Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31103/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th February 2017	**On 22nd May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR SHAMSHIR-UL-ZAMAN KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F Beach, Counsel, instructed by F S Law Solicitors & Advocates
For the Respondent: Mr J Parkinson, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Tanzania. On 25th June 2012, the appellant made an application for indefinite leave to remain in the UK. The application was refused by the respondent on 30th April 2013. The appellant appealed that decision to the First-tier Tribunal ("F*t*T").

2. The appeal was first listed for hearing before F*t*T Judge Carroll on 2nd January 2014. The appellant claimed that the respondent's decision was not in accordance with the law because the respondent had failed to consider the claim under her

publicly published policy, namely the carers' concession. At that hearing before the F*t*T, it was agreed between the parties that the matter should be remitted to the respondent for further consideration by her. The Judge remitted the matter to the respondent for further consideration.

3. The respondent reached a further decision on 15th July 2014, again refusing the application for leave to remain. The appellant again appealed and his appeal was dismissed by F*t*T Judge McWilliams for the reasons set out in a decision promulgated on 22nd May 2015. On 12th August 2015, the appellant was granted permission to appeal to the Upper Tribunal by F*t*T Judge Ransley. That appeal was heard by Upper Tribunal Judge Coker on 12th January 2016. In her decision promulgated on 27th January 2016, the Judge noted that the appellant had withdrawn his appeal under the Immigration Rules and the remaining challenge was purely an Article 8 challenge. The Judge stated at paragraph [8] of her decision:

> *"I am satisfied that the First-tier Tribunal Judge erred in law in failing to assess all of the evidence in the round and failing to give adequate reasons for the findings relied upon to find that the removal of the appellant to Tanzania was proportionate."*

4. Upper Tribunal Judge Coker set aside the decision of F*t*T Judge McWilliams insofar as it relates to Article 8 only. She remitted the matter back to the F*t*T for a decision on the appeal under Article 8.

5. The appeal was listed for hearing before F*t*T Judge Lawrence and dismissed for the reasons set out in a decision promulgated on 21st July 2016. Permission to appeal was granted by Upper Tribunal Judge McWilliam on 10th January 2017.

6. The matter comes before me to consider whether or not the decision of the First-tier Tribunal Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

The decision of F*t*T Judge Lawrence

7. At paragraph [2] of his decision, the Judge records that at the hearing before him, he heard the evidence of the appellant and the appellant's sisters and brother-in-law, namely Farida Khan, Shahe-Gul Khan-Sherwani and Farruk Naeem Khan-Sherwani. The Judge notes at paragraph [4] of his decision that it is accepted that the appellant does not meet the requirements of the Immigration Rules. He also notes that it is the health of the appellant's mother that amounts to the 'compelling circumstances' that take the appeal outside of the Immigration Rules (see: SS (Congo) & Others [2015] EWCA Civ 387).

8. A summary of the background is to be found at paragraphs [6] to [8] of the decision of the F*t*T Judge. The thrust of the claim is summarised at paragraph [7];

> *"It is claimed that the appellant's father's health deteriorated significantly. Appellant's mother, Fatima Khan Lodhi, had been caring for him but was finding it difficult to continue to cope due to her own ill-health. It is claimed the appellant took over the care of his father until he was hospitalised. He died on the 30th of October 2013. The death of the father affected Mrs Lodhi and her own health deteriorated significantly. The appellant took over care of Mrs Lodhi on a full-time basis."*

9. The findings of the Judge are to be found at paragraphs [10] to [37] of the decision. The Judge refers at paragraphs [10] to [22] of his decision, to the medical evidence before him relating to the appellant's mother.

10. At paragraphs [25] to [28] of his decision, the Judge begins his consideration of the Article 8 claim by reference to the decision of the Court of Appeal in **Kugathas –v-SSHD [2003] EWCA Civ 31**. That is, whether the appellants' Article 8 rights and those of his mother and siblings, and their respective families, are engaged. A parent and an adult child would not necessarily acquire the protection of Article 8 without evidence of further elements of dependency, involving more than the normal emotional ties. Article 8 protects the rights not only of the appellant, but also family members and each case has to be assessed on its own particular facts.

