IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10965/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 11th December 2014 & 22nd January 2015	**On 11th February 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

R K K A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Aloud, Counsel instructed by Crater Law Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Hague made following a hearing at Stoke on 29th May 2014.

Background

2. The Appellant is a citizen of Jordan born on 5th March 1989. He last entered the UK on 25th January 2012, as a visitor, although he has made twelve visits here in the preceding ten years.

3. On 10th April 2012 he applied for indefinite leave to remain as a dependent relative of a person present and settled in the UK. He was refused on 9th January 2014, on the basis that he did not meet the relationship requirements set out in Rule 317. The Respondent did not consider that the Appellant had raised anything of a sufficiently compelling or compassionate nature which would justify his remaining in the UK on an exceptional basis. Consideration was given to the Rules brought in on 9th July 2012 in relation to private life and, since the Appellant did not qualify under the Rules, leave was refused.

4. The Appellant appealed on the grounds that the Secretary of State had unlawfully applied the new Rules to an application made before they came into effect and had not properly considered the appeal on Article 8 principles.

5. The crux of the Appellant's case is that he is required to help with his aunt in the care of her terminally ill eldest son who is profoundly disabled and suffers from Duchenne muscular dystrophy. He is almost entirely paralysed.

6. In a very brief determination the Judge said that the argument was academic because the circumstances were not governed by the Rules but in any event said that he had not been provided with a full account of the family's situation and the resources open to them. He did not find that the Appellant's presence was reasonably necessary for the purpose claimed.

7. The Appellant sought permission to appeal on the grounds that the judge did not engage with the decision in Edgehill & Another v SSHD [2014] EWCA Civ 402 and erred by not conducting a full and proper Article 8 assessment. He failed to properly consider the evidence before him. There was a considerable amount of documentary evidence in the form of statements from family members and medical evidence from the physicians caring for the Appellant's cousin which had not been considered. The judge had not made any credibility findings, merely stating that the Appellant's evidence was unsatisfactory without saying why he considered it to be so. He appeared to believe that he was being given a partial picture of the family's circumstances but gave no reasons and neither he nor the Respondent put any such concerns to the Appellant at the hearing.

8. Permission to appeal was initially refused by the First-tier Tribunal but granted by Upper Tribunal Judge Allen on 30th October 2014.

9. On 7th November 2014 the Respondent served a reply stating that the grounds amounted to a disagreement with the decision.

The Hearing

10. Mr Diwnycz relied on the Rule 24 response and said that he would not argue that the reasoning in this case was adequate.

Consideration of whether there is a material error of law

11. There was a considerable body of evidence before the judge which did not find its way into the determination.

12. His consideration of the Edgehill point is very brief, but it seems that he comes to the conclusion that the matter should be considered under the ECHR and said that he was satisfied that the special care needs of a severely disabled youth were capable of giving rise to a protected relationship under Article 8. He went on to dismiss the appeal on the grounds that he had not been provided with a full and frank account of the family's situation. He appeared to believe that the Appellant's uncle was in a position to give the personal care which his son needs. He said that the Appellant's answers were uninformative but did not explain why he considered them to be so.

13. The determination is not an adequate consideration of the issues before the judge. Following Edgehill, he ought to have concluded that the Respondent was wrong not to have applied the transitional provisions, and to have materially relied on the new Rules in an application made before they came into effect.

14. Second, the judge gave no reasons why he considered the evidence to be unsatisfactory in relation to the uncle. There is no record in the determination of the evidence which was given, and therefore no analysis which could properly lead to the conclusions reached. The decision is set aside.

15. It was hoped that it would be possible to continue to remake the decision without the need for an adjournment and I began to hear oral evidence from the Sponsor. However it quickly became apparent that she had significant evidence on a critical issue, namely evidence from the police in relation to two recent incidents of domestic violence and evidence of an Islamic divorce in 2006 which were not before the First tier Tribunal.

