Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10360/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons promulgated**
On 09 February 2016	**On 23 March 2016**

Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAZAK SADEGHIAN

Respondent

Representation

Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
Respondent: Mr K Behbahani, of Oaks Solicitors

DECISION

Introduction

1. While this is the Secretary of State's appeal, I shall continue to describe Nazak Sadeghian, who brought the original appeal, as "the Appellant".

2. The origins of this appeal lie in the decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 16 January 2014, whereby the application of the Appellant, a national of Iran now aged 51 years, for indefinite leave to remain in the United Kingdom on the basis of continuous lawful residence was refused.

3. The First-tier Tribunal (the "*FtT*") allowed the ensuing appeal. The essence of its decision is encapsulated in the final paragraph:

> "*For the reasons stated above, the Appellant's removal from her family unit would constitute a disproportionate interference with her family life especially when the interests of her parents are taken into consideration. In addition, the Appellant satisfies the Respondent's requirements under section 117B of the 2002 Act for the reasons stated above.*"

The main point canvassed in the Secretary of State's application for permission to appeal was that the FtT failed to adequately grapple with the issue of the availability of care for her parents from other sources, described as "*her brother and third party support*". I construe this as a complaint of a failure to make necessary findings and/or a failure to take into account material evidence. The Secretary of State's representative was driven to accept, unavoidably, this analysis of the two key passages in the grounds of appeal *viz* Section C(a) and (b).

4. The Secretary of State's application for permission to appeal was initially refused, firstly, on the ground that whereas the deadline for receipt was 17 October 2014, it was not received by the Upper Tribunal until 23 March 2015. It was, therefore, significantly out of time and the Judge recorded that no reasonable explanation for this egregious delay had been provided. In a carefully reasoned decision, the Judge, having referred to relevant authority, further decided (in terms) that the proposed appeal had no realistic prospect of success.

5. However, the application for permission was renewed with success, permission to appeal being granted in the following terms:

> "*There was an arguable error in the Judge concluding that the appeal could succeed on Article 8 grounds notwithstanding that the evidence did not indicate that* [the Appellant's] *role as a carer of her parents was indispensable. On the Judge's own findings the brother was in a position to provide some care and, in addition, the Judge failed to engage with the Respondent's submission that there were adequate care agency sources of help if need be.*"

It is far from clear that the Judge granting permission was aware of the initial refusal and the primary reason therefor, given that neither this

decision nor the issue of time features at all in the grant. I shall revisit this issue *infra.*

Factual Matrix

6. I derive the following history from the impugned decision of the Secretary of State:

   (a) Between February and August 2001 the Appellant was lawfully present in the United Kingdom as a student.

   (b) Between July 2001 and December 2006, her leave to remain was extended three times.

   (c) A further such application, dated 20 December 2006, was refused and the Appellant's ensuing appeal was dismissed on 20 June 2007.

   (d) With effect from 04 April 2008 the Appellant's appeal rights were exhausted.

   (e) Between March 2010 and January 2012 the Appellant was the beneficiary of further leave to remain in the United Kingdom *qua* student.

   (f) On 08 April 2011 the Appellant's application for settlement on the basis of 10 years lawful residence was refused.

   (g) Between June 2012 and July 2013 the Appellant was the benefit of a further grant of leave to remain as a student.

   (h) On 07 July 2012 the Appellant made a further indefinite leave to remain application based on ten years' continuous lawful presence. This was refused on 01 May 2013, "*with no right of appeal as you had leave to remain in the UK at the time of the decision*".

   (i) On 03 June 2013 the Appellant submitted written representations which elicited no response.

   (j) On 26 July 2013 she made a further application which generated the decision lying at the heart of this appeal.

7. The first reason given for refusing the Appellant's application was that she had not demonstrated a period of continuous lawful residence of ten years. Next, the decision maker stated that the Appellant's suggestion that she had been badly served by her legal advisers was not considered sufficient to justify the grant of discretionary leave to remain. Third, the decision maker noted that the Appellant's case did not satisfy the requirements of Appendix FM of the Immigration Rules. Fourth, her application was considered not to satisfy Immigration Rule 276ADE. The

decision maker's final conclusion was that it would not be appropriate to permit the Appellant to remain in the United Kingdom exceptionally outwith the framework of the Rules.

FtT Error of Law?

8. The appeal to the FtT was presented and argued on the sole ground of whether the Secretary of State's refusal decision was in breach of Article 8 ECHR. The central question to be determined was whether, outwith the framework of the Rules, the impugned decision gave rise to a disproportionate interference with the Article 8 family and private life rights of the three persons concerned, namely the Appellant and her parents, both of whom are British citizens. The Judge recorded the following:

> "*The Appellant adopted her witness statement ….* [describing] *…. the dependency that her parents have developed towards her ….*
>
> *Her mother, in particular, has been diagnosed with dementia in the last year. The Appellant provided evidence that she provides* ***all*** *her parent's care needs …. She attends to her parents' toiletry needs and her brother helps with shopping and cooking.*"
>
> [My emphasis.]

Evidence was also given by the Appellant's brother, who testified that he –

> "*…. provides care to his parents by preparing breakfast and attending to his father's ablutions, a role which he shares with the Appellant. Due to the brother's work commitments he assists the Appellant with their parents in the morning and in the evening.*"

The Judge further recorded:

> "*In addition the mother's temperament is inconsistent due to her mental health. Enquiries have been made with care agencies but this is not a viable option due to the mother's reluctance to receive strangers to the family home. Additionally neither of the parents can speak English.*"

9. In submissions it was specifically argued by the Secretary of State's representative that "*…. the brother can provide care to the parents <u>with third party support from care agencies</u>*" [my emphasis]. I pause at this juncture. As the passages reproduced above demonstrate, evidence had been given that, following enquiries of care agencies, this was not considered a viable option for the reasons provided. Furthermore, the care which the Appellant's brother was capable of providing was, plainly, heavily constrained by his full time employment.

