Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13247/2018
HU/13257/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 July 2019	**On 4 September 2019**

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE MANDALIA

Between

AAK (1)
OA (2)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Moran, of Alex Moran Immigration & Asylum
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity order was made by the First-tier Tribunal Judge on 16th October 2018 and for the avoidance of any doubt, that order

continues. The appellants are granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

2. This is an appeal against the decision of Judge of First-tier Tribunal Judge Herlihy (the judge), promulgated on 16th October 2018, dismissing the appellants appeals against the respondent's decisions dated 26th May 2018, refusing their applications for entry clearance to the UK under appendix FM of the immigration rules, on the basis of their family life with their daughter, ("RAK")

Background

3. The appellants are both nationals of Syria. The first appellant ("AAK") was born in January 1936 and is now 83 years old. The second appellant ("OA") was born in January 1944 and is now 75 years old. They have two sons and one daughter, none of whom are dependent upon the appellants. Their eldest son, ("RA") was born in Syria in 1969 and he continues to live in Damascus with his wife and three daughters. The appellant's other son, ("GA") was born in 1982 and he is a dual national of Syria and Canada. He currently lives in Canada. The appellant's daughter was born in 1973 and until October 2015, she lived with her parents in Damascus. In 2015 she was given a scholarship to do a Masters at Edinburgh University, and she arrived in the UK in October 2015. In April 2017, she was granted refugee status, and she has the benefit of a residence permit that is valid until 27 April 2022.

4. In August 2015, shortly before their daughter left Syria to study in the United Kingdom, the appellants went to live with their son, GA in Saudi Arabia, where he was working. GA was later informed that his employment contract in Saudi Arabia would not be renewed when it

ended on 30 April 2018, and he began to make plans to relocate to Canada where he has a permanent residence permit. The appellants applied for a visa to visit Canada and when that was refused, plans were made for the appellants to join their daughter in the United Kingdom. In May 2018, they made applications to the respondent for entry clearance to the UK, as adult dependent relatives. Their applications were refused in May 2018 and it was those refusals that gave rise to the appeal before the First-tier Tribunal ("F*t*T").

5. It is relevant to note at this point that the applications for entry clearance made by the appellants were supported by witness statements signed by the appellants' son, GA, and their daughter, RAK. When those statements were made the appellants were living in Saudi Arabia with their son. In her statement dated 1 May 2018, the appellants' daughter states "*.. Clearly my parents cannot return to Syria. Their home is in near eastern Ghouta, an area which has seen intense fighting. Not only is it far too dangerous for them but there is only limited access to medical care..".* In that witness statement it is also said that the appellants cannot return to Syria to live with their son, RA, who lives in a small two-bedroom house with his wife and three teenage daughters. In his witness statement, GA confirms that that he had wanted his parents to move with him to Canada so that he could continue to support them, but the applications were refused by the Canadian Embassy. He states that *"..It is inconceivable that they move back to Syria, given the situation is much worse than when they left, and that they are much older and weaker."* He confirmed his commitment to supporting his parents financially. The position had however changed by the time that the appeal was heard. On or about 9 August 2018, the appellants had indeed returned to Damascus.

The decision of the F*t*T Judge

6. The Judge refers in her decision to the reasons provided by the respondent for refusing the applications. At paragraph [2] of the decision, the F*t*T Judge sets out the relevant immigration rule, and the requirements for entry clearance as an adult dependent relative. At paragraph [1.5], the Judge refers to the documents that were provided to the Tribunal and at paragraphs [5.1] to [5.5] of her decision, the Judge carefully sets out the evidence given by the appellant's daughter. The findings and conclusions of the Judge are set out at paragraphs [6.1] to [7.2] of the decision.

7. At paragraph [6.1] of the decision, the Judge notes that it is not disputed that the sponsor in the UK *(the appellant's daughter)* is unable to financially support the appellants. The Judge noted the submission made on behalf of the appellants that there was, nevertheless, credible evidence of the availability of financial support from the appellants' son in Canada.

