Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35906/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 20 October 2015	**On 23 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

TALAT MEHMOOD MALIK
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Schwenk of Counsel
For the Respondent: Mrs Petterson a Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The respondent notified the appellant of her decision to refuse to vary his leave to remain outside the Immigration Rules on 27 August 2014. His appeal against that decision was dismissed by First-tier Tribunal Judge Grimshaw ("the Judge") following a hearing on 2 March 2015. This is an appeal against that decision.

2. First-tier Tribunal Judge Reid refused to grant permission to appeal on 19 May 2015. Upper Tribunal Judge Smith granted permission to appeal on 16 July 2015 in the following terms (my underlining);

> "... the Judge may have adopted the wrong test when considering whether Article 8 needed to be considered outside the Rules by importing the test from the respondent's carers policy as to whether there existed particularly compelling and compassionate circumstances. It is arguable that, if the Judge had directed herself only in relation to the issue of whether there were exceptional circumstances and taking into account in particular the implications for Mr I of the appellant's removal, she might at the very least have considered it necessary to consider the proportionality of the respondent's decision to remove the appellant. Permission to appeal is accordingly granted on the issue raised at paragraphs 6-11 of the grounds."

The grounds

3. Paragraphs 6-11 of the grounds state as follows (my underlining);

> "6.) At paragraph 45 (sic) Immigration Judge acknowledges that *"a strong bond exists" between the Appellant and his uncle, Mr I, since the "Appellant has been the main carer of his uncle since December 2012 which is a significant period of time and has allowed trust and dependency on both sides to develop. Mr I has now become reliant upon the Appellant to manage all his personal care needs including attending to his personal hygiene, assisting with household chores and the preparation of food*" (paragraph 35).
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> 7.) That said, it is submitted that whist the Immigration Judge comments on the Appellant's family life, the Immigration Judge has totally overlooked the family life of Mr I which he enjoys with his carer, nephew, and if not the only family member actively involved in his care, support and assistance – the Appellant.
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> 8.) The Immigration Judge has also overlooked the family life the Appellant enjoys with his uncle and briefly comments on this, by suggesting the Appellant's family life is with his wife and daughter in the USA. The Immigration Judge has erred by failing to give adequate reasons for this conclusion which seems more of an opinion on its natural reading than a finding of fact supported by evidence.
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> 9.) The Immigration Judge ought to have considered the Article 8 rights of Mr I and has erred in failing to do so. Reference is made to the House of Lords judgements in the cases of Chikwamba (FC) v Secretary of State for the Home Department [2008] UKHL 40 & Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39 in which the House of Lords stated to the nearest meaning that the effect on other family members with a right to respect for their family and private life with the appellant must also be taken into account.
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> 10.) Whilst it is noted that family life exists here between adult relatives, it is submitted that the normal test of enjoying a relationship "beyond emotional ties" between adults should not apply in this

> instance, since here one of the parties is a heavily dependent adult with severe disabilities.
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> 11.) In assessing (sic), the Article 8 rights of the Appellant and the individual rights of Mr I, the Immigration Judge ought to have had regard to the factors set out in Razgar. Failure to do so amounts to an error of law."

Respondent's position

4. The respondent asserted (13 August 2015) that the Judge directed herself appropriately. The Judge correctly asked herself [27] whether there were circumstances which merit consideration of Article 8 outside the Rules. The reference to the carer's policy in [26] simply summarises the respondent's position. The Judge considered the factors in favour of the appellant and respondent, considered Mr I's situation, and made findings on the level of care required and the sources available for those needs to be met. Having weighed the evidence in the balance, it was open to the Judge to conclude [47] that neither the appellant's nor Mr I's circumstances were exceptional or compelling.

5. Mrs Petterson submitted that the Judge took all the circumstances into account, outlined the positive factors in the appellant's favour, identified that professional services can be provided, and looked at all the family relationships including the rights of Mr I and the impact on him of the appellant's removal. The balancing exercise was undertaken.

Appellant's submissions

6. Mr Schwenk submitted that the wrong test was applied. It should not be compelling or compassionate circumstances under the carer's concession but should be compelling circumstances of an exceptional nature. Exceptional is not the same as compelling. I cannot be confident that if she had applied the correct test the result would have been the same. There is no real balance in the family life assessment as the Judge has not considered the family life with Mr I. The appellant can have family life with both his wife and daughter, and Mr I. There has been no finding as to whether "they have a strong bond" or whether "trust and dependency" amounts to family life between adults. There is prima facie evidence that more than emotional ties exist.

7. The Judge has not considered proportionality regarding Mr I's family life. Mentioning proportionality does not sit with a finding that Article 8 was not engaged. There has been no Razgar analysis. The appellant does not know why he lost.

