Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14236/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 August 2014	**On 26 September 2014**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJWANT KAUR

(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, a Senior Home Office Presenting Officer
For the Respondent: Mr A Jafar, Counsel instructed by Mayfair solicitors

DETERMINATION AND REASONS

1. The claimant is a citizen of India. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Canavan, who allowed on human rights grounds the claimant's appeal against her refusal to issue the claimant a residence card recognising a derived right of

residence as the primary carer for a British citizen, her mother, alternatively under Article 8 ECHR (private and family life).

2. The claimant has been in the United Kingdom since 6 June 2007; she had entry clearance until 4 December 2007 as a visitor, but has not succeeded in gaining any leave to remain since that expired. On 21 February 2009, the claimant made a human rights claim, seeking to remain in the United Kingdom to care for her elderly mother. That application was refused and the claimant's subsequent appeal failed. The previous determination is not in evidence and was not before the First-tier Tribunal.

3. The claimant then made an application under the Immigration (European Economic Area) Regulations 2006 (as amended). It is that application which underlies the present application. The Immigration (European Economic Area) Regulations 2006 (as amended) appeal failed before the First-tier Tribunal but the Tribunal allowed the appeal on human rights grounds.

First-tier Tribunal determination

4. The First-tier Tribunal Judge noted that there had been a previous examination of the Article 8 ECHR issue in 2010, which had not been disclosed by the claimant or the Secretary of State. Whilst that should have been the starting point on *Devaseelan* principles, she was not in a position to start from that determination.

5. In any event, the judge considered it likely that the circumstances now were different: the claimant's mother was 82 years old, her health problems were of a degenerative nature and it appeared that her health had deteriorated over time, such that it seemed likely that her level of care and reliance on her daughter, the claimant, had increased in the four years since the previous determination.

6. The facts were not in dispute at the First-tier Tribunal hearing. The evidence was that for the past seven years, the claimant had made herself responsible for all aspects of her mother's day to day care: cooking, cleaning, emotional and social support, and 24-hour personal care.

7. The First-tier Tribunal's core findings in relation to the claimant's mother were in paragraphs 12 – 13 and 17 of the determination:

> "12. It seems clear from the evidence before me that the appellant's mother would not be compelled to leave the United Kingdom if the appellant is required to return to India. The letter from the Medway Council care manager dated 18 September 2013 states that they have a limited number of carers who speak Punjabi and could not guarantee to provide a carer who would be able to communicate with [the claimant's mother]. They would only be able to provide a carer at specific times of day to assist with personal care, supervision of medication and provisions of meals and drinks but they were unable to provide night time support. However, the council suggested that [the claimant's mother] may meet their criteria for

> residential care and they would put together a care package if her daughter were unable to continue to care for her mother. The care manager concluded that if her daughter was unable to care for her it was unlikely that she would not [sic] be able to go out to any social activities and that she would have to spend a great deal of time on her own. Her levels of anxiety would increase and this would have an adverse effect on her mental health.
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> 13. I conclude that this evidence shows that the [claimant's] mother would be provided with some level of care if her daughter had to return to India and for that reason she would not be compelled to leave the United Kingdom. However, the quality of her care is unlikely to be of the same quality as her daughter is currently able to provide. She is unlikely to have carers who are able to speak her language, understand her cultural, religious and emotional needs, and the level of care would be significantly reduced. If there is a shortage of Punjabi speaking carers available for home care the situation is likely to be the same in residential care. …
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> 17. I am satisfied that the level of care provided by the [claimant] is sufficiently high that there is a level of dependency that goes beyond normal ties between adult relatives. The [claimant] has devoted her time to caring for all aspects of her elderly mother's care. Over the years it appears that her mother's health has deteriorated and she now requires a high level of care. The appellant does not just provide physical care. She is able to provide her mother with company and emotional support. She is able to minister to her mother's social, religious and cultural needs. The evidence shows that tit is unlikely that the local authority would be able to provide the full level of care that her mother requires and that her mother's quality of life would be much more isolated and diminished with a far lower level of care. At the hearing it was quite clear that mother and daughter are particularly close and that requiring the [claimant] to leave her mother and return to India would cause both of them emotional distress. For these reasons I conclude that the [claimant] has established a family life in the United Kingdom with her mother and that removal in consequence of that decision would interfere with her life in a sufficiently grave way as to engage the operation of Article 8 (points (i) and (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349). "

8. The judge found that there were other family members in the United Kingdom, but that they had not taken, and would not take, any responsibility for the claimant's mother. She concluded that there was *Kugathas* dependency between these parties and that Article 8 ECHR was triggered. She considered that removal of the claimant would be disproportionate and therefore unlawful. It is right that she did not address herself to paragraph 276ADE or Appendix FM, nor indeed, in terms to the *Nagre* exceptional or compassionate circumstances approach. She followed the *Razgar* 5-stage test without reference to recent changes in the Immigration Rules.

