



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU044862015

THE IMMIGRATION ACTS

**Heard at Bradford
On 12 May 2017**

**Decision &
Promulgated
On 27 July 2017**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

**SUNYBOY NCUBE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Vaughan, Solicitor, NBS Solicitors

For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Spencer (hereafter "the Judge") promulgated on 8 August 2016 dismissing his appeal against a decision of the Respondent dated 11

August 2015 refusing his application to remain in the United Kingdom (UK) on human rights grounds (Article 8 ECHR).

2. The Appellant is a citizen of Zimbabwe born on 30 June 1997. He entered the UK on 23 December 2013 with entry clearance as a visitor conferring leave to enter until 20 June 2014. His mother and three minor siblings reside in the UK. The Appellant's elder brother has a severe level of autism, requires constant supervision, and is the subject of a dedicated care package provided by social services. The Appellant cares for his brother (as well as his other siblings) by assisting with his toilet needs; teaching him how to ride a bike and play football.
3. Before the Judge, the appeal was pursued outside of the Immigration Rules ("the Rules") in reliance on Article 8 of the ECHR, on the basis that the Appellant's absence would have an adverse impact on the emotional and psychological needs of his autistic brother and his family.
4. The Judge heard evidence from the Appellant and his mother. The Judge's findings are comprehensively set out at [29] to [53]. Before the Judge the parties' agreed that the Appellant's elder brother suffered from a severe level of autism and that he required care and constant supervision. It was also agreed that the Rules were not met. The Judge acknowledged that there were compelling circumstances to justify consideration outside of the Rules at [30], and proceeded to consider the application of Article 8. The Judge noted the issue essentially boiled down to that of proportionality [34]. The Judge accepted the Appellant cared for his autistic brother, but he rejected the evidence that care was required at night as this had been cancelled by the mother six months prior to the hearing.
5. The Judge rejected the evidence of a social worker that the support offered by the Appellant "*would be incredibly difficult to replicate*" as unreliable at [37]; there was no explanation as to why that was so and the Judge noted this comment could not be tested in the author's absence. The Judge considered that the difficulty in replicating care could arise from reasons of staff levels, financial reasons or because of the level of care required, and noted the level of care provided had since reduced. The Judge noted there was no claim the family were struggling to care for the child and noted that the care package could be altered to provide more care during the day should this be required. The Judge also noted the evidence from social services was out of date; that there was no evidence that care could not be increased if required, and that the mother accepted she could care for her autistic son.
6. The Judge accepted the Appellant provided daily care for his brother and supported his other siblings and mother, but found this was in his capacity as a loving brother - he did not take responsibility for making important decisions on behalf of any sibling. The Judge accepted the family would be distressed by the Appellant's absence and stated that he had considered the best interests of the minor children. The Judge attached no weight to

the comment made by a senior social worker that the Appellant's absence was likely to impact on the emotional and psychological needs of the autistic child; there was no evidence of her qualifications or medical training to make such a statement and her evidence could not be tested by her absence [46].

7. The Judge did not accept the evidence that the Appellant's autistic brother was aggressive to strangers and found that the care provided by the Appellant could be replicated by an experienced carer provided by social services [47-48]. The Judge also rejected the evidence that the needs of the autistic child had increased and that the mother could not care for him [49]. The Judge further found that the Appellant's other siblings would not be significantly affected by his absence albeit it was noted that separation would cause some distress [50]. The Judge found that the mother could continue to care for their needs with the provision of additional care. The Judge also found that all the children could remain in contact with the Appellant through means of social media, and that the autistic child (non-verbal) could continue to communicate his emotions through noise making via Skype allowing the Appellant to be seen and heard, and finally noted there was no evidence the family could not visit the Appellant in Zimbabwe.
8. The Judge had regard to section 117B of the Nationality, Immigration and Asylum Act 2002. Whilst the Appellant spoke English, his leave had always been precarious.
9. Thus, the appeal failed.
10. The matter came before me to determine whether the Judge erred in law.

Submissions

11. On behalf of the Appellant Mr Vaughan relied on the grounds and submitted that the Judge made a material error of law. He submitted the Judge failed to consider the best interests of the Appellant's autistic brother. He referred to the Judge's positive findings and stated that it was "strange" for the Judge to have concluded that an autistic child could maintain contact through "modern methods of communication". Mr Vaughan submitted that the Judge had not weighed all relevant factors into the balance.
12. In response, Mrs Pettersen amplified the Respondent's Rule 24 reply and submitted that there was no such error. She submitted that the grounds were a mere disagreement with the Judge's decision.
13. In reply Mr Vaughan submitted that the evidence from social services should have been given greater weight.

