Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07902/2019

THE IMMIGRATION ACTS

Heard at Field House via Skype	**Decision & Reasons Promulgated**
On 6th May 2021 & 4th June 2021	**On 22 July 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

NIAMKEY ESTHER MOCKEY EPSE DADIE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Simak instructed by SLA Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Lawrence promulgated on 25th March 2020 dismissing her

appeal against the respondent's decision not to grant the appellant leave to enter the UK as an adult dependent relative.

2. The grounds for the application for permission noted that the judge concluded that but for the appellant's condition requiring "long-term personal care" the conditions for a grant of leave as an adult dependent relative under Appendix FM were met. The judge also found that since the appellant's stroke in October 2019, not only that the appellant remained in hospital, but one of her three daughters, all of whom were settled in the UK with their family had to be with the appellant in the Ivory Coast. The appellant questioned the judge's interpretation of the term "long-term".

3. Secondly, the appellant invited the court to consider the application for permission to appeal in the context of the passage of time and the continuity of the appellant's dependency. Given the nature of the dispute it was incumbent on the judge to consider that ten months had passed, and the appellant's condition had not improved. The admission of this new argument into an appeal at the error of law stage of appeal proceedings was permissible, either by way of **Ladd v Marshall** [1954] EWCA Civ 1 or subject to exceptional circumstances in the interests of justice.

4. On the appellant's case the second condition (exceptional circumstances) was met, particularly where the appeal concerned fundamental human rights.

5. The appellant's position in the above regard held that where new evidence was credible and sufficiently cogent to be capable of affecting the final decision the court should be slow to exclude it **R Immigration Tribunal ex parte Azkhosravi [2001] EWCA Civ 977**.

6. It was also submitted that the judge did not undertake a proper assessment of undue harshness test when undertaking his assessment of the appellant's Article 8 ECHR interest and misdirected himself given his conclusions.

7. On the proper application of the exceptional circumstances in **R (Agyarko) v the Secretary of State for the Home Department [2017] UKSC 11** the court accepted the following propositions that:

(1) Ultimately the court has to decide whether the refusal is proportionate by "balancing the strength of the public interest in the removal of the person in question against the impact on private and family life." (Paragraph 57)

(2) "The ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test." (Paragraph 60).

(3) The court noted that the respondent:

> *"has defined the word 'exceptional', as already explained, as meaning 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate." (Paragraph 60).*

8. The test did not require a demonstration of unusual or unique circumstances on the appellant's part.

9. The correct starting point is that adult family relationships may be protected by Article 8 if there are elements of more than mere emotional dependency as per **Ghising (family life – adults – Ghurkha policy) [2012] 160**.

10. In **Kugathas v Secretary of State for the Home Department** [2003] EWCA Civ 31; [2003] INLR 31 Sedley LJ referred to dependency as "real" "committed" or "effective" support. The approach to unjustifiably harsh consequences was adopted by the respondent in her IDIs entitled family migration Appendix FM Section 6 adult dependent relatives (August 2017).

11. The grounds asserted that First-tier Tribunal Judge Lawrence in his determination identified no proper public interest consideration of any moment necessitating interference with family life at all, never mind a compelling one.

12. Upper Tribunal Judge Lindsley granted permission on the basis that as the appellant's care had continued from November 2019 to 25th March 2020 "it is arguable that there is insufficient reasoning to explain why it was concluded that the situation would not be continuing given she is 66 years old and arguably is found to have permanent right-side weakness. Similarly it is arguable that the finding that there are no Article 8 ECHR family life ties between the appellant and her daughters at paragraph 39 of the decision is insufficiently reasoned, particularly as this was not disputed by the respondent". Permission was granted.

13. A supplementary bundle of evidence was provided to the Upper Tribunal on 26th April 2021. This included a further letter from Dr Koutou entitled 'medical certificate' dated 1st February 2021.

14. At the hearing before me it was submitted that by the time the case had gone before Judge Boyes, who refused permission to appeal, the appellant was still in hospital and the appellant remained in hospital. The judge had been confused over the long-term care. The appellant had had a stroke in 2019 and her daughters had gone to the Ivory Coast. The new evidence, in the form of the letter from Dr Koutou dated 1st February 2021 should be admitted at this stage because of the question over the appellant's long care and on the basis of exceptional circumstances. There were conditions for submitting this evidence because of the interests of justice. I questioned whether evidence could have been obtained at the time, but it was submitted that the evidence was available now and the appellant's

condition was not improving. It appeared Ms Simak did not have the medical reports before her.