8. Mr Schwenk accepted there are some mentions of the correct test and that proportionality is mentioned at least twice but he asserted that it was not really a proportionality assessment.

The Judges findings

9. The Judge made the following findings. I have set them out in full. I have underlined the parts where the legal tests have been identified, the relevant findings, and where the matters appertaining to the grant of permission have been considered.

> 26. "If there are any exceptional circumstances consistent with the right to respect for private and family life contained in Article 8, consideration by the Respondent of a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules may be warranted. The Respondent's decision is that no compelling or compassionate circumstances are engaged in the present case and thus the concession granted to carers does not apply.
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> 27. Where a claimant does not meet the requirements of the Immigration Rules it is necessary to examine all the evidence in order strike a balance between the competing interests of the Appellant and the public interest in maintaining a fair immigration system. There must be an overall consideration of the facts of the case in order to establish whether or not there are exceptional or compelling circumstances which mean refusal of the application would result in unjustifiable harsh consequences for the individual (or their family) such that refusal would not be proportionate under Article 8.
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> 28. I note that the Appellant arrived in the United Kingdom as a visitor in July 2012. It is the Appellant's evidence that he has a wife and a daughter. They have remained in the United States where the Appellant and his wife have secured employment. According to the Appellant's statement of 10 October 2012, his wife and daughter are currently residing with his mother and father-in-law.
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> 29. The Appellant states that the purpose of his visit to the United Kingdom in 2012 was to spend time with his uncle, Mr I, and his grandmother (his uncle's mother). At that time the Appellant's grandmother had been granted leave to remain in the United Kingdom as the main carer of Mr I. She had provided him with support and assistance with his care needs for many years until her own health deteriorated. Sadly the Appellant's grandmother died on 4 December 2012. The Appellant took on the caring role and has been Mr I's main carer since that time.
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> 30. I accept that following an accident many years ago Mr I developed paraplegia and is a wheelchair user. I have seen the letter dated 1 October 2012 from the GP, Dr Javali. The GP states that Mr I has pain in his back and shoulders and *"because of his paraplegia he needs a significant amount of care input to manage his bowels and his day-to-day activities. He is also prone to incontinence and bowel accidents almost on a daily basis..."* There is a second letter from the GP dated 1 November 2013 which contains similar information.
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> 31. Although the evidence from the witnesses is that Mr I suffers from low mood there is no mention of any mental health problems in either letter from the GP. I have not overlooked a letter from Mr Raza the Consultant in Spinal Injuries dated 27 October 2014 which does refer to Mr I *"struggling mentally"* since the death of his mother. However, Mr I does not appear to have been referred for counselling or other

specialist help either at the time he was bereaved or subsequently. Accordingly, I am led to the conclusion that Mr I has the resources to cope with his mental health problems. My conclusion is reinforced by the report in the Appellant's bundle completed by a private care agency, Assisted Lives, in which the Appellant claims to receive *"good support from his family and friends"*. Thus, I find Mr I does have opportunities for social interaction with his family and presumably they can offer him companionship and comfort since the loss of his mother. I am satisfied that despite his disabilities Mr I's ability to maintain contact with his family and friends and with the outside world has not been significantly compromised.

32. I note and accept the information provided by Mr Raza namely that Mr I has a number of risk factors *"due to ageing and duration of his paralysis"*. He is followed up at the Spinal Injuries Centre on an annual basis. Mr Raza states that Mr I is *"struggling to cope with day-to-day activities of daily living especially bladder and bowel care"*.

33. The evidence from the witnesses indicates that due to a number of factors, including family reasons and the pressure of work, none of the family members of Mr I who are present in the United Kingdom are in a position to commit their time to offering him practical assistance. Furthermore, as Mr I is doubly incontinent and requires assistance if he soils or wets his clothes or bedding his relatives do not feel comfortable about providing him with this aspect of his personal care.

34. As to whether there are compassionate or compelling circumstances to the application I find the factors that weigh in favour of the Appellant are as follows.

35. The Appellant has been the main carer of his uncle since December 2012 which is a significant period of time and has allowed trust and dependency on both sides to develop. Mr I has now become reliant upon the Appellant to manage all his personal care needs including attending to his personal hygiene, assisting with household chores and the preparation of food.

36. Furthermore, the Appellant and Mr I submit that neither the statutory services nor an informal carer can replicate the level of care and support provided by the Appellant on a 24 hours basis every day. It would be harsh and culturally inappropriate to expect Mr I to live in a care home. It would also be costly. Mr I has consistently asserted that it is his wish to remain at home. His right to dignity and personal autonomy would be adversely affected if the Appellant was required to leave the United Kingdom.

