



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2023-005228

First-tier Tribunal No: HU/57863/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25th of January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DINA AHMAD HEREIKA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr F Farhat, Gulbenkian Andonian Solicitors

Heard at Field House on 15 January 2024

Although the Secretary of State is the appellant in these proceedings before the Upper Tribunal, for ease of reference I shall refer hereafter to the parties as they were in the First-tier Tribunal.

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal from the decision of Judge Ahmed promulgated on 20 November 2023 (“the Decision”). By the Decision, Judge Ahmed allowed on human rights grounds the appellant’s appeal against the decision of the respondent

dated 12 October 2022 to refuse her application for leave to remain made on 8 June 2021.

Relevant Background

2. The appellant is a citizen of the United State of America. As summarised in paragraph [3] of the Decision, her claim was that she had come to the UK in 2015 to care for her stepfather and mother, a British citizen. She claimed that since 2015 her mother's health had deteriorated such that the appellant provided her with considerable daily care in support of her medical, practical and emotional needs. She explained that her relationship with her mother was the basis for her family and private life in the UK, and that to return her to the USA would be disproportionate interference with her human rights.
3. The appeal hearing before Judge Ahmed took place at Taylor House on 7 November 2023. Both parties were legally represented, with Mr Farhat appearing on behalf of the appellant.
4. It was agreed with the representatives that the issues in dispute were, firstly, whether Article 8(1) ECHR was engaged between the appellant and her British mother, and secondly; if Article 8(1) ECHR was engaged, whether the refusal of the appellant's application to remain resulted in a disproportionate interference with her rights, protected by Article 8 of the ECHR.
5. The Judge received oral evidence from the appellant and her mother/sponsor. At para [6], the Judge recorded that she had also had reference to the material uploaded by the parties to the CCD file, including (f) the respondent's review and reply to directions dated 24 August 2023, and (g) the appellant's response to this dated September 2023.
6. At para [13], the Judge found that the level of dependency between the appellant and her sponsor involved more than normal emotional ties, and the support the appellant gave to the sponsor was real, effective and committed. She went on to give detailed reasons for this finding under the headings of (a) Physical Dependency, and (b) Emotional Dependency.
7. On the topic of physical dependency, the Judge said that evidence showed that the sponsor suffered from a number of physical conditions which limited her ability to live an independent life. The appellant explained that the sponsor was now taking medication for chronic obstructive pulmonary disease and was awaiting an appointment in February for a specialist to investigate further. In addition, she explained that the sponsor suffered from osteoarthritis, asthma, back and knee pain, and that her vision was also deteriorating such that she could only see out of one eye.
8. The appellant and the sponsor had lived together since 2015. The appellant explained that the care she gave her mother involved her

sleeping in the same room as her mother, and tending to her needs constantly during the day and night. The sponsor gave evidence that she would be unable to carry out many day-to-day tasks without the assistance of the appellant, including going to the toilet, cooking, shopping, showering, taking her medication and attending medical appointments. The sponsor said that without the appellant she would be unable to live, and she did not have anyone else to support her.

9. The Judge found that this evidence proved that the sponsor did receive a high level of necessary care from the appellant, and that her medical issues had demonstrated a high level of dependency between the appellant and the sponsor, including the giving of real, effective and committed support by the appellant to her mother.
10. On the topic of emotional dependency, the Judge said that the sponsor's husband had died in 2015. The appellant described how, since then, the sponsor had become increasingly isolated from a social perspective. She also explained that this was also because the sponsor's friends were not necessarily neighbours, but members of a Sudanese community who did not live nearby and had their own families.
11. The Judge went on to conduct a proportionality assessment at paras [14] to [17]. She concluded at para [18] that the factors raised by the appellant outweighed the public interest, and for those reasons the second issue in dispute was also resolved in favour of the appellant.

The Grounds of Appeal

12. A member of the Specialist Appeals Team settled the grounds of appeal on behalf of the Secretary of State. Ground 1 was that the Judge had made a misdirection of law on a material matter.
13. The Judge had failed to apply the findings of fact that had been made by the Tribunal in the appellant's previous appeal in 2015. These should have been the starting point when considering the current appeal. As a result, the Judge had accepted facts that were previously rejected. Also, the Judge had failed to follow the principles laid down in *Devaseelan*.
14. In the previous decision of the First-tier Tribunal, Judge Rowlands had found that there had been no formal assessment of what would be required for the mother in the appellant's absence, and no valid reason was provided as to why her needs could not be met by Social Services. In the instant appeal, there remained an absence of assessment or any objective medical evidence to substantiate the mother's precise conditions or care needs, such as a medico-legal report. The most recent medical evidence provided amounted to two NHS letters dated June and July 2023, which did not disclose any diagnosis of conditions, any prognosis or any care requirements.

