Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA / 21822 / 2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 November 2017	**On 20 November 2017**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

[Z A] Appellant
~~(ANONYMITY ORDER NOT MADE)~~

And

The Secretary of State for the Home Department Respondent

Representation:
For the Appellant: Mr M Moksud of International Immigration Advisory Services.
For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction and background facts:

1. This is the re-making of the decision on the appeal of [ZA]. His appeal was allowed on human rights grounds (Article 8) by Judge of the First-tier Tribunal Mitchell in a decision promulgated on 1 December 2016. The judge dismissed the appeal under the Immigration Rules (hereafter the "Rules").

2. Following a hearing on 23 August 2017 and in a decision promulgated on 11 September 2017, I decided that the judge had materially erred in law and set aside the decision of the judge, for the reasons given in my decision (the "EOL decision"). My decision is attached to this decision and speaks for itself.

3. I shall continue to refer to [ZA] as the "claimant". The claimant had appealed to the First-tier Tribunal against a decision of the respondent of 22 May 2015 to refuse his application of 16 March 2015 for leave to remain in the United Kingdom as the carer of his brother, [NA] (hereafter the "sponsor").

4. To summarise the judge's decision briefly: The sponsor was diagnosed HIV positive in 2013. His condition was under control. The judge noted that the sponsor was due to have an operation in the near future and that no one could say what his long-term prognosis was. He also suffered from depression and anxiety and had difficulty with day-to-day tasks as well as attending appointments. He needed prompting to take his medication. The judge accepted that the relationship between the sponsor and his wife had broken down and that she did not feel able to look after him although they continued to live in the same flat. The stigma of HIV was such that the sponsor did not wish to tell anyone that he was HIV positive. The judge said that it appeared that "*at the present time*" there were no family or friends who would be able to provide assistance to the sponsor other than the claimant except on an infrequent basis.

5. At para 30 of his decision, the judge decided that the decision to refuse the claimant a limited period of leave to care for his brother was not proportionate to any legitimate aim sought to be achieved and that "*the claimant could be granted a limited period of leave to establish the long-term prognosis of the brother and to ascertain the outcome of any treatment that is planned in the next six months"*.

6. The judge was referred to the Secretary of State's Carer's Policy in Chapter 17, section 2 of the Immigration Directorate Instructions. It is plain that he took the Carer's Policy into account in reaching his decision on proportionality.

7. In the EOL decision, I decided (in summary) that:

   (i) The judge had materially erred in law by taking into account the Carer's Policy because it was not relevant to the proportionality exercise. I decided that the Carer's Policy is a policy which operates in relation to the Secretary of State's residual discretion and does not throw light on the needs of immigration control ([42]) for the reasons given at [21]-[45], and that, in any event, the judge had failed to apply the high threshold for the grant of such limited leave under the Carer's Policy ([46]-[49]).

   (ii) The judge speculated when he said, at [34], that "*(t)he health services cannot provide day-to-day care*" for the sponsor given that there was no evidence before him that such care could not be provided by social services and at [33] where he found that the claimant would presumably be able to meet the terms of the Carer's Policy "*if he had provided details from social services as regards their inability to provide care*" for the sponsor ([58]-[62] of the EOL decision).

   (iii) The judge's ultimate conclusion, that the decision was not proportionate, could only have been reached by an impermissible failure to take the state's interests into account ([65]-[66]).

8. I therefore set aside the judge's decision on proportionality ([70]) and decided to re-make the decision in the Upper Tribunal as opposed to remitting the appeal to the First-tier Tribunal, as requested by both parties, for the reasons given at [71]-[76] of the EOL decision.

9. At [77] and [78] of the EOL decision, I said:

> "77. The findings of Judge Mitchell at [16]-[23] stand *on the evidence that was before him.* His findings do not otherwise stand. This means that, if the evidence before me at the next hearing is different from the evidence that was before Judge Mitchell and such evidence puts credibility in issue, I will be entitled to make my own findings and where appropriate, depart from the findings of Judge Mitchell.
>
> 78. I will approach the Carer's Policy and my assessment of proportionality under Article 8 as follows:
>
> i) In the first place, by treating the Carer's Policy as irrelevant to the proportionality exercise under Article 8, i.e. I will assess proportionality as if the Carer's Policy did not exist.
>
> ii) In order to adopt a "*belts and braces*" approach, I will consider, in the alternative, whether there are particularly compelling and compassionate circumstances in the instant case having regard to the list of points that are set out at para 17.3 of the Carer's Policy along with any other considerations I consider relevant and decide whether the decision is disproportionate in all of the circumstances of the case."

10. I now record the following:

(i) At the commencement of the hearing of the re-making of the decision, Mr Moksud asked me if I wished to hear oral evidence. I informed him that it was for him to decide. He decided to call oral evidence. He informed me that he would call the claimant, the sponsor and the sponsor's wife. He said that the claimant and the sponsor's wife speak fluent English but the sponsor did not. An interpreter had not been requested in advance. I asked him whether he was requesting an adjournment for an interpreter to be provided. He informed me that, having taken instructions from the claimant who did not require an adjournment, he was not requesting an adjournment.

(ii) As matters transpired, the sponsor said he was unwell when he was answering the first question. He said he was dizzy. At this point, I asked Mr Moksud whether he was requesting an adjournment in the hope that the sponsor will be better on another occasion. He said he did not request an adjournment because it was clear from his instructions that the sponsor was always unwell.

(iii) The claimant's case before the judge was that he only required leave for a limited period to provide day-to-care for the sponsor which no one else could provide and which the sponsor preferred to receive from him whilst the sponsor's long-term prognosis became clear and in order to ascertain the outcome of any treatment planned in the following six months. However, this is no longer the case. Given that more than six months have elapsed since the judge's decision, I specifically asked Mr Moksud whether it was still the claimant's case that the decision was disproportionate having regard to the limited period for which he was requesting that he be granted leave. Mr Moksud said that, if his appeal is allowed, the Secretary of State usually grants leave for 2 ½ years. When pressed, he accepted that it is not the claimant's case that the decision was disproportionate in view of the limited period of leave requested. This means that it is not necessary for me to adopt the "*belts and braces*" approach mentioned at [78] of the EOL decision. In other words, even on the claimant's case, the Carer's Policy is now irrelevant.

(iv) Finally, I record that, as the hearing progressed, it became clear that the oral evidence given at the hearing before me put into issue the credibility of the witnesses before me and their evidence. Indeed, Mr Moksud and Ms Ahmad

addressed me on credibility in submissions without it being necessary for me to invite them to do so and without any objection by Mr Moksud.

Oral evidence before me

11. The claimant and the sponsor's wife, Mrs. [A], spoke fluent English.

12. In evidence, the claimant described the care he provides the sponsor. He administers to the sponsor medication for the sponsor's HIV condition and depression. The sponsor requires prompting to take his medication. The sponsor also suffers from dizziness and has been diagnosed with memory problems by his doctor. He has mobility problems. The claimant helps the sponsor with his toilet, washes his laundry, deals with his financial affairs, takes him to hospital and doctor's appointments, interprets for him, pays his bills and gives him emotional support. When the sponsor's medication needs to be re-ordered, the claimant tells the social worker that the medicine is about to finish and social services then order the medication which is then delivered to the home address. Asked if he could name the medication he prompts his brother to take, he said he does not remember. When pressed, he remembered the name of one medicine (Setraline) which his brother no longer takes and which has been replaced by another medicine which he could not name. However, he said that the anti-depressant medication was in strips and the HIV medication in boxes. He named the sponsor's psychiatrist as someone called Martha Kenyon.

