Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: UI-2021-001321
[HU/03492/2020]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 July 2022	**On 2 September 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

HORTENCE NZAM MCHINDJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Adam Pipe, instructed by BHB Law
For the Respondent: Esen Tufan, Senior Presenting Officer

DECISION AND REASONS

1. On 1 June 2022, I issued my first decision in this appeal. I found that the First-tier Tribunal (Judge McKinney) had erred in law in dismissing the appellant's appeal against the refusal of her application for entry clearance. I set aside the FtT's decision in part and ordered that the decision on the appeal would be remade in the Upper Tribunal. The instant decision follows a further hearing which was convened for that specific purpose on 11 July 2022,

Background

2. A copy of my first decision is appended to this one. The background to the appeal and the errors in the decision of the First-tier Tribunal are set out at length therein and need not be rehearsed in this decision.

3. The appellant is a widow. She is a national of the DRC who is currently 63 years old. She sought entry clearance in order to join her daughter (the sponsor) in the United Kingdom. Her daughter – Ms Kashala - is a recognised refugee who lives in Coventry with her husband, who is a postman, and their four children (the youngest of whom was born as recently as May this year).

4. The application was refused by the Entry Clearance Officer for reasons which were set out at [4]-[8] of my first decision. On appeal, however, some of those matters were resolved conclusively in the appellant's favour. It was accepted that she and the sponsor were related as claimed. The judge also found that the appellant required long term personal care to perform everyday tasks and that she would be adequately maintained and accommodated in the United Kingdom. The judge found that the appellant was unable to meet the requirements for entry clearance as an Adult Dependent Relative, however, because she had not established that care could not be provided in the DRC. There was no appeal to the Upper Tribunal against that conclusion, and the FtT's decision under the Immigration Rules stands.

5. The grounds of appeal were directed to the residual Article 8 ECHR assessment undertaken by the judge. In many respects, I found that the grounds of appeal were not made out. I set out my conclusions on those aspects of the grounds at [26]-[31] of my first decision. With some hesitation, however, I did accept that the judge had erred in her assessment of the first and fifth questions posed by Lord Bingham in R (Razgar) v SSHD [2004] UKHL 27; [2004] 2 AC 368. I accepted, therefore, that the judge had erred in leaving material matters out of account when considering whether Article 8 ECHR was engaged in its family life aspect: [32]-[36]. I also accepted that there were errors in the FtT's assessment of whether the decision to refuse entry clearance was a proportionate measure: [37]-[40]. So it was that I directed that the decision on the appeal would be remade but only insofar as it related to the residual Article 8 ECHR claim, with the findings under the Immigration Rules preserved.

The Resumed Hearing

6. I ordered that the resumed hearing would be in person and that there should be a French interpreter for the sponsor. I was informed before the start of the hearing that no interpreter was in attendance. I explained this difficulty to Mr Pipe. He wished to proceed without evidence from the sponsor, and was content for the sponsor's partner to be the only live witness.

7. The respondent was not due to be represented by Mr Tufan, although he had represented her at the first Upper Tribunal hearing. Ms Ahmed was due to represent the respondent but was taken ill shortly before the hearing. Mr Tufan was able to attend and familiarise himself with the papers at very short notice and I am extremely grateful to him for ensuring that this appeal could be determined without further delay. It is to Mr Pipe's credit that he also expressed his thanks to Mr Tufan at the end of the hearing.

8. Mr Pipe confirmed that there had been two bundles before the FtT: one large bundle of 335 pages and one of 19 pages. He did not wish to make any reference to the smaller of these bundles as the material within it related only to matters (financial support and the adequacy of maintenance) which had been resolved in the appellant's favour by the FtT.

9. Mr Pipe renewed the application previously made to rely on additional evidence which had not been before the FtT. This comprised a short additional bundle of 22 pages. There was no objection by Mr Tufan to the admission of that bundle, and I was content to accede to the application. Mr Tufan did not have the supplementary bundle. Mr Pipe helpfully indicated that it was only the first document in that bundle (a hospital letter) to which he would make specific reference. I gave Mr Tufan time to read this document, after which he indicated that he was content to proceed.

