Neutral Citation Number: [2024] EWCA Civ 372

Case No: CA-2023-000482

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION (ADMINISTRATIVE COURT)
Mrs Justice Lang

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2024

Before :

LADY JUSTICE KING
LORD JUSTICE COULSON
and
LADY JUSTICE ANDREWS

- -

Between :

SALEH AHMED HANDULE ALI	**Claimant/ Appellant**
- and -	
(1) UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)	**Defendant/**
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party/ Respondents**

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- -

Martin Westgate KC and Paul Draycott (instructed by **Pristine Law Solicitors**) for the **Appellant**
John Paul Waite (instructed by **Government Legal Department**) for the **Second Respondent**
The **First Respondent** did not appear and was not represented at the hearing.

Hearing date: 14 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17th April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

Introduction

1. This is, by any standards, and in many different respects, a most extraordinary case. The underlying factual scenario is one which is highly unlikely to be repeated – or so one would hope. It raises the following issue of principle:

> "Is the private life aspect of Article 8 of the European Convention on Human Rights ("ECHR") engaged when a resident non-national who was granted indefinite leave to remain, and whose travel document has been lost or stolen whilst abroad, seeks re-entry to the United Kingdom to resume their life in the United Kingdom?"

2. The case comes before this Court by way of an appeal, with the permission of Newey LJ, against the refusal by Lang J to grant permission to proceed with a claim for judicial review under the *Cart* jurisdiction[1] of the refusal by the Upper Tribunal (IAC) to grant permission to appeal against one discrete aspect of a decision made by the First Tier Tribunal ("FTT") as long ago as 28 October 2020. The decision of the Upper Tribunal ("UT") was promulgated on 1 August 2022, but it was made on 24 May 2022, and thus before the date on which section 11A of the Tribunal Courts and Enforcement Act 2007 (which severely truncates the *Cart* jurisdiction) came into operation.

3. When dismissing the appellant's appeal against a decision by the Secretary of State for the Home Department ("the Secretary of State") refusing him entry clearance to return to the UK, (where he had lived between the ages of 9 and 18 and had been granted indefinite leave to remain), FTT Judge Rhys Davies summarily dismissed the part of the appellant's human rights claim which was based on his private life within the UK, in the short final paragraph. He relied upon his interpretation of a decision of this Court, *Abbas v Secretary of State for the Home Department* [2017] EWCA Civ 1393; [2018] 1 WLR 533 ("*Abbas*") which had not been cited nor referred to in any of the materials before the Tribunal, including the Secretary of State's refusal letter. The judge said of that aspect of the claim that Article 8 ECHR was not engaged, and therefore "[t]he remaining *Razgar* steps and any arguments about the proportionality of the decision… do not therefore arise."

4. The scope and ratio of the decision in *Abbas* had not been the subject of legal submissions by either party, nor was it raised by the judge in the course of the hearing. Indeed, far from submitting that there was an in-principle or threshold objection to the appellant's Article 8 claim so far as it related to his private life, the Home Office Presenting Officer argued that the refusal of entry clearance to allow the appellant to return to the UK to resume the private life that he had already established there was not disproportionate, relying on Article 8(2). Thus the "obvious relevance" of *Abbas* not only escaped the attention of the person in the Home Office who made the original decision under appeal, but that of the Secretary of State's own representative at the appeal.

[1] See *R (Cart) v Upper Tribunal (Public Law Project and another intervening)* [2011] UKSC 28; [2012] 1 AC 663.

5. It was nevertheless contended by Mr Waite on behalf of the Secretary of State that *Abbas* is so well-known, and its relevance should have been so obvious, that the appellant's counsel could and should have foreshadowed the point which the judge took. He submitted that it was not open to the appellant to argue the point now because "the ground was not advanced before the FTT" and the appellant was taking a fresh point on appeal. In the circumstances that I have outlined, that characterisation of what happened is as inaccurate as it is unattractive. If the decision under appeal was made by the Secretary of State on the basis that both the family life and private life aspects of Article 8 were engaged, and that was also the premise on which the appeal to the FTT was opposed, counsel for the appellant had no obligation to anticipate an argument, based on an authority that was not cited (and which addresses a very different factual scenario), that one of those aspects might not be engaged. Moreover, the width of the ratio of *Abbas*, which Mr Waite suggests establishes a "fundamental principle of immigration law which parties know or ought to know" is very much in contention.

6. If Mr Waite had been right about the relevance of *Abbas* being obvious, (which I do not accept), that might have provided an answer to a complaint of procedural unfairness; but when seeking permission to appeal to the UT, the appellant made no such complaint. Instead, counsel then instructed argued that the FTT Judge had misinterpreted the decision in *Abbas*, which he submitted is only authority for the proposition that Article 8 does not impose a positive obligation to grant entry clearance to an alien (i.e. a non-British Citizen) in order for them to develop a private life in the UK. That did not apply to someone like the appellant, whose case was based on interference with the private life which he had already developed when living as a settled resident in the UK. There is no good reason to preclude the appellant from raising that argument on appeal if it otherwise has merit. It is a pure point of law, and the Secretary of State has suffered no prejudice.