13. There are only a few members of the claimant's family who know about the sponsor's HIV condition. Mrs. [A] does not do anything for the sponsor. She cooks for herself and her son. The sponsor and Mrs [A] do not have a "*husband-and-wife*" relationship. They continue to live together only for the sake of their son who does not know that his father has HIV although he knows that the sponsor has depression and mobility issues. If the sponsor and Mrs [A] were to separate, this could affect the health of their son. Although the relationship between the sponsor and Mrs [A] has broken down, Mrs [A] is in court to give evidence because the sponsor is the father of her son and would have no one to look after him if the claimant were to leave the United Kingdom. On that basis, she is compassionate.

14. The claimant and the sponsor do not eat their meals with Mrs [A] and her son. The claimant's nephew is 16 years old. He does not know that the relationship between his parents has broken down. Asked to explain how a 16-year old does not know that the relationship between his parents has broken down if he and the parents do not eat their meals together, the claimant said: "*I don't know*" and that the nephew does understand that his father is not well, that he has mobility issues and keeps to himself. The nephew understands that they do not eat together because his father's health is poor. When asked again to explain, he said that it is not that the sponsor and Mrs [A] do not interact with each other at all. They do interact once in a while. He also said that the sponsor and Mrs [A] pretend in the presence of their son that there is nothing to worry about.

15. At this point, when asked whether it was still his evidence that the sponsor and Mrs [A] do not eat together, he said that they might eat together in the living room but they do not eat together as a normal husband and wife. Sometimes, it is a coincidence that his brother is eating and Mrs [A] also comes to eat. He does not know if this is regarded as "*eating together*". He then said that the sponsor eats in his room most of the time.

16. The claimant said that they all live in a 2-bedroom flat with one living room. The sponsor stays in his room most of the time. If it is necessary, the sponsor and Mrs [A] talk to each other. Otherwise, they keep their distance.

17. In her evidence, Mrs [A] said that, ever since she found out about the sponsor's HIV condition, she has not had a relationship with him. They do not talk to each other. She sleeps in the same room as him but they do not share a bed. They have separate beds. This is because they only have a 2-bedroom flat. The claimant and her son share the second room.

18. If the sponsor needs the toilet in the middle of the might, Mrs [A] goes to the claimant's bedroom and asks him to take the sponsor to the toilet. This happens more than once every night. She cooks for herself and her son. The claimant cooks for himself and the sponsor. She and her son do not eat with the claimant and the sponsor. The sponsor normally eats in his bedroom.

19. Mrs [A] said that, although she separated from the sponsor in 2013, her son does not know about the separation because she and the sponsor do not make it obvious. They try to make it look as if they are a normal family. During the four years' of separation, she and her son have not sat down to have a meal with the sponsor. Nevertheless, her son does not know that his parents have separated because he is at college and comes home at different times.

20. Asked to explain why her earlier evidence, that she and the sponsor do not communicate at all with each other, was inconsistent with her later evidence, that they pretend to be a normal family in the presence of her son, she said that they just pretend to be a normal family so that the situation will not affect her son's studies. Asked to explain how she pretends to be a normal family when it was her evidence that she does not communicate with the sponsor at all, she said that, in the presence of her son, she just pretends to say something like: "*would you like something to eat*" and that, once her son has left the room, she returns to doing whatever it was that she was doing.

21. If the claimant were not in the United Kingdom, Mrs [A] would not be able to support or help the sponsor in any way. She has no alternative plan. The sponsor cannot be looked after by social services because he is attached to the claimant. It would be very difficult for him if someone else were to come and provide care. Asked why it would not unreasonable to expect the sponsor to receive care from social services, she said she did not know.

22. The sponsor gave brief evidence before he stopped giving evidence. He said he felt dizzy. In the brief evidence he gave, he said that Mrs [A] still lives with him. They do not sleep in the same room. They sleep in separate bedrooms. When I asked him if he was able to continue to give evidence, he said he did not understand the question and then said he was not able to continue. This is the point at which Mr Moksud said he was not seeking an adjournment to enable the sponsor to give evidence on another day.

23. I pointed out to Mr Moksud at this point that, although I am aware from the decision of the judge that the sponsor has a personal preference for the claimant to provide the care that he needs, I do not have his evidence as to why he cannot reasonably be expected to obtain care from social services.

Assessment

24. The claimant must prove that he has established family and private life in the United Kingdom such as to engage Article 8; that his rights would be interfered with if he were to be removed from the United Kingdom; and that any interference would be disproportionate to the lawful and legitimate aim of the Secretary of State in maintaining immigration control.

25. The judge found that the claimant cannot meet the requirements of the Rules and dismissed his appeal on immigration grounds. This was not challenged by the claimant. It was not asserted before me at the error of law hearing or at the hearing of the re-making of the decision that the claimant could meet the requirements of the Rules. He relies on Article 8 outside the Rules.

26. Nevertheless, insofar as the claimant relies upon his right to private life, my starting point is that the claimant has failed to demonstrate that he satisfies the requirements of the Rules.

27. There is no threshold requirement of arguability before a case is considered outside the Rules, although the extent of any consideration outside the Rules will, of course, depend on whether all the issues in question have been adequately addressed under the Rules. In the instant case, it is plain that the claimant's Article 8 family life claim is based on the caring duties that it is said he performs for the sponsor. There is no provision for this under the Rules. It is therefore necessary to carryout the full five-stage assessment explained at [17] of Razgar [2004] UKHL 27.

28. I consider the rights of the sponsor and Mrs [A] pursuant to Beoku-Betts v SSHD [2008] UKHL 39.

29. I made it clear at [77] of my EOL decision that the findings of the judge will stand on the evidence that was before him but that, if the evidence before me at the next hearing was different from the evidence that was before the judge and such evidence puts credibility in issue, I will be entitled to make my own findings and, where appropriate, depart from the findings of the judge.

30. In view of the evidence that I heard, which was contradictory as explained below and which materially called into question the findings of the judge, I am justified in departing from the findings of the judge. It is therefore necessary for me to assess the credibility of the evidence before turning to answer the Razgar questions. My reasons for departing from the findings of the judge are as follows:

    (i) Despite saying in his evidence that he tells the sponsor's social worker when the sponsor's medication is about to finish and that he prompts the sponsor to take his medication, the claimant was unable to name the medication. He is fluent in English and therefore there is no reason on the basis of any inability to read or understand the language that he would not be able to name the medication if he does prompt the sponsor to take his medication and, more importantly if he rings social services to advise them when medication is about to finish. It is incredible that, if he telephones social services to tell them when medication is about to finish, he does not know the name of the medication that is running short. It would not be enough for him simply to describe to social services the packaging in which the medication is dispensed, as he did in evidence before me, even assuming that I accept his evidence that he is able to place an order for a repeat prescription with social services as opposed to the

sponsor's doctor or consultant.

(ii) Initially, the claimant gave clear evidence that the sponsor, Mrs [A] and their son do not eat together as a family. However, when he got into difficulties when asked to explain how his 16-year old nephew does not know that his parents have separated if they have not eaten together for four years, he initially said he did not know but later on in his evidence, he changed his evidence and said that they might eat together in the living room but do not eat together as husband and wife, evidence which I found ambivalent, as if he was trying to say both things at the same time in order to avoid being seen as giving contradictory evidence. He ended this part of his evidence by saying that if his brother is eating and Mrs [A] also comes to eat, this would be a coincidence and he does not know if this is counted as "*eating together*". However, he had no difficulty understanding the question when first asked whether the sponsor and Mrs [A] eat together. It was clear to me that he was simply feigning ignorance on the basis of language to get himself out of difficulty in his evidence.

(iii) The claimant's evidence that the sponsor and Mrs [A] do interact once in a while and that they talk to each other if it is necessary, contradicted Mrs [A]'s initial evidence when she said clearly that she and the sponsor do not talk to each other. Her initial evidence that she and the sponsor do not talk to each other contradicted her later evidence that they pretend to be a family in the presence of her son at which times she might ask her husband whether he would like to eat something. Mrs [A] said that the sponsor normally eats in his bedroom but the claimant made no mention of the sponsor eating in his room.

