Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04079/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 January 2019	**On 20 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SIBGHATULLAH [H]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr S Jaisri, Counsel instructed by Crown & Mehria Solicitors

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Afghanistan born on 1 January 1994. He made an application for entry clearance in order to join his family members in the United Kingdom. That application was refused by an Entry Clearance Officer on 14 July 2015, on the basis that the evidence provided regarding his medical condition was insufficient and the Entry Clearance Officer could see no reason why the existing arrangements for his care could not continue.

2. The Claimant appealed against that decision. His appeal came before First-tier Tribunal Judge Davidson for hearing on 12 March 2018. In a decision and reasons promulgated on 29 March 2018, the Judge allowed the appeal, finding as follows:

> *"22. I find that the Appellant requires care to perform everyday tasks. Based on the evidence of the Sponsor, the Appellant is not coping with normal everyday functions and has been diagnosed with a mental incapacity which affects his ability to look after himself.*
>
> *23. I find that the Appellant is only able to access treatment in Pakistan because it is not available in his home country of Afghanistan. There was an arrangement in place when the neighbour, Rafi, looked after him but since Rafi moved away, no satisfactory alternative has been found.*
>
> *24. I find that, in any event, the level of care required by the Appellant is best provided by his family and his absence from the rest of the family unit is contributing to his ill-health.*
>
> *25. I find that the Appellant has shown on the balance of probabilities that he falls within paragraphs 2.4 and 2.5 of E-ECDR of Appendix FM.*
>
> *26. I accept that Article 8 is engaged and it is an interference with his human rights to deny the Appellant entry clearance to join his family. I accept the arguments advanced on behalf of the Appellant that the other members of his family who are settled in the UK cannot easily relocate to Afghanistan to be with him.*
>
> *27. I find that it is a disproportionate interference with the Appellant's Article 8 rights, having taken into account the Respondent's legitimate purpose in enforcing immigration controls".*

3. The Secretary of State sought permission to appeal to the Upper Tribunal, in time, on the basis that the judge had erred materially in law in allowing the appeal: firstly, on the basis that the reasoning provided for so doing was inadequate, that the medical evidence was very thin, there was no analysis by the judge of the severity of the Claimant's condition or how it directly affects his ability to perform everyday tasks, nor any analysis as to why it is not possible to find local care to assist the Claimant with those things that he has difficulty with; and secondly, a failure to properly address the evidence. This was based on the assertion by the Presenting Officer that the Sponsor's evidence in cross-examination confirmed the Claimant did not require assistance to perform everyday tasks.

4. Permission to appeal was granted by Upper Tribunal Judge Perkins in a decision dated 31 July 2018, on the basis that it was arguable that the medical evidence was insufficient to support the judge's finding and the

grounds make out an arguable *prima facie* case that the decision that the Rules were satisfied was perverse as being contrary to the Sponsor's evidence.

5. The appeal was subsequently listed for hearing but adjourned in order for the Respondent to obtain and provide evidence in the form of a witness statement or Record of Proceedings from the Presenting Officer at the hearing, Ms Sharma. However, that evidence was not forthcoming. Thus, in a letter dated 21 November 2018, Mr Avery fairly set this out in writing and decided, in the absence of any evidence to substantiate the second ground of appeal that the best course of action was not to pursue that ground, but only the first ground of appeal.

Hearing

6. When the appeal came before the Upper Tribunal for hearing, Mr Tufan on behalf of the Secretary of State, confirmed that he was no longer relying on the second ground of appeal and the challenge to the judge's decision was based on the issue of the adequacy of the Judge's reasoning. He submitted that whilst there was medical evidence from Moonas Hospital, this was not adequate, it contained spelling mistakes and was very vague as to what the Claimant's diagnosis is. He submitted that the Rules set a very high test, *cf.* the Court of Appeal judgment in Britcits [2017] EWCA Civ 368, the Rules had been found to be compliant with Article 8. He submitted the grounds were self-explanatory and the judge had clearly erred in law.