At [25], the Judge found that there is no **Kugathas** 'dependancy', as claimed, between the appellant and his mother. Similarly, at [28], the Judge found that there is no such dependency between the appellant and his siblings and their respective families. He states:

> *"There is no evidence that there is the **Kugathas** 'dependency' between the appellant and his siblings and their respective families. In any event, even if there is 'family life', it can be enjoyed by the relatives visiting the appellant in Tanzania……I find that even if there is 'family life' between the appellant, his siblings and their respective families it can be enjoyed in myriad of other ways. The appellant is able to visit his mother with entry clearance as he has been doing in the past."*

11. At paragraphs [30] to [36] of his decision, the Judge sought to engage with the step-by-step process enunciated in the well-known decision of the House of Lords in **Razgar**. He set out the five questions posed therein, and considered each question in turn. The Judge found at [32] that the proposed removal of the appellant will not amount to an interference with the exercise of the appellant's right to respect for his private or family life. At [33], the Judge found that any such interference would not have consequences of such gravity as potentially to engage the operation of Article 8. The Judge found at [34] and [35] that there is no interference, but in any event, any interference that there may be, is in accordance with the law and necessary in the interests of proper immigration control. Notwithstanding his findings that the answers to the first and second of the five questions were answered against the appellant, the Judge nevertheless considered whether the interference is proportionate to the legitimate public end sought to be achieved. He found, at [36], that if there is any interference, it is proportionate to the legitimate aim of proper immigration control. At [37], the Judge referred to and considers the public interest considerations set out in **s117B** of the 2002 Act. At [38], the Judge sets out his omnibus conclusion:

> *"38. In my view, removal of the appellant does not engage article 8 of the Human Rights Convention. If it does, I find removal of the appellant is proportionate, on the evidence presented to me, to the legitimate aim of proper immigration control."*

The appeal before me

12. Although set out in paragraphs 6(a) to (e) of the Grounds of appeal as five separate grounds, the appellant advances four broad grounds of appeal. First, the Judge has failed to give clear reasons for his adverse credibility findings. Second, the Judge erred in finding that there was no a family life. Third, the Judge erred in his assessment of the medical and expert evidence before. Finally, the Judge failed to consider the issue of the proportionality of the decision to remove the appellant, and the impact of the removal on the appellant, upon the appellant's mother and his siblings, and in particular, the interference that would result to their personal lives.

13. Before me, Ms Beach submits that there are a lack of reasoned findings in the decision of the F*t*T. She submits that the Judge heard evidence from the appellant, his sisters, and his brother-in-law, but there is a complete absence of any real assessment of the oral and written evidence of the appellant and his family. She submits, the Judge fails to make clear and reasoned findings as to the credibility of the appellant and his witnesses. She submits that without clear credibility findings, the F*t*T Judge cannot properly have assessed the evidence before him, and cannot properly and rationally have reached his conclusions.

14. Ms Beach submits the Presenting Officer accepted, in submissions made to the F*t*T, that 'some' family life did exist between the appellant and his mother and that the issue between the parties was proportionality. In any event, she submts there was a wealth of evidence set out in the witness statements of the appellant and his siblings that were before the Judge, as to the family life that exists between the appellant and his mother. She also drew my attention to the report of Dr Halari which, at paragraphs 50, 54, 55, 56, 60, 62, and 64, refers to the reliance placed upon the appellant by his mother. She submits that all of that evidence should have been considered when the Judge reached his findings as to whether there is a family life between the appellant and his mother. Furthermore, the Judge failed to make findings as to the evidence of the witnesses inability to care for their

mother, and the care that they believe, would be available to their mother without the appellant. Ms Beach submits that without any proper assessment of that evidence of dependency and the need for care, the F*t*T Judge could not carry out a proper proportionality assessment.

15. Ms Beach also submits the Judge erred in his assessment of the medical evidence that was before him. She submits the Judge notes the qualifications of Dr Halari and does not appear to take issue with her expertise. Later, at [33], of his decision the Judge refers to "*…'experts' like Dr Halari..*", suggesting that he does not accept her expertise. If her expertise is not accepted, Ms Beach submits, it was incumbent upon the Judge to provide clear reasons for attaching little or no weight to her evidence. Ms Beach also submits that the fact that Dr Halari based her assessment (to some extent) on what was recounted to her by the appellant and his mother, does not mean that little weight should be placed on her report. She submits that the Judge erred in his finding, at [33], that there is no evidence from an independent source, apart from wishes expressed by the appellant and his mother to 'experts' like Dr Halari and the authors of letters emanating from the GP and hospital, that the appellant's mother is likely to suffer adversely, mentally or physically, should the appellant leave the UK. Furthermore, the FTT Judge failed to consider the evidence that was before him that the on-going psychiatric assessments of the appellant's mother by the Kent and Medway NHS, also involved the input of clinical psychologists.

