



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

Appeal Number: IA/27374/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 4 January 2018**

**Decision & Reasons
Promulgated
On 31 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**ALLAH [H]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Blundell, counsel instructed by Malik & Malik solicitors

For the Respondent: Ms. Z. Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The appeal came before the Upper Tribunal for an error of law hearing on 17 October 2017. In a decision and reasons promulgated on 23 October 2017, the Upper Tribunal found material errors of law in the decision of First tier Tribunal Sullivan and the appeal was adjourned for a hearing *de novo* before the Upper Tribunal. A copy of that decision is appended.

Hearing

2. I heard evidence from the Appellant, who confirmed the contents of his statement, dated 12.12.16 and his statement dated 29.12.17 at pages 14-19 of the supplementary bundle. In response to supplementary questions from Mr Blundell, the Appellant stated that when he travelled on his own to Pakistan and his brother remained with his family in the UK, they had a lot of trouble and in order to restrain his brother he used to talk to him over the phone. The reason the family had a tough time with his brother is that he used to take his brother out to different things and he needs that, but in his absence that was not possible and then he used to talk to him over the phone. The Appellant stated that whilst his intention was to be away for a month he was trying to bring his brother's son back to the UK so it took him longer, about 6 weeks.

This was in 2014. The Appellant said that prior to that, in 2011 possibly, he had been to Pakistan for 25 days. He had intended to go for a month and a half but he was needed here so he came back. When asked to clarify, the Appellant stated that as his brother has got that health problem he is like a child and over these 10 years he has got used to him taking him out e.g. for a walk and he also takes him to his friends, to the mosque as well as for a haircut. The Appellant stated that his brother cannot wash or shower himself. He said his brother is frightened by different things e.g. he is afraid of helicopter noise and also fireworks noises. When the curtains are open he wants to have them closed.

3. When asked about the trip his brother and his family took to Pakistan in 2014 the Appellant said that this was because their remaining brothers and their father and mother had been waiting for him as he had not been there for a long time. The reason they went on their own without him was that he had no visa so was unable to travel but he took them to the airport and on their return he collected them from the airport. Due to not having his visa he was unable to travel with them otherwise he would have definitely accompanied them. When asked how his brother and the family managed without him when they were outside the UK he said that as the family is very big they were staying with them, including his brothers, parents and wider family, but still he was missing here. When asked to clarify this answer the Appellant stated that if he stays in one place he cannot stay still there and wants to go back to the previous place and while obviously he missed his parents and his family (in Pakistan) he wanted to come back here to the UK as he had the accident here and survived and it was a new beginning and a new life for him.

4. In cross-examination by Ms Ahmad, the Appellant was asked about the problems his brother's family had when the Appellant went to Pakistan in 2014 and he said that as his brother is not well, he gets depressed at home so he wants to go out and to see his friends or be taken for a walk and his wife has Hepatitis C and she cannot look after herself, therefore, she cannot manage to look after him. When asked why his children could not take him for a walk, the Appellant stated that he has young daughters and in his culture they do not take young girls to different people's homes as it is not in the culture and what he does is to take him to his friends' houses or bring them to him and they play

cards: Tash, which is played with 4 individuals. The Appellant said that his brother is a stubborn person and sometimes he does not listen and does not listen to the girls, his daughters e.g. if you take him a particular route and he does not want to go that route the girls cannot make him go that route, but with him he is ok and listens to him.

5. When asked about washing himself the Appellant stated that his brother does not take showers unless he take his clothes off and sits him down in the bath and gets him washed. Apart from that he pulls out his hair and body hair and leaves it on the floor and picks hairs out one by one. The Appellant says that he takes his brother to the hairdresser. When asked if anyone else helps his brother to take a shower he said that his wife washes him, if he has helped by getting his brother undressed and in the bath.