The resumed hearing.

16. The Appellant provided a further bundle of documents and gave oral evidence as did his aunt, the Sponsor.

17. None of the evidence was contested by Mr Diwnycz who said that he was not challenging any of it and was not raising any credibility issues at all.

18. The facts of this case are as follows. The Appellant was born on 5th March 1989. His mother is one of three siblings, one of whom is the Sponsor, and the other is the parent of M who has a terminal illness and now almost entirely paralysed.

19. M was born on 2nd September 1995 had been ill since he was born. He first came to the United Kingdom in June 2002, as did the Appellant. In the same year the Sponsor, who is a nurse, adopted him as her child.

20. The Appellant's evidence is that his house in Jordan was next to M's house and as he was the biggest he used to take care of him the most.

21. Between 2002 and 2012 the Appellant made eleven visits to the United Kingdom, coming here almost every year, and when he returned to Jordan M often went with him. When he went to Jordan he stayed with his biological parents, which was next door to the Appellant and the Appellant saw him daily. He was responsible for his personal care there. The Appellant estimates that between 2002 and 2012, which was his last visit to the United Kingdom, he spent about 60% of the time with M.

22. The Appellant said that three or four months after his last arrival here M started to deteriorate and his needs increased. The Appellant has to carry him from his bed to his wheelchair to the commode. He is unable to do anything for himself and the Appellant washes and dresses him, feeds him and helps him to move his hands. Presently he cannot even use his fingers.

23. The Appellant said that he is able to communicate with M well because he knows from his eyes what he wants. M is very frightened of being touched by strangers and always wants to be with him. In August 2012 the Appellant underwent specialist training in health and social care so that he would be better able to assist him.

24. The Appellant accepts that social services would be able to offer some help. M would be entitled to four half hour visits a day but, he said, that would be insufficient because he needs turning every two hours.

25. The Appellant himself trained as a ground crew engineer with Jordanian Airways and in order to work as a flight engineer he would be required to do a one year course although there is nothing to prevent him doing that training.

26. The Appellant was asked about his uncle, his aunt's husband and whether he would be in a position to help with M. He said that his aunt and uncle lived separately but his uncle came once a week to see his daughters. There was an incident in 2014 when the police were called and the uncle was asked to leave the house. There was not a strong bond between either his aunt or uncle or between his uncle and M. His uncle did not provide any financial support to the children and he did not know exactly where he lived.

27. The Sponsor confirmed the Appellant's evidence in every respect. She said that her marriage had never been happy and in 2006 she entered into an Islamic divorce with him. The couple lived together after that for a

period but for the last three years have been separated and she regards that as permanent.

Findings and Conclusions

28. The Appellant's application for indefinite leave to remain as a dependent relative was refused by the Respondent under paragraph 317 and it is not disputed that he does not meet the relationship requirements set out in that paragraph. There is no challenge to the Respondent's decision under the Immigration Rules.

29. Appendix FM provides for persons in subsisting relationships with British citizens or as parents of British citizen children. Neither is applicable in the Appellant's case.

30. Whilst the changes in the Immigration Rules brought in, in July 2012 unify consideration under the Rules and Article 8 of the ECHR, and are a complete code, they cannot foresee every possible circumstance and indeed make no provision for the very unusual set of circumstances which apply in this particular case. Accordingly the Tribunal is required to determine whether the decision to refuse to vary the Appellant's leave breaches rights to respect for private and family life under Article 8.

31. Under Section 117A of the 2014 Immigration Act, in considering the public interest question, the Tribunal must have regard to the considerations listed in Section 117B.

32. Of particular relevance here is Section 117B(v) which states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

33. In this case the Appellant's immigration status was precarious in that he had come to the United Kingdom as a visitor with the expectation that he would return to Jordan within six months. Accordingly he is not able to succeed on private life grounds.