37. I find the factors that weigh in favour of the Respondent are as follows.

38. The diagnosis and treatment plan that applies to Mr I is not in dispute. However there is nothing in the medical evidence to substantiate the claim made by the Appellant, and the additional witnesses, that Mr I requires care and supervision for 24 hours a day, every day. The essential question is whether the help that is provided by the Appellant is reasonably required. It is evident that the Appellant is currently provided with suitable aids and adaptions at home. The letter from the District Nurse dated 22 October 2014 confirms that Mr I

has been given pressure relieving equipment and that he is monitored every 12 weeks.

39. The Wakefield Council's report is based on a questionnaire completed by Mr I. The questionnaire invites him to tick the statements in the document that he believes best fit his situation. The questionnaire makes it clear that the information provided is the starting point for the local authority to determine if the applicant is eligible for an individual budget and the amount of funding available. It also states *"if you are eligible for assistance from other funding sources information about these will be provided following completion of this form. If this form identifies needs assessed as being health-related needs you will be referred for a continuing healthcare assessment"*.

40. As to Mr I's specific circumstances the information supplied by Wakefield Council makes it clear that the local authority is prepared to facilitate access to the appropriate health and services to ensure that Mr I is able to remain at home. The social worker's assessment (page 27 of the report) concludes as follows *"even though Mr Malik wishes to carry on caring for his uncle, if for any reason he could not provide the support he is currently providing, services will be offered to meet Mr I's needs"*. From the point of view of the Respondent Mr I is in receipt of disability benefits and presumably could afford to purchase top-up care privately or from an informal carer if he believes the help provided by the statutory services is insufficient to assist him to manage activities of daily living and remain at home.

41. In addition, the report from Assisted Lives found in the Appellant's bundle is also based on a self-assessment rather than any objective evaluation of Mr I's care needs. It is headed Service User Needs Assessment. Although it contains a detailed account of the care needs identified by Mr I the estimate of his care costs reached by Assisted Lives is based entirely on the views of Mr I and the Appellant without any contribution being made to the assessment by a health or social care professional.

42. In short, the Respondent submits that Mr I is already known to the health and social care professionals. If he is struggling with the activities of daily living he is entitled to services to meet his needs from the statutory sector. Some of those services are free, such as continuing healthcare; others are likely to be means tested or will incur a cost. There is no evidence to justify a finding that Mr I will be forced to leave his home in the event of the removal of the Appellant.

43. Taking an overall view of the evidence before me, I do not doubt that the Appellant's return will inevitably disrupt his relationship with his uncle and cause inconvenience whilst alternative arrangements are made. It is not in dispute that Mr I cannot cope alone. However, I bear in mind that the Appellant has not provided a detailed and objective assessment of the extent of his uncle's care needs. Rather, the information provided is based on Mr I and the Appellant's own views. Crucially, the application and appeal has been predicated on the basis that Mr I requires 24-hour care and the Appellant's priority is to providing it. That maybe their view and sincerely held but it is not necessary based on clinical need or what is reasonably required.

44. I am satisfied there are services available from the NHS and the local authority to meet Mr I's need for assistance with the activities of daily living. I add here that much has been made of Mr I's need for assistance in managing his incontinence and the reluctance of family members to become involved in the intimate aspects of his personal care. I find it significant that in the questionnaire completed in behalf of Assisted Lives it is reported that the Appellant *"has been able to provide some physical care but cannot provide the intimate personal care that is needed"*. Thus it seems to me that the difficulties with incontinence, referred to by the Appellant and his uncle, is an issue that ought to be referred to the GP, community nurse or a continence advisor who can better advise Mr I on the management of his condition and arrange for outside specialist help if necessary.

45. I recognise that there is mutual affection and dependency between the Appellant and his uncle and that they consider a strong bond exists between them. The Appellant and Mr I have lived together for nearly three years and each has benefited from that arrangement. However, the Appellant's family life is clearly in the United States, where his wife and daughter continue to reside and where he has held employment in the past. The care and support put in place for Mr I in the future will not necessarily mirror the care that he has received hitherto and, of course, it will not be delivered exclusively by the Appellant. However, that does not mean that Mr I will be forced into residential or nursing care or that his essential needs will not be met.

46. I cannot accept that the Respondent's decision is not in accordance with the law, as Mr Schwenk submits, because I do not agree that there has been a misapprehension of the facts. The Respondent may well have taken into account that it appeared that the Appellant aspired to full-time employment, a matter which he denies. However, in my view, the Respondent properly considered all aspects to the application including the existence of alternative care and support to Mr I, before reaching a decision. The Carers Policy makes it clear that the Home Office's position on carers is not designed to enable people to stay in the United Kingdom who would otherwise not have leave to do so. Rather, leave is granted only where it is warranted by particularly compelling and compassionate circumstances and then only on the basis that the applicant understands it is an interim arrangement. The Home Office expects permanent arrangements for the future care of a relative by an individual not subject to immigration control to be put in place during that period of leave.