8. At paragraph [6.2] of the decision, the Judge considered whether the appellants can satisfy the requirement to show that as a result of age, illness or disability, they require long-term personal care to perform everyday tasks. The Judge states:

> ".. The evidence shows that the first appellant is aged 82 but does not disclose that he needs personal care from the sponsor to perform everyday tasks. There was no medical evidence submitted in respect of the first appellant and all the medical evidence related to the second appellant, the sponsor's mother who is aged 74. This discloses that she was examined shortly after returning to Syria from Saudi Arabia by a psychiatrist in Syria in September 2018 who has recorded that she has a diagnosis of PTSD following a missile that fell on her house and recurrent fighting and bombardment. The evidence from the psychiatrist at page 51 of the appeal bundle also indicates that the second appellant has a severe depressive disorder which he categorises as daily episodes of crying and severe sadness and loss of interest in life and lack of appetite and fatigue et cetera, and that she has been prescribed medication and referred for psychiatric therapy sessions. The psychiatrist recommends that she moves away from emotional and mental traumas and joins her daughter."

9. The Judge refers to other medical evidence regarding the second appellant at paragraph [6.3] of the decision. She notes that at page 117 of the appeal bundle there is a medical report prepared by a Doctor in Syria following the second appellant's return from Saudi Arabia which is dated 24 February 2018. The Judge summarises that evidence as follows:

> ".. This indicates that the second appellant is suffering from osteoporosis, spondylosis with a prolapsed disc and hyperthyroidism and that she suffers chronic pain, back/neck and shoulder pains with weight loss and has limited mobility in her range of movements and needs assistance with activities of daily living, showering, cleaning, shopping and cooking and that she also suffers from depression with emotional changes in chronic headaches, the medical report says that the second appellant needs assistance in performing daily activities."

10. The Judge noted that the appellants had travelled to Saudi Arabia in August 2015 and had remained there until they travelled back to Syria on 9 August 2018. At paragraph [6.4] of her decision, the Judge states:

> "…They had remained for three years in Saudi Arabia with their son [GA]. There is no evidence before me that whilst living in Saudi Arabia that either of the appellants needed help from their son with their day-to-day care. The evidence before me was that the son was working full-time. The medical evidence does not specify precisely what help is required by the second appellant but there was no evidence before me that such help could not be obtained in Syria."

11. At paragraphs [6.6] and [6.7], the F*t*T Judge concludes as follows:

> "I also note that the evidence shows that both appellants have another son [RA] living in Damascus with his family. There was evidence that [RA's] wife had been in a car accident in 2016 and that she suffered visual impairment. In considering the totality of the evidence I am not satisfied that the first appellant has established that he requires long-term personal care to perform everyday tasks. With regard to the second appellant, where the medical evidence indicates that she does require assistance with daily living, I am not satisfied that it has been established that such care could not be obtained to the required level in Syria where she is currently living. There was no evidence before me to indicate that such care would not be available for the second appellant if she and the first appellant sought to apply for settlement with their son in Canada.

> However I am not satisfied that the second appellant has provided satisfactory evidence that she requires long-term personal care to perform everyday tasks from the sponsor as she is presently being supported by her husband the first appellant, and their son, [RA], and was previously supported by their son [GA], who has moved to Canada. I'm not satisfied in considering the totality of the evidence that the appellants have established that they require long-term personal care to perform everyday tasks."

12. The Judge noted that it was common ground between the parties that the sponsor does not have sufficient funds to meet the costs of the appellant's care in the United Kingdom. Having considered whether the requirements of the immigration rules were met, the F*t*T Judge considered the Article 8 claim outside the rules. At paragraph [7.2], the Judge states as follows:

> "I find that the appellants have not submitted any satisfactory evidence that they enjoy family life with the sponsor in the United Kingdom. Relationships between adult children and their parents do not amount to a family life unless there is a degree of dependency. It is quite clear that the appellants and the sponsor have been living apart since 2015 when the sponsor came to the UK and the appellants then travelled to Saudi Arabia to live with their son [GA]. It is clear also that the sponsor has been able to maintain her relationship with the appellants without any difficulty notwithstanding they are separated by a considerable distance and that they continue to do so. The decision does not affect the status quo. I am not satisfied that the appellants have established that they are emotionally or financially dependent on the sponsor. I do not find the existence of compelling circumstances to justify discretionary grant of leave given that the appellants cannot satisfy the requirements of the immigration rules…."

The appeal before us

13. Permission to appeal was granted by Upper Tribunal Judge Chalkley on 20th February 2019. At the end of the hearing before us we reserved our decision and informed the parties that a decision would follow in writing.

