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CO/3763/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 20 April 2016

B e f o r e:

MR JUSTICE MITTING

Between:
THE QUEEN ON THE APPLICATION OF BRITCITS

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Ms N Lieven QC and **Mr D Seddon** (instructed by Migrants' Law Project) appeared on behalf of the **Claimant**
Mr N Sheldon (instructed by the Government Legal Department) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1.1. MR JUSTICE MITTING: Section 1(4) of the Immigration Act 1971 provides:

> "The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom."

1.2. It is the source of the power of the Secretary of State for the Home Department to make Immigration Rules: Lord Dyson in R (Munir) v Secretary of State for the Home Department [2012] 1 WLR 2192 at paragraph 27.

1.3. Until 9 July 2012, the entry of parents, grandparents and other adult dependants of persons lawfully in the United Kingdom was governed by Rule 317 of the Immigration Rules laid before Parliament on 23 May 1994. It identified the categories of persons potentially eligible; broadly speaking, parents and grandparents aged 65 or older and younger adults "in the most exceptional compassionate circumstances" who were mainly dependent financially on relatives settled in the United Kingdom. In addition parents and grandparents aged 65 or over had to have no other close relative in their own country to whom they could turn for financial support. The rule also required that the adult dependent relative would be maintained without recourse to public funds in the United Kingdom.

1.4. In the last year for which figures are available before July 2012, the years 2010 to 2011, 2,325 adult dependants were granted indefinite leave to enter (969), or indefinite leave to remain (1,356): see paragraph 5.2 of appendix 5 to the Home Office Policy Equality Statement supporting the change in the Immigration Rules, dated 13 June 2012.

1.5. A Home Office impact assessment for 2010 published in July 2012 contains slightly different figures: 2,665 grants of indefinite leave to enter or remain in 4,120 decisions. The applications received in the same year but not necessarily decided totalled 3,390.

1.6. As from 9 July 2012, the right to apply for indefinite leave to remain, in other words a right which could be exercised in country, has been abolished. The right to apply for indefinite leave to enter is now contained in section E-ECDR 2.1 to 2.5 of Appendix FM to the new rules. They provide:

> "E-ECDR.2.1. The applicant must be the-
>
> (a) parent aged 18 years or over;
>
> (b) grandparent;
>
> (c) brother or sister aged 18 years or over; or

(d) son or daughter aged 18 years or over,

of a person ('the sponsor') who is in the UK.

...

E-ECDR.2.3. The sponsor must at the date of application be-

(a) aged 18 years or over; and

(b)

(i) a British Citizen in the UK; or

(ii) present and settled in the UK; or

(iii) in the UK with refugee leave or humanitarian protection.

E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.

E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because-

(a) it is not available and there is no person in that country who can reasonably provide it;

or;

(b) it is not affordable."

1.7. This case concerns sponsors who are British citizens and one or more parents who reside abroad and are, at least to some extent, financially dependent on their British citizen sponsor. Sections E-ECDR 3.1 and 3.2 contain financial requirements that the applicant will be adequately maintained and accommodated by the sponsor without recourse to public funds and that a British citizen sponsor will provide a written undertaking to that effect good for five years.

1.8. The claimants are a United Kingdom charity set up to represent the interests of sponsors and applicants affected by the "Adult Dependent Relative" sections of the new rules and to campaign to revoke or alter them. Their case is that sections E-ECDR 2.4 and 2.5 are unlawful on one or all of three overlapping grounds: (1) they are outwith the rule-making power in section 1.4 of the 1971 Act; (2) they are arbitrary and unreasonable; (3) they are incompatible with Article 8 of the European Convention on Human Rights. Declarations to that effect and an order quashing the relevant sections

are sought, in the case of the third ground under section 8(1) of the Human Rights Act 1998.

1.9. The new Immigration Rules were the subject of the negative resolution procedure required by section 3(2) of the 1971 Act. There was no dissent in either House of Parliament. The procedure for bringing rules into force was therefore properly applied.