10. In the "Findings" section of his decision, the Judge unequivocally accepts the Appellant's evidence on the ground that it is considered "*consistent and credible*". He continues:

> "*Since her last appeal to the Tribunal the Appellant's personal circumstances have changed to the effect that family ties have developed beyond normal emotional ties .....*
>
> *I have had the benefit of having witnessed the Appellant's parents interact with the Appellant and her brother. There is no doubt that the Appellant's mother suffers from a significant mental incapacity which requires active and constant supervision. The Appellant's father is clearly infirm and his need for a wheelchair makes it reasonable to conclude that he requires attention above and beyond conventional family relationships.*"

The Judge further described the "*shared responsibility for their parents*" undertaken by the Appellant and her brother. This is followed by:

> "*It is also reasonable to conclude that the Appellant's brother provides essential respite care to relieve the Appellant of the unrelenting responsibility she endures in the care of her parents, which is undoubtedly offered with sincerity and affection.*"
>
> [Emphasis added]

In the concluding paragraphs of his decision the Judge also gives consideration to the operative provisions of section 117B of the 2002 Act, making appropriate findings and conclusions in doing so. His omnibus conclusion is reproduced in [3] above.

11. I have analysed the decision of the FtT in some detail above. I note in particular the assertion/submission in the Secretary of State's grounds of appeal:

> "*The Appellant's brother can take a primary role and seek the support of relevant agencies/provisions.*"

The exercise of juxtaposing the grounds of appeal with the decision of the FtT is an illuminating one. The assertion/submission quoted immediately above is made in a distant vacuum. First, it ignores the reality of the family circumstances, which entail the Appellant's brother working full time. Second, it ignores the Judge's specific conclusion that the Appellant's evidence was accepted in full. This included, as highlighted above, her testimony that she provides "*all*" her parent's care needs. I accept that this is not to be literally construed, given the (plainly limited) role played by her brother also. However, I consider it highly significant that the Judge characterised this "*respite care*". Simultaneously, he couched the Appellant's care of her parents in the terms of "*unrelenting*

responsibility". Finally, the Judge's acceptance of the Appellant's evidence in full entails a finding, readily to be inferred, that third party care of the Appellant's parents was not a reasonable or viable option, for the reasons given. Fundamentally, the Secretary of State's grounds of appeal are confounded by the Judge's findings, both express and readily inferred.

12. Given my analysis above, I conclude that the Secretary of State's grounds of appeal are unsustainable. The complaints made of the FtT's decision have no tenable basis. Furthermore, there is no suggestion that the Judge misdirected himself in law.

The grant of permission to appeal

13. In retrospect, it is clear that the Secretary of State's renewed application for permission to appeal should have been refused. It amounted to nothing more than a mere quarrel with a judicial decision which satisfied the requirements of adequate findings and reasons: see VV (grounds of appeal) Lithuania [2016] UKUT 00053 (IAC), at [22] – [26] and MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC). The Judge who was persuaded to grant permission did so on the basis that a question of law, namely whether it was incumbent on the Appellant to demonstrate that her care for her parents was indispensable, arose. As my analysis above of the grounds of appeal demonstrates, this question of law did not arise in this appeal. It simply did not belong to the framework of the Secretary of State's impugned decision, that of the ensuing appeal, the decision of the FtT or the Secretary of State's application for permission to appeal.

FtT Decisions: late applications for permission to appeal

14. Finally, the second permission Judge made no decision on whether the Secretary of State's heavily delayed application for permission to appeal should be admitted. This issue should have been specifically confronted and determined: see Rules 5, 7, 12 and 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008. While I entertain little doubt that if the second permission Judge had been alert to the preceding analysis of the first permission Judge a concurring refusal to admit the renewed application for permission would have ensued, I consider the correct analysis to be the following.

15. Since the second permission Judge made no decision on admittance and extension of time, I consider that the grant of permission to appeal is incomplete. In such circumstances it falls to me to determine this issue. In doing so, I concur fully with the analysis and conclusion of the first permission Judge. While it is correct that in the renewed permission application there was an assertion – pure and simple – that the application for permission had been transmitted "*by digital fax*" within time (on 17 October 2014) no supporting evidence was provided and none has been assembled at this stage. Accordingly, while I have no power to reverse the

second permission Judge's decision that, on its merits, the Secretary of State's renewed application overcame the threshold of demonstrating an arguable case, this is but a partial grant of permission to appeal. I now rectify the omission in the incomplete order by refusing to admit the second application for the reasons adumbrated in the first permission Judge's refusal decision. It follows that permission to appeal is refused. If I am wrong in this analysis and conclusion, the appeal is dismissed on its merits in any event on the grounds and for the reasons elaborated above.

16. Although I received no argument from either parties representative on the time issue, I note with interest that my analysis above, expressed in the *ex tempore* decision given at the conclusion of the hearing, is consistent with the jurisprudence of this Chamber. See AK and others (Tribunal Appeal - out of time) Bulgaria [2004] UKIAT 00201, at [22]-[23] (a "starred" decision), Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442 (IAC), at [16] and Samir (FtT permission to appeal: time) [2013] UKUT 00003 (IAC), at [18]-[21].

Decision

17. (a) The Secretary of State's application for permission to appeal is not admitted on the ground of excessive and unjustified lateness.

(b) Further, or in the alternative, the appeal is dismissed on its merits in any event.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 29 February 2016