14. The appellant advances nine grounds of appeal, many of which are inter-linked. They can broadly be categorised, first as a challenge to the Judge's consideration and analysis of the evidence in reaching her decision that the appellants do not satisfy the requirements of the

relevant immigration rule, and second, a challenge to the decision that Article 8 is not engaged.

15. It is perhaps useful to begin by considering the criticisms made in respect of the F*t*T Judge's consideration of the appeal by reference to the requirements set out in the immigration rules. The appellants claim that having referred to the relevant rule, the Judge fell into numerous errors, when applying the rules to the facts of the case.

16. Mr Moran submits that paragraph E-ECDR.2.4 of Appendix FM requires that an applicant or, if the applicant and their partner are the sponsor's parents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks. He submits that the appellants were not required to establish that both require long-term personal care to perform everyday tasks. It was sufficient to establish that the second appellant, as a result of age, illness or disability requires long-term personal care to perform everyday tasks. Mr Avery does not disagree.

17. Mr Moran submits that the Judge made conflicting findings on that key issue. He submits that at paragraph [6.3], the F*t*T Judge noted that the medical report says that the second appellant needs assistance in performing daily activities. However, the Judge concluded, at [6.7], that she was not satisfied that the second appellant has provided satisfactory evidence that she requires long-term personal care to perform everyday tasks". Mr Moran submits that those conflicting findings, cannot be reconciled.

18. In our judgement, the Judge does not reach conflicting findings. At paragraph [6.3] of the decision the Judge refers to the medical report that is to be found at page 117 of the appellants' appeal bundle. The Judge refers, at [6.3], to the content of that medical report and properly notes that the report confirms that the second appellant has limited mobility in her range of movements, and needs assistance with

activities of daily living. Paragraph [6.7] of the decision must be read as a whole. In that paragraph, the Judge was not simply addressing whether the second appellant requires long-term personal care to perform everyday tasks, but noted, that she was not satisfied that the second appellant has provided satisfactory evidence that she requires long-term personal care to perform everyday tasks from the sponsor, noting also that the second appellant is presently being supported by her husband the first appellant, and their son RA. The finding as to whether the second appellant requires long-term personal care to perform everyday tasks, is in fact set out at paragraph [6.6] of the decision. The Judge states:

> "… With regard to the second appellant where the medical evidence indicates that she does require assistance with daily living, I am not satisfied that it has been established that such care cannot be obtained to the required level in Syria where she is currently living…."

The Judge did not therefore seek to go behind the medical evidence that was before her.

19. Mr Moran submits that the F*t*T Judge made findings which are unsupported by the evidence. He submits that at paragraph [6.4], the Judge states that *"there is no evidence before me that whilst living in Saudi Arabia that either of the appellants needed help from their son with day-to-day care."*. Mr Moran submits that the F*t*T Judge fell into error in two significant respects. First, the Judge proceeds, at paragraph [6.3], in the mistaken belief that the medical report at page 117 of the appeal bundle was prepared by a doctor in Syria following the second appellant's return from Saudi Arabia. Second, having understood that the medical report had been prepared by a doctor in Syria, the F*t*T Judge erroneously concluded, at [6.4], that there is no evidence that whilst living in Saudi Arabia, either of the appellants needed help from their son with their day-to-day care. He submits that if the F*t*T Judge had properly recognised that the appellants had been receiving help to perform everyday tasks from their son whilst

they lived with him in Saudi Arabia, the Judge is likely to have accepted that the second appellant in particular, requires long-term personal care to perform everyday tasks.

20. Although we accept that the F*t*T Judge erroneously refers, at [6.3], to the report being prepared by a Doctor in Syria, that error is in our judgement immaterial. As we have already set out, at paragraph [6.6] of the decision, the Judge accepted that the medical evidence indicates that the second appellant does require assistance with daily living. The medical report confirms that her limited mobility has resulted in the second appellant needing assistance with activities of daily living like showering, cleaning, shopping and cooking. The Judge properly noted, at [6.4] that the medical evidence does not specify precisely what help is required by the second appellant. It was in our judgement reasonable for the F*t*T Judge to query precisely what help is required by the second appellant. The assistance identified in the medical report could conceivably be met by the provision of limited care for a limited number of hours each week. In the absence of such evidence, it was impossible for the F*t*T Judge to consider what was happening on a day to day basis, and what care provision is reasonably required.