6. The Appellant was asked about his brother's medication and he stated that his brother used to take 7 different items of medication but currently he is taking 3, however, whenever he is getting pain he takes the other 4 or if he pulls his hair out he also takes those. The Appellant said that he did not know the names of the medicines because he does not know English but he had them with him, outside the courtroom. When asked how he differentiates between the tablets he said that one of the tablets that he takes twice a day is for the attack and the second one is for sleep and tranquillity and the third one which he takes up to 3 tablets a day is for when he is pulling his hair out. The Appellant said that his brother's daughters and his wife can also give him his medication, but when they are together the Appellant makes him and encourages him to take his tablets.

7. The Appellant was asked whether his brother suffers from a depressive disorder and anger outbursts and he agreed and said that his brother suddenly gets very angry but can be comforted by little things e.g. Pashto drumming and that changes his mood. When asked for an example he said that his brother does get angry a lot over very trivial things and it happens a lot when he does not like a word or something he gets angry. When asked when he last did this the Appellant stated that his brother gets angry in a second and just yesterday when he was trying to find the court, he took his brother out and brought him with him to refresh him. When they reached a bus stop the Appellant wanted to go towards the bus stop but his brother did not want to go and told him that he wanted to go in the opposite direction. The Appellant had to listen to him, he calmed him down and explained where he wanted to go and he was OK. When asked if he intended to work if he were to be granted leave, the Appellant stated that he was serving his brother and looking after him and that was all he can do.

8. In response to questions from the Upper Tribunal the Appellant stated that his brother has a son, who was born on [] 2002. When asked about the relationship between his brother and his son aged 15, the Appellant said that they do not get on well because his brother is an ill person and the son is very young and they have communication problems. He said that his nephew does not help at all in terms of his father's care because he is going to school, he is a child and his father does not listen to him.

9. I heard submissions from Ms Ahmad, who sought to rely on the decisions of the Entry Clearance Officer dated 20 July 2015 and the judgments of the Court of Appeal in Kopoi [2017] EWCA Civ 1511; Rhuppiah [2016] EWCA Civ 803 and Rajendran [2016] UKUT 00138 (IAC). In respect of the previous decisions of the First tier Tribunal, allowing the Appellant's appeals, she submitted that her reading of Judge Maxwell's decision was that he allowed the appeal on the basis of the lack of care the Appellant's brother was receiving. In her submission that is the limit of the decision and he did not look into the question of family life between the Appellant and the Sponsor.

She submitted that the Appellant does not meet the requirements of the Rules. Ms Ahmad sought to rely on the judgment in Kopoi (op cit) at [20] and [21] and Kugathas [2003] EWCA Civ 31. She submitted that there is substantial evidence that the Appellant's brother is in need of help and assistance and whilst she was not seeking to make a challenge to credibility they have spent time apart for some periods and in her submission this requires consideration.

10. Ms Ahmad submitted that if I was satisfied that family life is engaged, then it was developed when the Appellant's leave was precarious *cf.* the headnote in Rajendran (op cit) however, she acknowledged that the judgment in Rhuppiah (op cit) is more favourable to the Appellant in respect of the question of precariousness when Article 8 is in play and this goes to the question of the weight to be attached. Ms Ahmad also drew attention to the Appellant's immigration history in this country and his inability to speak English and support himself. She submitted that Rhuppiah makes it very clear these can be negative and neutral factors that need to be taken into account and have a significant impact on the public interest. She submitted that the Appellant does have a nuclear family in Pakistan, who he visited a number of years ago. The Appellant has spent only the last few years in this country and in her submission, considering the fact that the Appellant's brother has his wife and children in this country, interference with family life would be proportionate. Ms Ahmad clarified that she was not conceding there is family life between the Appellant and his brother but she was not challenging his evidence.

11. In his submissions, Mr Blundell submitted that this could genuinely aptly be described as a heartbreaking case. [MS] was attacked in the course of his work as a minicab driver and the history and sentencing of the attacker is set out in the decision of Judge Pullig in 2010. The Appellant was then contacted by the Metropolitan police to ask whether he would be prepared to come to the UK to support his brother. The Appellant decided in 2008 to leave his own family in Pakistan and come to the UK to care for his brother.