(iv) Mrs [A]'s attendance to give oral evidence, not once but twice, does not sit with her professed unwillingness to do anything at all to help the sponsor if he needed help, beyond helping him if he fell down.

31. I simply do not believe the evidence I heard. I found both the claimant and Mrs [A] totally lacking in credibility. I reject the entirety of their evidence. I find that they have given untruthful evidence to cover up the fact that Mrs [A] is the sponsor's primary carer and to portray the claimant instead as his primary carer. Given that the sponsor professed to be feeling ill in giving his evidence, I am of course wary about relying upon anything he said but it is nevertheless telling that he said that he and his wife sleep in separate bedrooms, a simple point which it is very unlikely a person would get wrong on the basis of not feeling well. I make it clear, however, that in an abundance of caution, I do not rely upon the evidence of the sponsor in this regard to make my adverse assessment of credibility.

32. For the reasons given above, I am entitled to depart from the findings of the judge. On the whole of the evidence before me, I make the following finding of fact:

(i) I do not accept that the claimant provides care to the sponsor to the extent claimed. I find that he may well help out there and there as many people would if a sibling living in the same household is ill with serious health problems and needs assistance. I find that any such care that he gives does not go beyond normal emotional ties.

(ii) I do not accept that Mrs [A] does not provide any care to the sponsor. I do not accept that they are separated and that their relationship has broken down. I do not accept that they are not living together as a normal family. I find that Mrs [A] is the sponsor's primary carer.

(iii) In short, I find that the evidence the claimant, Mrs [A] and the sponsor gave to

the judge and the claimant and Mrs [A] gave to me is nothing but a tissue of lies. For the same reasons, I find that they have given false accounts to the medical professionals in order to bolster the claimant's Article 8 claim.

33. I turn to answer the Razgar questions. For the above reasons, I find that the claimant has not shown that he has established family life with his brother within the meaning of Article 8(1). Nevertheless, his relationship with the sponsor forms part of his private life. I accept that, during the period of his residence in the United Kingdom since arriving as a student on 17 March 2012, he has established private life. However, there was no evidence before me of the quality of such private or that he had formed any links in the United Kingdom beyond his relationship with the sponsor, Mrs [A] and his nephew.

34. I find that the Secretary of State's decision will amount to an interference with the claimant's private life, encompassing as it does his relationship with the sponsor, his nephew and Mrs [A]. I find that the interference will have consequences of such gravity as to potentially engage the operation of Article 8 ECHR, bearing in mind that, although the interference must be real, the threshold is not exceptionally high.

35. I am satisfied that any interference is in accordance with the law and for the legitimate public end necessary in a democratic society in the interests of the economic well-being of the country referred to in Article 8(2) which includes the maintenance of proper immigration control (Shahzad (Article 8: Legitimate aim) [2014] UKUT 00085 (IAC)) refers.

36. I turn to the ultimate question, i.e. whether the interference is one that is in all the circumstances proportionate to the legitimate public aim to be achieved.

37. In considering the public interest question, I must have regard to the considerations listed in s.117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") by virtue of s.117A. Section 117A(2) provides that "*the public interest question*" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). Section 117A(3) states that the Tribunal is required to carry out a balancing exercise. The maintenance of immigration control is in the public interest.

38. Mr Moksud relied upon the fact that the claimant has lived in the United Kingdom lawfully since his arrival as a student on 17 March 2012. He has not committed any offences. He provides care for the sponsor and saves the public purse money. The rights of three British citizens would be affected if the claimant is removed, i.e. the sponsor, Mrs [A] and their son.

39. The claimant is fluent in the English language. However, the Upper Tribunal held in AM (S117B) Malawi [2015] UKUT 260 (IAC) that an appellant can gain no positive rights to a grant of leave to remain from either s.117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. The same applies to the fact that the claimant has not committed any criminal offences.

40. I have already found that the claimant does not provide all the care that the sponsor needs, although he may well help out there and there as most people would if a sibling living in the same household was ill and needed assistance. On the evidence I heard and given my findings and my adverse credibility assessment, I have found that Mrs [A] is and has been the person who is primarily providing care to the

sponsor. I find that she can reasonably continue to do so. However, if this proves too onerous for her, it is reasonable to expect the sponsor to receive additional care from social services or to pay for such care from his financial resources, bearing in mind that he receives Personal Independence Payments.

41. It is not part of the claimant's case that any private life he has established in the United Kingdom (to the extent that he has developed private life beyond his relationship with the sponsor, his nephew and Mrs [A]) is such as to render his removal disproportionate. His Article 8 claim is entirely based on the care he provides to the sponsor.

42. The Upper Tribunal concluded in Kaur (children's best interests / public interest interface) [2017] UKUT 00014 (IAC) that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case; and that, in every balancing exercise, the scales must be properly prepared by the judge, followed by all necessary findings and conclusions and buttressed by adequate reasoning.

43. I do indeed give little weight to the claimant's private life for the following reasons:

    (i) There is a dearth of evidence about the private life established by the claimant beyond his relationship with the sponsor, Mrs [A] and his nephew.

    (ii) I have not accepted that his relationship with the sponsor, Mrs [A] and his nephew amounts to family life. It forms part of his private life.

    (iii) He does not meet the requirements of para 276ADE(1) of the Rules in relation to his right to his private life. That is to say, he has not established that there would be very significant obstacles to his reintegration in Pakistan. In any event, he has not said that he will experience any difficulties in returning to Pakistan and re-establishing his private life.

    (iv) Any such private life encompassing his relationship with the sponsor, Mrs [A] and his nephew was established whilst his immigration status was precarious.

44. In all of the circumstances, and giving such weight as I consider appropriate to the individual aspects of the evidence and having considered all of the evidence in the round, I find that the Secretary of State's decision is proportionate. The public interest in this case far outweighs the claimant’s right to his private life, which I have assessed to include his relationship with the sponsor, Mrs [A] and his nephew.

45. I should make it clear that, even if I had not departed from the findings of the judge and made an adverse assessment of credibility, I would still have dismissed this appeal on human rights grounds, for the following reasons:

    (i) Whilst the sponsor may prefer to receive care from a family member, this does not mean that his wishes are determinative. There are many people all over the United Kingdom who require care, including care concerning intimate aspects of their personal routines and who receive care from social services. There are many people who prefer not to disclose their medical condition to carers and their communities. I informed Mr Moksud that, as a result of the sponsor being unable to give evidence, I do not have evidence from him on the question

whether it is reasonable to expect him to receive any care he requires from social services.

(ii) Despite the fact that it is clear from my EOL decision that the fact that there was no evidence from social services as to the care that they would be able to provide the sponsor was material, there is still no such evidence from them. Since the decision of the judge, the claimant submitted two bundles of documents, one under cover of a letter dated 21 August 201 and one under cover of a letter dated 31 October 2017, which I will now summarise and deal with.

(iii) The bundle under cover of the letter dated 21 August 2017 includes a letter from the Department for Work and Pensions dated 10 January 2017 which confirms that the sponsor receives Personal Independence Payments. It is not evidence of the care that social services can or cannot provide the sponsor, nor does it help with the question whether it is reasonable for the sponsor to receive care from social services.

(iv) The document attached to the cover letter dated 31 October 2017 is entitled "*Face Overview Assessment (Social Care)"* and was prepared by a Mr Paola Marin Blanco, Social Worker, Information and Assessment Team, Adults Social Care. I reject Mr Moksud's submission that what is stated in this document represents the assessment of Mr. Blanco. It is plain that all Mr Blanco did was to record the answers he was given why the claimant and the sponsor to questions on the form. This is <u>not</u> evidence from the social services of the care that they would be able to provide or would not be able to provide the sponsor or the care that the sponsor requires, nor does it help with the question whether it is reasonable for the sponsor to receive care from social services.

