IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03101/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 October 2014	**On 10 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DEORAM NEETYE

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr S Saeed, Counsel instructed by Inayat Solicitors

DECISION AND REASONS

1. The respondent whom I shall refer to as the appellant as he was before the First-tier Tribunal is a citizen of Mauritius and his date of birth is 1 February 1952.

2. On 18 June 2012 the appellant made an application for indefinite leave to remain as the dependant of his daughter. The application was refused by the Secretary of State in a decision of 7 January 2013. The application was considered under paragraph 317 of HC 395 and Appendix FM.

3. The appellant arrived in the UK on 9 January 2012 with his wife. They were granted entry clearance as visitors. It was not accepted by the decision maker that the appellant is mainly financially dependent on his daughter and there was no evidence that the appellant's wife could not look after him. It was noted by the decision maker that she had not submitted evidence of her illness. The decision maker concluded that the appellant had not established that he would be living alone outside the UK in the most exceptional circumstances.

4. The appellant appealed against the decision of the Secretary of State and his appeal was allowed by Judge of the First-tier Tribunal Gibb in a decision which was promulgated on 16 June 2014 following a hearing on 23 May 2014. The Secretary of State was granted permission to appeal by Upper Tribunal Goldstein on 22 September 2014. Thus the matter came before me.

The Findings of the First-tier Tribunal

5. Judge Gibb recorded that the appellant's application resulted from a serious stroke. His wife did not make an application at the same time because she had returned to Mauritius to attend to administrative arrangements (relating to the appellant's retirement on health grounds from his job as a police officer). She returned to the UK in April 2013 and she then made an application as a dependent relative but this was refused (under the new rules) on 11 July 2013. She did not have a right of appeal because she had extant leave.

6. Judge Gibb made the following findings;

> 27. The more difficult issue is whether the appellant can meet the high test of living alone outside the UK in the most exceptional compassionate circumstances. In addressing this question I will deal, first, with the issue of whether the presence of the appellant's wife would mean, in itself, that the appellant could not meet the requirement of living alone. On this point I do not accept the submission by Mr Kotas. There is nothing in the relevant IDIs to suggest the limitation that he proposed The IDIs simply contain the following:
>
> > 'Applications from married couples should not be refused solely on the basis that they have each other to turn to.' [Emphasis in the original].
>
> 28. There is nothing here to suggest that this should not apply where applications have not been made at the same time. This is a situation where the appellant and his wife arrived as visitors together. The circumstances leading to the application that is the subject of this appeal arose, as a result of the appellant's

stroke, when the couple were both here in the UK as visitors. The different application dates were due to the fact that the appellant's wife had to return to Mauritius in order to deal with the administrative consequences of the appellant's stroke. When this had been accomplished an application was made on her behalf to remain in the UK with her husband on the same basis. The fact that the Immigration Rules changed in-between the two applications does not appear to me to make any difference. The simple fact is that the appellant and his wife, as a couple, are both seeking to remain as elderly dependent relatives of their daughter and son-in-law. It has not been suggested that the IDIs are not relevant to the appellant's application, which was to be considered under paragraph 317. In considering the assessment of the appellant's circumstances, therefore, it appears to me that the IDIs give clear guidance to a decision-maker, and that the appellant's application could not be refused solely on the basis that the application has his wife to turn to.

29. The central issue remains, however. That is whether the appellant would be living alone in the most exceptional compassionate circumstances. I accept that this is a demanding and difficult test to meet. In this case, however, my view is that it has been met. The appellant is highly dependent and has the need for daily care. The position that he finds himself in after the stroke is one of serious illness and incapacity. It is not a temporary condition. The unfortunate circumstances of the family dispute means that the appellant and his wife would be isolated. On the basis of the medical evidence showing the appellant's wife's current condition it appears to me that she is not well enough to take on the considerable burden of caring for the appellant on a daily basis. The evidence establishes that there are no other relatives who would be able or willing to step into the breach and provide the sort of care that is currently being provided by the appellant's daughter. Even if the appellant's daughter and son-in-law were to make arrangements and provide financial backing for a care package in Mauritius it therefore appears to me, given the severity of the appellant's condition, that this would meet the test of living alone in the most exceptional compassionate circumstances. Even with the care of his daughter and son-in-law, and with the benefits of the best care available in the circumstances, the appellant is still struggling psychologically to come to terms with the impact of the stroke. If he were in a position where he was deprived of this care it appears to me that the consequences could be disastrous. Despite the high level of the relevant test, therefore, it appears to me to be met in this unusual and difficult case.