1.10. Parliamentary consideration was preceded by widespread consultation by the Home Office and by a Home Office Statement of Intent of 11 June 2012 and an Equality Statement and an Impact Assessment, to which I have already referred. The Statement of Intent made the Secretary of State's intent in relation to adult dependent relatives plain:

> "Adult Dependent Relatives.
>
> 118. The new Immigration Rules will change the basis on which non-EEA adult dependent relatives can settle in the UK, in view of the significant NHS and social care costs to which these cases can give rise.
>
> ...
>
> 121. We will end the routine expectation of settlement in the UK for parents and grandparents aged 65 or over who are financially dependent on a relative here. Non-EEA adult dependent relatives will only be able to settle in the UK if they can demonstrate that, as a result of age, illness or disability, they require a level of long-term personal care that can only be provided in the UK by their relative here and without recourse to public funds.
>
> 122. In particular, this will mean:
>
> • The applicant must, as a result of age, illness or disability, require long-term personal care: that is help performing everyday tasks, e.g. washing, dressing and cooking;
>
> • The applicant must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living because it is not available and there is no person in that country who can reasonably provide it, or because it is not affordable there.
>
> • The entry clearance officer must be satisfied that the applicant will be adequately maintained, accommodated and cared for in the UK by the sponsor without recourse to public funds."

1.11. The intent of the changes, including but not limited to the sections under challenge, was set out by the Secretary of State in her introduction to the consultation document issued in July 2011:

> "...stopping abuse, promoting integration and reducing the burden on the taxpayer."

1.12. As Clive Peckover, the senior civil servant responsible for the development and delivery of the policy encapsulated in the new rules, says in his witness statement:

> "Primary consideration was given to the impact of the new rules on the taxpayer and, in particular, on the burden imposed on the taxpayer by the NHS. A reduction in numbers would be welcome, but was not one of the primary objectives. They were to reduce the burden, in particular the financial burden, on the NHS and on local authorities of caring for elderly adults. The former was quantified in an impact assessment. No attempt has been made to estimate the latter."

1.13. The saving of NHS costs is put in section 2.4 of the Impact Assessment at £23 million over 10 years. No estimate of the reduction in the number of successful applicants is stated in the Impact Assessment, but, in response to questions posed by the claimants in pre-hearing correspondence, the Secretary of State has stated that it was based on the anticipation that there would be an annual reduction of 281 grants of indefinite leave to enter as a result of the rule change.

1.14. It is far from clear to me how the arithmetic works, given that the estimated cost to the NHS over the remaining life of an adult aged 65 is said to be £75,000, which would suggest a total reduction in the number of grants of indefinite leave to enter over 10 years substantially fewer than the figure implied by the annual total multiplied by 10: 2,810.

1.15. The saving is in part increased by a saving of administrative costs and an increase in processing fees said to be of £12 million in total. It is offset by an increase in administrative costs and a loss in processing fees totalling £25 million. The net saving over 10 years was therefore estimated at £10 million. That saving was, however, based on certain assumptions: that 50 per cent of out-of-country applications for indefinite leave to enter would fail and that 25 per cent of those aged 65 years or older and 50 per cent of those aged 18 to 65 who would have applied in-country for indefinite leave to remain would apply out-of-country for indefinite leave to enter. Altering these percentages produced different outcomes ranging from a net present value of minus £2 million to one of plus £25 million of savings. No attempt was made to evaluate the potential loss to the United Kingdom Exchequer which would be caused by the possible departure from the United Kingdom of sponsors.

1.16. The evidence of what has occurred since the introduction of the new rule is patchy and in part anecdotal. The best figures which can be produced were those obtained by a manual search of UKBA records. They reveal that for the last complete year for which figures are available, 2014, the number of applications was 723 and the number granted 37. A further 33 were allowed on review or on appeal. In particular in the case of those allowed on review or appeal, it is not clear whether the decision resulted from an exercise of the Secretary of State's power to admit an applicant outside the Immigration Rules or as a result of decisions within them.

1.17. This documentary evidence is consistent with the statements of three reputable immigration solicitors practising in an area of immigration law in which their clients expect to comply with the law and conscientiously attempt to do so and who can afford to instruct them privately. It also accords with the report of the Parliamentary All-Party Group on Migration of June 2013. All say, in effect, that the adult-dependants route has all but closed.

1.18. If the UKBA figures are right, the number of applications made in 2014 was about 23 per cent of those made in 2010 and the number of grants of indefinite leave to enter about 3 per cent of the number of grants of indefinite leave to enter and to remain combined.

