Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04134/2018

THE IMMIGRATION ACTS

Heard at Field House
On 25 April 2019

Decision & Reasons Promulgated
On 09 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

M. S.
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:
For the Appellant: Ms F Shaw of Counsel instructed by Citadel Immigration Lawyers
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Lodge promulgated on 15 January 2019 dismissing on human rights grounds the appeal against a decision of the Respondent, the Entry Clearance Officer in Sheffield, to refuse entry clearance to the Appellant as an adult dependent relative.

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2. The Appellant is a citizen of Yemen born on 28 August 1995. On 21 September 2017 an application was made online for entry clearance as the adult dependent relative of his mother E.A-N ('the sponsor'). The sponsor is a national of Yemen settled in the United Kingdom. She entered on 4 March 2009 and obtained settled status on 7 June 2011. She is married to a British citizen husband – who is not the Appellant's father; he has his own particular mental health needs which are looked after primarily by the sponsor. The sponsor and her husband in the United Kingdom have two children who, at the time of the making of a supporting statement on 10 October 2017, were 5 years old and 4 months old respectively. The children are half-siblings of the Appellant, but have never met the Appellant in person.

3. When the sponsor came to the United Kingdom she left the Appellant with her parents – i.e. his maternal grandparents - with whom he has resided ever since. The sponsor has only been able to make limited visits to see the Appellant since her arrival in the United Kingdom. She went to see him between 15 December 2012 and 14 January 2013; she also saw him in September 2013 in Egypt when she was hoping to be able to make an application for entry clearance at that time, in the end not being able to do so and returning to the United Kingdom in January 2014.

4. In support of the application the Appellant and the sponsor emphasised that the Appellant is a person with cognitive impairment who has been attributed a mental age of 8 years. It was also said that his grandparents were facing increasing difficulties in looking after him.

5. In support of the application amongst other things two medical documents were provided - which are included in the Respondent's bundle before the First-tier Tribunal. There was a letter dated 21 February 2017 from the Saber Hospital in Aden in Yemen which gave details of the Appellant's underlying medical conditions in these terms:

> *"Low intelligence, hyperactivity, stubbornness, destructive and aggressive, talking irrelevant.*
>
> *Duration: since early childhood, … delayed psychomotor development; failure in school.*
>
> *MSE: uncooperative, inappropriate behaviour, irritability, irrelevant talk.*
>
> *IQ mental age 8 years.*
>
> *Diagnosis: mental retardation with psychotic features".*

It is apparent that two types of medication were prescribed to the Appellant.

6. Further to this there is a document from the Ministry of Public Health and Population, Al-Gamhuria Modern General Hospital in Aden, the date of which is not readily manifest being rendered in Arabic script and not being translated. It is stated:

> *"The abovementioned male has history of cerebral palsy due to difficulty in birth. He [complains of] difficulty in speaking and walking since long time, he is under go to intrusive medical and physiotherapy and improved".*

Nothing physically was noted, his chest being clinically clear, his pulse rate not indicating any particular concerns, and there being no problems otherwise in respect of his central nervous system.

7. The application for entry clearance was refused for reasons set out in a combined Notice of Immigration Decision and 'reasons for refusal' letter dated 8 January 2018, with reference to the requirements of Appendix FM in respect of adult dependent relatives. The Respondent's decision maker was satisfied in respect of the 'suitability' requirements of the Rules, the 'eligibility' financial requirements and the 'eligibility' English language requirements. However, the application was refused with particular reference to paragraphs E-ECDR.2.4 and E-ECDR.2.5 in the following terms:

> *"You do not meet the eligibility relationship requirements of paragraphs E-ECP.2.1 to 2.10 because you state that you require long term personal care to perform everyday tasks because you have mental retardation with psychotic features as described by a letter from Saber Hospital. Although the letter explains your condition, it makes reference to the medication you are prescribed but does not give any details with regard to level of care you have provided. Therefore, I am not satisfied that you require, due to either age, illness or disability, long term personal care to perform everyday tasks. I therefore refuse your application under paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules (E-ECDR.2.4)*
>
> *You state that you require long term personal care to perform everyday tasks because you have mental retardation. You state that you cannot obtain the care you require in the Republic of Yemen. As evidence of this you have provided a letter from Saber Hospital. Your mother left for the UK in March 2009 and since that date you have been living with your grandparents and receiving all the prescribed medication that you require with financial support from your mother. Although your grandparents are elderly this alone does not demonstrate that you cannot receive appropriate care in your home*

country. The letter from Saber Hospital confirms that you are in receipt of prescription medication required for your condition. There has been no evidence provided that states that you would be unable to receive the relevant level of care if your application was refused in the interests of maintaining a fair and robust immigration control. I am not satisfied that you are unable to obtain the required level of care in Yemen. I therefore refuse your application under paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules (E-ECDR.2.5)".

8. The Appellant appealed to the IAC.

9. On appeal the First-tier Tribunal Judge found in the Appellant's favour in respect of paragraph E-ECDR.2.4:

   "The appellant is twenty three years of age. He suffers from cerebral palsy and is mentally retarded. He has a mental age of eight years. He also suffers from psychosis. There are three medical reports testifying to his mental and intellectual problems at pages 30-33 in the appellant's bundle. I am satisfied on the basis of those reports the appellant meets E-ECDR.2.4. It is almost self-evident that a person with a mental age of 8 years is not likely to be able to perform the activities of daily living for themselves". (paragraph 22).

10. I pause to note that it is clear from this passage that the Judge had well in mind the exact medical problems of the Appellant as indicated in the supporting medical evidence, referencing the supporting medical evidence in terms.

11. Notwithstanding this favourable finding in respect of E-ECDR.2.4, the First-tier Tribunal Judge found against the Appellant in respect of the requirements of paragraph E-ECDR.2.5. The Judge's consideration of these matters is set out at paragraphs 23-30 in these terms:

   "23. When the appellant was twelve years of age his mother, the sponsor, came to the UK. She has lived here ever since though she has visited the Yemen twice in 2011 and 2013. The appellant was left in the care of his grandparents. All the indications are that he has lived happily and contentedly in his home country with his grandparents. It is said that his condition has worsened but there is no evidence to substantiate that. The medical reports do not suggest that.

> 24. *It is said that his grandparents cannot continue to care for him as they are old and suffering from various medical problems themselves.*
>
> 25. *The grandfather is 77 years of age and suffers from shortness of breath and fatigue (see medical letter pages 83–84). He appears to be modestly medicated for these problems (see page 85).*
>
> 26. *The Appellant's grandmother is 65 years of age. Somewhat bizarrely she suffers from some of the exact same medical problems as her husband, for example, "chest pain stating (sic) radiate left indies (sic) exertion, shortening of breathily (sic) in night". There are references again to identical problems such as anxiety and fatigue.*
>
> 27. *It is unnecessary, however, for me to come to any conclusions as to the credibility of the medical evidence as it does not in any event support the appellant's contention that his grandparents are, because of their medical problems, unable to care for him. I accept that his grandfather is 77 years of age but there is no evidence that his medical problems significantly affect his ability to care for the appellant. In the same way his grandmother is 66 years of age but I have no objective evidence of how her medical conditions affect her and certainly no evidence to support the sponsor's contention that she cannot care for the appellant.*
>
> 28. *I note that the sponsor provides financial support for the appellant as is demonstrated by the money transfers in the appellant's bundle. There is nothing to suggest that cannot continue.*
>
> 29. *Although in evidence before me the sponsor said the appellant was not getting the medical help that he required I again have no evidence that that is the case. He appears to be or to have been under the care of both a psychiatrist and a neurologist.*
>
> 30. *On the evidence I am satisfied the appellant does not meet E-ECDR.2.5".*

12. I have been told today that the ages of the maternal grandparents at the time of the hearing before the First-tier Tribunal were in fact 78 and 66, not 77 and 65. It seems to me that ultimately nothing turns on any such slight error.

13. The Judge considered that the failure to meet the requirements of the Immigration Rules was essentially dispositive of the appeal under Article 8 (paragraph 31). The Judge nonetheless gave separate consideration to Article 8, but found that there was no breach in this regard.