16. Ms Beach also submits that although the Judge refers to the Care Plan dated 9th June 2015, the Judge failed to consider the concerns regarding the appellant's mother's mental state. The plan records that that she was 'very anxious and agitated' and sets out the day-to-day care that she requires with cooking, preparation of meals and prompting to take medication. She submits that the opinion of the expert is that the support and assistance that is provided by the appellant has a positive effect on his mother.

17. In reply, Mr Parkinson submits it was for the Judge to decide whether family life in the Article 8 sense is established between the appellant and his mother and or siblings. He submits that the Judge had before him an extensive bundle relied upon by the appellant comprising in excess of 400 pages. He submits that the Judge has carefully considered the evidence relied upon by the appellant and reached findings that were properly open to him. In any event, notwithstanding the Judge's concerns about whether the appellant has established that he has a family life with his mother and siblings, the Judge, in the alternative, went on to consider the Article 8 claim by reference to the five stage approach in **Razgar**. Mr Pakinson submits that having carefully considered all of the evidence before him, it was open to the Judge to find that the needs of the appellant's mother can be met by Social Services and the NHS. He submits it was open to the Judge to conclude that there is no independent evidence to establish the claim that the appellant needs to remain in the UK to care for his mother. He submits that the appellant and his siblings might prefer that the care provided to their mother is provided by the appellant, but that is a matter of preference. The appellant's desire to remain in the UK to care for his mother does not equate to a right to do so. Mr Parkinson submits that as there was no evidence put before the F*t*T as to the alternative care that may be available, it was open to the Judge to reach the conclusion that he did, that any third party support that is needed by the appellant's mother, can be amply accommodated by Social Services and the NHS.

Discussion

18. I remind myself of the observations made by Mr. Justice Hadon-Cave in **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC);**

> *"It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the*

evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.

19. I have also had regard to the decision of the Upper Tribunal in **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 IAC** where it was stated in the head note that:

> "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, those reasons need not be extensive if the decision makes sense, having regard to the material accepted by the judge.*"

20. In **Shizad**, the Tribunal also confirmed that although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

21. The issue for me to decide is whether the Judge was entitled to dismiss the appeal on Article 8 grounds for the reasons set out. I have carefully read through the decision of the F*t*T Judge, and his findings that are set out at paragraphs [10] to [37] of his decision.

22. I have carefully read the witness statement of the appellant that is to be found in the appellant's bundle and have considered the exhibits thereto. I have also read the witness statement of the appellant's mother, sisters, and brother-in-law, all of which were in the appellant's bundle. Essentially the appellant's case is that he lives with, and is the primary carer of his mother who has a history of a number of physical and mental health issues. The appellant's sisters live in the UK and they confirm the role undertaken by the appellant in respect of their mother's care, and

the burden that would be placed upon them, if the appellant was no longer here to fulfil that role.

23. I reject the submission that there are a lack of reasoned findings in the decision of the F*t*T and a complete absence of any real assessment of the oral and written evidence of the appellant and his family. It is right to note, as Ms Beach submits, the Judge does not make specific reference in his decision to everything that was said by the appellant and his witnesses, but as is clear from the authorities, that is not necessary or to be encouraged.

24. The failure to expressly refer to all of the evidence, is not to say that the Judge did not consider that evidence when he resolved the key conflicts in the evidence, and explained his reasons in a way that the parties can understand why they have won or lost. At paragraph [3], the Judge notes that he has taken into account the evidence contained in the respondent's bundle, the evidence in the appellant's bundle and the various documents submitted on behalf of the parties, together with the oral evidence and submissions. At paragraph [18], the Judge states:

> *"I have considered the medical evidence, the contents of the witness statements, the oral evidence, the policy regarding carers and the written and oral submissions in the round…"*

I have no reason to doubt that the Judge did consider the evidence as a whole, in completing an individual and fact-specific inquiry as to the appellant's Article 8 claim.