47. When I stand back and look at the factors specific to the present case I do not accept that the end result makes the position of the Appellant or the uncle he leaves behind either exceptional or compelling. The Appellant is subject to immigration control. As I have already stated his family life is with his wife and daughter in the United States. I am satisfied that the health and social care professionals are in a position to arrange and deliver suitable care to the Appellant's uncle.

48. Unfortunately for the Appellant, for the reasons given above and having conducted the proportionality weighing process, I cannot find that there are any compassionate or compelling features of his application requiring leave to be granted outside the rules. I am

> satisfied that the removal of the Appellant pursuant to the decision to refuse to grant leave, would not engage the operation of Article 8. In any event, I conclude that such removal would be proportionate to the legitimate public end, namely the operation of a fair and effective system of immigration control."

Discussion

Ground 1 – wrong test

10. The Judge made reference to "compelling circumstances" in [27 and 47], "compelling or compassionate circumstances [34 and 48], "compelling and compassionate circumstances" [46], and "exceptional" circumstances [26, 27, and 47].

11. Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387 states that [33];

> "… compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. This is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but gives appropriate weight to the focused consideration of public interest factors as finds expression in the SSHD's formulation of the new Rules in Appendix FM."

12. There is therefore a difference between "exceptional" and "compelling". It is plainly right that foreign criminals have a more demanding test to meet than who have not offended while here. However the Judge considered the facts as established using both criteria as is evident from the heart of the appeal which is summarised at [47] that;

> "I do not accept that the end result makes the position of the Appellant or the uncle he leaves behind either exceptional or compelling."

13. On the facts she was entitled to find that the case did not meet either test. She gave multiple reasons for that as already identified. It may have been more helpful if she had used the phrase "compelling" throughout, but her failure to do so does not mean that she made a material error of law. If the appellant did not meet the "compelling" test, he could not meet the "exceptional test". In any event he met neither.

14. In my judgement there was therefore no material error of law in the decision in the application of the relevant test.

Ground 2 – failed to make adequate findings on Mr I's family life with the Appellant

15. Having failed to establish that compelling circumstances existed outside the rules such as to mean that Article 8 was engaged [48], which on the facts the Judge was entitled to find, there was no

obligation on the Judge to consider Mr I's right to respect for his family life. However she did, albeit briefly.

16. I note that it was wrongly asserted in the grounds that the Judge;

> "... acknowledges that *"a strong bond exists" between the Appellant and his uncle".*

17. The Judge recorded [45] (my underlining);

> "... that <u>they consider</u> a strong bond exists between them".

18. The Judge was plainly aware of the strength of the relationship having found that [45];

> "... there is mutual affection and dependency between the Appellant and his uncle and that they … have lived together for nearly three years and each has benefited from that arrangement."

19. The Judge also considered his other family relationships when finding that;

> "Mr I does have opportunities for social interaction with his family and presumably they can offer him companionship and comfort since the loss of his mother. I am satisfied that despite his disabilities Mr I's ability to maintain contact with his family and friends and with the outside world has not been significantly compromised."

20. Mt I was, at the date of hearing, almost 50 years old and had other family members here. The appellant had been in the United Kingdom for less than 3 years. In those circumstances it was open to the Judge to find that the appellant's primary family life was with his wife and daughter and not Mr I. Accordingly little further needed to be said about Mr I's family life with the appellant, it not being a core consideration, as the main consideration was the private life entitlement he had to personal care where the shortfall in personal care required, as opposed to desired, could be taken up by professional agencies.

21. In my judgement, for both of the reasons set out above [15 and 20], there was therefore no material error of law in the decision regarding Mr I's family life.

<u>Ground 2 – proportionality assessment</u>

22. The Judge, having found that compelling circumstances did not exist such as to consider the matter outside the Rules, still went on to consider proportionality as confirmed in [48] even though she did not need to. One only has to read [34] to [45] to see that the balancing exercise required within a proportionality exercise was undertaken. She was entitled to find that the balance fell against the appellant. The Judge does not have to slavishly recite <u>Razgar</u> or repeat the facts as found when she considers each question she was asked to determine.

23. In my judgement there was therefore no material error of law in the decision regarding the proportionality assessment.

Decision:

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.

Deputy Upper Tribunal Judge Saffer
21 October 2015