Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17123/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29th August 2014	**On 2nd September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GHATFAN SAAI

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms M Thirumaney, Solicitor of Trott & Gentry LLP

DETERMINATION AND REASONS

1. Mr Saai, the Respondent to this appeal, is a citizen of Syria whose date of birth is recorded as 23rd November 1958. He made application to come to the United Kingdom as a medical visitor. An application was also made by his daughter Nour Saie but I am not concerned with her in this matter because there is no appeal concerning her in the Upper Tribunal and no cross-appeal.

2. On 29th July 2013 a decision was made to refuse the application against which the Appellants appealed. Their appeal was heard by Judge of the First-tier Tribunal Hussain on 6th May 2014. He allowed the appeal of Mr Saai but dismissed the appeal of his daughter.

3. The judge heard evidence from Dr Alsaai, the brother of the Respondent in this appeal. The Respondent has problems with his eyesight such that it is necessary for him to have treatment from time to time which treatment he has previously received in the United Kingdom.

4. The Secretary of State in refusing the application was concerned that insufficient evidence of available funds had been provided and that given the current instability in Syria the Respondent would overstay.

5. From paragraph 17 through to paragraph 31 the judge considered the evidence and made a finding in respect of the Respondent that was favourable to him. He found that human rights were engaged and that the Respondent suffered from a degenerative eye condition for which he had received long-term treatment including "on numerous occasions in the United Kingdom". Importantly also he found that unless the Respondent received the treatment in respect of which he was seeking entry clearance, "there could be serious impact on his sight".

6. The judge also recognised that if entry clearance were refused this was not a case where the status quo would be maintained but that the eyesight of the Respondent was likely to deteriorate.

7. On the question of funding the judge dealt with this at paragraph 23. The judge expressed himself in rather strong terms and he said that he was "baffled" by the suggestion of the Entry Clearance Officer that the Respondent had not provided satisfactory evidence of his personal and financial background. He noted that the Respondent had said that he was employed as a consultant for a company earning 50,000 Syrian pounds per month and it was also noted that the Respondent had savings equivalent to £3,100.

8. There was at one time some difficulty with respect to some of the documents which had not been translated but it is clear from paragraph 25 that this was remedied and the material bank account to which it was found that the Respondent would have access was shown to have a balance equivalent to £12,000. The costs estimated for the treatment that the Respondent would need in the United Kingdom was considerably less therefore than the amount of money that was demonstrated to be available. I refer here to paragraphs 26 and 27 of the determination.

9. In addition there was evidence that the Respondent owns property in the United Kingdom in North West London. Unless he has no equity in that property it would be difficult to imagine that there would not be sufficient even in that to cover the costs of the medical treatment but I put that to one side as the judge found that there were in any event sufficient funds available.

10. I turn to the issue whether or not the Respondent would return to Syria at the end of the visit. The judge noted that there were previous visits to the United Kingdom on more than one occasion and that there had been compliance with Immigration Rules. The judge particularly recognised the instability in Syria at paragraph 30 of the determination but set against that the fact that there were good reasons offered for wanting to come to the United Kingdom with the Respondent having family members left behind and indeed all the more so now given that the Second Appellant in the First-tier Tribunal was not given leave and has not sought to appeal. And so the judge was satisfied on the totality of the evidence that the Respondent had made out his case.

11. Not content with that determination the Secretary of State, by Notice dated 30th June 2014, made application for permission to appeal. It was submitted that the judge had failed to give adequate reasons why the treatment could not be obtained in Syria. It was also said that there was an absence of consideration to say that the treatment was not available in Syria and therefore it would be a breach of Article 8.

12. On 10th July 2014 Judge of the First-tier Tribunal Davidge granted permission and thus the matter comes before me.

13. I have to decide in the first instance whether there is on the face of the determination a material error of law and the question I ask myself is whether on the evidence the findings were open to the judge or whether it can be said that they were if not perverse and irrational made in the absence of sufficient evidence which is the contention of the Secretary of State.

14. Against that I am told on behalf of the Respondent that the issue as to whether or not treatment was available in Syria was not raised at an earlier stage. I also remind myself that in justifying any interference in an article 8 right, the burden was upon the Secretary of State. Ms Isherwood did not point to any particular evidence that was relied upon by the Secretary of State at the hearing below. It seems to me that the judge looking to the totality of the evidence was entitled to have regard to the letter dated 19th June 2013 from the Respondent's doctor in Syria who advised that the treatment would be better performed in the United Kingdom, indeed he went so far as to say, "I do not recommend that he receives this treatment in Syria". That was the assessment of the treating doctor in Syria. It was open of course to him or her to say that the treatment would be available but that was not the recommendation. The treating doctor in Syria had had the Respondent under his or her observation for the previous seven months but had noted that the condition had become more recently "very serious". There is no reason to suppose that if it were that serious that the Syrian doctor would not have taken steps to perform, or have performed, the necessary procedures in Syria were it possible, and so it seems to me entirely open to the judge to come to the conclusions which he did. It was never part of the Secretary of State's case that the Respondent's eye sight was not deteriorating; the evidence pointed in favour of the Respondent – he had previous treatment, which was not in dispute.

15. Although at first Ms Isherwood sought to persuade me in reliance upon guidance in the case of **AAO v Entry Cleance Officer [2011] EWCA Civ 840**, that Article 8 ECHR was not engaged in this appeal at all, after some discussion, it became common ground that it was open to the Respondent to rely on Article 8 and that the five stage approach in **R (Razgar) v Secretary of State for the Home Department [2005] UKHL 27 at para. 17:**

> "In a case where removal is resisted in reliance on article 8, these questions are likely to be: (1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

16. Ms Isherwood was in my judgment right to abandon her argument that Article 8 was not engaged in the instant appeal. The case of **AAO** was based upon an entirely different set of facts and concerned family life between adult relatives. That Article 8 ECHR is relevant in a case such as the one before me was specifically discussed in the case of **MF (Article 8 – new rules) [2012] UKUT 393** at paragraph 23 and whilst that case went on appeal, that particular point remains good.

17. In my judgment, when one looks to those five questions the determination is unimpeachable. The judge carefully examined the evidence. Although he did not set out **Razgar** in terms it is clear reading the determination as a whole that one is able to elicit the answers to those questions from it. The first question is answered by recognising that refusal of entry clearance denies the appellant access to medical treatment recommended to him (see paragraph 19 of the determination). The second, by the fast deterioration in the vision of both eyes which would occur without the necessary treatment, which treatment was not recommended should be received in Syria. (The Judge actually dealt expressly with the first questions at paragraph 20 of the determination.) The third question is easily answered in the affirmative in that it is open generally to the United Kingdom to refuse entry clearance in appropriate cases. The fourth question is dealt with by the consideration of the judge of the financial resources available to the appellant which were found sufficient. Finally in the proportionality issue the judge found that the risk of blindness to the appellant weighed against all other factors including the turmoil in Syria but the favourable immigration history of the Respondent meant that the decision of the Appellant was disproportionate. These were findings open to the judge on the basis of the available evidence. It was, of course, open to the Appellant to produce evidence in rebuttal. The Judge did the best he could on the available evidence. For the avoidance of doubt, however, it is likely that I would have come to the same view.

Decision

18. In the circumstances the appeal to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Zucker