Conclusions

14. This is a case that evokes some feelings of compassion. It concerns an Appellant who understandably wishes to remain with his family and to assist his mother who bears the challenging task of caring for her children one of whom is an autistic child. Having considered the competing submissions made by the parties, I am satisfied that the Judge's decision did not involve the making of a material error of law for the following reasons.
15. I agree with the submissions of Mrs Pettersen that the Appellant's grounds amount to a disagreement with the Judge's findings rather than identifying any material error of law. On a holistic reading of the decision, in my judgement, it is apparent that the Judge referred extensively to the evidence and made detailed findings, the essence of which I have summarised above. The grounds open by asserting: "*in a disappointing determination the judge has attached little or no importance to the needs of a disabled child in the appellant household, instead prioritising the imputed needs of the state*" (sic), that expressed disappointment is in essence the upshot of this appeal. While I accept the Appellant is understandably disappointed with the outcome, it is demonstrably clear, even from my summary of the Judge's conclusions above, that he was fully aware of and considered the needs of the Appellant's autistic brother.
16. In summary, the grounds complain the Judge failed to give due weight to the expert evidence; failed to consider the importance of care being provided by a close family member; misunderstood the evidence and made contradictory and irrational findings. I am satisfied that these challenges to the Judge's decision are not made out.
17. The Judge heard evidence from the Appellant and his mother. While he noted that they were "*very pleasant witnesses*", the Judge did not accept their evidence in its entirety, finding their evidence was exaggerated and unreliable in certain respects. There is no direct challenge to those findings which were open to the Judge on the evidence.
18. The grounds assert the Judge failed to consider that the Appellant's brother had become familiar with the care provided by the Appellant, but this fails to recognise the limits to the care he provided and the mother's own admission that she could provide care. The Judge was entitled to place weight on that evidence. As the Judge noted, there was no reliable evidence before him that the Appellant's brother was so reliant on the care he provided that any interference with it would be detrimental to his well-being. In my judgement, the Judge was entitled to attach no weight to the comment made by a social worker that the care package would be difficult to replicate should the Appellant have to leave [37]. The Judge noted there was no explanation as to why that was so and observed the evidence could not be tested as the author of the letter was not present at the hearing.

19. The Judge rightly noted that there could have been many reasons why care could not be replicated and noted that since the date of the letter the level of care had reduced, and that, at the date of hearing there was no evidence the family were struggling to care for the child [37]. These findings were clearly open to the Judge on the evidence. The assertion in the grounds that the expert was “*ideally placed to make comment*” fails to identify any error, and I am satisfied that there was no error in the Judge’s approach. Similarly, at [46] the Judge was entitled not to attach any weight to the statement of a social worker that the Appellant’s absence would have repercussions on the child’s emotional and psychological needs in the absence of any evidence that she was medically trained. The Judge in my view took a measured approach to the evidence in assessing whether the care provided by the Appellant could be replicated in his absence.
20. It is further asserted that the Judge misunderstood the evidence of the Appellant’s mother in respect of the provision of night care. The Judge comprehensively dealt with this evidence at [34] - [35]. The Judge made detailed reference to the evidence and found the evidence was unreliable [34]. It has not been shown either in the grounds or in submissions that the Judge misunderstood the evidence. On the contrary, the Judge’s findings were based squarely on the evidence that was before him.
21. While the grounds further criticise the Judge for failing to explain his conclusion that the Appellant’s autistic brother was not aggressive to newcomers, that ignores the detailed findings made at [47], where the Judge specifically rejected the Appellant’s evidence and noted the child’s attendance at school and that he had successful days at “Active group sessions” where he was likely to meet new people.
22. I am also satisfied that no error is evinced by Mr Vaughan’s complaint that it was “strange” for the Judge to have concluded that communication could be maintained through Skype given the child’s impairments. Mr Vaughan properly acknowledged that the child could communicate through noise making, which the Judge found could take place through such a medium. It has not been shown that the Judge’s conclusion in this regard was perverse or irrational.
23. While Mr Vaughan said all that he could say on the Appellant’s behalf, I am far from persuaded that the Judge erred in law. I find that the grounds are misconceived and cherry-pick certain findings which amount to no more than a wholesale disagreement with the Judge’s conclusions.
24. Overall, I am satisfied that the Judge gave clear and cogent reasons why he considered the Respondent’s decision was proportionate. While another Judge may well have reached a different conclusion that is not the benchmark to which his decision is to be assessed.

Decision

25. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. Accordingly, the decision of the First-tier Tribunal shall stand.

Signed:

Date: 20 June 2017

Deputy Upper Tribunal Judge Bagral