14. I note that the Judge found that there was family life between the Appellant and the sponsor but characterised this as being *"very limited family life over the last eleven years"* (paragraph 32). The Judge explains this finding essentially on the basis of the circumstance that the sponsor had not been able to visit the Appellant on a regular basis. The Judge consequently concluded *"There will therefore be very little disruption to the existing family life"*. The Judge also noted the public interest consideration that the Appellant "*will be a burden upon public funds given his medical problems*", before concluding that the appeal should be dismissed on Article 8 grounds.

15. The Appellant applied for permission to appeal to the Upper Tribunal which was granted on 18 February 2019. The grant of permission to appeal in material part is in these terms:

> *"Although the Appellant may well not succeed, it is arguable that the Judge erred in failing to give adequate consideration to the fact that the Appellant is 23 years of age, has cerebral palsy, a mental age of 8 and has psychosis when considering the ability of his carers, his grandparents, to look after him when they are both aged 77 and 65".*

16. In my judgment, respectfully, it is not immediately obvious that the grant of permission identifies an arguable error of law. The suggestion that it is arguable that there was a failure to give 'adequate consideration' to the key facts in circumstances where it is not identifiable that any facts were overlooked in the Decision, appears in substance to be founded on criticisms of 'weight' and/or the premise that a different outcome might have been reached. This echoes the grounds of challenge which are couched in the language of disagreement rather than error of law.

17. Indeed, it seems to me that ultimately in each of the application, the appeal before the First-tier Tribunal, the grounds of appeal to the Upper Tribunal, and the submissions before me that a significant part of the Appellant's case is in substance to invite the decision-maker to conclude that 'it speaks for itself' that people of the age of the Appellant's grandparents cannot ably look after an individual with the characteristics of the Appellant. I do not accept that this is a 'self-evident' proposition.

The case, like any other, needs to be proved on its own particular facts, and on the basis of evidence.

18. The grounds of appeal, so far as are relevant, are in these terms:

"2. The First-tier Tribunal Judge has not taken proper consideration to the evidence provided by the Sponsor in oral evidence as well as the submission provided. It has been accepted that the Appellant has the mental age of an 8 year old hence will not be able to perform everyday living tasks on his own (see paragraph 22). The Appellant is currently being cared for by his grandparents who are 77 years old and 65 years old who suffer their own medical problems which has been accepted. The FtT believed that there was no evidence that their age and medical problem stops them from caring for the Appellant who suffers cerebral palsy and is mentally retarded with a mental age of an 8 year old. However, it is almost self-evident that a 77 year old and a 65 year old are unable to care for Appellant due to his condition. It is unreasonable to expect an elderly couple to continue to care for the Appellant especially now that he has grown up and a bigger build.

3. The FtT Judge has not properly considered skeleton argument submitted with the appeal detailing the difficulties with the Appellant's current care as well as the severe conflict war zone Yemen is in.

4. The FtT Judge has not properly assessed Article 8 ECHR and concluded there has been limited family life when the Sponsor has been on daily contact with the Appellant, constant financial and emotional support (evidence provided with bundle). The only factor is that the Sponsor has not visited the Appellant since 2014 due to the security situation in Yemen and no flights. No consideration has been given to the family life that will be breached between the Appellant and his younger siblings residing in the UK. Regardless of the Appellant's date of birth making him over 18 years of age the assessment should be to assess the Appellant as a child as he has a mental age of an 8 year old. As such the FFT Judge should have considered whether that finding should lead her to consider there are unjustifiably harsh consequences so that the refusal is disproportionate (see ***R (Agyarko) v SSHD [2017] UKSC 11****)".*

19. In my judgment the grounds of appeal do not disclose an error of law.

20. It seems clear from the multiple use of the word ‘accepted’ at paragraph 2 of the grounds, that it is in substance acknowledged that the First-tier Tribunal Judge *did* have regard to the evidential material before him, and therefore the essence of the Appellant’s case with regard to the Appellant’s own medical circumstances and the position of the Appellant’s grandparents. I do not see how it can be argued where it is repeatedly said that the Judge accepted certain matters that the Judge somehow then failed to take those matters into account. In reality the phrase “*has not taken proper consideration to the evidence*” is really no more than an assertion that the Judge has not given the primary facts the weight that the Appellant would have liked: this is to disagree with the Judge, but is not to suggest an error of law.