7. Mr Jaisri in his submissions stated that the reasons provided by the judge were sufficient to deal with the issue before him.

Findings and Reasons

8. I found a material error of law in the decision of the First-tier Tribunal Judge for the reasons set out in the grounds of appeal. It is apparent from the judge's findings that the reasons provided, set out in their entirety at [2] above, are not adequate to deal with the issue that was before him, given that the threshold for meeting the requirements of the Immigration Rules is a high one. In particular, there was an insufficient evidential basis upon which the Judge could properly find that the Claimant requires care to perform everyday tasks.

9. I then heard submissions from the parties in order to re-make the decision.

10. Mr Tufan submitted firstly that it remains unclear what is wrong with the Claimant, there are spelling errors in the letter from the Moonas Hospital which was vague, and the relevant Rules do set a high hurdle. Mr Tufan acknowledged that what does go in the Claimant's favour is that he is the only family member who is left in Afghanistan, however this was not sufficient in itself to constitute exceptional circumstances so as to justify allowing the appeal on the basis of Article 8. He further submitted that in

light of the test in Kugathas [2003] EWCA Civ 31, there was no evidence of dependency with his family that went over and above normal emotional ties.

11. In his submissions, Mr Jaisri accepted that perhaps there were deficiencies in respect of the specified evidence, however the context of the case was important and that is that it was brought on the basis that the Claimant was an individual who is the sole member of the family left behind in Afghanistan when his mother and siblings were given entry clearance to join his father. As a consequence, he has suffered depression and these were facts accepted by the judge, which have not been challenged by the Secretary of State. Whilst there are spelling errors in relation to the letter from Moonas Hospital in Peshawar, that letter and the diagnosis had been accepted by the Judge and his findings of fact had not been challenged and were therefore preserved.

12. Mr Jaisri submitted that the Sponsor's evidence is that the two visits he made to visit his son in Afghanistan found him to be living in very desperate and poor circumstances, the judge accepted that the Claimant's neighbour who had previously assisted in taking him to hospital had left Afghanistan, see the statement of Rafi Jalaly at page 32 of the Claimant's bundle. In relation to the test of dependency, Mr Jaisri submitted that it was highlighted in the case of Rai [2017] EWCA Civ 320 that it is necessary to look at whether there is real and effective support in order to show there is dependency. He submitted that the medical situation and the Claimant's circumstances were accepted by the judge and these clearly demonstrate an exceptional level of dependency. The Claimant has always lived in the family home and was living with his family unit until they left Afghanistan. He now remains in the family home on his own.

13. He submitted that given the Claimant's reliance on medical assistance is tortuous, that he has to travel to Peshawar, the continuation of medical treatment must also fall for consideration as part of the Article 8 assessment. He submitted that the continued exclusion of the Claimant from the United Kingdom was disproportionate and that his appeal should be allowed. He also asked that the fee order be maintained if the appeal is allowed.

Findings and reasons

14. The relevant Immigration Rules provide as follows:

> *"**E-ECDR.2.4.** The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.*
>
> ***E-ECDR.2.5.** The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor,*

to obtain the required level of care in the country where they are living, because-

(a) it is not available and there is no person in that country who can reasonably provide it; or

(b) it is not affordable."

15. Whilst the Claimant has been diagnosed with depression, there is no medical evidence before the First tier Tribunal to this effect and the Sponsor's oral evidence was that the Claimant does not know how to cook, lives on takeaways and often skips meals; he does not bathe regularly but he does so himself when he does it: [5](f) refers. This is, however, not consistent with the Sponsor's statement at [11] where he states '*Whilst my son can cook it is often something very simple like an omelette or sandwich.*"

16. I find that the requirements of E-ECDR 2.4. of Appendix FM of the Immigration Rules are not met on the basis of the evidence before me. It is clear that the intention of that Rule is to address the requirements of applicants who require "long term personal care" which clearly constitutes something more than the ability to prepare meals. The Claimant does not have a carer but lives on his own and was previously relying on assistance from a neighbour, Rafi Jalali, who has now moved to Iran. In his undated statement at page 32 of the Claimant's bundle, Mr Jalali states only: "*I have been looking after him for quite a long I give food to him sometime and help him with daily but it's been long enough that his family lives in United Kingdom*". The quality of the English in this letter is poor and I find the content to be undermined by the fact that, whilst the writer gives his name as Rafi Jalali, the letter is signed Rafi Jalaly.