1.19. The first ground is that the rules are outwith the rule-making power, in other words ultra vires. The test is not in dispute. It is for me, as a judge, to decide as a matter of law what aims the statute, under which the Immigration Rules are to be treated as having been made, pursued. If the Rules frustrate the objectives of the legislation, I must say so and grant appropriate relief: see R (GC) v The Commissioner of Metropolitan Police [2011] 1 WLR 1230 paragraph 83 per Lord Kerr. The aim or objective of the statute has been authoritatively identified by Lord Dyson in R (Munir) v Secretary of State for the Home Department at paragraph 26:

> "... the Act was intended to define the power to control immigration and say how it was to be exercised."

1.20. Section 1(4) defines the categories of persons who may be admitted under rules laid down by the Secretary of State:

> "... persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom."

1.21. As a matter of language, it gives the Secretary of State the right to define the cases in which persons within those categories may be admitted as well as the restrictions which may be imposed upon them: "... in such cases and subject to such restrictions as may be provided by the rules."

1.22. Parliament has imposed no obligation on the Secretary of State to admit all persons coming for the purpose of taking employment or for the purposes of study or as visitors. Subject to approval by the negative resolution procedure, the Secretary of State is entitled to pick and choose which categories within each of those groups may be admitted.

1.23. So too in my judgment with dependants. It was and is within the power of the Secretary of State to limit categories of dependants who may be admitted. Subject nowadays to Article 8, the Secretary of State could, if she chose, entirely exclude adult dependants from the cases which may be admitted. It therefore follows that she is empowered by section 1(4) to exclude from admission a subcategory of such adult

dependants; namely, those who do not require personal care and/or those who do whose care can be provided in their country of origin.

1.24. Ms Lieven QC submits that an examination of the documents available to Parliament when the 1971 Act was passed shows it cannot have intended that an entire subcategory of dependants be excluded from admission by the Immigration Rules. There was, it seems, no White Paper preceding the 1971 Act, but the 1965 White Paper on immigration from the Commonwealth did in paragraph 7 note that since the enactment of the Commonwealth Immigration Act 1962 "... certain categories of dependants are in practice, but purely by way of discretion, also admitted without vouchers...", (i.e. vouchers issued by the Ministry of Labour), including children, spouses and a widowed parent or elderly parents of a person settled here. However, in paragraphs 19 to 21, which dealt with proposals for dependants, those categories were not mentioned.

1.25. Paragraph 42 of the Instructions to Immigration Officers issued in February 1970 under the Commonwealth Immigration Acts 1962 and 1968, which were not subject to Parliamentary approval, provided for the admission for settlement of dependent widowed mothers and parents over 65.

1.26. Paragraph 65 of the Instructions to Immigration Officers for Aliens contained similar provision with a lower age limit, 60, and without a condition of dependency. No one has attempted to explain the reason for the surprising difference.

1.27. Parliament, therefore, can be taken to have been aware that existing practice provided as a matter of discretion for the conditional admission of dependent parents over 65 from Commonwealth countries and of parents over 60 who were aliens, but that awareness does not support a reading of section 1(4) in such a way as to limit or qualify its express words. Their meaning and purpose are clear. They do not prevent the Secretary of State from laying down Immigration Rules which exclude a subcategory of dependants or of a subcategory of the subcategory. Each would be a "case" provided by the rules. The ultra vires or Padfield challenge therefore fails.

1.28. The second ground of challenge is that the new rule is unreasonable. This challenge is not and cannot be based on Wednesbury irrationality, a ground which applies to administrative decisions. Because the Immigration Rules derive their authority from Parliament and have received Parliamentary approval, a narrower test of unreasonableness is conventionally applied: that expressed in Kruse v Johnson [1898] 2 QB 91. It was recently explained by Aikens LJ R (on the application of MM) v Lebanon and the Secretary of State for the Home Department [2015] 1 WLR 1073 at paragraph 133:

> "...the Secretary of State plainly is under a common law duty not to promulgate an IR that is discriminatory, manifestly unjust, made in bad faith or involves 'such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men'. If she does promulgate such an IR, it can be struck down or the offending part can be severed."

1.29. A relatively modern example of the application of this principle, on which Ms Lieven relies, is R v IAT ex parte Manshoora Begum [1986] Imm AR 385. Paragraph 52 of the Immigration Rules then in force imposed similar requirements for adult dependants as Rule 317 of the 1994 Rules, but contained the additional requirement that they must have a standard of living substantially below that of their own country. Simon Brown J held that that proviso made it logically impossible for any dependent adult relative to gain admission. If the sponsor could maintain them in the United Kingdom without the support of public funds, so he could send enough money that they may live above a substantially substandard level. The offending proviso therefore failed the Kruse v Johnson test.