7. In refusing permission to appeal, the UT judge failed to engage with the legal arguments raised in the Grounds of Appeal in respect of the FTT judge's peremptory dismissal of the appellant's Article 8 private life claim. He described the grounds, in general, as "no more than a disagreement with the findings and decision and an attempt to reargue the appeal". He made no mention of *Abbas* or the other authorities referred to in support of the appellant's case. Instead, he described the private life claim as "not arguable" (on the substantive merits), for reasons which omitted to mention certain key factors which would and should have played a significant part in the assessment of proportionality had the FTT judge ever got as far as carrying one out.

8. The Court was greatly assisted by the written and oral submissions of Mr Waite, and of Mr Westgate KC and Mr Draycott for the appellant. At the start of the hearing we asked counsel for their submissions as to the approach that should be adopted; in particular, whether the Court should deal with the appeal as a "rolled up" hearing of the claim for judicial review, determine the point of law and then, depending on the outcome, either dismiss the appeal or allow it, quash the refusal of permission to appeal to the Upper Tribunal, and then decide for ourselves whether we should grant permission and remit the human rights appeal to the Upper Tribunal for determination on its merits, or remit the question of permission to the Upper Tribunal. It was sensibly agreed that this was the appropriate course.

9. The *Cart* jurisdiction is rarely exercised, and for good reason: the Tribunal is a specialist tribunal, and due respect should always be paid to an evaluation by its judges of the merits of an appeal. Moreover, the question whether to grant permission to appeal and the question whether to grant permission to proceed with judicial review of the refusal of permission both involve judicial evaluation and the exercise of judicial discretion, with which a higher court will not lightly interfere. However, this is one of those truly exceptional cases in which I am persuaded, for the reasons set out in this judgment, that:

    i) the FTT judge made a clear error of law in misinterpreting a decision of this Court;

    ii) the UT judge should have recognised that this was at least arguable, and given permission to appeal, but instead failed to engage with the appellant's argument at all;

    iii) the point of law, though narrowly circumscribed, is one of general importance, and the consequences for the appellant of not rectifying the judicial error are such as to provide a compelling reason for allowing the claim for judicial review to proceed;

    iv) there was therefore a sufficiently arguable case for judicial review of the refusal of permission to appeal to meet the *Cart* threshold, and consequently

    v) Lang J erred in refusing permission to proceed with the judicial review.

10. For the reasons set out in this judgment, I would answer the question posed in paragraph 1 above: "yes". I would therefore allow this appeal.

Background

11. The appellant, who was born on 1 July 1990, is a national of Somalia. He came to the UK (aged 9) on 19 April 2000 with his mother and two younger siblings under the Immigration Rules then relating to family reunion for refugees, to join his father, who had been granted refugee status in September 1999. Subsequently they were joined by an older sister (the mother's child from a previous relationship). All the family members settled in the UK and were granted indefinite leave to remain at the same time in 2004. At that time, it was Home Office policy to grant status to family members in line with the refugee's status, and so the appellant, his mother and siblings would all have been recognised as refugees and granted indefinite leave to remain on the same terms as his father.

12. The appellant was issued with a Home Office travel document under the UN Convention for Refugees, valid for 10 years from 9 June 2004 to 9 June 2014. He could not have obtained that document unless he had been granted indefinite leave to remain. We have seen a photocopy of the main page of that document which, like a passport, has a unique number and the appellant's photograph on it. It was in evidence before the FTT. His mother's evidence was that she made the copy shortly before he travelled abroad in 2008.

13. At some point, the father left home and ceased all contact with the family. He is believed to have left the jurisdiction. The children and their mother remained in the UK.

14. In 2008 the appellant was diagnosed with tuberculosis, for which he received some medical treatment in the UK. On 1 December 2008, aged 18, he travelled to Djibouti in the hope that the warmer climate would aid his recovery. His case is that he intended to stay for a short period until he had recuperated, and then return to the UK. However, whilst in Djibouti, at some point in 2009, he lost his travel document. As there was no British consular assistance available in Djibouti, he made his way to Ethiopia, which was where the nearest British Embassy was. He went to the British Embassy in Addis Ababa on 1 September 2009 to try and obtain a valid travel document. (Pausing there, although the FTT judge referred to the appellant's case without expressly making any fact-findings about it, that behaviour was consistent with his stated intention to return to the UK.) The appellant made at least two attempts to obtain assistance from the Embassy without success. His mother's evidence (which the judge did not reject, though he found it unreliable in certain respects) was that she sent a copy of the travel document to the appellant and that he took it to the Embassy in Ethiopia, but they still refused to assist him.