25. The Tribunal must first determine whether Article 8 of the ECHR is engaged at all. If it is not, the Tribunal has no jurisdiction to embark upon an assessment of the remaining issues stages identified in **Razgar**. If Article 8 is engaged, the Tribunal should go on to consider the remaining four stages identified in **Razgar**.

26. At paragraphs [10] to [23] of his decision, the Judge makes reference to the evidence before him. At paragraph [15] of his decision, the Judge expressly refers

to the opinions expressed by Dr Halari. The Judge states *"I have considered them in detail."*. The Judge considered the medical evidence in the round, together with the evidence of the appellant and his witnesses, and what is said in the care plan. At paragraphs [18] and [19] of his decision, the Judge notes that the care plan relied upon by the appellant does not record Mrs Lodhi as being in need of day-to-day care as claimed by the appellant and his witnesses. At paragraph [19], the Judge states:

> *"..on careful examination of the medical evidence, it does not appear to me that Mrs Lodhi is actually in need, as opposed to 'wants' or 'prefers', of physical or mental assistance."*

27. At paragraph [22] of the decision the Judge notes, Dr Halari reports Mrs Lodhi is opposed to receiving help from Social Services or strangers entering her property on cultural grounds. In my judgment it was properly open to the Judge, on the evidence, to find that that is a personal choice she has made. Dr Halari's report in this respect was based upon what the appellant and Mrs Lodhi had told her. As the Judge notes, "It is not based on any objective independent and verifiable assessment by a qualified expert in the relevant filed.". For the reasons identified at paragraphs [22] and [23] of the decision, and having carefully considered the report of Dr Halari for myself, in my judgment it was open to the Judge, on the evidence, to find that Mrs Lodhi's preference to be cared for by the appellant, is a personal one.

28. Much of what is set out in the findings of the Judge at paragraphs [10] to [23] of his decision, might more appropriately have been set out in the assessment of the Article 8 claim that follows at paragraphs [24] to [37] of the decision. Although I accept that the Judge's decision could have been more clearly expressed, it is clear from a proper reading of what is set out at [25] to [32] of the Judge's decision, that the appeal was dismissed by the F*t*T primarily upon the finding of the Judge that the appellant has not shown that he has a family life with his mother and siblings, and thus Article 8 is not engaged. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or

absence of family life for the purposes of Article 8. The question whether an individual enjoys family life is one of fact, and depends on the relevant facts of the particular case. The Judge referred to the care plan relied upon by the appellant, but that does not record Mrs Lodhi as being in need of day-to-day care as claimed by the appellant and his witnesses. The Judge found that Mrs Lodhi's preference to be cared for by the appellant, is a personal one. The appellant's desire to remain in the UK to care for his mother does not equate to a right to do so.

29. In my judgment, it was open to the Judge to find that the appellant has not shown that he has a family life with his mother and siblings, and thus Article 8 is not engaged, having considered the evidence before him. The Judge's finding is neither irrational nor perverse. The Judge therefore had no jurisdiction to embark upon an assessment of the remaining stages identified in **Razgar**

30. Notwithstanding that, the Judge states at paragraph [31]

> *"In the event, I am wrong about my assessment of the Kuhathas 'dependency' I turn to the 'proportionality' assessment in Razgar v SSHD [2004] UKHL 27…"*

31. Although referred to as 'the proportionality assessment', the Judge carried out an analysis of the Article 8 claim by reference to the five-stage approach in **Razgar**. At paragraph [32] of his decision, the Judge again states that the proposed removal will not be an interference with the exercise of the appellant's right to respect for his private of family life. The appeal was dismissed after the Judge had carefully considered the facts and circumstances of the claim and all the evidence before him. Looking at the matter through the five Razgar questions, the Judge found that the appellant has not shown that he has a family life with his mother and siblings and as such the appeal failed at the first hurdle. That was again in my judgment, a finding that was reasonably open to him. The finding cannot be said to be perverse, irrational or a finding that was not supported by the evidence.

