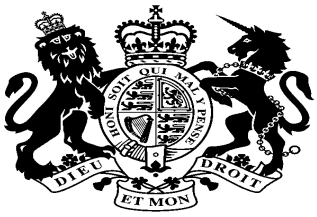

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14427/2019 (P)**

THE IMMIGRATION ACTS

Decided Under Rule 34 (P)
On 3 November 2020

Decision & Reasons Promulgated
On 5 November 2020

Before

UT JUDGE MACLEMAN

Between

ENAS [S]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS (P)

1. The appellant is a citizen of Egypt, born on 2 September 1935 (aged 84 at the time of the hearing in the FtT). On 30 November 2018, the respondent refused her application for entry clearance as an adult dependent relative. Having subsequently entered the UK as a visitor, she applied on 2 April 2019 for leave to remain on family and private life grounds. The respondent refused that application on 15 August 2019. FtT Judge Cohen dismissed her appeal by a decision promulgated on 8 January 2020.

2. The appellant sought leave to appeal to the UT on 9 grounds. By a decision issued on 4 August 2020, UTJ Kekic granted leave on grounds 1, 2, 8 and 9 only, and issued directions with a view to deciding without a hearing (a) whether the FtT erred in law, and, if so, (b) whether its decision should be set aside. Parties were also given

the opportunity to submit on whether there should be a hearing to decide those questions.

3. In a response filed on 14 August 2020, the SSHD says that a hearing is not required. She submits that the FtT made no material error and its decision should stand.

4. In a response filed on 17 August 2020, the appellant submits that the UT should "accept the 4 grounds of appeal and overrule Judge Cohen's decision". Nothing is said about any need for a hearing.

5. In a further submission filed on 25 August 2020, the appellant asks for a hearing, citing authorities on the value of oral argument, and saying under heading (1), "procedural fairness", that a hearing "will allow the witnesses to be re-examined" and under heading (2) that an appeal on the papers "risks a lack of focus on the appellant as an individual … rather than a number".

6. The request for a hearing is confused. It relates to remaking the decision, rather than to error of law. At the error of law stage there is no re-examination of witnesses or evaluation of the appellant as an individual; the first question is whether the FtT erred on the case which was put before it. Both sides have said all they have to say on that question, so the UT may now proceed to answer it without a hearing, in terms of rules 2 and 34.

7. The submissions for the appellant are also rather confused, and in parts irrelevant, being based on evidence which was not before the FtT, and on deterioration in the appellant's condition since the hearing. Error of law must ordinarily be shown by reference to what *was* before the FtT. The appellant does not advance an argument for any exception to that general principle.

8. I have resolved the error of law issue without taking account of anything which was not before the FtT.

9. Ground 1 is directed against [31] of the decision:

> "The appellant has submitted a medical report and update from Miss Jasdeep Kaur Gahir who is to all intents and purposes a breast implant and cosmetic surgeon. She is known to the sponsor and works in the same hospital as him. She has prepared a medical report which appears significantly outside her area of expertise. The medical report appears prone to exaggeration. It indicated that the appellant was virtually bedbound. The appellant attended her appeal before me and walked independently … the evidence indicated that the appellant remained at home alone whilst the sponsor and his wife went to work at 7 am and did not return until 5 pm. She was alone until 3:30 pm when her grandchildren were brought home by a childminder. She would watch tv and eat food that was prepared for her and go to the toilet independently. I find that the evidence in the medical report is prone to significant exaggeration and I attach very little weight to it."

10. The reports by Miss Gahir are dated 8 August and 28 November 2019. They are headed and signed off with her qualifications, "MB ChB FRCS Consultant Breast

Oncoplastic and General Surgeon – GMC" (registration number given). They are addressed from BMI King's Oak and Cavell, and from the North Middlesex, which are among the UK's leading private and NHS hospitals, respectively. Oncoplastic surgery combines breast cancer tumour removal with breast conservation surgery. The author of the reports has impressive medical qualifications, both specialised and general, and holds senior posts. Those are all public matters.

11. The judge does not explain the basis on which she considers that the reports go beyond the author's expertise – which would be a serious professional impropriety.

12. The description of the author as "to all intents and purposes a breast implant and cosmetic surgeon" takes an oddly belittling tone.

13. The appellant does not dispute that the author "is known to the sponsor and works in the same hospital". It is not error of law accurately to record facts, even if they are irrelevant. However, why does that sentence appear? So far as pertinent, it seems intended to convey that the author has allowed herself to become partial, a serious charge. Judges should not shrink from such findings, where justified, but they should be stated explicitly, not by innuendo, and they should not be made without good reasons.

14. The reports follow on from an earlier report, which was not before the FtT. They disclose that the author first saw the appellant after discovery of an abdominal swelling while the sponsor's wife was bathing the appellant, raising concern whether there might be a need for surgery. The appellant is assessed at level 7, "severely frail" on a clinical frailty scale of 9 levels. The earlier report says that she is "totally dependent" on her relatives "in most aspects such as getting up from bed, bathing and even when walking a few steps she needs to be supported". The later report confirms that score, and says she has "an unsteady gait" and is "susceptible to falls".

15. The judge does not go into detail of her observation of the appellant "walking independently", but presumably that was within a hearing room over a short distance. The appellant offers to prove by witnesses that she was assisted over those few steps, but it is not necessary to explore the matter by evidence. The suggestion of obtaining CCTV footage from the hearing centre does not need to be followed up either, although I suspect that any record may by now have gone, or at least be difficult to trace.

16. A judge is entitled to rely on her own observations, but has to be careful when rejecting expert findings.

17. The frailty scale is appended to the reports. There is nothing to suggest that it is for use only by geriatricians, rather than by all medical professionals.

18. Level 6, "moderately frail", is illustrated by a person using a frame to stand, and defined thus: "People need help with all outside activities and with keeping house.

Inside, they often have problems with stairs and need help with bathing and might need minimal assistance … with dressing".

19. Level 7 is illustrated with a person in a wheelchair, and defined: "Completely dependent for personal care… even so, stable and not at high risk of dying (within 6 months)."

20. The appellant's submissions point out that level 7 does not mean bedbound, which is level 8, and that the reports do not say that the appellant is bedbound.

21. The reports, read in detail, and the evidence as a whole, might have justified an observation that the appellant was on the borderline between 6 and 7, moderate and severe. I cannot see justification for saying that the reports engaged in "significant exaggeration".

22. The FtT's overall reasoning at [31] is legally inadequate to justify giving the reports "very little weight". Ground 1 shows material error.

23. Ground 2 shows that in saying there was no evidence of medication, the FtT overlooked evidence that the appellant was prescribed an anti-depressant in Egypt. I doubt whether consideration of the report by the Egyptian doctor was so inadequate as to amount to material error. Ground 8 is only disagreement with the proportionality assessment. Ground 9 shows that the appellant was a vulnerable witness, which might have made some difference when assessing discrepancies in the evidence. In view of the outcome on ground 1, it is not necessary to resolve grounds 2, 8 and 9 any further than that.

24. The decision of the FtT is set aside. There is no need for further submissions on procedure. The nature of the case is plainly such that it is appropriate under section 12 of the 2007 Act, and under Practice Statement 7.2, to remit to the FtT for a fresh hearing, not before Judge Cohen.

25. (The best starting point will probably be the adult dependent relative rule.)

26. No anonymity direction has been requested or made.

Hugh Macleman

UT Judge Macleman
3 November 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as

follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.