15. Unfortunately, the Embassy officials were not persuaded that the appellant had indefinite leave to remain. One might have expected it to have been a relatively straightforward task to check his credentials with the Home Office in the UK, particularly after a copy of the lost travel document with its date and unique number was provided to them. However, (unbeknown to the appellant and his family at that time), the Home Office had failed to keep a record on its database of the grant of indefinite leave to remain to the appellant. He has been stranded in Ethiopia, undocumented, ever since.

16. Matters were further complicated by the fact that, under the guidance applicable at the time concerning Home Office travel documents that were lost or stolen whilst the holder was abroad, even if that individual reported the matter to the nearest British Embassy, Consulate or High Commission (as the appellant did, and as the guidance advised), it was not possible to apply for a replacement travel document until the individual was back in the UK. On the face of it, that produced a Catch-22 scenario in which a person whose travel document was lost or stolen could not rectify the situation, because they could not get back into the UK in order to make an application for a replacement without their travel document, and they could not apply for a replacement travel document until they were within the UK.

17. We were told by Mr Waite that it was not possible for someone else, e.g. another family member, to make an application on the individual's behalf from within the UK for a replacement travel document. So although the FTT judge criticised the applicant's mother for making no attempt to contact the Home Office in England to obtain replacement travel documents for him, (since she had retained a photocopy of his travel document) it is clear that this would have achieved nothing even if the Home Office had a record of the grant of indefinite leave to the appellant - which we now know it did not keep.

18. Presumably (though this is just an inference, as there was no evidence about it) the Embassy would have been able to provide some kind of short-term emergency travel

document to enable a stranded individual to return, but only if that person could establish their credentials to the satisfaction of the relevant officials. Were that not the case, a person who is not a British citizen but who has indefinite leave to remain and who has long-established ties with the UK would still find themselves in limbo through no fault of their own, with no means of getting back, if their travel document were lost or stolen whilst abroad, *even if* (unlike the unfortunate appellant) their identity and immigration status were accepted.

19. Under the Home Office Guidance for returning residents that was in force at the relevant time (Version 2, published on 13 July 2018), Entry Clearance Officers and border control officials were informed that a person with indefinite leave to remain who had been absent from the UK for less than 2 years would not need to apply for entry clearance before resuming their residence in the UK. That reflected paragraph 18 of the Immigration Rules which provided:

> "18. A person may resume their residence in the UK provided the Immigration Officer is satisfied that the person concerned:
>
> (i) had indefinite leave to enter or remain in the United Kingdom when he last left; and
>
> (ii) has not been away from the United Kingdom for more than 2 years; and
>
> (iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and
>
> (iv) now seeks admission for the purposes of settlement."

The appellant's initial visit to the British Embassy in Addis Ababa was well within the 2-year period. At that stage he had only been absent for 9 months.

20. However, subject to certain exceptions (which did not apply to the appellant), a person in that category who has been absent from the UK for more than 2 consecutive years will automatically lose their indefinite leave as a matter of law (paragraph 20 of the Immigration Rules and Article 13 of the Immigration (Leave to Enter and Remain) Order 2000.) Such a person must therefore apply for entry clearance as a returning resident, and will be assessed by Entry Clearance Officers under paragraph 19 of the Immigration Rules. At the material time this provided that:

> "19. A person who does not benefit from the preceding paragraph by reason only of having been absent from the United Kingdom for more than two consecutive years, must have applied for, and been granted indefinite leave to enter by way of entry clearance if he can demonstrate he has strong ties to the United Kingdom and intends to make the United Kingdom his permanent home."

The appellant was therefore obliged to seek entry clearance once his indefinite leave to remain lapsed on 1 or 2 December 2010. That was the inevitable consequence of the fact that he had no travel document and no means of returning to the UK within 2 years.

21. The guidance made it clear that in a case where paragraph 19 applied, the length of time spent outside the UK would be an important factor, but that it must be assessed against all other factors, including the time spent in the UK before the applicant left. Other identified factors include the reasons for leaving and wishing to return. Worked-through examples given in the guidance indicate that the length of time spent in the UK and the ties formed by the individual whilst in the UK can be determinative.

22. In the appellant's absence, his mother and siblings all achieved British Citizenship due to their long residence in the UK.

23. This family are of limited means; the mother, the appellant's sponsor, who suffers from a number of debilitating medical conditions, is in receipt of state benefits. Indeed it is the Secretary of State's case that she has insufficient means to support the appellant were he to return. When she had saved up enough money to pay lawyers to make an application for Entry Clearance on the appellant's behalf as a returning resident, an application was lodged on 2 May 2015. By then, he had been outside the UK for about 6½ years.

