BRITCITS -v- SSHD

CASE NOTE

1 On 20 April 2016[1], Mitting J gave judgment in *BritCits-v- SSHD* [2016] EWHC 956 (Admin). The claimant is an NGO and registered charity established to lobby and campaign against the impact of restrictive Immigration Rules which disrupt the family lives of British citizens and others residing in the UK, unable to achieve family reunion with their loved ones. The challenge was to the Adult Dependant Relative ["ADRs"] aspects of HC 194[2] ["the ADR Rule"] and, in particular, paragraphs E-ECDR.2.4 and E-ECDR.2.5 which require that the applicant must:

- as a result of age, illness or disability, require long-term personal care to perform everyday tasks; and
- 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.

2 The challenge was brought on three grounds, namely that the ADR is unlawful:

(i) pursuant to the rule in *Padfield* [1968] 1 AC 997 under which any statutory power must be exercised to promote the policy and objectives of the statute in circumstances in which s1(4) of the 1971 Act requires that the Rules "shall include" provision for the admission of "dependants" of those lawfully in the UK whereas the ADR Rule has operated as an effective exclusion of ADRs by largely closing down the route of entry;

(ii) because it is unreasonable on *Kruse -v- Johnson* principles by an analogy to a successful challenge to an earlier iteration of the ADR Rule in *R -v- IAT ex parte Manshoora Begum* [1986] Imm AR 385, as it is self-defeating: those able to maintain, accommodate and care for their ADR, will almost always be able to afford to pay for care abroad, certainly where the ADR resides in a less advanced country;

(iii) as incompatible with article 8 ECHR in circumstances where the Rules ignore the importance of emotional and practical support provided personally by a family

[1] The Judgment was given orally and the approved transcript became available in May 2016
[2] Introduced from 9 July 2012 and inserting Appendix FM into HC 395

member (rather than a paid carer) and where the public policy justification for their introduction was flawed on a number of grounds.

3 The challenge failed on all three grounds, although Mitting J gave permission to appeal and the case is pending before the Court of Appeal.

4 *However* and very significant for practitioners in the meantime, is the approach of the Judge to article 8.

5 *BritCits* was a general challenge to the ADR Rules. Individual claimants could not be found given the (demonstrated) impact that declaring intentions as regards settlement has upon the ability to utilise the visitor route as many such claimants do. Thus, although many practical examples were provided, there was no *particular* case or decision applying the ADR Rule that fell to be ruled upon by the Court. In those circumstances, Mitting J considered himself bound by previous authority (*MM (Lebanon)* [2015] 1 WLR 1073[3] and *Bibi* [2015] 1 WLR 5055), to the effect that a Rule will not be unlawful (given the residual powers that exist outside the Rules and which can be used to accommodate article 8), unless the Rule is "incapable" of being applied in a manner which is proportionate; and that the Court will not be entitled to strike the Rule down unless it were "inherently unjustified in all or nearly all cases" (see *BritCits* at §§43-47). Free of that authority, Mitting J would "not have hesitated to consider the lawfulness on the grounds of proportionality of the rule and, if I had found it to be disproportionate and so unlawful, to declare it so" (§43).

6 Very detailed case-studies and practical examples were placed before the Court showing the impact of the Rule. The importance of the Judgment for existing cases is that, on the basis of it, it is clear that the application of the criteria of the Rule alone will have the effect of interfering with the article 8 rights of ADRs and their relatives in the UK (their adult children and grand-children[4]) in a "significant number" of cases involving frail and elderly ADRs. Mitting J was clear that such would be the case because the application of such criteria precluded the ability of families to "interact personally", for both emotional and physical care to be provided in a shared home and the ability to receive personal care from family members rather than strangers (§34).

[3] Which itself is pending decision before the Supreme Court

[4] That relationships between grand-parents and grand-children may fall within 'family life' under article 8 is recognised in Strasbourg: *Marckx -v- Belgium* [1979] 2 EHRR 330.

7 The application of the criteria of the Rules will also cause an interference in some ADR cases even where the applicant is "fit" because these ignore other "valued aspects of family life" (§34).

8 Thus the Judgment is helpful in demonstrating engagement and interference under article 8 in a much wider range of cases than the Rules acknowledge.