15. Mr Lindsay submitted that the supplementary bundle provided with the application for permission to appeal postdated the First-tier Tribunal decision and was not capable of assisting the case today because it postdated the decision and was not directed to the date of decision nor demonstrated that the judge had erred. **Ladd v Marshall** was directed to admissibility and to the evidence which existed at the time. It was a common thread that the appellant had not proved that she required long-term personal care and the judge was entitled to make that finding and therefore under the Immigration Rules the appellant would fail, the public interest was not outweighed and thus the Article 8 claim would fail. At the time the appellant was in hospital but what was lacking was detailed medical evidence on her condition and it was not clear the extent of the appellant's limitations and further it was unclear why the appellant would need her family to care for her when in fact she was in hospital. On the evidence this appellant was bound to fail. The failure to find that the appellant needed long-term care was fatal to any claim outside the Rules. On Article 8 outside the Rules the claim was bound to be dismissed unless there unjustifiably harsh consequences and there were none here. Contrary to the Upper Tribunal grant of permission to appeal the judge did find no family life on **Kugathas** grounds and the judge took an alternative approach. That said, Article 8 private life was not engaged because this was an entry clearance matter.

Analysis

16. The hearing in the First-tier Tribunal was held on 10th February 2020, the daughter of the appellant Ms Agnes Callaghan gave evidence and the judge had before him a medical certificate signed by Dr Olivier Koutou Doctor of Medicine of the Port-Bouet General Hospital dated 3rd February 2020. In that letter the doctor states that the appellant is

> *"a known diabetic and hypertensive patient for the past two years, but not cooperative with follow-up care and treatment, now has a right-side hemiparesis with a left-side facial paralysis resulting from a haemorrhage cerebral vascular accident, following a spike in blood pressure occurring in October 2019".*
>
> *She is having functional physiotherapy sessions with anti-hypertensive and anti-diabetic oral medications.*
>
> *This medical certificate is issued to her for all for all statutory effects. I so attest".*

17. The judge at paragraphs 34, 35 and 36 stated the following:

> *"34. Ms Callaghan stated that one of her sisters had been to visit the Appellant for four weeks in November 2019, and that another*

was with her presently. There was only Ms Callaghan's word for that, but I found those aspects of her oral evidence to be plausible and credible, despite the lack of documentary evidence which could have been produced.

35. *Ms Callaghan referred in her oral evidence to 'the report' stating that the Appellant could not use her left side, whereas the certificate in fact states that the Appellant has weakness (hemiparesis) in her right side, but the difference is of no consequence. There was consistency with Ms Callaghan's oral evidence that the Appellant presently needs help getting dressed.*

36. *There is in my consideration therefore sufficient evidence that the Appellant needs personal care to perform everyday tasks, owing to age, illness or disability. There is no evidence as to the likely duration of that need however, and although it is possible that that the need is long-term in nature, I do not consider that I am able to find that that is inherently likely, even after a stroke that has left her with weakness. Therefore I do not consider that the Appellant has established that it is so to the applicable evidential standard that as a result of age, illness or disability she requires long-term personal care to perform everyday tasks."*

On the basis of the medical certificate that was provided for the judge at that time, there was no evidence as he stated, of the likely duration of the need for personal care and it was entirely open to the judge to find that he was not able to find, even after a stroke, which had left her with 'weakness' (without being further defined) that she required long-term personal care or indeed the extent of its intensity. The certificate merely stated, as the judge identified, that the appellant was continuing to have "functional physiotherapy sessions" and as the judge stated, "but the nature of the therapy and the need it presumably targeted are not stated in the certificate". Indeed the appellant had not been cooperative with follow-up care but there was no suggestion that she continued to be uncooperative as the judge referenced.

18. The judge also took into account the oral evidence of Ms Callaghan who identified that she was the eldest of four daughters and the oral evidence recorded that one of her sisters had visited the appellant four weeks in November 2019, but another was with her presently. There was no indication that Ms Callaghan had visited, and I note the grounds identify that three of the daughters, are settled in the UK with their children and families but does not refer to the fourth.

19. The witness statement of Ms Callaghan recorded that "At the moment she had nobody to assist her day-to-day upkeep. All of us are in the UK and it is only proper that she comes to live with us so that we can take good care of her". That did not acknowledge that the appellant was in fact in

hospital nor detail the long-term personal care required and in the face of the evidence the judge was entitled to conclude as he did that there was no evidence that the appellant was in need of long-term personal care as a result of her "weakness".

20. The judge identified that there was a lack of documentary evidence as at the date of the hearing; he was entitled to find it was limited and his conclusions were open to him despite the oral evidence. His reasoning was adequate and took into account the oral and documentary evidence.

21. Subsequent to the First-tier Tribunal decision, further evidence was produced on 26th April 2021 showing flights booked presumably in 2019 and a further medical certificate from Dr Koutou stating, "done in Abidjan on 1st February 2021" and referred to the fact that "*She suffered an incapacitating right side hemiparesis with left side facial paralysis ...The patient is still hospitalised, and her state of health requires the presence of her family members to assist with her medical care and nursing needs".* There was no explanation as to why the appellant needed her family members and there was no further detail of the care required.