1.30. The analogy with present facts is imperfect. The rule in issue does not make it logically impossible for a dependent relative to gain admission, it simply makes it exceptionally difficult to do so. It may or may not make it more likely that dependent relatives in prosperous countries can gain admission than those from poor or middle income countries. Much may depend on their precise circumstances and the care facilities available to them in each country. A rich country may make adequate provision for care at no or at affordable cost to the recipient. Care may not be available at all in a strife-torn poor country. But it is not logically impossible for the rule to operate without arbitrariness or unjustifiable unfairness in the very limited number of cases in which admission may be granted. The Kruse v Johnson challenge therefore fails.

1.31. I turn, finally, to Article 8. Family life was memorably defined by Lord Bingham Huang v Secretary of State for the Home Department [2007] 2 AC 167 at paragraph 18:

> "...Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. 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...."

1.32. Practical examples of the family life enjoyed by elderly relatives and sponsors and their immediate families have been given by individuals who supported this claim in their witness statements. It is not necessary for me to set out the detail of their circumstances. None of them are anonymous, and I have accepted readily the suggestion made by Ms Lieven on their behalf that I should treat their personal and private information with discretion. I do so by omitting to set it out. I have however read their witness statements and taken them into account in the findings that I will make hereafter.

1.33. The new rule is certain to interfere with the family life of a significant number of frail and elderly parents of persons settled in the United Kingdom, including a significant number of British citizens, and with the family lives of those British citizens and their

spouses and children. It will do so in at least the following respects: the ability to interact personally between applicants and their children and grandchildren and vice versa; the ability of their adult child and sponsor and his family to provide physical care and emotional support for them within a home shared by some or all; the ability to receive personal care from family members rather than strangers.

1.34. By restricting the ability for the grant of indefinite leave to enter to those in need of personal care services, valued aspects of family life are inevitably going to be interfered with for the elderly who are fit. By limiting eligibility to those whose personal care needs cannot be met in their country of origin, only those who would be bereft of assistance may be considered.

1.35. It is unsurprising that in the three cases of the individuals who have provided witness statements in support of the claims whose relatives' cases have already been determined by the First-tier Tribunal, the First-tier Tribunal judge has concluded that family life did exist between the sponsor and his immediate family and the applicant and that refusal of leave to enter would interfere in a significant way with it. These conclusions are likely to be replicated in many cases which have reached the First-tier Tribunal and many which have not. The issue under Article 8 is always whether the interference is justified; in other words proportionate.

1.36. All current formulations of the proportionality test involve four elements. I take them from Lord Sumption's speech in Bank Mellat v Her Majesty's Treasury (No.2) [2014] AC 700 at paragraph 20:

> "... the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

1.37. The third element is now usually qualified in the manner explained by Lord Neuberger in R (Bibi) v SSHD [2015] 1 WLR 5055 at paragraph 85:

> "...it has been authoritatively said that the question it involves may be better framed as was 'the limitation of the protected right ... one that it was reasonable for the legislature to impose' to achieve the legitimate aim, bearing in mind any alternative methods of achieving that aim..."

for which Lord Reed's speech in Bank Mellat was cited.

1.38. It is a significant feature of the two First-tier Tribunal cases concerning witnesses that the judge concluded that significant weight had to be given to the challenged rule. It is,

therefore, at least arguable that the proportionality of the rule can and should be judged, not merely its application to the facts of an individual case. If it has independent weight, it must itself be lawful and so, of necessity, proportionate.

1.39. There are factors which powerfully suggest that this rule is not one which it was reasonable to impose;

1.40. 1. It appears to have had a much heavier impact on families than was avowed when approved by Parliament. The Secretary of State did not suggest that it would result in successful applications for the grant of indefinite leave to enter in only 3 per cent of the number of cases made in the last full year before the adoption of the rule.

1.41. 2. In a measure adopted mainly for financial reasons, estimates of the outcome have proved hopelessly amiss and do not take into account the potential loss to the UK Exchequer of sponsors who might leave the United Kingdom to avoid the hardship and loss imposed on their family members by the refusal of leave to enter for their elderly parents.

1.42. 3. Alternative methods of avoiding the burden on the National Health Service and on local authorities are likely to be available in some cases; for example, by purchasing medical and care insurance or a bond, for which provision is made in other cases in section 38 of the Immigration Act 2014. Such provision could relatively readily be accommodated by a proviso drafted in appropriate terms to the current rule.