30. I understand that it was argued on the appellant's behalf that his wife could not be expected to go to Mauritius with him. In my

view, however, the question under consideration, which is in any event hypothetical given that the appellant is in fact in the UK, is better considered on the hypothetical basis that the appellant's wife would be with him if he were to be in Mauritius. If this was considered on the basis that the appellant would be in Mauritius without his wife then the position is even more straightforward. Given the clear guidance in the IDIs, and the appellant's wife's own health difficulties, the conclusion is the same whether considered on the basis that the appellant's wife would be with him, or not.

7. The grounds seeking permission to appeal argue that the Judge erred in relying on the IDI because the appellant's wife had not made an application at the same time. It was asserted by the appellant that his wife had made an application for asylum but there was no record of this and in these circumstances she was an overstayer and as such could return to Mauritius to care for her husband. He would not be living alone outside the UK in the most exceptional circumstances. The Judge misdirected himself when applying the test of the most exceptional circumstances and he failed to provide adequate reasons.

8. I heard oral submissions from both parties. Mr Wilding argued that it was not open to the Judge to find that the appellant's wife had made an application for asylum. This was a question of fact and there is no record of such an application having been made. This is not a material error in isolation but the effect of it is that the appellant's wife is an overstayer who can be removed. The Judge's approach to the IDIs was flawed. The IDI refers to applications in the plural. The starting point should have been that the appellant and his wife would be together in Mauritius. These erroneous findings impacted on the Judge's decision that the appellant would be living alone outside the UK in the most exceptional circumstances. The Judge did not engage with the high threshold referred to by the Court of Appeal in **Mohamed [2012] EWCA Civ 331**. Mr Wilding referred specifically to paragraph 4 which reads as follows:-

> "Put another way, is the question which the decision-maker has to answer –
>
> (a) whether, but for the support provided by relatives settled in the UK, the applicant would be living in the most exceptional compassionate circumstances (the 'but for' test, which takes support out of the calculation), or
>
> (b) whether, notwithstanding the support provided by relatives settled in the UK, the applicant is already living in such circumstances (the 'notwithstanding' test, which incorporates support in the calculation)?

Mr Wilding submitted that the correct test adopted by the Court of Appeal is that in paragraph 4(b).

6. Mr Saeed made submissions in the context of his Rule 24 response and relied on the decision of **KC & Ors [2007] EWCA Civ 327**.

Conclusions

7. The Judge did not an error of law. He found that the evidence of the appellant, his wife and his daughter was credible. The evidence before the Judge was that the appellant's wife had, through her solicitors, called the respondent to inform them that she wished to claim asylum. This telephone call was made on 9 October 2013 and the solicitors were still waiting for a date for a screening interview. The Presenting Officer at the hearing before the First-tier Tribunal noted that there was no record of an asylum application having been made on the respondent's system. The Judge did not find that an application for asylum had been made but clearly accepted that a telephone call had been made and that this was the appellant's wife's intention.

8. The Judge decided that the fact that the appellant's wife had not made an application as a dependant relative at the same time as her husband did not result in the IDI not applying this case. He gave full and detailed reasons and for his decision which are consistent with the wording of the IDI. There is no requirement that the applications have to be made at the same time.

9. In any event, the above arguments are not material. The Judge considered the most compassionate exceptional circumstances in the context of the appellant's wife returning with him to Mauritius. This is clear from paragraphs 29 and 30 of the determination. He found that she was not well enough to take care of the appellant because of her own ill health and that on return they would be isolated. The Judge considered the appeal on the basis that the appellant and his wife would be together in Mauritius. In addition the Judge applied the "notwithstanding test" preferred by the Court of Appeal in **Mohamed** (see [29]). It is clear that he understood that the test is stringent.

10. The Judge gave clear and coherent reasons why he found that the appellant met the test having properly directed himself. There is nothing irrational or perverse about the conclusion. The grounds are an attempt to re-argue the case in a disagreement with the findings.

11. The decision of Judge Gibb stands.

Signed Joanna McWilliam Date 7 November 2014

Deputy Upper Tribunal Judge McWilliam