10. I then heard oral evidence from the sponsor's husband, who adopted his witness statement before being asked supplementary questions in chief by Mr Pipe. He was cross examined by Mr Tufan and asked some clarificatory questions by me before being re-examined briefly by Mr Pipe. I do not propose to rehearse his oral evidence in this decision. I will refer to it insofar as it is necessary to do so in order to explain my findings of fact.

Submissions

11. Mr Tufan submitted that the appeal was one in which it was accepted on all sides that the requirements of the Immigration Rules were not met. It had been found by the FtT, in particular, that the appellant would be able to obtain the required level of care in the DRC. That conclusion had not been challenged and necessarily informed the assessment of Article 8 ECHR. In this connection, he cited what had been said by Sales LJ in BRITCITS v SSHD [2017] EWCA Civ 368; [2017] 1 WLR 3345, particularly at [88]. Ultimately, the question was whether there were unjustifiably harsh consequences, bearing in mind the public interest in the appellant's exclusion.

12. Mr Tufan noted that it was to be submitted that section 55 of the Borders, Citizenship and Immigration Act 2009 militated in favour of the appellant's admission. In reality, that was not the case; the appellant's grandchildren had never met her.

13. The focus, therefore, was on the appellant's situation. This had become clearer during the appellant's oral evidence. She was supported by her family in the UK to the tune of $200 US per month. Her medication was bought and delivered to her by a family friend, Mr Ngandu. Mr Ngandu's wife did her shopping for her on a regular basis and delivered the food to her. She was in contact with her family by mobile phone, which was charged for her by street vendors. She was able to go to church on a Sunday. It was clear that she was suffering from certain conditions but there were still holes in the evidence, particularly as regards her medication and her mental health. It was not clear why the sponsor was supposedly renting a property in poor repair for her and the sum of money which was sent to her would be significant by Congolese standards. Whilst it was accepted that there was a family life in existence, it was nevertheless proportionate to exclude the appellant in light of the policy behind the ADR Rules.

14. Noting Mr Tufan's submissions about the sums which were remitted to the appellant, I invited the advocates to agree a figure for the average per capita monthly income in the DRC, and rose to give them an opportunity to do so. On my return, Mr Tufan and Mr Pipe were content to agree that the various figures they had located on the internet were all in the same region, of between $785 US per annum and $1098 US per annum. The former figure was from Wikipedia, citing the World Atlas from 2018. The latter figure was from the CIA World Fact Book of February 2021, which gave that figure for 2019.

15. Mr Pipe relied on the skeleton argument he had prepared for the FtT hearing. He confirmed that the only live issue was Article 8 ECHR, since the FtT's findings under the Immigration Rules had not been challenged. It was of note that various requirements in the Rules were met, however. Into that category fell the suitability requirements, the maintenance requirements and the need for the appellant to require long term personal care.

16. It was accepted by the respondent that Article 8 was engaged in its family life aspect and the authorities did not preclude the possibility of a case succeeding on human rights grounds where it had failed under the Immigration Rules.

17. The appellant's family circumstances were not in dispute. She had another daughter but there had been no contact with her for some years. There had been no explicit finding about that in the FtT but the evidence had not been challenged by the respondent at any stage. The appellant has no family in the DRC and is in poor health. So much was clear from the medical evidence in the original and supplementary bundles. There was no list of medication and the appellant had not been prescribed any mental health medication but her conditions were clear.

18. It was not the appellant's case that her medical treatment was deficient. Her case was, instead, that she needed the day-to-day support of her family. It weighed against her that she does not meet the ADR Rules. That was accepted, but some parts of the Rules were clearly met.