(v) Whilst I accept that the care that a family member can provide is qualitatively different from the care that can be provided by social services and whilst I accept that a family member's presence in the same home means that he/she is available to assist at times when a social worker or carer may not be, it is nevertheless the case that the social services are obliged to provide such care as is required. It is entirely reasonable to expect the sponsor to receive such care from social services or to pay for his care from his financial resources. In reaching this decision, I have taken into account the public interest considerations.

(vi) The claimant's case before the judge was that it would be disproportionate to refuse to grant him leave to remain for a limited period until the long-term prognosis of the sponsor is established and to ascertain the outcome of any treatment planned for the following six months. Nearly a year has elapsed since the judge's decision. There is still no evidence about the sponsor's long-term prognosis nor any evidence of any treatment he has received in the period of almost one year since the judge's decision or the treatment that he will receive in the next six months. In the absence of such evidence, the circumstances in the claimant's case, taken cumulatively, cannot outweigh the state's interests, on any legitimate view, giving due weight to the state's interests and the circumstances in the claimant's case.

46. Finally, I make it clear that I have considered the medical evidence (such as was submitted) in reaching my conclusions. I have not found it necessary to consider whether the weight to be given to this evidence is to be reduced on account of the fact that, for example, the evidence that the sponsor is suffering from depression is

not from a psychiatrist. Even taking the whole of the medical evidence at face value, this appeal falls to be dismissed. Firstly, on account of my finding that the claimant does not provide the care it is claimed he provides and that, contrary to the evidence I heard, Mrs [A] and the sponsor are not separated. Secondly, and in any event, even if the claimant does provide all the care that the sponsor needs, the sponsor can reasonably be expected to obtain adequate care from social services or pay for adequate care himself.

47. The claimant's appeal against the Secretary of State's decision is therefore dismissed.

Decision

The making of the decision of Judge of the First-tier Tribunal Mitchell involved the making of an error on a point of law. The decision to allow the appeal on human rights grounds (Article 8) was set aside. The decision to dismiss the appeal on immigration grounds stands.

The Upper Tribunal re-made the decision on the appeal on human rights grounds by dismissing the appeal on human rights grounds.

Signed
Upper Tribunal Judge Gill

Date: 19 November 2017

ANNEX - EOL decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21822/2015

THE IMMIGRATION ACTS

Heard at Field House
On 23 August 2017

Decision Promulgated

……

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department — Appellant

And

[ZA] — Respondent

~~(ANONYMITY ORDER NOT MADE)~~

Representation:
For the Appellant: Mr P Armstrong, Senior Home Office Presenting Officer
For the Respondent: Ms C Warren, of Counsel, instructed by Silverdale Solicitors.

DECISION AND REASONS

Introduction and background facts:

1. The Secretary of State has been granted permission to appeal to the Upper Tribunal against a decision of Judge of the First-tier Tribunal Mitchell who, following a hearing on 17 November 2016, allowed the appeal of [ZA] (hereafter the "claimant") against a decision of the respondent of 22 May 2015 to refuse his application dated 16 March 2015 for leave to remain in the United Kingdom as the carer of his brother, a [NA] (hereafter the "sponsor"). The judge allowed the appeal outside the Immigration Rules (hereafter the "Rules") on the basis of Article 8 of the 1950 European

Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

2. The claimant is a national of Pakistan, born on 9 November 1991. He arrived in the United Kingdom on 17 March 2012 with entry clearance as a Tier 4 student, valid until 30 August 2014. His leave was subsequently curtailed to expire on 3 November 2013. He was then granted further leave to remain until 18 March 2015 as a Tier 4 student.

3. The sponsor is a British citizen. He is married. He and his wife have a child. The claimant lives with the sponsor and the sponsor's wife and child (the judge's decision at [20]).

The Carer's Policy

4. The judge was provided with Chapter 17, section 2 of the Immigration Directorate Instructions ("IDIs"). According to the department's website, this is a document which "*deals with how UK visas and Immigration handles applications from carers*". I shall refer to this hereafter as the "*Carer's policy*". The relevant paragraphs read:

> "17. Introduction
>
> The United Kingdom's position on carers and the 'Care in the Community' policy stems from existing case law, particularly the case of R v. Secretary of State for the Home Department ex parte Zakrocki.
>
> …
>
> It is important to note that UKBA and the Department of Health have consistently argued that the care in the community policy is not designed to enable people to stay in the UK who would otherwise not have leave to do so. Rather, leave should only be granted where it is warranted by particularly compelling and compassionate circumstances.
>
> 17.1 Entry Clearance
>
> There is no provision in the Immigration Rules for issuing entry clearance on the basis of an applicant coming to the UK to care for a sick family member or friend. A person who wishes to enter the UK to provide short-term care or make alternative arrangements for the long term care of a friend/relative may do so under the Rules relating to general visitors.
>
> 17.2
>
> There is no provision in the Immigration Rules for leave to enter to be granted solely to allow a person to care for a friend or relative in the UK. Where an applicant wishes to care for a friend or relative for a short period, s/he must first satisfy the requirements of the Immigration Rules relating to general visitors.
>
> 17.3 Leave to remain
>
> Whilst each case must be looked at on its individual merits, when considering whether a period of leave should be granted, the following points are amongst those that should be borne in mind by caseworkers:
>
> - the type of illness/condition (this should be supported by a Consultant's letter); and
> - the type of care required; and
> - care which is available (e.g. from the Social Services or other relatives/friends); and
> - the long-term prognosis.

> Caseworkers should be aware that whilst most applications will come from carers who are in the UK as visitors this will not always be the case.
>
> 17.3.1.
>
> Where the application is to care for a sick or disabled relative it will normally be appropriate to grant leave to remain for 3 months on Code 3 (no records to employment or public funds) **outside the Rules**.
>
> **The** applicant **must** be informed that leave has been granted on the strict understanding that during this period arrangements will be made for the future care of the patient by a person who is not subject to the Immigration Rules.
>
> The following wording must be added to the grant letter:
>
> 'I must advise you/your client that this leave has been granted exceptionally outside the normal requirements of the Immigration Rules to enable you/your client to make permanent arrangements for the future care of your/his/her relative, by a person who is not subject to immigration control. It is unlikely that any further leave will be granted on this basis'.

The judge's decision

5. Before the judge, it was accepted that the claimant did not meet the requirements of the Rules ([18]). The appeal was pursued before the judge in relation only to his Article 8 claim outside the Rules.

6. The judge heard oral evidence from the claimant, the sponsor and the sponsor's wife.

7. The judge's reasons for allowing the appeal under Article 8 outside the Rules may be summarised as follows:

8. In his decision, the judge said that the sponsor was HIV positive, that this condition was under control, that he also suffered from depression and anxiety, that he had difficulty in engaging with other day-to-day tasks such as attending appointments and taking his medication, that he has memory problems ([22]), that he was due to have another operation in the relatively near future and that no one could say what his long-term prognosis was ([22]).

9. The judge appeared to accept the credibility of the witnesses before him, stating that there was no reason to doubt their credibility although the family arrangements of the sponsor and his wife were *"somewhat unusual"* ([17]).

10. The judge accepted that the relationship between the sponsor and his wife had irretrievably broken down, although they continued to live in the same house ([20]). He appeared to accept the wife's evidence that she was psychologically unable to care for the sponsor. He noted that she gave evidence that, if the sponsor fell down, she would assist him but she finds herself unable to provide any other form of care ([21]).

11. The judge noted that the sponsor had two sisters who live in the United Kingdom and that they visit him on a weekly basis. The sisters were married and had their own families. He said that there were no reasons to doubt that it would not be practical for them to provide assistance to the sponsor. Both sisters work ([24]).

12. At [25] the judge said that it appeared that "*at the present moment"* there were no family or friends who would be able to provide assistance other than the claimant except on an infrequent basis.