22. I am not persuaded that **Ladd v Marshall** applies in this instance. The principles explained in Ladd and Marshall are as follows

> '*In order to justify the reception of fresh evidence or a new trial, three conditions mast be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible'.*

23. The 'new' evidence was not in existence at the date of the First-tier Tribunal and reflected a changing medical condition and cannot arguably serve to undermine that decision of the First-tier Tribunal. The 'new' report was compiled almost one year after the hearing. It was open to the appellant to produce at the time, particularly as she was represented, evidence in relation to her medical condition and requirements at the relevant time and indeed she made her application knowing the requirements under the Immigration Rules. The judge at the First-tier Tribunal accurately reflected the nature of the evidence before him and it is the legality of that decision which is relevant. As identified above there was minimal information on long term care. The second limb to the argument appeared to be that there were exceptional circumstances particularly in asylum cases in the interests of justice and applying the requirement for anxious scrutiny following **E v the Secretary of State for the Home Department [2004] EWCA Civ 49**.

24. Reasonable diligence would have ensured that a comprehensive medical report was produced prior to the date of the First-tier Tribunal and

although I enquired there were no exceptional circumstances outlined, merely that the appeal concerned the fundamental human rights interests of the appellant as well as her daughter's and their settled families in the UK. This appellant has been living in the Republic of Ivory Coast on a long-term basis and undertaking visits to the United Kingdom and as Mr Lindsay pointed out, this is an entry clearance application.

25. Even so, the medical certificate produced latterly did not take the appellant's case any further forward and indeed there was no explanation of why, if the appellant was in hospital, she required the presence of her family members to assist with medical and nursing needs.

26. Turning to the criticism of the judge's approach to the Article 8 assessment, it was asserted that the judge failed to undertake a proper assessment of undue harshness. Outside the Rules the correct test, as identified, is that set out in **Agyarko** such that the court has to decide whether the refusal is proportionate and whether the refusal would result in unjustifiably harsh consequences for the individual. It was advanced that a First-tier Tribunal Judge did not in his determination identify a proper public interest consideration of any moment, never mind compelling ones. That is incorrect.

27. It was further asserted that the correct starting point is that adult family relationships may be protected by Article 8 if there were elements of more than emotional dependency as per **Ghising family life adults Ghurkha policy [2012] UKUT 00160** and as per **Kugathas**. It was open to the judge, having applied **Kugathas**, as he did at paragraph 39, to consider that the appellant had not established to the required standard of a balance of probabilities that her relationship with her daughters in the UK involved elements of dependency beyond normal emotional ties between adult relatives. That was a finding the judge was entitled to make on the evidence particularly in view of the fact of the long-term location of the appellant and the limited nature of evidence from the other sisters who had apparently visited the appellant in the Republic of Ivory Coast.

28. The judge however addressed the position in the alternative that even if the appellant did enjoy family life, she did not satisfy the requirements for a grant of leave to remain under the Immigration Rules (see paragraph 42 of that decision). That sets out the position of the Secretary of State and the relevant immigration rules which have been found not to be incompatible with Article 8, **Britcits v Secretary of State** [2017] EWCA Civ 368. The public interest was thus identified and factored into the equation by the judge. As the judge identified at paragraph 47 with reference to the Immigration Rules

> *"The weight to be attributed to the achievement of that policy and those objectives rather than the retention of sponsors who might prefer to re-locate to countries which have a less rigorous policy for permitting dependants to enter and remain, and rather than avoiding*

the risk of deterring potentially desirable immigrants, was essentially a matter for the government and Parliament to decide".

29. The judge rightly identified that a balance was to be struck on the facts of any particular case, but the judge also cited that as explained at paragraph 59 of **Britcits**, the standard of care available in an applicant's home country had not been evidenced by the appellant and that "any such considerations or requirements are relevant to her case, aside from establishing that two of her daughters have visited her since she suffered a stroke, but that is not sufficient".

30. The judge thus did identify the public interest considerations and it was open to him to weigh the evidence as it was and strike the balance as he did. Mere disagreement about the weight to be accorded to the evidence, which is a matter for the judge, should not be characterised as an error of law, **Herrera v SSHD** [2018] EWCA Civ 412.

31. As set out in **Agyarko** at paragraph 47

> *"47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case..."*

32. Additionally, the judge found when applying Sections 117B(2) and (3) of the Nationality, Immigration and Asylum Act 2002, as he was obliged to do, that there was no indication that the appellant could speak English and the judge noted that the respondent accepted that the appellant met the eligibility financial requirement, and this would not count against her (paragraph 44). Although not relevant to my decision, I note that it was asserted that the appellant was in need of medical care and yet there was no evidence that private medical care was set up for her. That the judge did not take this point, however, was to the appellant's advantage.

33. In the circumstances, the judge's brief but relevant findings on proportionality were properly reasoned and justified and on the evidence the question of proportionality properly decided, namely that the refusal on entry clearance was not incompatible with the appellant's right to respect for her family life under Article 8, or indeed that of her family in the UK.

Notice of Decision

34. I find no error of law and the decision shall stand. If the appellant wishes to adduce new evidence the correct approach in these circumstances is to make a new entry clearance application.

No anonymity direction is made.

Signed Helen Rimington Date 12th July 2021

Upper Tribunal Judge Rimington