24. In that application, the appellant's former solicitors explained that he had intended to return to the UK once he had recovered from tuberculosis, but that he was unable to do so because of the loss of the travel document. They set out the history of the appellant's visits to the Embassy to try and obtain a replacement without success, and supplied both the number and date of his Home Office travel document as well as his National Insurance number. They also explained why he could not return to Somalia, and that he had no status in Ethiopia.

25. The application form makes reference to an attached letter, which has not been produced by the Secretary of State. We do not know what that letter said or whether there were any attachments to it. In the present appeal the FTT did not have before it all the documents that were sent in support of the 2015 application because the Secretary of State failed to comply with directions for their disclosure. (This led to FTT Judge Povey, at a pre-hearing review, directing that the FTT would assume that certain facts set out in the grounds of appeal were not challenged, including that the appellant, his mother and siblings had settled here and obtained travel documents as refugees in 2004, the reason why the appellant left the UK in 2008, and the loss of his travel document in Djibouti.)

26. The Entry Clearance Officer refused the application on 25 June 2015. It appears on the face of the refusal letter that the alleged absence of evidence that the appellant had indefinite leave to remain was central to the reasons given for that refusal. Without such evidence, he would not have been treated as qualifying as a returning resident for the purposes of paragraph 19. Insofar as the reasons for refusal went on to deal with the issue of proportionality of refusal, they largely failed to engage with the application as advanced. No mention is made of the loss of the travel document or the impact which this would have had on the appellant's position. Instead, the appellant was treated as if he had remained outside the UK voluntarily, which is difficult, if not impossible to reconcile with the factual history, especially since he had no means of establishing himself in Ethiopia and only went there in the first place in order to try to get back to the UK.

27. That decision was not appealed. However, in 2017, as a result of efforts made on behalf of the appellant's mother's MP, she was informed that the Home Office had no information on their system to show that the appellant had been granted indefinite leave to remain in the UK before he left the country in 2008. Quite how this could have happened, particularly when all the other family members were granted indefinite leave to remain at the same time, and the appellant had been issued with the travel document, is difficult to comprehend. In any event, the appellant's mother was told that *she* should have some paperwork relating to the grant of indefinite leave to remain. It is understandable why, at the hearing before the FTT, the appellant's counsel likened this situation to that which gave rise to the injustices complained of by the Windrush cohort.

28. In January 2019, a fresh application for entry clearance as a dependent adult was made on the appellant's behalf by the different firm of solicitors who are now instructed. That was the application which led to the decision under appeal to the FTT. Whilst it is fair to say that, as initially presented to the Home Office, the focus of the application was on the appellant's family life, by the time the refusal of the application was appealed, his private life had become a key feature of the legal arguments presented to the FTT.

29. The case as articulated by counsel then instructed was, in essence, that refusing him re-entry to resume his pre-existing life in and ties to the UK formed over an extensive period of his childhood was a disproportionate interference with his Article 8 rights. He had no means of establishing a private or family life in Ethiopia because, being undocumented, he had no right to remain or reside there, let along work; he was living from hand to mouth in very parlous financial circumstances. Reference was made in this regard to the Country Guidance case of *SL & HA (Ethiopia - work permits - restrictions) Ethiopia CG* [2009] UK AIT 00052. Moreover, it was contended that there had been an historic injustice because the wrongful failure by the Home Office to recognize his status as a returning resident had led to his being unable to return within two years (or in 2015) and to the invidious situation in which, through no fault of his own, he now found himself.

30. As already mentioned, the FTT judge did not consider the proportionality of any interference with the appellant's private life, because he held himself bound by *Abbas* to find that his private life was not engaged. The family life aspect of the appeal was rejected on the facts. The judge was not satisfied on the evidence that the appellant met the requirements of the immigration rules for admission as a dependent adult, and there were found to be no compelling circumstances to require his admission outside the rules on grounds of family life. The appellant's rights to challenge that aspect of the decision have now been exhausted.

The decision in Abbas

31. *Abbas* concerned an application made by a Pakistani national living in Pakistan for a visitor's visa to enable himself, his wife and his children to enter the UK for a short period to visit elderly relatives (as they had done on previous occasions). When that application was refused on the basis that the Entry Clearance Officer was not satisfied that they would return to Pakistan at the end of the visit, the applicant contended that the refusal of entry was a disproportionate interference with his right to develop a private life in the UK. That submission gained some traction in the FTT and the UT,

and it was the Secretary of State who successfully appealed to this Court. The respondent did not appear and was not represented on that appeal.