13. At [27] the judge referred to R v Zackrocki [1996] EWCA Civ 1326 and, at [28], said that the instant case had some similarities when compared with Zackrocki, i.e. that there was evidence that the family was receiving some support from the community and that there was considerable evidence that the sponsor was entirely reliant on the claimant to provide care as his wife was unable to do so. These paragraphs read:

> "27. I was referred to the case of R-v- Zackrocki [1996] EWCA Civ 1326 where Mr Justice Carnwath's judgement also referred to in *[sic]* the carer's concession of the respondent. In that case the court accepted the evidence of a brother-in-law, not a doctor, as regards the effects on the patient who required the care. There was however evidence from social services backed by a doctor that there are no satisfactory alternative arrangements would could *[sic]* be made for that particular subject's care. Mr Carnwath considered that the evidence that had been provided was consistent with the government's policy that existed at that time. The Secretary of State in that case had asserted that he was satisfied that adequate arrangements could be made for the care of the subject in that case but there was no evidential basis to support that. That is also the situation in this case.
>
> 28. There are some similarities with this appellant and his brother. There is evidence that the family is receiving some support from the community as a result *[sic]* letter from the building stronger families, family action, head office letter dated 13 October 2016 that appears *[sic]* page 10 of the appellant's bundle. There is consistent evidence from both the GP and the hospital that the appellant's brother is entirely reliant on the appellant to provide the care as the wife is unable to do so."

14. At [29] the judge noted that there was a "*potential gap in the evidence*" as there was no independent assessment by social services before him and that the letters from the health professionals before him showed that the professionals appeared not to have considered whether social services should be involved as they were satisfied with the care that the claimant was giving the sponsor.

15. At [30] the judge said:

> "30. The [claimant's] representatives have addressed this matter by suggesting that care by social services would be at cost to the public funds and the care would not fully cater for the needs of the brother who at the present moment is only comfortable discussing the matters with the [claimant]. It does appear that the brother does require care and support not only during the day but frequently and at odd intervals during the night. His mental health is also indicative that he finds it increasingly difficult to relate to other individuals and to take any notice of them. He is reluctant to take his medication relating to his depression and anxiety and he also is reluctant to take exercise. All in all, the [claimant's] brother seems to be reluctant to take notice of health professionals and to require to be persuaded and reminded by the [claimant] to take his medication."

16. Having then reminded himself of the 5-step approach explained at [17] of R (on the application of Razgar) v SSHD (2004) UKHL 27, the judge said at [32]-[34] as follows:

> "32. The [claimant] has been in the United Kingdom for a relatively short period of time. He came to the United Kingdom as a student. He has taken on the role of carer for his older brother. The unusual circumstances of the brother's household mean that the [claimant] is the only person in the household who is willing and able to provide care for the brother. The [claimant] has developed a private and family life with the brother in the United Kingdom. The proposed removal would have consequences of such gravity as to potentially engage the operation of article 8 as the care of the brother would almost certainly not be of such high

quality and it is entirely possible that the brother's health would deteriorate as a result of not taking his medication or even attending hospital appointments.

33. The [claimant] cannot meet the requirements of the immigration rules. There is a concession however which the [claimant] would presumably be able to meet if he had provided details from social services as regards their inability to provide care for the brother.

34. There are significant compassionate circumstances concerning the condition of the brother and the fact that he is receiving appropriate treatment from both the health services and the [claimant]. The health services cannot provide day-to-day care for this [claimant]. It does not appear necessary in this society for the [claimant] to be removed at this stage. In fact, his presence is actually protecting the health of a British citizen. Having considered the evidence as a whole I consider that the decision to refuse the [claimant] a limited period of leave in the United Kingdom to care for his brother is not proportionate to any legitimate public end sought to be achieved. I considered that the [claimant] could be granted a limited period of leave to establish the long-term prognosis of the brother and to ascertain the outcome of any treatment that is planned in the next six months. I therefore allow the appeal under article 8 ECHR."

The Secretary of State's grounds and the issues

17. In response to the Secretary of State's grounds, the claimant submitted a Reply (hereafter the "Reply") pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In her Reply, Ms Warren relied, inter alia, upon [43] of the decision of the Asylum and Immigration Tribunal ("AIT") in AG and others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082, the Court of Appeal's judgment in AB (Jamaica) v SSHD [2007] EWCA Civ 1302 and Zackrocki.

18. The Secretary of State's grounds may be summarised as follows:

i) (Ground 1) The Judge erred by failing to make any findings as to whether the claimant meets the criteria for the grant of leave under the Carer's Policy. The grounds contend that this is relevant to the balancing exercise outside the Rules.

In this regard, I raised the question at the commencement of the hearing whether the claimant's submissions on ground 1 (see [21] below) rely upon [43] of the decision in AG out of context.

ii) (Ground 2) The judge failed to properly apply the weight to be given to the public interest. The grounds contend that the Secretary of State's policy on immigration control is set out in the Rules and that there are a number of policies outside the Rules which allow individuals who meet the terms of such polices to be granted permission to remain in the United Kingdom. The Rules and the policies represent a statement by the Secretary of State as to where she considered the public interest lies. The grounds contend that this is a weighty consideration which the judge failed to apply properly.

iii) (Ground 3) The judge failed to identify any exceptional circumstances in this case which would outweigh the public interest.

iv) (Ground 4) The judge had no power to direct the Secretary of State to grant the claimant six months' leave in the United Kingdom.

Mr Armstrong confirmed that ground 4 was misconceived because the judge had not directed the Secretary of State to grant the claimant six months' leave. He therefore did not pursue ground 4.

19. During the course of the hearing, I asked Ms Warren to address me on the question whether the judge erred in his reliance upon the decision of Carnwath J (as he then was) in Zackrocki.

20. At the commencement of the hearing, I asked the parties to address me on the question whether there was any evidence before the judge to support his finding at [24] that: "*there is no reason to doubt that it would not be practical for [the sponsor's two married] sisters to provide assistance to the sponsor*" and at [34] that: "(*T)he health services cannot provide day-to-day care for this [sponsor]"*. During the course of his submissions in reply, Mr Armstrong submitted that the judge had also speculated in the second sentence of [33] of his decision.

Assessment

21. In relation to ground 1, the key point that Ms Warren made was that ground 1 misstates the law. Ms Warren submitted, in reliance upon [43] of the decision AG, that the judge was not obliged to make any findings as to whether the claimant met the criteria under the Carer's Policy. She submitted that it was clear from AG that the judge was obliged to "*take into account*" the Carer's Policy which, she submitted, is exactly what he did.

22. Para 43 of AG reads:

> "43. For the foregoing reasons we reject the argument that the Tribunal is bound or entitled to consider or review the exercise of a discretion outside the Immigration Rules. Both principle and statute are against it; and the decisions to which we have been referred do not support it. The Tribunal is bound to consider whether a particular decision is proportionate, and in so doing has to assess the force of the Secretary of State's claim that the decision is necessary in order to maintain immigration control. When making that assessment it takes into account any declared policy **that incorporates a presumption that immigration control will not be enforced** against persons of a category into which the claimant falls. The reason for taking such a policy into account is that it throws light on the needs of immigration control and so helps to assess the proportionality of the decision in the individual case. If there is no policy that creates a presumption, or if the claimant is not, on the facts, entitled to a benefit of any presumption in a policy, the policy is not likely to be of relevance in assessing proportionality and hence the claimant's Convention rights."
>
> (My emphasis)

23. Ms Warren submitted that this guidance in AG was approved by the Court of Appeal in AB (Jamaica) v SSHD [2007] EWCA Civ 1302. She relied upon paras 25, 26 and 29 of the judgment of the Court of Appeal in AB (Jamaica) which read:

> "25. There appears to be little if any authority on this question. It is common ground that a failure by the Home Secretary to apply his own policy will render his decision "not in accordance with the law" within ground (e) of the permissible grounds of appeal set out in s.84(1) of the Nationality, Immigration and Asylum Act 2002. But it is the Home Secretary's contention that if a Home Office decision fails this test before the AIT, the immigration judge has no power to apply the policy and is limited to remitting the case so that the Home Office can do so. This is what the AIT in *AG (Kosovo) v Home Secretary* [2007] UKIAT 0082, §51, considered to be the situation. For the rest, Parishil Patel for the Home Secretary submits that the proper course of reasoning is to ask first whether the case comes within the Rules and if – like this case – it does not, to proceed to consider

it under the Convention. As to whether, in doing this, any weight can be given to the Home Secretary's own policy, he was unwilling to commit himself.

