few torts such as false imprisonment which are actionable *per se*), there must be not only a tortious wrong, breach of contractual obligation or public law error, but also some kind of damage or impact on the claimant. In this case, now that the appellant has died, there is no effect whatsoever, good or ill, upon him as a result of the outcome of these proceedings. There is therefore no longer any cause of action to pursue.

35. Nor have the appellant's legal representatives explained who they are now representing or how they are taking instructions. If they are representing the appellant's estate they would need to show that they were taking instructions from the executor(s) and that the estate had some interest in these proceedings. The appellant's legal representatives had not provided any detail in relation to either of these matters. It was therefore difficult to see how the cross-appeal could properly be pursued. To continue the appeal in the circumstances was an improper use of Tribunal time and resources.

Discussion

36. The Upper Tribunal was established by the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) (see s.3(2)). Its jurisdiction and scope of operation therefore stems from statute. A party has a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision" (s11(1) and (2) of the 2007 Act). S.12 of the 2007 Act reads, so far as its material:

> '**Proceedings on appeal to Upper Tribunal**
>
> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal —
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.'

37. Reading sections 11 and 12 it is apparent that the Upper Tribunal must determine whether there has been an error on a point of law in a First-tier Tribunal decision. The 2007 Act makes no express provision in respect of the death of a party.

38. Sections 104(4) and 104(4A) of the 2002 Act (as they were at the relevant time for the purposes of this appeal) provided for an appeal to be treated as abandoned if, in respect of an appeal brought by a person while he was she is in the UK, they leave the UK or are granted leave to enter or remain (subject to exceptions that are irrelevant for the purposes of this appeal). The appellant was not in the UK when his appeal was brought and s.104(4) and s.104(4A) would therefore not apply to him. The 2002 Act makes no express provision in the event of the death of an appellant.

39. The Tribunal Procedure (Upper Tribunal) Rules 2008 were made pursuant to s.22 of the 2007 Act. There is no express provision within the Procedure Rules dealing with a situation where a party has died. Rule 17 sets out the process by which the Upper Tribunal may give its consent to a party's application to withdraw all or part of its case, and Rule 17A provides that a party in an immigration case must notify the Upper Tribunal if the appellant has been granted leave to enter or remain in the UK and that where an appeal is treated as abandoned pursuant to sections 104(4) and 104(4A) of the 2002 Act the Upper Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned. Neither the appellant nor the respondent have applied to withdraw their case.

40. Section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 states,

> '**Effect of death on certain causes of action**
>
> (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this subsection shall not apply to causes of action for defamation.'

41. On behalf of the appellant it is contended that his cause of action against the respondent survives for the benefit of his estate. The appellant' cause of action consisted of an application for entry clearance under the Immigration Rules which, if he was successful in meeting the requirements, would have resulted in a grant of Indefinite Leave to Enter (ILE), and his challenge to the respondent's adverse decision by way of an appeal to the First-tier Tribunal.

42. The appellant's cause of action was concerned with his personal entitlement to a particular immigration status. The determination of this appellant's immigration status did not and could not realistically have any impact on anyone other than the appellant. The cause of action was, on the specific facts of this case, personal and exclusive to the appellant. It did not involve debt or a claim for damages of any kind (the First-tier Tribunal, in any event, has no power to award damages on an appeal against an entry clearance decision and the powers of Upper Tribunal in respect of a statutory immigration appeal does not include jurisdiction to make an award of damages).

43. Section 1(1) of the 1934 Act enables a cause of action to be maintained "for the benefit of" a person's estate. There can however be no benefit to the appellant's estate from his cause of action. Although the cause of action was concerned with a public law status, it was entirely personal to him. The appellant's estate is incapable of benefiting from a posthumous grant of ILE rather than the grant of limited leave following his successful Article 8 appeal. The cause of action related exclusively to the appellant as a living individual. It is difficult to see how his challenge can continue to subsist in the absence of any other tangible benefit that could conceivably accrue to his estate. As such, I find that this appellant's cause of action cannot continue after his death. I do not consider the absence of any express provision dealing with these circumstances supports the submission made on behalf of the appellant that it is impermissible to imply any further circumstances in which an appeal is terminated. My attention has not been brought to any case law or other legislative provision capable of supporting the submissions made on behalf of the appellant in reliance on the 1934 Act. As there is no longer an appellant capable of maintaining this appeal, the appeal falls to be dismissed on this basis.