32. The leading judgment was delivered by Burnett LJ (as he then was), with whom Ryder LJ and Gloster LJ agreed. In paragraph 2, Burnett LJ identified the "important point of principle which arises in this appeal" in these terms:

> "To what extent does the state *have a positive obligation* on grounds of private life (where no relevant family life exists) *to grant entry clearance for an adult to visit an elderly relative located in the United Kingdom?"* [Emphasis supplied]

33. It was in that specific context that the arguments were advanced on behalf of the Secretary of State that (a) the private life aspect of a foreign national outside the United Kingdom is not engaged by an application for entry clearance, but (b) in any event the threshold for engagement of article 8 is only met when the refusal of a visitor visa has consequences of sufficient gravity (see paragraph 13 of the judgment). There is nothing controversial about proposition (b). Nor indeed is there anything controversial about proposition (a) if and insofar as it relates to a foreign national, like the applicant in *Abbas*, who could not claim that he already had a private life within the UK that was affected by the refusal of entry clearance.

34. The Court of Appeal was not concerned with the scenario in which the applicant has already established a private and/or family life here, and it was unnecessary for it to address that scenario in order to be able to determine the point of principle identified as arising on the appeal. Burnett LJ's analysis relates solely to the situation in which the applicant has no established Art 8 rights within the UK.

35. At paragraph 15, Burnett LJ considered the case of *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630, upon which the UT in *Abbas* had relied, and distinguished it. As he pointed out, *Singh* was a case about a family within the UK seeking indefinite leave to remain. He said that the discussion of private life arose in *Singh* because "there was no doubt that the adults in question, who had been in the United Kingdom for a long time, had developed a private life here". He then quoted with approval a passage from the decision of the Strasbourg court in *AA v United Kingdom* [2012] INLR 1, paragraph 49, which ends with this statement:

> "… it must be accepted that *the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of* '*private life*' *within the meaning of article 8*. Thus, regardless of the existence or otherwise of a 'family life', *the expulsion of a settled migrant constitutes an interference with his right to respect for private life."* [Emphasis added by Burnett LJ in his quotation].

There was therefore an implicit recognition that settled migrants fell within a different category from a person in the position of the applicant in *Abbas*.

36. Burnett LJ then went on to consider the Strasbourg jurisprudence on family life cases where family members outside the UK seek entry to join family members within the UK. He referred to the line of cases concerning foreign national spouses (or civil

partners) seeking to establish a family life with life partners who were already in the UK, where it had been held by the Strasbourg court that Article 8 *was* engaged, but there was no right for a couple to choose where to live together. Again, these cases were concerned with a situation in which the person applying for entry clearance had no established private or family life within the UK. Burnett LJ cited *Khan v United Kingdom* (2014) 58 EHRR SE15 as providing an explanation (at paragraph 27) for the line of cases establishing that a contracting state's obligations under Article 8 may in certain circumstances require family members to be reunited with relatives living in that state: namely, that it

> "rests, in large part, on the fact that one of the family members/applicants is already in that contracting state and is being prevented from enjoying his or her family life with their relative because that relative has been denied entry to the contracting state".

37. The key passage in *Abbas* is at paragraph 18, where Burnett LJ refers to the fact that the Secretary of State had been unable to identify any case, still less a settled line of authority, in which the Strasbourg court has held article 8 in its private life aspect to be engaged in respect of a person outside the contracting state seeking to enter to develop that private life. He said:

> "Such a conclusion would have a striking effect and undermine the often repeated starting point of the Strasbourg court that a state has the right as a matter of well-established international law and subject to their treaty obligations, including the Convention, *to control the entry, residence and expulsion of aliens.* Private life as a concept has a broad reach, by contrast with family life. Even though article 8 is a qualified right (unlike article 3) the prospect of a very large number of individuals relying on private life in support of applications for short and long term stays would be inevitable. To accept that the private life aspect of article 8 *could require a contracting state to allow an alien to enter its territory* would mark a step change in the reach of article 8 in the immigration context. As a matter of principle it would be wrong to do so. As a matter of binding authority on the approach to an expansion on the reach of the ECHR it would be impermissible to do so." [Emphasis added].

38. He then went on to explain that such an expansion would be wrong as a matter of principle because there is no equivalence for these purposes between private life and family life. In essence, a family is regarded as a single unit and the interference with the family life of one is regarded as an interference with the rights of all within the ambit of the family whose rights are engaged. No such reasoning could apply to the "multifarious aspects of an individual's private life".

39. This distinction also carried through to an *obiter* discussion, in paragraphs 23 to 25, of whether the applicant in *Abbas* and his wife and children fell within the jurisdiction of the UK for the purposes of Article 1 ECHR. Burnett LJ accepted the argument that they did not. Again, it is important to emphasise that they were nationals of another state who had not established a private or family life in the UK. The rights of their elderly relatives who were within the UK may have been affected for the purposes of an argument based on Article 8 family life, but there was no jurisdictional connection

for private life purposes. The impact on them was purely extra-territorial. That passage says nothing about the position of someone with an established family or private life within the UK.