26. The starting point, as it seems to me, is that no principle of law makes inadmissible on an appeal to the AIT a policy used by the Home Secretary for the very purpose which the AIT is now addressing in the light of the Home Office's submissions. Indeed, I find it troubling that the Home Office presenting officer does not appear herself to have drawn the immigration judge's attention to the policy or to have sought to put forward a case consistent with it. Doing so might well have involved accepting that the Home Office did not regard a simple breach of immigration control, once there was a qualifying marriage, as by itself a sufficient reason for removal or deportation. It would also have involved pointing out that the Home Office did, however, regard insufficient proof of unreasonableness in relation to the settled spouse as justifying removal.

...

29. It follows in my view that the determination is further flawed by its failure to bring into the assessment of the proportionality of removing the appellant the fact that the executive as a matter of policy does not regard an overstayer who is now in a qualifying marriage as ordinarily liable to removal if the settled spouse cannot reasonably be expected to go too. The immigration judge appears to have directed himself that policy is for the executive (which is what I take him to have meant by "the elected powers in the state") and not for him. For the reasons given above, he was right in the first half of this proposition but wrong in the second."

24. Ms Warren submitted that AG and AB (Jamaica) confirm that the judge was not required to decide, and indeed had no statutory jurisdiction to decide, whether the Carer's Policy was met, this being a discretionary policy. Ms Warren submitted that what the judge had to do was to "*take into account"* the Carer's policy *"to ascertain whether the terms of the policy tell generally in favour of non-removal"*, relying upon AG at para 40. Ms Warren submitted that this was precisely what the judge did, at [27], [28] and [33] of his decision.

25. Ms Warren submitted that the Secretary of State's reliance upon the Supreme Court's judgment in Mandalia v SSHD [2015] UKSC 59 was misguided because Mandalia was not concerned at all with the question of how the Tribunal should approach the question of policy in a human rights appeal. Mandalia concerned the question of whether the Secretary of State had correctly applied her own policy to the application of the claimant in that case.

26. I asked Ms Warren whether reliance upon AG was misconceived or out of context. In essence, Ms Warren maintained her position.

27. I am satisfied that Ms Warren is relying upon [43] of AG out of context, for the following reasons:

28. At [30] of AG, the Tribunal explained that claims based on human rights must be assessed in priority to claims based on the hope of a favourable exercise of a discretion. The Tribunal said that, in general, the order must be rights first, then possibilities. The Tribunal said at [43] that, where one is dealing with "*a declared policy that incorporates a presumption that immigration control will not be enforced against persons of a category into which the claimant falls*", then a judge, in considering whether a particular decision is proportionate, "*takes into account*" the policy because "*it throws light on the needs of immigration control and so helps to*

assess the proportionality of the decision in the individual case". The Tribunal went on to say that:

> "If there is no policy that creates a presumption, or if the claimant is not, on the facts, entitled to a benefit of any presumption in a policy, the policy is not likely to be of relevance in assessing proportionality and hence the claimant's Convention rights."

29. In AG, there were three claimants. In the cases of the claimants AG and PB, the relevant policy was D5/96 which was said to set out the criteria to be considered when deciding whether to pursue enforcement action against families of minor dependent children who have been living continuously in the UK for seven years or more.

30. The decision in AG was promulgated on 7 August 2007 and published on 13 September 2007, some years before the implementation of the amendments to the Rules by HC 194 with effect from 9 July 2012. The policy D5/96 is now incorporated in modified form both in primary legislation and the Rules, in the case of the former by s.117B(6) and the definition of "*qualifying child"* in s.117D of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") and, in the case of the latter, by EX.1 (a) of Appendix FM.

31. In the case of the claimant BE in AG, the policy in question was DP3/96 which was described in the refusal letter addressed to BE in the following terms:

> "Guidelines have been laid down for dealing with marriage applications from over-stayers (a document commonly referred to as DP3/96). These guidelines state that it will normally be appropriate to consider granting leave to remain, exceptionally, on the basis of a marriage if we are satisfied that, (i) the marriage is genuine and subsisting; and (ii) that it pre-dates the service of an enforcement notice by at least two years; and (iii) that it is unreasonable to expect the settled spouse to accompany his/her spouse on removal."

32. The requirement in DP3/96 for the marriage to pre-date enforcement action by at least two years is now present, in modified form, as an eligibility requirement in Appendix FM of the Rules and the requirement that it be unreasonable for the settled spouse to accompany his/her spouse on removal is now present, in modified form, in EX.1(b) of Appendix FM of the Rules.

33. AB (Jamaica) was decided on 6 December 2007, i.e. before 9 July 2012. AB (Jamaica) concerned DP3/96. It is clear from the Court of Appeal's judgment that DP3/96 did "*throw light on the needs of immigration control*" because it described circumstances in which there should not be enforcement action against a spouse who did not qualify for leave under the Rules. In other words, DP3/96 indicated policy considerations that were relevant to proportionality.

34. Accordingly, it is plain that D5/96 and DP3/96 were each "*a declared policy that incorporates a presumption that immigration control will not be enforced against persons of a category into which the claimant falls*" in the words of the Tribunal at [43] of the decision in AG. Thus, they were relevant in deciding proportionality because they threw light on the needs of immigration control.

35. Whilst the principles that emerge from AG and AB (Jamaica) continue to apply, care needs to be exercised in view of the fact that many policies that were considered to be relevant to the proportionality exercise under Article 8 now fall for consideration in deciding Article 8 claims through having become incorporated in primary legalisation

or the Rules or both. It is a matter of common sense and logic that such policies as were relevant to the assessment of proportionality under Article 8 should have been, or should be, incorporated within s.117B or the Rules. One would therefore expect that those policies that now exist outside the Rules relate to the general discretion of discretion outside the Rules, although of course one should bear in mind that this may not necessarily be the case. It is therefore important to examine carefully the terms of any policy relied upon in order to ascertain whether it does throw light on the needs of immigration control in the particular case.

36. I have quoted the relevant parts of the Carer's Policy. Whilst para 17.3, which concerns the grant of leave to remain, sets out "*points*" that are amongst those that "*should be borne in mind by caseworkers*", the points in question do not indicate the circumstances in which the Secretary of State considers that leave to remain should be granted or removal should not take place. The second paragraph under the heading "*Introduction*" states that "*leave should only be granted where it is warranted by particularly compelling and compassionate circumstances*". However, there is nothing at all in the policy which explains how caseworkers will assess whether there are "*particularly compelling and compassionate circumstances"* in any case.

37. Ms Warren submitted that the Carer's Policy shows that the Secretary of State recognises that, in some cases where there are *"compassionate circumstances"*, it can be in the public interest to grant leave to remain if there is a family member who provides care that is needed. However, the fact is that there is something nothing in the Carer's Policy which assists in determining when the circumstances are such that the Secretary of State recognises that the public interest yields to the individual case, save that the opening para 17 refers to "*particularly compelling and compassionate circumstances*", a threshold that did not feature in the judge's reasoning.