It was also relevant to consider that the appellant's daughter could not visit her in the DRC, as she is a refugee from that country. The appellant was aging, infirm and alone and she was desperately sad to be kept apart from her family in the UK, including her grandchildren. Annual visits by the sponsor's husband were insufficient, not least because he was working hard and trying to support four children. The appellant received funds from the UK but she was not living in luxury. Refugee family reunion was an important principle and it was unjustifiably harsh on the facts of this particular case to keep the family apart.

19. I reserved my decision at the end of the submissions.

Analysis

20. I was impressed with the evidence given by Mr Mpongo. He is a postman who earns something in the region of £27,000 per annum according to the payslips and P60 in the papers. He is the main breadwinner in the family, although I note that the sponsor has also worked for a firm called Zenith Contractors, as a cleaner. They are able as a family to remit in the region of $200 US to the appellant every month. Mr Tufan did not submit that Mr Mpongo had attempted to mislead me in any respect and he was correct not to make that submission. Mr Mpongo struck me as a witness of truth.

21. He gave clear evidence about his mother-in-law's circumstances in the DRC, having observed those circumstances during his annual visit in November 2021. He explained that her property is a single room, that she has no electricity, and that she is miserable as a result of her infirmity and loneliness. He was clearly conscious of the fact that this evidence was helpful to the appellant. He was equally content to volunteer evidence which, in my judgment, he knew to be unhelpful to the appellant. He explained that her medication and her food is delivered to her and that she is able to have her mobile phone charged by street vendors. He volunteered that she went to church on a Sunday. My overall impression of Mr Mpongo was that he was a kind man who was determined to do what he could to help his mother-in-law but that he was also determined to tell the truth. I accept the evidence he gave.

22. Mr Tufan did not attempt to contest Mr Pipe's submission that Article 8 ECHR is engaged in its family life aspect. Again, I consider that he was correct to adopt that stance. It is accepted on all sides that the appellant is wholly dependent upon her family in the UK financially. There is no reason to doubt Mr Mpongo's evidence that she is isolated and alone and that she speaks to her family in the UK every day, during which she often becomes upset. I need not traverse the development of the jurisprudence on this subject, from Advic v United Kingdom (1995) 20 EHRR CD 125 to Mobeen v SSHD [2021] EWCA Civ 886 via Kugathas v SSHD [2003] EWCA Civ 31; [2003] INLR 170. Despite the distance between the members of the family, it is clear that the appellant receives real, committed and effective financial and familial support from her

sponsor and her husband. The irreducible minimum of what family life implies exists in this case.

23. The real question, therefore, is that upon which the submissions focussed, of whether the appellant's ongoing exclusion is a proportionate measure. In order to consider that question, it is necessary to consider the balance sheet of considerations weighing for and against her admission. I begin with the matters which are said by Mr Tufan, on behalf of the Entry Clearance Officer, to justify the appellant's ongoing exclusion.

24. Whilst Mr Pipe understandably highlights that various requirements of the Immigration Rules are met, it is necessary to note that the appellant failed before the FtT because she was unable to establish that she would be unable to obtain the required level of care in the DRC. Unlike many requirements of the Immigration Rules, the policy intention behind this aspect of the Immigration Rules has been stated expressly by the respondent and has been considered judicially in the Court of Appeal.

25. In BRITCITS, the Court of Appeal considered a head-on challenge to the lawfulness of the (then newly introduced) ADR Rules which was brought on three grounds: that the Rule was ultra vires the 1971 Act; that it was arbitrary and unreasonable; and that it was incompatible with Article 8 ECHR. The claim failed before Mitting J but he gave permission to appeal to the Court of Appeal.

26. The Court of Appeal (Sir Terence Etherton MR, Davis LJ and Sales LJ (as he then was)) considered and rejected each of the three grounds. The Master of the Rolls and Sales LJ each gave reasoned judgments. Davis LJ agreed with both. At [18] of his judgment, the Master of the Rolls noted the reliance placed by leading counsel for the appellant on what she described as the paradigm factual situation:

> a UK citizen with an elderly parent resident outside the UK, who is dependant on the UK citizen, and both the parent and the UK citizen wish the parent's last years to be spent being cared for by his or her child and enjoying time with his or her grandchildren.