9 As to proportionality / justification, having considered the public interest relied on by the Secretary of State for the ADR Rule (for the most part the projected costs to the NHS), Mitting J considered that there were factors "which powerfully suggest that this rule is not one which it was reasonable to impose" in particular:

(i) the impact upon families has been much heavier than supposed when the Rule was approved by Parliament: it had resulted in success in only 3% of the number of such cases in the last full year of the previous Rule;

(ii) in a measure adopted mainly for financial reasons, estimates of the outcome had proved hopelessly amiss and did not take into account the potential loss to the UK of sponsors who might leave the UK to avoid the hardship;

(iii) alternative methods of avoiding the burden on the NHS and on local authorities had been available to the Secretary of State as least in some cases, for example by purchasing medical care and insurance or paying a bond, or by utilising the provisions for charging under s38 of the 2014 Act.

13 Actual cases, either applications before the ECO, or appeals before the FtT/UT do not face the obstacle encountered by Mitting J. Such cases do not require or seek a universal 'declaration' that the Rule is unlawful, or an order to strike the same down; rather they involve article 8-based challenges to particular decisions on particular facts.[5]

14 The Secretary of State has proceeded on the basis that, in essence, the ADR Rule is sufficient to cover her obligations under article 8. There is, therefore, no guidance outside the Rules to officers indicating the approach to an ADR case under article 8 where the application falls to be refused under the Rules.[6] *BritCits* serves to demonstrate: (i) there is *very large* gap between the content of article 8 and the criteria of the ADR Rules; and (ii) there are

[5] And see the distinction drawn by the House of Lords in the social security case of *Chief Adjudication Officer -v- Foster* [1993] AC 754 at 764E-F. In an appeal to the statutory body, there is no question of 'declaring' the Rule to be unlawful. The approach to the Rule is merely incidental to the decision on the appeal itself and has no binding force beyond the particular case.

[6] In the course of the litigation in BritCits, the SSHD acknowledged that the only relevant guidance was that contained in the IDIs for 13 December 2012 for 'Adult Dependant Relatives'

"powerful" reasons for considering that the restrictions imposed by the Rule are unlawful as disproportionate.

15 As is acknowledged in the existing case law, where there is an existing gap, the part played by the Secretary of State's residual discretion in satisfying the requirements of article 8 is correspondingly greater and the practical guidance to be derived from the content of the Rules as to relevant public policy considerations for the purposes of the balance to be struck under article 8 is heavily reduced (*SS Congo* [2015] EWCA Civ 387 at §17 drawing also upon Aitkens LJ in *MM (Lebanon)* [2015] 1 WLR 1073 at §135). The weight to be attached to any reason for rejection of a human rights claim indicated by particular provisions of the Rules will depend both on the particular facts and the extent to which the Rules themselves reflect criteria approved in the previous case law (*Izuazu (Article 8 - new Rules)* [2013] UKUT 45 (IAC) at §43, approved in *Nagre* at §30). The more the Rules restrict otherwise relevant and weighty considerations from being taken into account, the less regard will be had to them in the assessment of proportionality and the conclusion under the Rules may have "little bearing" on the Judge's own assessment (*Izuazu* at §§52, 67-68).

16 *BritCits* shows that the failure of an application to satisfy the ADR Rule says nothing of practical use about the question of whether an application should succeed under article 8. On the contrary, the case demonstrates that there will be a "significant number" of ADR cases in which article 8 is both engaged and interfered with by a refusal.

17 In addition, because there are factors which "powerfully suggest" that the restriction on admission imposed by the Rules is unreasonable, it may be difficult for the Secretary of State to assert public policy reasons to justify such interferences in individual cases pursuant to the burden imposed upon her by article 8(2). Following the *BritCits* Judgment, reliance upon the Rules themselves and the proposed savings to the public purse advanced for their justification is inherently problematic for the SSHD.

18 Cases are likely, of course, to turn upon their own particular facts, for example: (i) the level and extent of the interference; and (ii) whether the particular case engages the factors referred to in the Judgment as disclosing the unreasonable nature of the Rule (for example the cost to the UK - either the Exchequer or to public service of any risk of departure by the sponsor potentially to another country where the ADR regime is less restrictive - as many have contemplated).

19 Thus the BritCits Judgment opens up the possibility of the success of a significant number of ADR cases pursuant to article 8 notwithstanding refusal under the ADR Rule.

20 As stated, permission to appeal was granted by the Judge, who considered himself unable, as bound by authority, to consider directly the lawfulness of the Rule for Convention purposes. BritCits appeal pends before the Court of Appeal.

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