17. As Mr Tufan identified, the medical evidence also suffers from spelling errors: the letter from Moonas at page 14 of the Appellant's bundle is headed "Medical Center and Psychitric (sic) Hospital" and is entitled "Madical certificate" albeit the word psychiatric is spelt correctly in the body of the every short letter, which simply states that the Claimant "*who was born in the year 1994 is psychiatric patient and he is under treatment from 06/09/2014 till now with Prof, Dr Wahid Ali in Moonas Hospital*." There is no diagnosis, nor explanation as to what the Claimant is being treated for. There are copies of three prescriptions on Moonas headed paper but there is no medical report or letter stating what the tablets are being prescribed for. The Sponsor's evidence before the First tier Tribunal was that the tablets are anti-depressants and sleeping pills. I do not find the medical evidence to be helpful or reliable for these reasons.

18. Whilst I am prepared to accept that the Claimant suffers from depression, having been left in Afghanistan whilst the remainder of his family have relocated to the United Kingdom, I find that there is no evidence that the requirements of E-ECDR 2.5 are met. Whilst the evidence is that the Claimant travels to Peshawar in Pakistan for treatment, I find that it would be possible for him to obtain some treatment in Afghanistan, particularly

as the evidence before me would indicate that this treatment only constitutes the prescription of tablets for depression. It is well documented that there is a public psychiatric hospital in Kabul where it would be reasonable to expect the Claimant to attend as an outpatient: *AS (Safety of Kabul)* Afghanistan CG [2018] UKUT 00118 (IAC) at [142]-[143]. Undoubtedly, this is far from ideal, however, that is not the test set out in E-ECDR 2.5 which requires that the applicant must be unable to obtain the required level of care in Afghanistan because it is not available or affordable and I find that the test is not met.

19. Clearly, the Claimant and his family would prefer to be able to live together as a family unit. I accept that the Sponsor provides the Claimant with financial support in the form of remittances and payment of the rent on the house where he lives alone and emotional support in the form of telephone calls and visits in 2016 and 2017. I find that the evidence shows that family life as defined by the Court of Appeal as "*real, effective or effective support*" in Rai [2017] EWCA Civ 320 has been established.

20. However, given that the requirements of the Rules have not been met, it is necessary for the Claimant to show that there are exceptional circumstances in order for his appeal to succeed. I find that the fact that the family are separated and the Claimant is living alone in Kabul is not sufficient in itself to amount to an exceptional circumstance, given that he is an adult now aged 25 and in the absence of clear, reliable evidence as to his medical condition(s).

21. I have also had regard to the public interest considerations set out in section 117B of the NIAA 2002 and find that there is no evidence that the Claimant speaks English. The evidence is that he is financially dependent on his father. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest.

22. In light of the considerations and my findings set out above, I find that the decision refusing to grant the Claimant entry clearance does not constitute a disproportionate interference with his right to family life with his parents and siblings in the United Kingdom.

Notice of Decision

The First tier Tribunal Judge made material errors of law. I set aside that decision and substitute a decision dismissing the Claimant's appeal against the refusal of entry clearance.

No anonymity direction is made.

Signed Rebecca Chapman Date 20 February 2019

Deputy Upper Tribunal Judge Chapman

I have dismissed the appeal and therefore there can be no fee award.

Signed Rebecca Chapman Date 20 February 2019

Deputy Upper Tribunal Judge Chapman