27. In his assessment of the appellant's Article 8 ECHR submissions, the Master of the Rolls returned to that paradigm case and concluded that it could not be assumed that Article 8 ECHR would be engaged in such a case. He also stated, amongst other things, that 'significant weight' was properly to be attached to the fact 'the proposed policy and objectives of the new ADR Rules were the subject of prior consultation, debate within Parliament and Parliamentary approval following that debate': [77]. In the following paragraph, he stated that the balance (of proportionality) depended on the facts of the particular case, taking into account 'the particular strength of the family bond and all other matters in favour of the particular applicant, on the one hand, and the public interest in achieving the policy and objectives of the new ADR Rules'.

28. Sales LJ's concurring judgment was to similar effect. At [86], he suspected that there would be a significant number of cases of the paradigm type described in which Article 8 ECHR would not even be engaged. At [88], he said this:

> Applying that formulation of the test, it is clear that the appellant cannot satisfy it in this case. There is ample scope for the ADR rules to be operated lawfully and without violation of Article 8 rights both because (a), as explained above, in some cases where the rules are applied Article 8 will not be engaged and application of the rules will not involve any interference with Article 8 rights and (b) even in cases where Article 8 is engaged, the interference with Article 8 rights arising from application of the rules will often be justified by reference to the public interest objectives identified by the Secretary of State and will often be proportionate. Point (b) is reinforced by the proper interpretation of the relevant rules as explained by the Master of the Rolls. If the care required by an elderly relative cannot reasonably be provided overseas the relative may well be able to succeed in gaining leave to enter under the ADR rules; conversely, if the required care *can* reasonably be provided overseas, it is likely that it will not be disproportionate to apply the ADR rules with full force and effect in such a case. (There might be some scope in the specific circumstances of a particular case for seeking leave to enter or leave to remain outside the rules in reliance on Article 8 rights, as explained by Laws LJ in *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082; [2009] Imm AR 254, at [39], and by Baroness Hale and Lord Carnwath in *MM (Lebanon)* at paras. [57] and [58]; but it is unnecessary to say more about this in the context of the challenge to the ADR rules themselves in this case). [emphasis added]

29. As I have said, the observations above were made after an extensive evaluation of the background behind the introduction of the ADR Rules and are necessarily highly relevant to the weight which is to be attached to the appellant's failure to meet this particular part of the Immigration Rules.

30. As a result of the decision in BRITCITS, no challenge to the lawfulness of the ADR Policy in the Rules was pursued in Ribeli v ECO (Pretoria). That was in many respects a case which turned on its own facts, although I note the extensive citation from BRITCITS and the observation made by Singh LJ in the final paragraph, [72], about the weight which is to be given to the assessment made by the Secretary of State and Parliament of what the public interest requires. Similar observations were made by Carr and Underhill LJJ at [52], [68] and [78] of Mobeen v SSHD.

31. On the respondent's side of the scales, therefore, I am bound to attach significant weight to the appellant's failure to meet the rigorous and demanding requirements of the ADR Rules. I am bound, in particular, to attach significance to the policy which underpins paragraph E-ECDR.2.5

of Appendix FM, which is that those such as the appellant will only be able to settle in the UK if the care that they require can only be provided in the UK: the Statement of Intent dated 11 June 2012, as cited at [8] of BRITCITS refers.

32. The public interest in the maintenance of effective immigration control, as recognised in s117B(1) of the Nationality, Immigration and Asylum Act 2002, therefore weighs persuasively against the appellant. As I explained at [29] of my first decision, the public interest considerations in s117B(2) and (3) also weigh against her. She has not paid the Immigration Health Surcharge and she is likely to represent a burden on the NHS, as a result of which she will not be financially independent. She is unable to speak English. That would not have mattered if she had been able to satisfy the ADR provisions but it is statutorily relevant to the consideration of proportionality outside the Rules.