21. Mr Moran submits that in then considering the requirement in paragraph E-ECDR.2.5 of Appendix FM, the F*t*T Judge failed to apply the guidance provided by the Court of Appeal in Britcits -v- SSHD [2017] EWCA Civ 368. He submits that the focus should properly have been on whether the care required by the appellants could "reasonably be provided to the required level in Syria", and the question as to the reasonableness, must be addressed by reference to the perspective of the provider and the appellants. Furthermore, the standard of care must be what is required for the second appellant. He submits that the appellants contended that the current care arrangements that have been made for their care are "unreasonable",

from the perspective of the appellants' son, RA, who lives on the other side of Damascus, and whose wife has care needs resulting from a car accident in 2016.

22. As Sir Terence Etherton, MR, noted at paragraph [59] of his judgment in Britcits -v- SSHD, the focus of the relevant rule is whether the care required by an adult dependant relative can be reasonably provided, and to the required level, in the home country. What is reasonable is to be objectively assessed. Here, the F*t*T Judge found, at [6.4] that the medical evidence before the Tribunal did not specify precisely what help is required by the second appellant. We have carefully considered the medical report that is at page 117 of the appellants' bundle for ourselves. The report confirms that the second appellant's limited mobility has "..*resulted in her needing assistance with activities of daily living like showering, cleaning, shopping and cooking."* The extent of the assistance required is not identified. What care is both necessary and reasonable for the second appellant to receive in Syria, can only be considered by reference to the evidence before the F*t*T as set out in the evidence, and particularly, the medical evidence. At paragraph [5.1], the F*t*T Judge set out the evidence of the appellants' daughter. She gave evidence that her father is old and is barely able to manage and that her mother needs help preparing meals and showering, and she cannot stand for long periods. It was in our judgement open to the F*t*T Judge to find, at [6.6], that having considered the totality of the evidence, it has not been established that such care that is required by the second appellant, cannot be obtained to the level required, in Syria, where she is currently living. There was as the F*t*T Judge notes repeatedly, no evidence before the Tribunal that such assistance that the second appellant might need with daily living, is not available in Syria. The F*t*T Judge noted, at [6.7], that the second appellant is presently being supported by her husband the first appellant and their son RA.

23. We accept, as Mr Moran submits, that the F*t*T Judge erroneously had regard to whether the appellants could apply for settlement in Canada with their son GA. The question under the relevant rule is whether the applicant is able to obtain the required level of care in the country where she is living. The Judge did not accept that the appellants had applied for, and been refused settlement in Canada. The Judge found that they had been refused an application for a visa to visit Canada. The Judge's finding and conclusion in that respect, was immaterial to the outcome of the appeal.

24. We have carefully considered the criticisms made by the appellant regarding the Judge's consideration and analysis of the evidence. It is clear from a careful reading of what is set out at paragraphs [6.4] to [6.7] of the decision, that in the end, the appeal failed for two reasons. First, although there was some medical evidence that indicates that the second appellant does require assistance with daily living, the medical evidence does not specify precisely what help is required by the second appellant. Second, there was no evidence before the F*t*T, that the second appellant could not obtain the required level of care in Syria because it is not available even if the appellants son RA, cannot reasonably provide it.

25. The Judge was not satisfied that the requirement set out at paragraphs E-ECDR.2.4. and E-ECDR.2.5. of Appendix FM are met. There was, as Mr Moran accepted before us, no evidence that the required level of care is not available in Syria. Mr Moran submits that it would be difficult for an applicant in the position of the appellants to adduce evidence of something that is not available. That misses the point. The appellants have been able to obtain medical evidence to support their application and appeal. At page 51 of the appellants' bundle, there is a letter from Dr Mohamed Qasim Al Shukairy, a psychiatrist and neurologist. That letter was considered by the F*t*T Judge. The letter confirms that the second appellant has PTSD and

that she suffers from a severe depressive disorder. The letter confirms that she has been prescribed appropriate medication and has been referred to psychiatric therapy sessions. There is no suggestion in that letter that the second appellant, is unable to obtain the required level of care in Syria, because such care is not available. There was no evidence before the Tribunal as to the availability of, and the extent to which domestic care could be arranged, to assist the second appellant secure the required level of care in Syria. That is evidence that should have been readily available. In her witness statement, the appellants' daughter states that her parents cannot return to Syria because their home is near eastern Ghouta, an area which has seen intense fighting. She states that not only is it too dangerous for them, but there is only limited access to medical care. That statement was made at a time when the appellants were in Saudi Arabia, but they have since returned to Syria. The appellants might well be reluctant to bring in other help for fear of criminals but that is not to say that suitable domestic care is not available, or could not be safely arranged.