1.43. Free of authority, therefore, I would not have hesitated to consider the lawfulness on the ground of proportionality of the rule and, if I had found it to be disproportionate and so unlawful, to declare it so. However, I believe that I am bound by authority to do otherwise. In MM (Lebanon) v SSHD [2015] 1 WLR 1073 Aikens LJ, giving a judgment with which the other members of the court agreed, analysed the line of cases which, on the one side, suggested that a rule could be struck down and, on the other, that rules were not required to guarantee compliance with an Article of the Convention. He reconciled them in the following manner:

> "... In a particular case, an IR may result in a person's Convention rights being interfered with in a manner which is not proportionate or justifiable on the facts of that case. That will not make the IR unlawful. But if the particular IR is one which, being an interference with the relevant Convention right, is also incapable of being applied in a manner which is proportionate or justifiable or is disproportionate in all (or nearly all cases), then it is unlawful."

1.44. Those observations were approved by Lord Hodge with whom Lord Hughes agreed in Bibi at paragraph 69:

> "For the reasons which I discuss below, I think that there may be a number of cases in which the operation of the Rule in terms of the current guidance will not strike a fair balance. But there may also be many cases in which it will. The court would not be entitled to strike down the Rule

unless satisfied that it was incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases..."

1.45. He then cited the passage which I have just read from Aikens LJ's judgment.

1.46. It is possible to construct an argument around that difficulty. However, I do not believe that it is my task as a first instance judge to attempt to get round the clear thrust of a decision of the Court of Appeal which is binding on me by a route which may be thought an expedient rather than a principled departure from the clear statement made by the upper court. Accordingly, and for the reasons which I have given, the Article 8 challenge too must fail.

1.47. I therefore dismiss this claim for judicial review and will hear any consequential applications.

1.48. MS LIEVEN: My Lord, it will not surprise your Lordship to hear that in light of your Lordship's judgment, I do ask for permission to appeal.

1.49. MR JUSTICE MITTING: Granted.

1.50. MS LIEVEN: I suspected that from the paragraphs that proceeded.

1.51. My Lord, I suspect the only other issue is costs, but, as this was a two-day case, I am not sure that summary assessment of costs would be appropriate. I do not know whether that was what my learned friend was about to rise --

1.52. MR JUSTICE MITTING: There is a limit of £15,000. The cost claims are a bit over that, are they not, but not much?

1.53. MS LIEVEN: My Lord, I am slightly at sea, because I do not have the schedule in front of me. Yes. I understand the costs claimed are £20,000. Can I just take instructions?

1.54. MR JUSTICE MITTING: Yes, of course.

1.55. MS LIEVEN: My Lord, on the assumption, and I am sure knowing my learned friend it is a fair assumption, that there is not some absolutely outrageous figure in here which I have not spotted, I do not think it would be possible for me to resist an order in the sum of £15,000, which I assume is what my learned friend is going to ask for.

1.56. MR SHELDON: That is precisely what I was going to ask for.

1.57. MR JUSTICE MITTING: Are you asking that I impose a stay on that pending your appeal, because I have given you permission?

1.58. MS LIEVEN: Yes, my Lord, I am.

1.59. MR JUSTICE MITTING: Do you oppose that?

1.60. MR SHELDON: No, my Lord.

1.61. MR JUSTICE MITTING: Very well. I order the claimants to pay the defendant's costs limited to £15,000. I stay execution of that order until after determination of the appeal.

1.62. MS LIEVEN: I am grateful, my Lord.

1.63. My junior just asks whether your Lordship could indicate to the shorthand writer to produce an expedited transcript so that we can get this matter into the Court of Appeal as quickly as possible.

1.64. MR JUSTICE MITTING: Let me ask how long it is likely to be.

1.65. MS LIEVEN: I would not be asking for expedition in 48 hours.

1.66. MR JUSTICE MITTING: You have 21 days to put in your notice of appeal.

1.67. MS LIEVEN: Yes. I think it is 21 as your Lordship has granted permission.

1.68. THE SHORTHAND WRITER: Monday morning.

1.69. MS LIEVEN: So perhaps in 14 days if possible.

1.70. MR JUSTICE MITTING: Monday morning was mentioned so 14 days sounds generous.

1.71. MS LIEVEN: I am very grateful to the shorthand writer.

1.72. MR JUSTICE MITTING: I will turn it round the day I receive it. Thank you both for a well-presented and interesting argument.