Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/51707/2013
IA/51712/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th May 2015	**On 3rd June 2015**

Before

THE HONOURABLE MR JUSTICE EDIS
DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MANSUKHLAL KHODIDAS MULJI GADHIA
MRS SUSHILA MANSUKHLAL KHODIDAS GADHIA

Respondents

Representation:

For the Appellant: Mr S Whitwell (Senior Home Office Presenting Officer)
For the Respondents: Ms G Kiai (Counsel)

DECISION AND REASONS

1. The respondents' appeals against decisions to refuse to vary their leave and to remove them from the United Kingdom were allowed by First-tier Tribunal Judge Swaniker ("the judge") in a decision promulgated on 19th January 2015. The respondents sought to remain as dependent adult relatives, having last entered the United Kingdom as visitors in 2012. The judge found that the requirements of the Immigration Rules ("the rules")

were not met and went on to make an assessment outside the rules, in the light of the respondents' reliance upon Article 8 of the Human Rights Convention. She took into account medical and country evidence regarding the first respondent's dementia and the availability of support for someone suffering from the condition in Kenya, the country of the respondents' nationality. The judge concluded that removal to Kenya would amount to a disproportionate interference with the respondents' family life with their children here and with their private lives and allowed the appeals.

2. The Secretary of State applied for permission to appeal, contending that the judge made a material misdirection of law in relation to Article 8. In particular, the judge failed to take into account public interest factors including the cost of medical provision in the United Kingdom. It was asserted on the appellant's behalf that care would be available in Kenya and that the respondents' children could choose whether to accompany their parents abroad. Permission to appeal was granted on 26th February 2015, on the basis that it was arguable that the judge failed to have sufficient regard to the public interest in removal in her assessment.

3. A response was made under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The appeal was opposed. The respondents contended that the judge took into account all relevant matters, including the cost of medical provision. She found that the respondents were self-sufficient and accepted that medical care in the United Kingdom had been paid for privately and that the respondents' children (British nationals), would care for them financially. All relevant public interest factors were taken into account and the health aspect was properly weighed in the balance by the judge. Alternatively, any error of law was immaterial as the Secretary of State did not challenge the findings of fact made by the judge and the overall conclusion was one which was available to her, on the evidence. In summary, the grounds amounted to a disagreement with the outcome but disclosed no material error of law.

Submissions on Error of Law

4. Mr Whitwell said that reliance was placed upon the grounds. He handed up a copy of the Immigration Directorate Instruction ("IDI") regarding family members under Appendix FM of the rules and a copy of the judgment of the Court of Appeal in GS (India) [2015] EWCA Civ 40.

5. The respondents made their application for leave under paragraph 317 of the rules but that route closed on 9th July 2012 and, subsequently, the application was considered under Appendix FM and outside the rules. It was clear from the IDI that an expectation of settlement for dependent adult relatives was severed in December 2012. It was not possible to switch into a settlement route in the respondents' circumstances from within the United Kingdom. The requirement that the application be made out-of-country was important because the overseas post could seek a five year undertaking regarding adequate maintenance, and would also have

much better insight into the reality of the medical treatment available to the applicant than was available in the UK. A claimant might be referred for a professional assessment of his or her circumstances. Paragraph (c) of the grounds raised concerns which appeared in the IDI. Mr Whitwell also relied upon the judgment of the Court of Appeal in GS (India), particularly at paragraphs 110 and 111. The judge in the present appeals appeared to treat the inadequacy of medical treatment for Alzheimer's in Kenya as determinative and found family life between the respondents and their adult children, without giving sufficient reasons.

6. Ms Kiai relied upon the rule 24 response. The respondents applied under paragraph 317 of the rules without any prospect of success, as a result of poor advice. The five year undertaking which appeared in the IDI was not material in the particular circumstances of the case in the light of the judge's finding regarding the family's financial self-sufficiency. So far as the extent of the first respondent's ill-health was concerned, the Secretary of State had not disputed the medical evidence. It was correct that the respondents could not apply for leave in-country but the reason no application abroad had been made was the first respondent's ill-health. He was unable to travel to Kenya for this purpose. If the respondents had gone abroad, the requirements of paragraph E-ECDR.2.5. would have been met. So far as GS (India) was concerned, the medical treatment available in Kenya was not a determinative factor and the appeal was not allowed merely on the basis that any treatment in Kenya would fall short of what was available here. The judge made a clear finding of fact regarding the respondents' dependence on their children, and in particular on their son. This was clear from paragraph 21 of the decision and was not challenged in the grounds.