32. The Judge nevertheless went on to consider each of the four remaining stages of the Razgar test. The appellant criticises the Judge's findings, at [33], as to whether any interference will have consequences of such gravity as potentially to engage the operation of Article 8, and the Judge's assessment of the medical evidence.

33. At paragraph [33], the Judge states:

> *"The next Razgar point is "(b) if so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?" The answer is again in the negative for reasons set out. In so far as Mrs Lodhi is concerned, there may temporary disturbance to her routine. This can be accommodated. I fully note she has expressed her desire for the appellant to remain with her. This is well documented especially in the report by Dr Halari. However, there is no independent source, apart from wishes expressed by the appellant and Mrs Lodhi to 'experts' like Dr Halari and authors of letters emanating from the GP and hospital, that Mrs Lodhi is likely to suffer adversely, mentally or physically, should the appellant leave the UK. She has not been observed, discreetly, by an independent expert, to react to third party involvement in the provision of care. Dr Halari's report is entirely based on what the appellant and Mrs Lodhi said to her. The evidence of the witnesses to me is from the appellant's siblings and brother-in-law. They will benefit from the appellant being granted leave in the UK. Of course they will. However, the issue is whether removal of the appellant have an adverse effect of gravity on them. On the evidence before me, the answer is in the negative."*

34. I have carefully considered the content of the psychological report of Dr Rozmin Halari, a Chartered Consultant Clinical Psychologist, dated 4th March 2015. Although the Judge states that there is nothing apart from the wishes expressed by the appellant and Mrs Lodhi to experts like Dr Halari and the authors of letters emanating from the GP and hospital that Mrs Lodhi is likely to suffer adversely, mentally or physically, should the appellant leave the UK, the Judge had

previously noted the professional opinions set out in the report of Dr Halari. At paragraph [15] of the decision, the Judge records;

> *"Dr Halari expresses her opinion that should the appellant be returned to Tanzania Mrs Lodhi is likely to suffer deterioration in her mental health (para 83); that she would benefit from counselling and cognitive behavioural therapy (para 84-85);at this stage of her life she would benefit from consistent practical and emotional support (para 86); she is opposed to idea of social services entering her home from a cultural and tradition prospective (para 87); she is receiving the support she needs from her son and she is happy (para 88). Dr Halari sets out her opinions on the rest of her instructions between para 89-112. I have considered them in detail".*

35. Again, in my judgement, the decision could have been more clearly expressed, but I reject the submission made on behalf of the appellant that the Judge erred in his assessment of the medical evidence that was before him.

36. The Judge was aware of the opinions expressed by Dr Halari and refers to those opinions at paragraph [15] of his decision. He states that he has considered them. At paragraph [33] of his decision, the Judge addresses whether any interference will have consequences of such gravity as potentially to engage the operation of Article 8. In considering the medical evidence, at paragraph [33], the Judge notes that Mrs Lodhi has not been observed, discreetly, by an independent expert, to react to third party involvement in the provision of care.

37. I have carefully considered whether the Judge's decision read as a whole, discloses a material error of law. In my judgment, as the Judge had already found that the proposed removal will not be an interference with the exercise of the appellant's right to respect for his private of family life, the Article 8 appeal failed at the first hurdle. The question of whether any interference will have consequences of such gravity as potentially to engage the operation of Article 8 did not arise. The Judge's conclusions at paragraphs [33] to [37] of the decision, could not therefore be capable of materially affecting the outcome of the appeal.

38. Overall I am not satisfied that the Judge fell into a material error of law capable of affecting the outcome of the appeal. Although muddled in some respects, in my judgment, upon a holistic reading of the decision, it cannot be said that the Judge's analysis is irrational or perverse. The Judge did not take into account irrelevant factors, and the weight that he attached to the evidence either individually or cumulatively, was a matter for him. I am satisfied that the Judge's decision is a sufficiently reasoned decision that was open to him on the evidence.

39. It follows that in my judgement the decision of the F*t*T does not disclose a material error of law capable of affecting the outcome of the appeal and the appeal is dismissed.

Notice of Decision

40. The appeal is dismissed and the decision of the First-tier Tribunal stands.

41. No anonymity direction is applied for, and none is made.

Date 10th May 2017

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

As I have dismissed the appeal, no fee award is appropriate.

Signed Date 10th May 2017

Deputy Upper Tribunal Judge Mandalia