33. Against the public interest considerations I have set out above, I must balance what is at stake on the appellant's side of the scales. In recognition of the fact that there is only one family life (Beoku-Betts v SSHD [2008] UKHL 39; [2008] Imm AR 688 refers), that side of the analysis must take account of the rights of each family member, including the appellant, the sponsor, her husband and their children. I must undertake a careful assessment of the severity and consequences of the interference: Razgar v SSHD, at [20].

34. I accept the evidence I have heard and read about the upset which is caused to this family as a result of their ongoing separation. I accept that the appellant was upset during Mr Mpongo's visit in November last year and that she becomes upset when she is able to see her grandchildren during video calls. Mr Mpongo said, and I accept, that they sometimes decide to terminate the video call because the appellant becomes tearful.

35. Mr Pipe rightly, in my judgment, highlighted a feature of this case which is not present in cases such as Ribeli v ECO. The sponsor is a refugee and she cannot go to the DRC to see her mother. There was some consideration in the FtT of whether the appellant might be able to travel to a third country so that they could meet. That is unrealistic, in my judgment, given the appellant's poor health and the age of the sponsor's youngest child. The appellant plainly has mobility issues and it would be difficult indeed for her to find her way to transport which would enable her to go to a third country to see her daughter. As Mr Pipe suggested, the family might in any event consider that it would be too painful for them to meet in that way only to separate again. There is a real difference between bringing the appellant to the UK permanently (as they hope to do) and getting her to a third country for a limited time, only to return to her lonely existence in the DRC,

36. The reality presented by this case is therefore a stark one and should be stated in terms. The situation in the DRC is unlikely to change and it was not submitted by Mr Tufan that there was ever likely to be a point in time that the sponsor could return to her country of nationality in order to see

her mother. The reality is that they are unlikely to see each other again, face to face, unless entry clearance is granted. Equally, now that the appellant has made an application for settlement under the ADR provisions, she is most unlikely to be able to satisfy an ECO that she will abide by the terms of a visit visa: BRITCITS, at [23]. Mr Mpongo can continue to visit the appellant. He might be able to take one or more of his children to see her in the future. They can speak on the telephone and they can use Skype or other such programmes for video calling. But the appellant will not see her daughter again unless she is granted entry clearance in the capacity sought. The significance of that reality for the family cannot be overstated.

37. What has been overstated, in my judgment, is the weight which can properly be attached to section 55 considerations in this case. As Mr Tufan observed, the appellant has never met her grandchildren. That is not to say that it would be *contrary* to their best interests for her to be in the UK. As the Court of Appeal explained in EV (Philippines) v SSHD [2014] EWCA Civ 874, however, the real question is how emphatically the best interests of the child press in favour of the outcome sought. In a case such as the present, I am unable to conclude that the best interests of the appellant's grandchildren add any real weight to her side of the proportionality assessment. They will continue to live in the UK in the only family unit they have ever known in the event that the appellant is not given entry clearance. The refusal of entry clearance to the appellant will not affect their health or their education. The news that she will not be permitted to join the family unit may be upsetting but there is no reason to think that it will have any substantive effect on their best interests.

38. Mr Pipe is potentially on more fertile ground when he submits that the appellant's health weighs on her side of the scales. It is necessary to recall once more, however, the basis upon which the appellant failed before the FtT. She failed to persuade the FtT that she satisfied the requirement in paragraph E-ECDR 2.5, which is as follows:

> E-ECDR.2.5. 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.