44. This is sufficient to dispose of these proceedings. An appeal cannot continue if the appellant has died and the determination of his immigration status cannot benefit his estate or anyone else.

45. It is additionally unclear how the appellant's legal representatives are now able to represent the appellant and how they can take instructions. As was pointed out in the respondent's submissions dated 11 January 2019, if the legal representatives are representing the appellant's estate they would need to show that they are taking instructions from the executor(s) and that the estate has some interest in the proceedings. In my directions issued on 13 November 2018 I requested that appellant's representatives explain the basis upon which they were able to take instructions and continue with the appeal. The written submissions advanced on behalf of the appellant stated that, "… the estate now wishes to pursue the extant cross-appeal on his behalf." I have not received any documentation from the executor(s) of the appellant's estate and I have not been informed of any application made by the appellant's estate for an order to enable them to carry on proceedings.

46. In light of my above findings it is not necessary for me to consider the appellant's other submission in great detail, and I do not propose to do so. By his cross-appeal, the appellant contended that the FtJ erred in law in dismissing his appeal under the Immigration Rules. Underlying this contention is the proposition that the relevant provision of the Immigration Rules is unlawful as it is *ultra vires* and/or irrational and/or incompatible with Article 8. The written submissions dated 14 December 2018 contend that "the real challenge in the appeal is to the underlying rule itself" (at paragraph 18) and this is an appeal "challenging the legality of the ADR rule *per se*." However, as recognised in the same submissions, the Court of Appeal decision in **BritCits** is binding on this Tribunal (see paragraphs 15 and 20 of the written submissions). Although the challenge before the Court of Appeal was brought by an organisation and not an individual appellant, the Court considered a large body of written evidence including several 'paradigm cases' with similar facts involving grandchildren (e.g. [18] and [46]). Although the Court of Appeal accepted that the new rules imposed "a rigorous and demanding test" they were held to be lawful and compatible with Article 8. I note that a challenge to the lawfulness of the relevant part of Appendix FM ((E-ECDR.2.5)) was withdrawn in the context of a statutory appeal in **Ribeli v Entry Clearance Officer, Pretoria** [2018] EWCA Civ 611 following the decision in **BritCits**.

47. Whilst I accept the canons of construction advanced by the appellant's representatives at paragraph 29 of the December 2018 submissions (that E-ECDR.2.5 should be construed compatibly with Article 8 ECHR and s.55 of the Borders, Citizenship and Immigration Act 2009), the FtJ's approach to E-ECDR.2.5 was in accordance with such an approach. At [45] (see paragraph 27 of this decision) the FtJ considered the particular care needs of the appellant and was rationally entitled to conclude that the level of care the appellant required, as had previously been provided by Mr Patra, would be available in India and that this included the possibility of the appellant entering a care home or by way of care provided to him in his own home. The FtJ's construction of the requirements of E-ECDR.2.5 was in accordance with section 3 of the Human Rights Act 1998 (requiring legislation to be read and given

effect in a way which is compatible with Convention rights) and with s.55 of the Borders, Citizenship and Immigration Act 2009 given that the focus is on the 'level of care' that is potentially available in India.

48. Even if an error of law were uncovered (which is not the case), it would not be appropriate to set the decision aside given the death of the appellant and the exclusively personal nature of his claim. The appeal would, for similar reasons, fall be to be dismissed on the basis that it is academic (applying **SM (withdrawal of appealed decision: effect) Pakistan** [2014] UKUT 00064 (IAC) and **MS (A child) v The Secretary of State for the Home Department** [2019] EWCA Civ 1340). The appellant's representatives submit that the issues raised in this appeal are untested and of general importance, but they have been conclusively determined in the **BritCits** litigation. The fact that this appeal is brought under the appeals regime prior to that introduced by the Immigration Act 2014 does not prevent the legality of the immigration rules or their application from being challenged in a future case either by way of judicial review or statutory appeal (a refusal of an application under the ADR provisions of Appendix FM constitutes a refusal of a human rights claim which gives rise to a right of appeal and, although the 'not in accordance with the law' ground of appeal is no longer available, the legality of the immigration rules may still be a relevant factor that a Tribunal is entitled to consider when determining the overall proportionality of the challenged decision under Article 8).

Notice of Decision

The appeal under the immigration rules is dismissed.

(The First-tier Tribunal had allowed the Article 8 human rights appeal, and this is maintained)

D. Blum

4 September 2019

Signed
Upper Tribunal Judge Blum

Date