15. The guidance given in *TK (Burundi) -v- SSHD* [2009] EWCA Civ 40 was relevant. The Judge's findings were based primarily on the oral evidence of the appellant and the mother, and applying *TK (Burundi)*, these findings amounted to speculation and could not stand.
16. Ground 2 was that the Judge had failed to resolve whether the appellant would experience very significant obstacles to her reintegration into the USA, which was where the Secretary of State had intended to remove the appellant if she failed to voluntarily depart. The appellant had failed to engage with this point in her submissions or in her response to the Secretary of State's Review, and she had instead focused on the country of her birth, Sudan. She had thus failed to establish that she could not return to the USA where she had spent the majority of her life.

The Reasons for the Grant of Permission to Appeal

17. In a decision dated 5 December 2023, Judge S Aziz held that there was merit in both grounds. As to Ground 1, it was arguable that the findings of fact made at the previous hearing regarding the appellant's family and private life ought to have been the starting point in the consideration of the appellant's human rights appeal, and in omitting to do this, the Judge had failed to apply *Devaseelan*.

The Hearing in the Upper Tribunal

18. At the hearing before me to determine whether an error of law was made out, Mr Tufan developed the grounds of appeal. In response, Mr Farhat developed his written submissions opposing the appeal.
19. Mr Farhat submitted that the 2017 determination was a neutral and thus illusory starting point. As was submitted in the appellant's response to the respondent's review referenced at sub-para (g) of para [6] of the Decision, the 2017 determination never explored or adjudicated upon the issue of Article 8 outside the Rules. Article 8 was not a justiciable matter in the context of a *Zambrano* Carer appeal under the former EEA Regulations. The First-tier Tribunal Judge in 2017 never considered the question of emotional ties beyond the norm under the *Kugathas* test required for Article 8(1) engagement, but instead the physical and clinical needs of the British mother in the context of a *Zambrano* Carer's appeal. The *Zambrano* criteria were about physical and clinical care needs provided by a Carer. Consideration of this specific and self-confined *Zambrano* criteria was not dispositive or transposable to the question of whether the threshold of the *Kugathas* test had been met.
20. After briefly hearing from Mr Tufan in reply, I reserved my decision.

Discussion and Conclusions

29. As was acknowledged by Mr Tufan at the hearing, Ground 2 falls away because, as is recorded in the Decision, the representatives were in

agreement that the Judge was not required to resolve the question of whether there would be very significant obstacles to the appellant's reintegration into life and society in the USA. The background to this agreement was that the appellant had conceded at a previous case-management review hearing that she could not succeed in a private life claim under the Rules.

30. As to Ground 1, the decision of Judge Rowlands promulgated on 14 September 2017 recorded that the appellant had joint USA and Sudanese nationality, and that she had been to the UK on numerous occasions, and to Sudan, in order to care for her mother and her (now deceased) stepfather. She had last entered the UK on 27 February 2015 as a visitor. She had made an in-time application on 19 August 2015 for a derivative right of residence as a Carer for both her stepfather and her mother. Sadly, by the time of the refusal decision, her stepfather had passed away and her application was considered only in respect of her mother.
31. Both parties were represented at the appeal hearing, which took place at Hatton Cross, and the appellant was cross-examined on her witness statement.
32. In the decision, Judge Rowlands recorded that the respondent's position was that it was accepted that her mother had some medical issues, but other matters were still being investigated. It was not clear that the appellant's mother still required as much care as was claimed. Because she had been receiving a certain level of care, it did not mean that it was necessary. The appellant had failed to show that the care needed would not be provided if she was to be removed.
33. Judge Rowlands held that it was clear that a local authority (i.e. Social Services) had had some involvement, as this was evidenced by the wet room and hand rails etc that had been set up in the mother's flat. There was also other evidence of the local authorities' involvement, such as the Fall Clinic, which showed they were providing assistance and that the assistance had to some degree worked.
34. At para [20], the Judge said that her mother had talked of needing 24/7 care, but the truth was that the appellant did not provide her with that level of care, and it would be wrong to conclude that she did. This was highlighted in the report. Not only that, but it was clear that some of the mother's needs were of her choosing, rather than through necessity. It was accepted that she might have difficulties lifting heavy items and that she had difficulty sometimes getting in and out of clothing, but this might be quite common in people of her age and it did not necessarily require her daughter's presence. It was said that her daughter had to prepare her at night to have items nearby in case she had an asthma attack, and of course there was absolutely no reason why Social Services could not have somebody coming in to do that kind of preparation before she went to bed every night.