21. It also seems to me in particular that in the phrase *“however it is almost self-evident …”*, the word ‘almost’ is a plain indication that it is acknowledged that it is not inevitably self-evident. To that extent, the drafting of the ground essentially seeks to re-put the case on behalf of the Appellant, rather than pleading in terms that the Judge reached a perverse conclusion, or one that was otherwise in error of law.

22. In respect of paragraph 3 of the grounds, I find it is not possible to identify anything significant in the Skeleton Argument that is not essentially encompassed in the findings and consideration of the First-tier Tribunal. Insofar as the situation in Yemen was pleaded in aid of the Appellant, Ms Shaw indicated in her submissions before me that that was something that impacted upon the availability of medical care, the medical and health services in Yemen being restricted and depleted by the unfortunate situation in that country. It follows, in my judgement, that the country situation was not something that directly impacted upon the Appellant’s *personal care* needs beyond his healthcare – i.e. his care needs in respect of daily living activities, which are distinct from medical input through medical services. As such the country situation did not specifically impact upon the ability of the grandparents to meet the Appellant’s personal care needs.

23. Insofar as the country situation may have had an impact generally on the medical services available in Yemen, it is clear that the Judge made a finding on the evidence before him that the Appellant seemed able to access medical care (paragraph 29). In this context I note that the Appellant’s medical issues are essentially chronic in nature, and his underlying diagnoses seemingly longstanding; he was not the subject of ongoing investigation so much as a continuing medication regime that had been established over a period of years. There was nothing to indicate

that the country situation had resulted in the Appellant being unable to obtain the medications that he was taking.

24. Paragraph 4 of the grounds essentially pleads that the Judge was wrong in concluding that there was limited family life. The matters relied upon in the ground of appeal - the Appellant's dependency both financially and in consequence of essentially having the mental age of a child - are all matters that go to the question of whether there is or is not a family life. The Judge found that there was a family life. It seems to me that the Judge cannot be criticised for characterising the family life as between the Appellant and his mother as having been limited over the last eleven years. I can see nothing in substance in this ground of challenge. Insofar as the Appellant's siblings were concerned, there had been no actual meeting and to that extent again, it cannot be said that there was anything undue in the Judge essentially characterising family life as being limited.

25. In all the circumstances I find the grounds of appeal to be without merit.

26. I note that Ms Shaw valiantly sought to develop the grounds of appeal with reference to the supporting evidence before the First-tier Tribunal, in particular in respect of the Appellant's actual personal care needs. In this context, pursuant to the wording of E-ECDR.2.4 and 2.5, and it being the finding of the Judge that the Appellant was able to access medical care, the focus of the appeal was indeed on the long term personal care needs required to perform everyday tasks.

27. The nature and extent of those needs were in part a matter of oral evidence. The Judge records this:

> *"[The sponsor] said that her son could not feed himself. He could not be relied upon to look after himself. If he had food put in front of him he could eat it but he needed to be prompted and he needed to be prompted to take his medication"* (paragraph 13).

28. Further to this my attention has been directed to the sponsor's witness statement before the First-tier Tribunal signed on 8 December 2018 (Appellant's bundle before the First-tier Tribunal, pages 9-12). At paragraph 6 the sponsor said this:

> *"The Appellant suffers from mental retardation. He has a mental age of 8 years. He has been cared for by my parents in my absence however this has been difficult for them as he has grown older. My parents are unwell and getting old. They cannot continue caring for Mohammed. There are times when Mohammed has just walked off in the streets after hearing sounds of firearms. He was fascinated by the sound and wanted to see what it was. Thankfully a neighbour recognised him and took him back home. He has wandered off more than once and my parents are finding it hard to control him. Mohammed is big and well-built while my parents are old and fragile".*

Reference is also made in the witness statement to the Appellant being *"depressed and cries like a baby. He says that he does not want to live any more if he is not with me. He constantly blames me for leaving him and not bringing him earlier and now the same is used against me by the Entry Clearance Officer"*. I was directed to this passage as illustrative of emotional needs of the Appellant.