12. Mr Blundell submitted that the Appellant's brother's current medical predicament is best summarised in the: (i) GP letter of 1.8.17; (ii) Annie Williams letter of 30.11.16 and (iii) Hugh Jones letter of 8.2.16. In respect of his previous health issues, these comprised a back injury and Hepatitis C which pre-dated the traumatic head injury, but which has precipitated these issues. He submitted that the Appellant's brother is like a child and being essentially unmanageable for the remaining members of the household. As the Appellant explained, the fact that his brother's symptoms are unmanageable does not

stem simply from the fact that he has been responsible for his care since 2008 but there is also a cultural element at play and his brother will not accept instruction from his wife or adult daughters. The Appellant was asked a number of questions about medication to ascertain whether he is on top of his brother's medication regime and his evidence is entirely plausible and chimes with the evidence at page 1 of the bundle, which is the list of medication his brother takes.

13. In respect of the family's ability to manage when they were away in Pakistan, the Appellant's brother will listen to a male member of the family, including his own father. However, when the Appellant was away (visiting his own family) they did not cope very well. As he explained the reality was that he hoped to be able to spend a month to a month and a half but had to return to the UK after 25 days. He tried to manage by way of phone calls but it did not work so he had to come back. Mr Blundell submitted that the evidence from the advanced nurse practitioner at page 12 of the supplementary bundle should be accepted as an accurate statement of the family's circumstances.

14. Mr Blundell submitted that the judgments in Kugathas (op cit) and Rai [2017] EWCA Civ 320 are fact specific and are not relevant to the facts of this case. The test remains whether there are more than normal emotional ties between the Appellant and his brother. He submitted that the starting point must be what is said by the nurse practitioner at page 12 and this really chimes with what was said by Judge Pullig in 2010 and by Judge Clarke in 2012 i.e. that the family have fallen through the net. The Judges adopted the Respondent's stance as set out in her Carers' policy at 17.5. and the fact that arrangements for [MS]'s care have been made within the family and that Social Services have confirmed to the Respondent that no care plan is in place. Considering the circumstances as of today's date, Mr Blundell submitted that the reality is clear and the family would find themselves in a desperate situation with no male figure in the house to whom the Appellant's brother would listen in order to bathe himself, take his medication, get out of the house and manage a host of symptoms including pulling his hair out. Whilst it is possible that social services could eventually be persuaded to put something in place, both male and female carers present a problem so the only solution may well be care in a residential institution. Simply, it would be a catastrophe for the family if the Appellant is not permitted to remain in the UK.

15. Mr Blundell submitted that the only question for the Upper Tribunal is whether those consequences amount to unjustifiably harsh consequences so as to render removal disproportionate. The relationship between the brothers has deepened through lawful periods of leave and the fact that he has held such leave for such a long time is relevant to assessment of proportionality and can be balanced against the public interest considerations. There is a good reason why the Appellant does not speak English and the Respondent has failed to adhere to her own policy in terms of identifying adequate alternative care arrangements.

16. In respect of section 55 and the Appellant's nephew, Judge Sullivan found he would remain with his parents. However, the precise consequences for the

boy are not entirely clear but would result in a diminution of his quality of life as he would become a child carer as the only realistic person who could take his father in hand, which would be contrary to his best interests.

17. I reserved my decision, which I now give with my reasons.

Findings

18. It is not disputed that the Appellant does not meet the requirements of the Immigration Rules as there is no provision that covers his particular factual circumstances.

19. I firstly consider whether the requirements of Article 8(1) of the ECHR are met i.e. whether the Appellant has established family or private life in the UK. He first arrived on 8 March 2008 as a visitor, having been asked to come to the UK by the Metropolitan police to care for his brother. He made an in-time application for further leave to remain, as a result of which further leave was granted from 12 October 2008 to 12 January 2009. A further application for leave was refused, but following a decision by Judge Pullig promulgated on 3 February 2010, his appeal was allowed and the Appellant was given further leave to remain from 12 November 2010 to 12 November 2011. A third application for further leave was refused but following a successful appeal before Judge Clarke, the Appellant was granted further leave from 31 October 2012 to 31 October 2013. A fourth application for further leave was also refused but following a successful appeal before Judge Maxwell, leave was granted from 12 September 2014 to 15 March 2015. A fifth in time application for leave to remain was refused on 20 July 2015 and on appeal to the First tier Tribunal, the appeal was dismissed by Judge Sullivan. That decision was set aside by virtue of a decision by the Upper Tribunal promulgated on 23 October 2017. In summary, I find that the Appellant has resided in the United Kingdom pursuant to lawful periods of leave since 8 March 2008, almost 10 years.