39. The FtT found that the appellant had failed to discharge the burden upon her of showing that the care she had been receiving was inadequate or that it could not continue: [38]-[41]. The appellant failed, therefore, to show that the care which was available in the DRC was

unreasonable, both from the perspective of the provider and from her perspective, and that the standard of care was not what was required for the appellant herself: BRITCITS refers, at [59]

40. Mr Mpongo's evidence about the care which is provided was rather different to that which was described to the FtT. First-tier Tribunal Judge McKinney heard about a carer and about assistance being provided by the church. Before me, there was not said to be any such care, and the appellant was said to be in receipt of medication and food from a Mr Ngandu and his wife. There was no suggestion on Mr Mpongo's part that this was insufficient for the appellant's physical wellbeing. I was not told what medication she received but it is seemingly common ground that it is adequate to manage her physical ill-health. Equally, I was not told precisely what food she receives from Mr Ngandu's wife, but there was no suggestion that it is inadequate for her needs, or that she is unable to prepare it. Mr Pipe did not belatedly invite me to depart from the preserved finding in this respect. As the FtT did, therefore, I must proceed on the basis that the appellant receives the necessary care in the DRC and that it is reasonable according to her needs.

41. It is nevertheless apparent that the appellant suffers from physical ill-health. The recent letter from N'Djili General Reference Hospital dated 18 March 2022 states that her medical history includes the following:

> An appendectomy in 1975
>
> Asthmatic and gastric known [sic] and monitored
>
> Hypotension with vision problems
>
> Osteoarthritis and osteoporosis

42. The letter stated that the appellant is treated for the latter two conditions and that her asthma was aggravated by various things. She was said to walk with a crutch and to be monitored by the orthopaedics department. The letter concluded:

> Given her multi-disciplinary problems and living on her own, we considered it difficult to provide her care in its entirety in her current environment and we recommend that she be with her daughter living in England for her entire care.

43. I also note the letter dated 12 June 2019 which was before the FtT, at p233 of the large bundle. It is from the Mweka Medical Centre in the Community of Lingwala and is signed by three doctors. It is a short letter and might properly be reproduced in full:

> We have the honour to refer Mrs Hortence Mchindj Nzam, born on 06/12/1958, residing in Kinshasa on Avenue Kindu no 04, community of Barumbu, who is suffering from eye problems as the result of hypertension, acute articular rheumatism, asthma, back problems and serious psycho-emotional disorders which make it impossible for her to carry out daily

> household chores, in particular given that she is living by herself.
>
> Given her advanced age, she requires a carer and is requesting support from her daughter Huguetee Kashala, who is living in Great Britain and who is her only remaining family who could look after her and who could pay for any fees resulting from her care.
>
> In light of the aforementioned and in particular the fact that Mrs Hortence Mchindj Nzam is living on her own, without any material or financial assistance in the Democratic Republic of Congo, we Dr KITOKO Benjamin, Dr Fataki Thierry, DR OTSHUDI Jean-Piere, Doctors of the Congolese government, hereby have decided that Mrs Hortence Mchindj Nzam shall join her daughter Huguette Kashala in Great Britain to receive a better complete support.

44. Mr Pipe did not attempt to submit that the appellant's physical needs could not be met in the DRC. Given the preserved finding, that submission was unavailable to him. The focus of his submissions was, instead, on the appellant's isolation and the low mood which Mr Mpongo observed when he last visited. I accept, as I have above, that the appellant would much prefer to be with her family in the UK. She has no other family and she wishes to spend her last days with her loved ones in this country. Her inability (thus far) to realise that hope must cause her and her family significant upset. They, of course, have busy lives in the UK, occupied by work and the raising of four young children. The appellant, on the other hand, has little to occupy her time and is likely to dwell on her predicament in precisely the manner described by Mr Mpongo.

45. There is no medical evidence before me to establish that the appellant suffers from any recognised mental health conditions, however, and Mr Pipe confirmed in his oral submissions that she has not been prescribed any mental health medication. The 'pyscho-emotional disorders' mentioned in the 2019 letter are not particularised or identified elsewhere. Insofar as Mr Mpongo referred to the appellant being 'depressed', therefore, he must be taken to have used that term in its common usage and not as a result of any formal, medical diagnosis of depression. Whilst I accept that the appellant is upset and that she misses her daughter (and vice versa), there is no medical evidence before me to show that she suffers from a recognised mental health condition, or that her ongoing exclusion is either causing or worsening such a condition.