Discussion

40. I do not disagree with the analysis in paragraph 18 of *Abbas*, insofar as it addresses the point of principle identified by Burnett LJ in paragraph 2 of his judgment. The ratio of *Abbas* is that Article 8 does not oblige a state to allow a non-national to enter its territory in order to develop a private life there. This was correctly reflected in paragraph [78] of the judgment of Laing LJ in *R3 v Secretary of State for the Home Department* [2023] EWCA Civ 169; [2023] Imm AR 3:

> "This Court held that Article 8 *did not impose a positive obligation* on the United Kingdom *to admit* a person who was outside the United Kingdom *for the purpose of developing his private life.*" [Emphasis added].

The ratio is not, as a Presidential Panel of the Upper Tribunal characterised it in *SD (Sri Lanka) v Entry Clearance Officer, (British Citizen: Entry Clearance)* [2020] UKUT 00043 (IAC) at [73], that "the right to respect for private life was not engaged in entry clearance cases".

41. The key words in *Abbas* are "oblige" and "require" (which need no further elaboration), and "develop" which was here being used in the sense of "start to exist, experience or possess" (this is put beyond doubt by the discussion of *Singh* at paragraph 15, in which Burnett LJ said that the adults in that case "had developed" a family and private life in the UK). The principle in *Abbas* applies to a situation in which a foreign national with no, or no sufficient ties to the UK, is seeking to enter in order to develop a private life in the UK in the future, which was the situation which this Court was there specifically addressing. Otherwise, anybody could turn up at the border and demand entry to the UK, and as Burnett LJ rightly pointed out, that is completely antithetical to the right of immigration control.

42. However, the Court in *Abbas* was <u>not</u> addressing the markedly different situation in which, as here, a settled migrant (indeed, an accepted refugee) has been denied re-entry after a period of temporary absence that the Immigration Rules both envisaged and permitted, because, through no fault of his own, he is no longer in possession of the travel document which proved his immigration status (and the Secretary of State wrongly (as is now accepted) refused to accept that he had that status).

43. The appellant was not seeking entry to "develop" a private life in the sense used in *Abbas*, but rather to resume or continue a long-established private life within the UK which had been curtailed for reasons beyond his control. He was a settled migrant with indefinite leave to remain. It was that pre-existing private life within the jurisdiction that provided the jurisdictional "peg" for the purposes of Article 1. Recognition of the fact that such an individual's private life in the UK is engaged and that the decision to refuse them entry must be proportionate would not involve any extension of the ambit of Article 8, let alone an extension that would drive a coach and horses though the UK's right of immigration control and lead to numerous applications for entry clearance.

44. I do not accept Mr Waite's submission that, since a person always has a private life, which must be exercised somewhere, someone in the appellant's position is seeking to "develop" their private life in the UK, and that there is no distinction to be drawn between someone who is attempting to resume the enjoyment of a private and family life they have already established in the UK and someone who is seeking to enter the UK to establish a private and family life there. He suggested that if Burnett LJ had intended to draw that distinction, he would have done so in paragraph 18, which was expressed in wide terms and was plainly intended to lay down a general principle. But the distinction, in my judgment, was already recognised in the preceding discussion of *Singh* and *AA*, which did not turn on the physical presence of the adults concerned within the UK but rather, on their status as settled migrants. The general principle laid down in *Abbas* is not as wide as Mr Waite contends.

45. Cases such as *Singh* and *AA* establish that the private life (as well as any family life) rights of an individual already established in the UK would be engaged, and questions of proportionality would therefore arise, were the State seeking to *remove* them from the jurisdiction (in exercise of its right to control the entry, residence and expulsion of aliens). Why then, in principle, should it not be engaged if the State is refusing such a person re-entry, (at least if when they left, they had no intention of leaving permanently) in exercise of that very same right of immigration control? I can find no principled justification for the proposition that a settled migrant can complain about the interference with his private life within the UK if his leave is curtailed whilst he is still physically in the UK, but not if it is curtailed when he goes abroad on holiday or to visit relatives.