20. I have had regard to the decisions by the previous Judges of the First tier Tribunal, bearing in mind the decision in Devaseelan [2003] Imm AR 1. It is clear from the decision of Judge Pullig that he considered it necessary for the Appellant to remain in the UK to care for his brother until “*suitable proper arrangements*” could be made for him to be cared for [51]. It is clear from [49] that Judge Pullig considered that: “*strenuous efforts ought to be made by Social Services and not the family to find a suitable carer who will be able to provide live-in care for [MS].*” In her decision of 14 September 2012, Judge Clarke noted that the existence of family life had been conceded in the appeal before Judge Pullig. The Judge expressly accepted at [14] that Social Services had abdicated responsibility for the care of his brother to the Appellant and that the approach of the Social Services was contrary to the Respondent’s (then) policy in respect of carers. It is clear that in allowing the appeal Judge Clarke relied upon the history of the case and the findings of Judge Pullig. The next appeal was before Judge Maxwell on 31 March 2014. In a decision and reasons promulgated on 14 April 2014, Judge Maxwell noted the absence of any progress by Social Services in providing care for the Appellant and allowed the appeal on the basis that 6 months leave was appropriate for both parties to

make efforts to resolve the care situation.

21. I am mindful that the decision in Devaseelan (op cit) does not mandate that the same decision is reached by a later Tribunal but simply that previous judicial decision(s) are the starting point. At [37] the Tribunal held:

"The first Adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only."

22. I find that eight years after the decision of Judge Pullig there is still no care plan in place for the Appellant. Mr Blundell drew my attention to an internal minute produced by the Home Office Presenting Officer at the hearing before Judge Sullivan which provides that:

"I was provided with an email dated 17.7.15 and a case referral note dated 14.7.15 which stated that the Appellant's brother was not receiving support from social services because he had immediate family members to care for him."

23. Mr Blundell also drew my attention to the relevant Home Office policy, Chapter 17, section 2 of the Immigration Directorate Instructions, last updated on 4.12.13, which provides at 17.5:

"If caseworkers are intending to refuse an application from an applicant who wishes to provide care for a relative in the UK, the Secretary of State must be able to show that s/he is satisfied that there would be alternative arrangements for care should the applicant not be available."

The fact that an applicant may be able to provide the best care for the patient does not mean that the patient cannot be adequately cared for by the local authority. Local authorities are under a duty to put themselves in a position to arrange suitable care for all categories of people in respect of whom they have community care functions."

If social services are involved caseworkers should send them a letter asking whether the carer has made alternative arrangements and if not what kind of alternative arrangements could be made."

24. I am satisfied in light of the internal minute emanating from the Home Office, that the Respondent has failed to show that there would be alternative care arrangements for the Appellant's brother were the Appellant to be removed from the UK. Given that the Appellant has now resided in the UK for almost 10 years and the Respondent has been on notice since the decision of Judge Pullig, 8 years ago, that it was incumbent upon Social Services to make alternative care arrangements, and none have been made, the Respondent

cannot meet the requirements set out in her policy above. I consider that this is a factor relevant to the assessment of the proportionality of the Appellant's removal, given that the Respondent's decision is effectively not in accordance with the law *cf. Razgar* [2004] UKHL 27 at [17] (3).

25. I have also considered whether the family would be in a position to provide alternative care in the absence of the Appellant and I have concluded that due to cultural norms, the burden of providing this care would fall heavily upon the Appellant's 15 year old son and I accept Mr Blundell's submission that he would, in effect, become a child carer by default and this would not be in his best interests and thus be contrary to section 55 of the BCIA 2009.