35. At para [21], the Judge said that the difficulty with the case was simply that no one had actually assessed the mother properly, and had said what it is they would do in the absence of the appellant.
36. At para [22], the Judge said that he had carefully considered the report of Dr Lyall who actually agreed that the appellant's departure from the UK was not likely to directly impact upon her mother's medical condition, but that her independence might be compromised. These were matters that social work involvement should deal with.
37. The Judge concluded that the appellant had not shown that she met the requirements of a person who is a Primary Carer and that a derivative residence card should thereby be issued to her.
38. The appellant's solicitors included the decision of Judge Rowlands in the final appeal bundle. In the ASA uploaded to the CCD file on 30 July 2023, Mr Farhad relied upon the decision as showing that the First-tier Tribunal had found that the mother was in need of care on account of her condition, and that the appellant was providing that care and meeting her care needs. The appeal had been dismissed on a discrete jurisprudential point. The point was that the local authority, in the absence of the appellant, could provide the relevant care and there was no evidence before the Tribunal that the local authority would not be able to provide that care.
39. In their review and reply to directions dated 24 August 2023, the POU quoted para [20] of Judge Rowlands' decision, and submitted that its contents did not show that the relationship between the appellant and her mother would necessarily acquire the protection of Article 8 of the Convention, as the respondent did not find material evidence of dependency, involving more than normal emotional ties - let alone that such dependency needed to be met by the appellant herself.
40. In the response to the respondent's review uploaded to the CCD file on 7 September 2023, Mr Farhat submitted that the respondent's reliance upon para [20] of Judge Rowlands' decision was wholly misplaced, as the findings that the Judge had made were in relation to a different legal framework and a wholly different set of criteria. In the earlier appeal, the question of Article 8 was not justiciable and was not before the First-tier Tribunal. Para [20] of the decision was not a finding that Article 8(1) was not engaged. Nor was it in substance supportive of such a proposition. Aside from being five years ago, para [20] simply indicated that the British sponsor did not in 2017 require 24/7 care. The engagement of Article 8(1) for the present appeal was not contingent upon 24/7 care being required. Overall, the appellant had been looking after her mother since August 2015 - for the last nine years - and in circumstances where her mother's health and outlook had naturally deteriorated with the passage of time. Her British mother would otherwise be alone, without support and widowed.

41. There is no reason to suppose that Judge Ahmed was unaware of the competing arguments about the significance, or lack of it, of para [20] of Judge Rowlands' decision. As previously noted, the Judge expressly referenced both the respondent's review and the reply to that review at para [6] of the Decision.
42. For the reasons given in the reply to the respondent's review, and also in Mr Farhat's skeleton argument opposing the Secretary of State's appeal to the Upper Tribunal, I find that the Judge did not err in law in not overtly applying the *Devaseelan* Guidelines to the decision of Judge Rowlands.
43. There is no indication that the Presenting Officer at the hearing before Judge Ahmed actually pursued the point taken in the respondent's review, rather than accepting that it had been comprehensively debunked by Mr Farhat in his reply. In any event, as it was bad point, Judge Ahmed did not err in not giving reasons for rejecting it.
44. It is also important to emphasise that the point taken by way of appeal is not the same as the point raised in the respondent's review.
45. If the issue before Judge Ahmed had been the same as the issue before Judge Rowlands, there would have been some merit in the criticism that there was no up-to-date medical report in respect of the sponsor's various medical conditions and her consequential care needs. But as the central focus was upon whether the *Kugathas* criteria were met, no error of law is disclosed by the Judge primarily relying on the oral evidence of the appellant and the sponsor in order to arrive at a finding in the appellant's favour on this disputed issue.
46. Although the grounds of appeal include an error of law challenge to the Judge's proportionality assessment, this is solely on the basis that her assessment is "*parasitic*" upon the impugned finding that Article 8(1) ECHR is engaged.
47. Accordingly, as the Secretary of State has not made out a case that Judge Ahmed's finding on Article 8(1) is legally erroneous, the error of law challenge to her proportionality assessment falls away.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law, and accordingly the decision stands. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
23 January 2024