29. In this context I was also directed to the supporting medical evidence at pages 30-33 of the bundle (cited by the First-tier Tribunal Judge at paragraph 22). The documents at pages 32 and 33 are the documents submitted with the application to which I have already referred at paragraphs 5 and 6 above. The document at page 30 is from the same Saber Hospital, but is dated 18 October 2018. Notwithstanding the change of date, the contents of that document appear to be essentially identical to the earlier letter from the hospital - even down to stating the age of the Appellant to be 20 years, notwithstanding the intervening 18 month period. Those documents are highlighted by Ms Shaw as indicating the Appellant's behavioural characteristics and emotional problems, which are necessarily matters in respect of which he requires input from any carer.

30. In terms of assistance with everyday tasks, the only specific matters identified are in respect of feeding and medication. It has not been disputed that the Appellant has a mental age of 8. As such there is no reason to think that - providing he receives an appropriate level of encouragement and direction - he is not able to get himself out of bed, is not able to wash himself, is not able to make use of a toilet, is not able to dress himself. Whilst it could not be expected that he would be able to wash his clothes, there is nothing to suggest that the maternal grandparents are not habitually washing their own clothes and so can do so for the Appellant. Insofar as eating is concerned, again it is not to be suggested that the Appellant would be in a position to cook for himself but again, plainly the grandparents are habitually preparing meals for themselves and no doubt for the Appellant at the same time. It is suggested, and it is not disputed, that he needs prompting to eat, but that

is not something that the grandparents' medical conditions – even with any recent deterioration as suggested before the First-tier Tribunal - would suggest is beyond their capabilities. Similarly so in respect of medication.

31. With regard to emotional support, it is to be noted that the grandparents have been looking after the Appellant for a very considerable period of time. Although it is said that he has grown to be a largely built adult, it is also to be noted that at or about the date of the application it was approximately five years since he had reached technical adulthood. There is nothing to suggest that his physical development was inhibited or limited in the same way as his mental development. Accordingly, he is a child who has grown physically into an adult during a period when he has been consistently looked after by his grandparents who will have experienced over that period of time all of the facets of his emotional difficulties.

32. In all such circumstances it seems to me that the Judge's observations at paragraph 27 (quoted above) are rational and adequately reasoned, and, as of the date of the decision before the First-tier Tribunal, a complete and sustainable answer to the question of whether or not the grandparents were able to continue to meet the Appellant's long term care needs.

33. Accordingly, notwithstanding the helpful and clear articulation of the case by Ms Shaw - which perhaps went beyond the strict scope of the grounds of appeal, and had an element of rearguing the merits of the appeal – I do not identify an error of law.

34. For completeness I note that the Appellant has now filed some further evidence - but as discussed with Ms Shaw, such evidence post-dates the Decision of the First-tier Tribunal and is not for the consideration of the Upper Tribunal at the 'error of law' stage. The materials filed - a short witness statement from the sponsor and a short document from the Aden German International Hospital dated 3 February 2019 headed Medical Report - are to the effect that the Appellant's grandfather has had a stroke since the date of the appeal hearing. The sponsor expresses the view that the stroke has been triggered by the pressure of having to look after the Appellant. This is not presently a matter for the Tribunal; the Tribunal could only take into account the new evidence in the event that the decision of First-tier Tribunal Judge Lodge were to be set aside for error of law. For the reasons given I do not consider that to be the case. How the Appellant and the sponsor may now wish to make use of the new evidence

and the suggested change of circumstance is essentially a matter for them, and not for the Tribunal.

Notice of Decision

35. The decision of the First-tier Tribunal contained no error of law and accordingly stands.

36. The Appellant's appeal remains dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **2 May 2019**

Deputy Upper Tribunal Judge I A Lewis