26. I note that Judge Sullivan concluded that the Appellant's brother's condition had materially improved, however, Mr Blundell took issue with that finding and as this is a hearing *de novo* I have considered the medical evidence to ascertain the current health status and requirements of the Appellant's brother, in particular, whether he still requires the same level of care that he has done since he was seriously assaulted in 2008.

27. The letter from Dr Jones, consultant psychiatrist, dated 8.2.16 states that:

"Currently [MS] presents with very significant symptoms. These include a significant disturbance in his mood and level of anxiety ... [MS] has presented during the six months with our service as significantly impaired and this is compatible with his presentation to services in 2011. It would seem that he has an essentially static condition which requires significant care from others ... The cognitive mood and anxiety symptoms that [MS] has are likely to have an impact on almost all aspects of his life and social functioning. Currently he requires care from members of the family on a 24 hour basis and indeed, were he not living with a supportive family, would need to live in supported care."

28. A letter from Annie Williams, Advanced Nurse Mental Health Practitioner dated 30.11.16 provides *inter alia* that *"without the brother's help the wife and daughters would not be able to care for [MS] as they would only be able to provide his basic needs such as providing him with food. However they do not feel strong enough to manage his aggression and his violence."*

29. A letter from the Appellant's GP, Dr Hossain, dated 1.8.17, is in line with the evidence set out above.

30. I find in light of the medical evidence before me that the medical condition of the Appellant's brother, [MS], has not improved, materially or otherwise. Whilst as was made clear in the oral evidence, the Appellant has been able to visit his own family in Pakistan, the Appellant's wife and daughters struggled to care for [MS] in the Appellant's absence and I find that it would place an intolerable burden on Mrs [S], who has her own health problems, the two teenage daughters and teenage son if the Appellant were to be required to leave the UK.

31. The existence of family life was conceded before Judge Pullig in 2010.

Whilst Ms Ahmad was not in a position to do so at the hearing before me, I find that if the Respondent accepted that family life had been established between the Appellant and his brother in 2010, given that they have remained in the same household and the Appellant has continued to care for his brother since that time, clearly family life has continued between them since that time. I also find that the Appellant is an integral part of his brother's family since he resides not only with his brother, but also with his brother's wife and three children. However, there was no evidence before me to show that the relationship the Appellant has with his nieces and nephew constitutes a parental relationship within the meaning of section 117B(6) of the NIAA 2002.

32. In considering the proportionality of the Respondent's decision not to grant the Appellant leave to remain, I have attached weight to the public interest considerations, particularly those set out in section 117A-D of the NIAA 2002. None of those considerations particularly assist the Appellant, given that he does not speak English and is not in paid employment, due to the fact that he cares for his brother. There was no evidence before me, however, to show that the presence of the Appellant in the UK places an additional burden on the public purse and in his decision, Judge Pullig found at [5] that the entire family are funded by a cousin, [ZH], who also gave evidence at that appeal hearing. Whilst family life has been established whilst the Appellant has been lawfully present in the UK I find that, albeit his leave is based on family rather than private life, it is precarious as it is been predicated solely upon his care for his brother *cf. Rajendran* (op cit) and that he cannot at the outset have reasonably have expected to remain in the UK indefinitely *cf. Rhuppiah* (op cit). Nevertheless, three previous judges have seen fit to allow the Appellant's appeals on the basis of his family life with his brother and because his presence in the UK was necessary in order to care for him and he has been lawfully present in the UK since March 2008.

33. I have concluded on the particular facts of this unusual case that, given the Appellant's length of lawful residence, the significant adverse consequences for his brother and his brother's wife and children were the Appellant to be required to leave the UK and the failure by the State to put in place any alternative care arrangements at any stage over the past almost 10 years, that it would be disproportionate to expect the Appellant to leave the UK as this would bring unjustifiably harsh consequences for the Appellant's brother and his family.

34. I further consider that it is neither in the public interest nor in the interests of the Appellant, his brother and his brother's family for this case to return to the Tribunal yet again, given that there have been four hearings before the First tier Tribunal and three before the Upper Tribunal over the past 8 years. On that basis I would request that the Respondent give consideration to a grant of leave commensurate with the costs already incurred and the reasons I have given for allowing the appeal.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

29 January 2018