46. Considering the evidence as a whole, I conclude that the appellant's predicament in the DRC militates in favour of her admission, but only to an extent. She clearly suffers from a range of physical health problems and is understandably upset by her separation from her family in the UK. With their assistance, however, she receives care which is adequate for her physical needs and there is no medical evidence to show that she is

suffering from mental health problems, or that any such problems are worsening as a result of her separation from the sponsor and her family. On any view, she lives an isolated and solitary existence which causes her family concern but she can be cared for adequately notwithstanding her separation from her family.

47. In his skeleton argument and in his oral submissions, Mr Pipe made reference to the principle of family reunion. He cited what was said by Lord Clarke in ZN (Afghanistan) v ECO (Karachi) [2010] UKSC 21: 'An important factor in this regard is that referred to in para 25 above, namely that one of the purposes of the Refugee Convention is to protect and preserve the family unit of a refugee.' I recognise that the interests of the sponsor are necessarily relevant in this connection, as submitted by Mr Pipe at [34] of his skeleton argument, with reference to Beoku-Betts v SSHD.

48. A refugee has no automatic right to be joined by her entire family in the country of refuge, however. As the learned editors of *Macdonalds Immigration Law and Practice* recognise at [12.228] of the current edition of that work, the Convention itself does not impose an obligation of family unity. It was the Final Act of the UN Conference on the Status of Refugees which recommended governments to take the necessary measures for the protection of the refugee's family and the UK accordingly makes some provision for family reunion. The UK has chosen, as a matter of policy, to exclude elderly dependent relatives from the cohort of those who are entitled to benefit from the generous Family Reunion provisions in the Immigration Rules. There has been no suggestion that that policy decision was unlawful and it seems to me that it is entitled to respect. Insofar as Mr Pipe relies on Refugee Family Reunion as a matter militating in the appellant's favour, therefore, I consider that only very limited weight can properly be given to it, given the rational and lawful line drawn by the Secretary of State between those who can and those who cannot succeed on that basis under the Immigration Rules.

49. Standing back and considering the balance sheet of proportionality considerations as a whole, the result is quite clear. There are a range of matters which weigh in favour of the admission of this elderly and infirm lady who requires long-term personal care and is nearly able to satisfy the requirements of the Immigration Rules. The manner in which she failed before the FtT to meet the Immigration Rules is critically important, however, because it demonstrates that the care she receives is adequate and reasonable and because it engages the policy considerations to which I have referred. The policy decision which was taken in 2012 necessarily brings with it the prospect that there will be those such as the appellant who will continue to be separated from their families despite their longing to be reunited. It also brings with it the reality that some refugees are unlikely to see their family members again, unless there is a change in the circumstances in the country of origin. That policy has Parliamentary approval through the negative resolution process.

50. The appellant is getting no younger and her health is apparently worsening. Focussing on matters as they presently stand, however, I conclude that the public interest considerations in Part 5A of the 2002 Act outweigh the appellant's interests, and do so by some margin. Whilst she and her family are desperately unhappy and would prefer to be reunited, she can receive adequate care in the DRC and there is a cogent public interest in that continuing. The appellant is fortunate to have family in the UK who work hard and are able to remit to her sums equivalent to more than twice the average wage in the DRC. The policy behind the ADR provisions requires that that money continues to be used for her care in the DRC rather than being used to support her in this country. Largely in recognition of the Parliamentary approval of that policy, I conclude that the respondent has discharged the burden upon her of showing that the appellant's exclusion from the UK is a proportionate measure.

Notice of Decision

The decision of the FtT having been set aside, I remake the decision on the appeal by dismissing it.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 July 2022