38. In addition, para 17.3.1 of the Carer's Policy specifically states that applicants must be informed that leave is being granted on the strict understanding that during the period of the leave that is granted arrangements will be made for the future care of the patient and that it is unlikely that any further leave will be granted. The guidance does not require caseworkers to consider an individual's human rights at this stage. If the Carer's Policy was relevant to the needs of immigration control, one would expect to see some guidance to caseworkers by which they are reminded to consider the human rights of any individuals involved when considering an application for further leave to remain. Para 17.4 of the Carer's Policy, which deals with requests for further leave to remain, is silent on this point.

39. Furthermore, as is well-known, applications for leave to remain on the basis of an individual's human rights are made on forms that are specifically designated for such applications, whereas it is clear from paras 17.1 and 17.2 of the Carer's Policy, that applicants for entry clearance and for leave to enter in order to care for someone must satisfy the Rules that relate to general visitors. Para 17.3 of the Carer's Policy, which deals with applications for leave to remain, also makes the point that most applications for leave under the Carer's Policy will be from individuals who are in the United Kingdom as visitors. Applications for leave under the Carer's Policy are not made on the forms that are used for applications for leave to remain on the basis of Article 8. The type of form to be used and the fact that the Carer's Policy states that the Rules relating to general visitors must be satisfied suggest strongly that the Carer's Policy relates to the Secretary of State's exercise of discretion outside the Rules when considering an application for leave as a visitor in order to care for someone.

40. Importantly, the phrase "*particularly compelling and compassionate circumstances*" is one that requires an evaluative judgment, in my view. Equally important is the fact that there is nothing in the Carer's Policy that states that leave for a short period will be granted in *all* cases in which there are such "*particularly compelling and compassionate circumstances*". The sentence: *"… leave should only be granted where it is warranted by particularly compelling and compassionate circumstances*" indicates that, whilst the Secretary of State requires there to be particularly compelling and compassionate circumstances for leave to be granted, the existence of such particularly compelling and compassionate circumstances does not automatically lead to a decision to grant such leave. This further suggests that, even if there are particularly compelling and compassionate circumstances, a decision is taken whether to grant leave *in the exercise of discretion*.

41. Furthermore, unlike DP5/96 and DP3/96 which set out clear criteria for the application of the policy in question, there is no such clarity in the case of the Carer's Policy. All we have are the words "*particularly compelling and compassionate circumstances*" in the opening paragraph 17 and a list of points at 17.3 that are amongst those that caseworkers should bear in mind.

42. All of the above, taken together with the phrase "*particularly compelling and compassionate circumstances*" and the fact that that phrase is one that requires an evaluative judgment, lead me to conclude that the Carer's Policy operates in relation to the Secretary of State's residual discretion and does not throw light on the needs of immigration control in the Tribunal's assessment of proportionality in relation to Article 8. In the words of the Tribunal in AG at [43], the Carer's Policy is not one that "*creates a presumption that immigration control will not be enforced against persons of a category into which the claimant falls"*.

43. I have considered whether the judgment in Zackrocki indicates that the Carer's Policy is relevant to the assessment of proportionality in an individual case. I have concluded that it does not. In the first paragraph, Carnwath J (as he then was) said specifically that he considered it unnecessary to seek assistance from the ECHR.

44. It is clear that the judge in the instant case took into account the Carer's Policy. He referred to the "*concession*" at [33]. Indeed, it was Ms Warren's submission that he took the Carer's Policy into account (as opposed to making factual findings on the policy) and did not err by doing so.

45. Since the Carer's Policy does not throw light on the needs of immigration control, the judge erred in law by taking into account an irrelevant consideration. This error is material given that the judge said, at [33], that there was a concession which "*the [claimant] would presumably be able to meet if he had provided details from social services as regards their inability to provide care for the brother*". Plainly, he relied upon his entirely speculative assumptions about the evidence that the claimant may be able to produce and the evidence that may be forthcoming from social services in a material way to reach his decision on proportionality.

46. However, even if I am wrong in concluding that the Carer's Policy was irrelevant to the assessment of proportionality under Article 8, the judge materially erred in law for the following reasons:

47. Ms Warren submitted that ground 1 is incorrect in stating that the judge was obliged to make any findings as to whether the claimant meets the criteria for the grant of

leave under the Carer's Policy. She submitted that the Tribunal made it clear at [43] of its decision in AG that a judge was not obliged to make any findings as to whether the claimant met the Carer's Policy. She submitted that the judge was obliged to take the Carer's Policy *into account* in assessing proportionality, which, she submitted, is exactly what he did.

48. I reject this submission. At [43] of AG, in particular the first sentence, the Tribunal was dealing with the submissions before it, summarised at [33] of its decision to the effect that, where the Secretary of State has published a policy incorporating a discretion, the Tribunal is to make the discretionary decision for itself. In the first sentence of [43], the Tribunal was merely rejecting that submission and making the point that a judge is precluded from exercising any discretion under the policy. The Tribunal was not saying that the judge was precluded from making relevant findings of fact in order to decide what light is shed on the needs of immigration control in a given case in assessing proportionality. By relevant findings of fact, I refer to findings concerning whether an individual satisfies any criteria that may be set out in a policy for it to be applied in an individual's favour. In the instant case, the judge should have decided whether there were "*particularly compelling and compassionate circumstances*" in the instant case.

49. However, even if I am wrong in concluding that the judge should have decided whether there were particularly compelling and compassionate circumstances in the instant case and even if Ms Warren is correct that AG required the judge to "*take into account*" the Carer's Policy without making findings of fact in relation to it, there is nothing in the judge's decision that shows that he was even aware of, or applied, the relevant high threshold that is necessarily implicit in the phrase "*particularly compelling and compassionate circumstances*", the threshold at which the Carer's Policy indicates that the Secretary of State's view is that the state's interests in immigration control may in the exercise of discretion yield to the individual circumstances, at least so as to result in a the grant of leave for a short period. The judge's failure to have regard to the relevant high threshold is plainly a material error of law in the assessment of proportionality. In this regard, I have noted that, at [34] of his decision, the judge said that there are "*significant compassionate circumstances*" concerning the condition of the sponsor. However, this is a different, and lower, threshold.

50. I shall now turn to the judge's reliance upon Zackrocki.

51. It is clear from [27]-[28] of his decision that the judge drew an analogy between the instant case and Zackrocki on the basis that in both cases there was no evidential basis to support the Secretary of State's assertion that adequate arrangements could be made for the care of the relative who was said to require care.

52. However, not only was Zackrocki a judicial review case, the Secretary of State had stated *in terms* in Zackrocki that adequate arrangements could be made for the care of the relative in question but she had not given any reasons for not accepting the view expressed by the social services authority backed by a doctor that there were no satisfactory alternative arrangements which could be made and that care by the claimants in that case was by far the best solution. The conclusion in Zackrocki was therefore simply that the Secretary of State's decision should be quashed as being *Wednesbury* unreasonable.

53. I agree with Ms Warren that the Carer's Policy gave effect to the judgment in Zackrocki, not least because Zackrocki is specifically mentioned in the opening paragraph under the heading "*Introduction*". However, as I have explained, the conclusion in Zackrocki was simply that the Secretary of State had not given reasons for rejecting the view expressed by the social services authority backed by a doctor that there were no satisfactory alternative arrangements which could be made and that care by the claimants in that case was by far the best solution. In other words, the *process* by which the Secretary of State made her decision was in error. No doubt this is the rationale for the list of points set out at para 17.3 of the Carer's Policy for caseworkers to bear in mind.

54. Ms Warren submitted that Zackrocki was relevant because it is a case that concerns where the balance lies in relation to proportionality. I reject this submission. Not only did Carnwath J make it clear in the opening paragraph that it was unnecessary to seek assistance from the ECHR, I could not see anything in Zackrocki from which any general guidance can be drawn *on the assessment of proportionality generally*, much less the proposition that Ms Warren drew from Zackrocki, that it decided that if a judge finds that a relative is providing unique care then the public interest does not require removal. That is an astonishing generalised proposition which I have no hesitation in rejecting.