46. *Khan v United Kingdom* (above) indicates that a person's private life may be engaged for the purposes of an Article 8 claim if they are excluded from the UK by the cancellation of their leave to remain whilst they are outside the jurisdiction. In that case, the applicant had been in the UK on a student visa for less than 3 years when he was arrested on suspicion of conspiracy to commit terrorist offences. He was served with a notice of intention to deport, and left the UK voluntarily. Whilst he was outside the jurisdiction his leave to remain was cancelled on national security grounds, which SIAC later found fully justified. He complained that he had been deprived of his right to live and study in the UK. His Article 8 claim was certified by the Strasbourg court as manifestly unfounded and therefore inadmissible because of its obvious lack of merit, not because of a lack of jurisdictional competence under Article 1 (which was a complete answer to his other human rights claims, including one under Article 3). The Court found that "given the very serious nature of the allegations against him, which were found to be proven by SIAC, *and the rather limited nature of his prior private life* in the United Kingdom, the decision to *exclude* him from the United Kingdom was *clearly proportionate*" [paragraph 32]. (Emphasis added). One does not reach the stage of assessing proportionality under Article 8 unless the rights in question are sufficiently engaged.

47. *Khan* also seems to me to provide the complete answer to the jurisdictional objection which Mr Waite sought to advance based on paras 23 to 25 of *Abbas* (albeit that it was not at the forefront of his submissions). If someone is a settled migrant, then the actions of the state in removing them, cancelling their leave to remain, or refusing them leave to re-enter all have an impact on their established private life within the territory of the state which is sufficient for the purposes of Article 1.

48. Mr Westgate submitted that the private life aspect of Article 8 was engaged in the circumstances of this case. He drew the Court's attention to the Strasbourg case of *Sargsyan v Azerbaijan* (2017) 64 EHRR 4 GC which was not cited to the Court in *Abbas*. The facts of that case were complex, but in summary the applicant, who was an ethnic Armenian, lived for many years in a village named Gulistan. This was in a region of the Azerbaijan Soviet Socialist Republic which was annexed during a civil war and became part of the self-proclaimed "Republic of Azerbaijan". He was forced out of his home in around 1992, and fled with his family to Armenia, where he gained citizenship in 2000. He complained, among other matters, that "the denial of his right to return to the village of Gulistan and to have access to his home and to the graves of his relatives constituted a continuing violation of Article 8" (see paragraph 243). That complaint was necessarily made from outside Azerbaijan and was a complaint about the refusal of a right to re-enter that state.

49. The Strasbourg Court found at paragraph 257 that Article 8 was engaged. This was in part because the applicant had a "home" in Gulistan which he left involuntarily, and the gist of his complaint was that he had been unable to return ever since. In those circumstances, it was found that his prolonged absence did not break the continuous link with his home. But the Court then went on to find on the facts that he had lived in Gulistan for the major part of his life and must therefore have developed most of his social ties there, and consequently, his inability to return also affected his private life. His cultural and religious attachment with his late relatives' graves in Gulistan was also held to fall within the notion of "private and family life". At paragraph 258 the Court said that it considered "that the facts of the case fall [both] within the notions of "private and family life" and "home". Article 8 therefore applied. It went on to find that there was a continuing breach of the applicant's Article 8 rights.

50. The applicant's lengthy involuntary absence from Azerbaijan did not preclude him from arguing, successfully, that the refusal to allow him to go back to Azerbaijan was a disproportionate interference with the private life he had established in that state. Likewise, although any evaluation of proportionality in the appellant's case would necessarily involve weighing the length of time he spent in the UK against the length of time he spent outside it, the fact that the latter period was largely an involuntary consequence of the loss of his travel document and the refusal of re-entry because of an erroneous failure to recognise that he had previously been granted indefinite leave to remain, should be highly significant.

51. Mr Waite submitted that *Sargsyan* was a sub-set or extension of the line of authorities on removal, such as *Singh* and *AA*, because the applicant had been forcibly expelled from Azerbaijan instead of leaving voluntarily. But the principle for which the Secretary of State contends *Abbas* to be authority is that a foreign national's private life is *never* engaged in an application for entry clearance from outside the UK. Such a principle, if it existed, would not depend on what caused them to be outside the UK in the first place.

52. In *Sargsyan* the applicant was physically outside the state and complaining about the denial of re-entry; moreover, on the facts, he had been away for many years, and had even settled and developed a private life in another state of which he was now a citizen. The decision in that case plainly contradicts the broader interpretation of *Abbas* contended for by the Secretary of State, as it envisages that there may be scenarios in which the private life of an individual developed within the host state

who is no longer within that state will be sufficiently engaged for Article 8 purposes by a refusal of the right of entry to that state. The decision is, however, entirely compatible with the interpretation of the principle in *Abbas* as relating only to those persons seeking entry clearance who have no (or no sufficiently) established private life in the UK.

53. *Sargsyan* was distinguished on its facts by Singh LJ in *Secretary of State for the Home Department v Onuorah* [2017] EWCA Civ 1757, in which *Abbas* was followed in another case concerning a foreign national with no pre-existing private life in the UK. No argument was raised in that case as to the true ratio of *Abbas*, but if it had the broader application contended for by the Secretary of State in the present case, there would have been no need to distinguish *Sargsyan*.