Grounds of appeal

9. The Secretary of State in her grounds of appeal argued that the Immigration Rules on private and family life are a complete code and should form the starting point for a decision maker; that there were no

compelling or exceptional circumstances in the *Nagre* sense which the respondent should have considered outside the Rules; that there were other family members who could assist with the claimant's mother's care; and that there was no *Kugathas* dependency between the parties. The claimant and her mother could maintain contact by modern methods of communication and visits, as they had done in the past. The Secretary of State argued that the decision to remove would have been found to be proportionate, had these matters been considered properly.

Grant of permission

10. First-tier Tribunal Judge Holmes granted permission to appeal to the Secretary of State because he considered it arguable that the First-tier Tribunal Judge had failed to consider the proportionality of removal by reference to the Immigration Rules HC 395 (as amended) paragraph 276ADE and Appendix FM, instead adopting what was arguably an impermissible freewheeling approach to Article 8 ECHR.

11. That was the basis on which the appeal came before me.

Upper Tribunal hearing

12. At the hearing before me, the parties agreed that the claimant could not bring herself within the Rules. For the respondent, Mr Melvin argued that the findings of the First-tier Tribunal were inadequate and that there were no compelling circumstances. The respondent had a carer policy and the claimant had been given three months to make alternative arrangements. The determination was unsound and should be set aside and remade.

13. For the claimant, Mr Jafar argued that the determination was impeccable and that the judge had found that there was indeed something over and above the normal mother-daughter relationship such that family life had been established between them. The claimant had demonstrated compelling and compassionate circumstances and it had been open to the First-tier Tribunal to allow the appeal on that basis. He relied on paragraph 128 of *MM & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2014] EWCA Civ 985, and on paragraph 15 of *Shahzad (Art 8: legitimate aim) Pakistan* [2014] UKUT 85 (IAC). The First-tier Tribunal had made a carefully reasoned and crafted determination and the Secretary of State's challenge was no more than a disagreement with the conclusions. The evidence regarding the health of the claimant's mother was not disputed. The Upper Tribunal was entitled to interfere with findings of fact only where they were irrational or perverse, which these were not. He asked me to uphold the determination.

Discussion

14. The Upper Tribunal's guidance in *Shahzad,* so far as relevant to these proceedings, is as follows:

"…(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.
(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;
(vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

15. *MM*'s case in the Court of Appeal concerned the lawfulness of the Immigration Rules in relation to the amount of income which a couple must have in order for one spouse (and children if appropriate) to join the other in the United Kingdom. The ratio of *MM* is at paragraph 134-135, not paragraph 128 in the judgment of Lord Justice Aikens, with which Lord Justices Maurice Kay and Treacy concurred.

16. Immigration Rules are abbreviated by Aikens LJ as 'IRs' in his judgment. At paragraph 134-5, the judgment reads as follows:

"134. Where does that leave the statements made in the ***AM (Ethiopia), Pankina*** and ***Nagre*** line of cases, viz. that the Secretary of State's duty is to protect an immigrant's Convention rights whether or not that is done through the medium of the IRs so that "it follows that the Rules are not of themselves required to guarantee compliance with the [relevant Article]". I think that the reconciliation must be along the following lines: first, Laws LJ was dealing with the principles of construction of IRs. IRs are not to be construed upon the presumption that they will guarantee compliance with the relevant Convention right. Secondly, therefore, a particular IR does not, in each case, have to result in a person's Convention rights being "guaranteed". 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.

135. Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the ***Huang*** tests and UK and Strasbourg case law."

17. In this case there is no dispute that the claimant's circumstances do not meet either the EEA Regulations or the family life provisions of the Immigration Rules. But *Nagre* acknowledges that the Rules are not, in private and family life cases, a complete code, since they do not provide for exceptional or compassionate circumstances. The circumstances relied upon here are that this claimant has been caring for her mother for 7 years, albeit without leave. No other member of the family in the United Kingdom is prepared to help and although her local council is willing to assist, the claimant's mother is 82 years old and has high dependency needs, and the council is concerned that they will be unable to provide night care or even someone who can understand what the mother is saying: they do not have enough Punjabi speakers to achieve that. The judge found that the same language problems were likely to occur in the event that residential care was provided for the claimant's mother. The Secretary of State has not sought to rebut that finding.

18. The First-tier Tribunal Judge did consider the circumstances with anxious scrutiny before concluding, in effect, that there were exceptional and compassionate circumstances. Although the claimant may have been given time to make alternative arrangements, the quality of the available arrangements, given the language difficulty and the other matters identified in the First-tier Tribunal determination, would be significantly worse: this elderly Punjabi-speaking woman would become isolated and suffer a significant deterioration in her quality of life and her mental health, to the distress of the mother and the daughter. On the basis of those findings of fact, which were open to him on the evidence, the First-tier Tribunal Judge was unarguably entitled to conclude that the *Nagre* test had been met and that removal of the claimant was disproportionate.

19. The First-tier Tribunal determination stands. It is a matter for the respondent what leave is granted to the claimant, and for how long.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

Consequential Directions

Forthwith on receipt of this decision the respondent shall grant the appellant leave to remain for such period as is necessary to give effect to this determination.

Date Signed

Upper Tribunal Judge Gleeson