7. The case was not advanced simply on the basis of a comparison between medical treatment here and in Kenya. Indeed, the medical evidence showed that Alzheimer's, as a condition, could not be properly treated as such. The judge had in mind the first respondent's ill-health and also the impact on the second respondent, his wife.

8. In a brief response, Mr Whitwell observed that no mention was made of GS (India) in the grounds because the judgment was not available when they were drafted.

Conclusion on Error of Law

9. The decision has been carefully prepared and the judge has clearly assessed the evidence before her. Turning to the first ground, the judge has, contrary to what appears there, taken into account public interest factors which include the cost of medical support in the United Kingdom. This is clear from paragraph 24 of the decision, where she accepts the evidence before her that the respondents are economically self-sufficient and that their children, British citizens, are able and willing to support them financially. The author of the grounds has drawn attention to Akhalu [2013] UKUT 00400 and Mr Whitwell handed up the judgment in GS (India).

In both the Upper Tribunal and the Court of Appeal, guidance given in the earlier decision of MM (Zimbabwe) [2012] EWCA Civ 279 was taken into account and applied.

10. In this context, the appellant asserted in the grounds that care is available in Kenya and that the respondents' children may choose whether to accompany their parents abroad for an interim period or permanently. The decision shows that the judge had these features of the case in mind. Indeed, she noted acceptance by the respondents that carers were available in Kenya but went on to find, having taken into account expert evidence from Dr Lunn, that such care would not be suitable, in the light of the first respondent's advanced dementia. Importantly, the judge found that family life was shown and that the first respondent was dependent upon his children, and particularly his son, for all practical support and guidance and that the second respondent, his wife, was, similarly, dependent. At paragraph 23, the judge made findings regarding the absence of family members in Kenya, the extent to which the respondents' British citizen children have established themselves here with their own families and she went on to find that it was not reasonable to expect those family members to abandon all that they have invested here.

11. In GS (India), Underhill LJ raised the question of how the engagement of Article 8 in a health case is reconcilable with Article 3 in relation to the "no obligation to treat" principle enunciated in N in the House of Lords ([2005] UKHL 31) and in Strasbourg ((2008) 47 EHRR 39) and addressed by the Court of Appeal in MM (Zimbabwe). Laws LJ foresaw cases where the absence of adequate medical treatment in the country to which a person is to be removed would be relevant to Article 8 only where it is an additional factor to be weighed in the balance. The Article 8 paradigm would require firm family ties established here, so that the availability of continuing medical treatment in this country, coupled with dependence on the family for support, would together establish an Article 8 case. That case would not involve a comparison between medical facilities here and abroad.

12. In the present appeal, we accept Ms Kiai's submission, in the light of the judge's findings of fact regarding family and private life, that this is not simply a health case. The outcome did not depend on a comparison between the medical support and facilities available in the United Kingdom to treat the first respondent's dementia, compared with what is available in Kenya. The health aspect, although clearly a salient feature, was a factor taken into account by the judge in reaching her conclusion that family life and dependency are shown. The respondents' circumstances fall within the Article 8 paradigm, explained by Laws LJ in GS (India). This would not be the case if the health aspect were determinative. As Mr Whitwell pointed out, the judgment in GS (India) was not available when the grounds were drafted but the judgment in that case makes no real difference. Again, the guidance given in the earlier judgment in MM (Zimbabwe) shows the limited impact of Article 8 in a health case.

13. The judge took into account section 117A to D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), in weighing the competing interests. Her finding of fact regarding the financial self-sufficiency of the respondents was plainly material in the light of section 117B(2) and shows that the judge considered that they would not be a burden on the tax payer, touching on the same underlying policy issue as appears in the IDI Mr Whitwell handed up, in the context of the undertaking maintenance that might be sought from a person seeking entry clearance from abroad.

14. In our judgment, the grounds have not been made out and no material error of law has been shown in the decision. The judge carefully summarised the evidence before her, took all salient features of the case into account and made sustainable findings of fact regarding the existence of family life in the United Kingdom. Understandably, in the light of the respondents' ages and the ill-health suffered by the first respondent, she gave particular scrutiny to the medical and related country evidence. She did not fall into error by treating the health aspect as determinative. Rather, it formed one part of her assessment, the focus properly being on the family and private life ties established here. In weighing the competing interests, the judge properly took into account the factors which appear in section 117A to D of the 2002 Act. Having done so, she concluded that removal would be disproportionate. We find that she was entitled to reach that conclusion and that sustainable reasons supporting the outcome have been given.

15. The decision of the First-tier Tribunal contains no material error of law and shall stand.

DECISION

The decision of the First-tier Tribunal to allow these appeals shall stand.

Signed Date

Deputy Upper Tribunal Judge R C Campbell