34. Whilst the existence of family life without more is accepted only in the case of relationships between husband and wife and parent and dependent infant children, in more remote relationships, the existence of family life depends upon special dependency requirements. The existence of family life is a question of fact in each case. In general terms, in order to establish family, it is necessary to show that there is real, committed and effective support between the family members and normal emotional ties are not enough.

35. So far as siblings are concerned it would be very unusual for the purposes of Article 8 to extend the notion of family life to adult siblings (Bakir [2002] UKIAT 01176) because the relationship between siblings is not one which could be expected to give rise to a permanent common household. It is possible to maintain family life between siblings by regular communication

and visits. On the other hand, in H (Somalia) [2004] UKIAT 00027 the Tribunal accepted that there was family life between siblings where the Appellants had a quasi parental relationship with a Somali refugee Sponsor.

36. In this case the Appellant is not M's brother but his cousin. However it is clear from the evidence that these families have operated as one, both in Jordan and the UK. It was decided at an early age that the Appellant was in the best position to look after M and he has been an integral part of his care for his entire life. M requires intimate care from a male relative which he feels that his aunt could not properly supply.

37. The Appellant has demonstrated over the years that he has established a quasi sibling relationship with M because it is to him whom M has looked to for his care, both in the United Kingdom and in Jordan. As time has gone by, and as M's situation has deteriorated his needs have increased.

38. The medical evidence is compelling. Both the consultant paediatric respiratory physician and the specialist neuromuscular care advisor at the Sheffield Children's NHS Foundation Trust confirm the seriousness of M's condition which is said to be life limiting. He requires a ventilator to support his breathing overnight. The consultant says that any change in circumstances or situations is very distressing to M and increases his anxiety. He is very vulnerable as he has little physical ability to move.

39. It is absolutely clear that the relationship between the Appellant and M is characterised by extreme dependency, and this establishes family life between them.

40. The Appellant's removal would clearly be an interference with the Appellant's right to a family life and Mohammed's right to family life with him but would be lawful since he has no basis of stay in the UK and in pursuit of a legitimate aim.

41. So far as proportionality is concerned I am required to take into account the public interest considerations set out in paragraph 117B. The maintenance of effective immigration controls is in the public interest, and that persons who seek to enter or remain here are able to speak English and are financially independent.

42. The Appellant came to the UK as a visitor intending to leave within six months, but due to the deterioration in his cousin's condition made an in time application for indefinite leave to remain which could never have succeeded under the Immigration Rules. Those Rules set out the circumstances in which persons may make applications for variation of their leave and the fact that the Appellant is unable to meet the requirements of the Rules is a strong argument in favour of his removal from the UK.

43. He does speak English, and gave his evidence in English, but this is of less relevance in this case since the basis upon which he seeks to remain is sadly time limited; his cousin is unlikely to live for many more years.

44. So far as the economic interests of the United Kingdom are concerned he is supported by his aunt, but more relevantly, he is performing the role of carer to his cousin which would otherwise fall to the public purse. There would therefore be a disbenefit to the United Kingdom if the Appellant were to be removed since the costs of caring for M in his absence are considerable.

45. M's interests must also be considered. The unchallenged evidence is that he is wholly dependent upon the Appellant for all of his personal care and that the kind of care which his cousin provides cannot be matched by professional help offered by social services either in terms of the amount of hours given or in the quality of the care.

46. This is not a case in which the Appellant has recently assumed responsibility for his cousin. It is clear that he has done so since he himself was a child and since M was very young. It is not a relationship which can simply be replaced by professional carers coming in for half hourly visits. If M's situation was less extreme, the situation would be entirely different. However, in these circumstances I conclude that it would be disproportionate for the Appellant to be removed.

Notice of Decision

47. The original judge erred in law. This decision is set aside. The Appellant's appeal is allowed on human rights grounds.

Direction regarding anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Unless and until a Tribunal or Court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date **22nd January 2015**

Upper Tribunal Judge Taylor