54. When Mr Waite was asked why in principle a distinction should be drawn in this context between settled migrants who were seeking to remain or to resist removal from inside the jurisdiction, and settled migrants who were making an application to return from outside the jurisdiction, his only answer was that "a bright line has to be drawn somewhere", and a distinction can be drawn between the "confined number" of people who are already in the UK and the world at large outside it. When asked directly whether he accepted that this meant in principle that a single adult with indefinite leave to remain who had their travel document stolen whilst on holiday outside the UK had no means of returning, Mr Waite said that he did, if that individual had no basis for seeking re-entry other than their private life, though he submitted that the Court did not have to consider extreme cases because this was "a relatively conventional application for entry clearance". That is not how I would characterise this case. There is nothing conventional (or at least there should be nothing conventional) about being wrongly denied a right of re-entry to which one is entitled under paragraph 18 of the Immigration Rules and then, inevitably, finding oneself in a situation where that right is lost – and the situation is then compounded by refusing re-entry under paragraph 19 because of a failure by the Home Office to keep proper records.

55. I am fortified in my conclusion that Mr Westgate's submission is correct by the Immigration Rules and guidance at the material time pertaining to returning residents who were granted indefinite leave to remain, all of whom would have established a private life within the UK irrespective of whether they had also established a family life. Paragraph 18 draws no distinction between different types of residents within that cohort. It implicitly accepts that in principle it would be a disproportionate interference with their private lives to refuse them the right to come back within two years if it is their intention to settle in the UK, provided that the state did not fund their repatriation when they left. They are not even required to seek entry clearance.

56. By contrast, paragraph 19 envisages that in cases where the individual concerned is absent for more than 2 years, and does have to seek entry clearance, a fact-sensitive proportionality exercise would be undertaken by the Entry Clearance Officer of precisely the same nature as the exercise that would be undertaken under Article 8. In such a case, the reasons why the person left the UK, why they did not come back within 2 years, the period spent in the UK and outside it, and the existence of family and other ties will all have a part to play.

57. These are classic examples of rules indicating in general terms where the balance between the individual's private life rights and the state's right of immigration control should be struck as a matter of policy. As in all such situations, there may be exceptional cases where Article 8 would be infringed notwithstanding that the individual falls outside the strict criteria.

58. In the present case, the appellant was only put in a situation where he had to seek entry clearance from outside the UK because he lost his travel document, and therefore could not return within 2 years. It was accepted he met the suitability requirements. The Entry Clearance Officer denied his application under paragraph 19 in 2015 in circumstances where it was not accepted that he had ever had indefinite leave to remain. However, that position has moved on, and it is now established that he did indeed have indefinite leave to remain when he left, that he lost his travel document whilst abroad, and that he sought assistance from the British Embassy in getting a replacement for it well before the 2 years he was allowed to be absent before losing the right to return had elapsed.

59. In my judgment, depending on the facts, the refusal of entry clearance could interfere with a person's private life developed in the UK sufficiently to engage Article 8, and *Abbas* does not decide the contrary. It is unnecessary for the purposes of this appeal to decide anything more than that it was open to this appellant, as a settled migrant, to contend that the refusal of re-entry to resume his private life within the UK was disproportionate in all the circumstances. There is no need for the Court to consider the position of an individual whose private life within the UK is of a more tenuous nature.

60. The question whether the interference in this case was disproportionate will be a matter for the Upper Tribunal to determine on the appeal, but the extraordinary circumstances in which the appellant found himself unable to return within 2 years will obviously be a relevant consideration.

Conclusion

61. The FTT judge misinterpreted *Abbas*. That was an error of law. The UT judge should have granted permission to appeal on the basis that there was an arguable error of law in the determination which had a real prospect of success. The error, which this Court has now established after hearing full argument, was plainly material. Remitting the question of permission to appeal to the UT in these circumstances would not serve the overriding objective. Since the FTT judge did not go on to consider the question of proportionality of the interference with the appellant's private life, that is something which the Upper Tribunal will need to address on the appeal. However, unlike the UT judge who refused permission to appeal, it must carry out a proper evaluation of the situation in which the appellant found himself.

62. If my Lady and my Lord agree, I would therefore allow this appeal; grant permission to proceed with the claim for judicial review and allow the claim; quash the order of the UT refusing permission to appeal; grant permission to appeal to the Upper Tribunal; and remit the case to the Upper Tribunal for determination of the appellant's Article 8 ECHR private life appeal on the merits.

Lord Justice Coulson:

63. I agree that this appeal should be allowed, for the reasons so clearly explained by Andrews LJ. This case is typical of many immigration and asylum cases, where those involved become fixated with so-called 'principle', and fail properly to consider the underlying facts. Here, on any view, the appellant's history provides an overwhelming case for allowing the appeal.

Lady Justice King:

64. I also agree.