55. For the reasons given above, I am satisfied that the judge erred in law in drawing the analogy he drew between the instant case and Zackrocki. Whereas there was evidence in Zackrocki from social services which stated *positively* that *no* satisfactory alternative arrangements could be made, there was no such evidence from social services in the instant case.

56. Furthermore, in Zackrocki, Carnwath J (as he then was) considered it "*a critical issue*" that the individual who required care was *"a British citizen and entitled to remain here and to be looked after in accordance with the policies and duties which apply to citizens of this country"*. However, in R (Agyarko) v SSHD [2017] UKSC 11, the Supreme Court, including Lord Carnwath (as he now is) held (at [68]), in the context of a marriage case, that, whilst the right of a British citizen under section 1(1) of the Immigration Act 1971 was an important right, it does not entitle the British citizen to insist that his or her non-national partner should also be entitled to live in the United Kingdom when that partner may lawfully be refused leave to remain to remain.

57. Thus, even if some general guidance can be drawn from Zackrocki on the issue of proportionality, which I do not accept, it is by no means clear that such guidance remains unaltered notwithstanding the amendments to the Rules by HC 194 with effect from 9 July 2012, the implementation of s.117B of the 2002 Act and Agyarko.

58. This is a convenient point at which to consider whether the judge speculated at [24], [33] and [34] of his decision.

59. Ms Warren submitted that the reason why the judge did not have any evidence from social services that the care that the sponsor needed could not be provided by social service is because the claimant was providing the required care adequately and it was the sponsor's preference that he should do so. She submitted that the judge had to reach a decision on proportionality on such evidence as he had.

60. In effect, the submission is that the subjective preference of the sponsor for the claimant to provide the care that he requires makes it unnecessary to consider whether such care can adequately be provided by social services or someone who is not subject the immigration control. In other words, that there is no need to inject any objectivity into the analysis. I reject this submission as wholly untenable. Just as a judge must consider, in a case involving the right to family life, whether family life can be enjoyed elsewhere, so too must a judge consider whether it is reasonable for a patient who requires care to receive such care from social services or someone who is not subject to immigration control if adequate care can be provided. In the absence of any evidence from social services, it is difficult to see how a judge can conclude that the decision is disproportionate, if due weight is placed on the state's interests.

61. In the instant case, it is the personal preference of the claimant's brother that he should receive care from the claimant. Given that there was no evidence before the judge that such care as he needed could not be adequately provided by the social services, I am satisfied that the judge speculated when he found, at [34] that "*(t)he health services cannot provide day-to-day care*" for the sponsor and that he erred in law by so speculating.

62. I am also satisfied that the judge speculated at [33] when he found that the claimant would presumably be able to meet the terms of the Carer's Policy "*if he had provided details from social services as regards their inability to provide care*" of the sponsor.

63. I am further satisfied that, in speculating as he did at [33] and [34], the judge materially erred in law. It is therefore not necessary for me to consider whether the judge speculated at [24].

64. Finally, I turn to grounds 2 and 3.

65. In relation to ground 2, I have considered the judge's reasoning very carefully. It is plain, in my judgement, that he did not make it clear that he had placed due weight on the state's interests in immigration control. It may be possible to infer that his mind was directed at certain points to the state's interests in immigration control. For example, in the first and second sentences of [32] of his decision where he mentioned that the claimant has been in the United Kingdom for a relatively short period of time and that he came as a student and the sentence at [34]: "*I consider that the decision … is not proportionate to any legitimate public end sought to be achieved".*

66. However, there is nothing that shows that he was aware that the state's interests are a weighty consideration. Indeed, I am satisfied that his ultimate conclusion, that the decision was not proportionate, could only have been reached by an impermissible failure to take the state's interests into account, given that there was no evidence before him that the care which was required by the sponsor could not be adequately provided by the social services. He effectively completely marginalised the state's interests impermissibly.

67. I am also satisfied that ground 3, that the judge failed to identify any exceptional circumstances which outweigh the state's interests, is established, once one strips away the judge's erred approach in relation to the Carer's Policy and the decision in Zackrocki, his speculative findings at [33] and [34] and his impermissible failure to take into account the state's interests in immigration control (ground 2).

68. In summary:

    i) (Ground 1) The judge erred in law by taking into account the Carer's Policy in his assessment of proportionality. In the alternative, he erred in law by failing make any findings as to whether there were particularly compelling and compassionate circumstances in the instant case. In the further alternative, the judge erred in law by failing to apply or "take into account" the correct high threshold indicated by the phrase "*particularly compelling and compassionate circumstances".*

    ii) The judge erred in law in drawing the mistaken analogy he drew between Zackrocki and the facts in the instant case. Whereas there was evidence in Zackrocki from social services which stated positively that no satisfactory alternative arrangements could be made, there was no such evidence from social services in the instant case.

    iii) I am satisfied that the judge erred in law by speculating at [33] and [34] of his decision.

    iv) (Ground 2) The judge erred in law by failing impermissibly to take into account the state's interests in immigration control.

    v) (Ground 3) The judge erred in law by failing to identify exceptional circumstances which outweigh the state's interests.

69. I am further satisfied that each of the above errors were material to the judge's decision that the Secretary of State's decision was not proportionate.

70. I set aside the judge's decision on proportionality.

71. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chamber of the Upper Tribunal recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

    "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

    (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

72. At the hearing, Ms Warren submitted that the appeal should be remitted to the First-tier Tribunal because the appellant would wish to rely upon further evidence. Mr Armstrong agreed that the appeal should be remitted to the First-tier Tribunal given that a period of two and half years have elapsed since the appeal was heard by Judge Mitchell and also because his appeal was allowed by Judge Mitchell.

73. The fact that the appellant wishes to rely upon further evidence is not a good enough reason to justify remittal, nor is the lapse of time since the appeal was heard by Judge Mitchell.

74. I have considered whether the appeal should be remitted in view of the fact that the appellant's appeal was allowed on the last occasion. As will be seen (below), I have decided to preserve some of the findings made by Judge Mitchell in relation to the appellant's Article 8 claim. In any event, the appellant's case has been put to the

First-tier Tribunal and considered by it, albeit that the First-tier Tribunal materially erred in law in its assessment. It cannot therefore be said that para 7.2(a) of the Practice Statements applies.

75. This is not a complicated case. It does not raise any issues in relation to asylum or humanitarian protection or Article 3. The appellant only relies upon Article 8. The issues raised in relation to Article 8 are not complicated. It cannot therefore be said that para 7.2(b) of the Practice Statements applies.

76. I am therefore not satisfied that para 7.2 (a) or (b) of the Practice Statements apply. The Upper Tribunal will therefore re-make the decision on the appellant's appeal. The case is reserved to myself.

77. The findings of Judge Mitchell at [16]-[23] stand *on the evidence that was before him.* His findings do not otherwise stand. This means that, if the evidence before me at the next hearing is different from the evidence that was before Judge Mitchell and such evidence puts credibility in issue, I will be entitled to make my own findings and where appropriate, depart from the findings of Judge Mitchell.

78. I will approach the Carer's Policy and my assessment of proportionality under Article 8 as follows:

    i) In the first place, by treating the Carer's Policy as irrelevant to the proportionality exercise under Article 8, i.e. I will assess proportionality as if the Carer's Policy did not exist.

    ii) In order to adopt a "*belts and braces*" approach, I will consider, in the alternative, whether there are particularly compelling and compassionate circumstances in the instant case having regard to the list of points that are set out at para 17.3 of the Carer's Policy along with any other considerations I consider relevant and decide whether the decision is disproportionate in all of the circumstances of the case.

Decision

The decision of the First-tier Tribunal involved the making of material errors of law. I set aside the decision. The case will be re-listed for a resumed hearing before Upper Tribunal Judge Gill in the Upper Tribunal.

Signed
Upper Tribunal Judge Gill

Date: 8 September 2017