26. It is now well established that the issues which the Tribunal is deciding and the basis on which the Tribunal reaches its decision may be set out directly or by inference. The weight that the F*t*T Judge attached to the evidence was a matter for her. The obligation on a Tribunal Judge is to give reasons in sufficient detail to show the principles on which the Tribunal has acted and the reasons that have led to the decision. An appellant is entitled to know the basis of fact on which the conclusion has been reached. Appellate courts should not rush to find such misdirection's simply because they might have reached a different conclusion on the facts or expressed themselves differently. In our judgement, it was open to the F*t*T judge to conclude that the requirements of the immigration rules cannot be met.

27. Turning then to the Article 8 claim, the F*t*T Judge found that the appellants have not submitted any satisfactory evidence that they

enjoy family life with the sponsor in the UK. Mr Moran concedes before us that there was no evidence before the F*t*T as to the frequency of contact between the appellants and their daughter in the UK, and there was no evidence adduced before the F*t*T regarding any particular emotional ties between them, that might go beyond the normal emotional ties that one expects between parents and adult children. Mr Moran submits that the immigration rules make provision for adult dependent relatives to join children in the UK, and that is a strong indication that in such circumstances there is likely to be a family life between the applicants and their sponsor in the UK.

28. The submission made by Mr Moran was rejected by the Court of Appeal in Britcits -v- SSHD. At paragraph [74], Sir Terence Etherton, MR *(with whom Lord Justice Davis agreed)* said:

> "Firstly, as I have said, I reject the appellant's submission that there is family life which engages Article 8 in every case where a UK sponsor wishes to bring their elderly parent to the UK to look after them. As Sedley LJ said in *Kugathas* at [18], [24] and [25] with regard to an adult, neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, enough to constitute family life; there is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise all the relevant factors. There must be something more than normal emotional ties. As Lord Bingham said in *Huang* at [18]:
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> > "Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

29. Lord Justice Sales added, at [86]:

> "…For the reasons given by the Master of the Rolls by reference to the *Kugathas* case, I cannot accept Miss Lieven's submission that Article 8 rights are always engaged in the cases covered by the ADR rules and hence cannot accept her submission that application of the rules will invariably involve an interference with Article 8 rights. In my view there is likely to be a significant number of cases even within the paradigm type of situation

> involving elderly parents abroad (on which Miss Lieven focused her submissions) in which Article 8 rights will not be engaged and where for that reason the application of the ADR immigration rules would not contravene Article 8. The position becomes clearer still when the wider categories of adult dependant relatives to which the rules apply outside that paradigm situation are taken into account, in relation to which it will often not be possible to show that there is any recognised family life for the purposes of Article 8."

30. It is well-established in the authorities that there is no relevant family life for the purpose of Article 8 simply because there is a family relationship between two adults (such as a parent and child) who live in different countries. There must be something more than normal emotional ties: see *Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31*. That is plainly the starting point that was adopted by the F*t*T Judge at paragraph [7.2] of her decision. It was uncontroversial that the appellants and the sponsor have been living apart since 2015 when the sponsor came to the UK and the appellants then travelled to Saudi Arabia to live with their son GA. We accept that another Judge might well have concluded that Article 8 is engaged, but this is an issue which faces Judges of the specialist immigration Tribunals on a daily basis. The Judge here, was not satisfied that the appellants have established that they are emotionally or financially dependent on the sponsor. That was in our judgement, a conclusion that was open to the F*t*T Judge on the evidence before the F*t*T. The finding reached by the Judge was neither irrational nor unreasonable in the *Wednesbury* sense, or a finding that was wholly unsupported by the evidence.

31. It follows that in our judgement, the decision of F*t*T Judge Herlihy is not infected by a material error of law capable of affecting the outcome and the appeal is dismissed.

Notice of Decision

32. **The decision of the First-tier Tribunal did not involve the making of an error on a point of law.**

33. **The appellant's appeal is dismissed.**

4th July 2019

Signed
Upper Tribunal Judge Mandalia