



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

R (on the application of Sison) v Secretary of State for the Home Department IJR [2016]  
UKUT 00033 (IAC)

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**Heard at Field House  
Date of Hearing 2 December 2015**

**EX TEMPORE JUDGMENT GIVEN FOLLOWING HEARING**

**THE QUEEN  
(ON THE APPLICATION OF)  
FLORENTINA SISON**

**Applicant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**BEFORE**

**UPPER TRIBUNAL JUDGE GRUBB**

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Mr Symes, instructed by Gulbenkian Andonian Solicitors appeared on behalf of the Applicant.

Mr McLellan, instructed by the Government Legal Department appeared on behalf of the Respondent.

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**ON AN APPLICATION FOR JUDICIAL REVIEW**

**JUDGMENT  
(Approved)**

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## JUDGE GRUBB:

1. In this claim the applicant challenges a decision of the Secretary of State taken on 6 August 2014 refusing to grant her leave outside the Immigration Rules (HC 395 as amended).
2. The applicant sought leave to continue as a carer of an elderly couple, Dr Peter Jost and Mrs Margaret Jost, who are aged respectively 93 and 91 years of age. The applicant has been employed since January 2014 as their carer, in particular that of Mrs Jost, for whom she provides overnight care. Mrs Jost suffers from Alzheimer's Disease and a variety of medical issues. There is medical and other evidence, particularly from Dr Jost himself, supporting her need for 24 hour care which is in part provided by the applicant but also by others during the day.

### Background

3. The background to the claim is as follows. The applicant came to the United Kingdom on 12 December 2006 with a work permit as a qualified carer. She is a Philippine national and is qualified to degree level as a nurse. She worked in a nursing home in Dorset and then latterly in London at the Springdene Nursing Care Home as a senior care assistant. Her leave was extended as a work permit holder for five years from 29 January 2008 to 28 January 2013.
4. At some point she stopped working for Springdene Nursing Care Home. As a result of that the Secretary of State made a decision to curtail her leave to 26 July 2010. That decision was taken on 27 May 2010.
5. In the acknowledgement of service the chronology records that the curtailment notice was returned undelivered to the Secretary of State on 23 June 2010 and there is nothing in the material before me to suggest that that is other than what happened. Although there was some discussion before me as to the effect of that curtailment notice if it was undelivered it seems to me that there is only one possible view that can be taken. The applicant's leave was not effectively curtailed by that notice since it was not communicated and therefore not given under s.4(1) of the Immigration Act 1971. That follows from the decision of this Tribunal in the case of Syed [2013] UKUT 144. As a consequence the applicant's leave expired naturally on 28 January 2013.
6. On 5 January 2014 the applicant was employed by Dr and Mrs Jost as a carer. The contract of employment between them is at pages 43 to 46 of the trial bundle. That states that the applicant's employment begins on 5 January 2014, that she is employed as a carer on an annual salary of £20,800; her work is for 40 hours per week starting at 4.30 on all days except Sunday. In fact her working week does not include Saturday, it is from Sunday to Friday.
7. In addition, and I will return to this later, there are provisions for holidays, dealing with sickness and other matters which would normally be expected to be seen in a contract of this sort. Her duties are set out at Appendix 1 to the contract headed "Carer's Duties" and I do not need to refer to them in detail in this judgment other than to note that they primarily deal with Mrs Jost's personal and other needs

and the provision of support and assistance to her and Dr Jost in the home during the applicant's hours of work.

8. On 30 June 2014 the applicant applied for further leave based on her carer's role. Her application was made outside the Rules. That was refused by the Secretary of State on 6 August 2014 and a pre-action Protocol letter was sent dated 1 September 2014 with a pre-action Protocol response from the respondent dated 26 September 2014. The claim was then filed on 5 November 2014.

### **The Respondent's Decision**

9. I begin with the decision of the Secretary of State which is under challenge dated 6 August 2014 and is at pages 31 to 32 of the bundle. So far as relevant it provides as follows:

"You have indicated in Section 3 of your FLR(O) application form that you are applying for leave to remain as a domestic worker. However, the grounds of your application as detailed in the covering letters you have provided specify consideration outside the Immigration Rules. Consideration as a domestic worker has therefore been disregarded."

10. The letter then goes on to say:

"Your representative has stated that you wish to be granted leave to remain outside the Rules as a carer of two British citizens. The Secretary of State's policy is to consider granting leave outside the Immigration Rules where particularly compelling circumstances exist. Grants of such leave are rare and are given only for genuinely compassionate reasons.

We have carefully considered your application. You claim that you are the carer of two elderly British citizens, Dr H Peter Jost and Mrs Margaret Jost, who have multiple health problems. However, you are not the sole carer of the couple. It is considered reasonable to expect the couple to continue to explore other options for care (for example by means of seeking assistance from family and friends or requesting their two other carers to extend their hours into the evenings). Moreover, your adverse immigration history weighs heavily against you in the consideration of your application. You decided to take up employment in the United Kingdom despite you having no valid leave to enter or remain.

In view of the above, the Secretary of State is not satisfied that your circumstances are such that discretion should be exercised outside the Immigration Rules."

As a consequence the applicant's application for leave was refused.

### **The Challenge**

11. The applicant's grounds challenging the legality of that decision have been somewhat refined since the initial application. I will return to this in a moment.
12. Permission was initially refused by Upper Tribunal Judge Eshun on 11 June 2015 but was subsequently granted at an oral hearing on 5 August 2015 by Upper Tribunal Judge Freeman on the ground that the Secretary of State had given inadequate consideration to Mrs Jost's situation when considering whether they were exceptional circumstances to grant leave outside the Rules. The grant of permission

also raises the prospect of the applicant claiming that the decision breached Mrs Jost's human rights, in particular her right under Art 8 to respect for her private life.

13. Following that grant of permission the applicant sought to amend her grounds to raise three grounds: first that the respondent's decision was unlawful on public law grounds, namely a failure to consider all relevant considerations and overlook the relevant material; secondly that the decision was incompatible with the private life of Mrs Jost; and thirdly that the Secretary of State had failed to take into account a relevant policy, namely her carers policy set out in the IDIs.
14. Mr Symes, who appeared on behalf of the applicant, sought permission to amend the applicant's grounds to those and Mr McLellan, who appeared on behalf of the Secretary of State, did not oppose that application. I therefore granted permission during the course of the hearing to amend the grounds to those three grounds.
15. In essence the first ground is the ground upon which UTJ Freeman granted permission. The second ground raises a not obvious or easy point of law concerning whether an applicant can rely on another's human rights in a claim such as this. The third ground, as I have said, concerns the application of the Secretary of State's carers' policy and its relevance to this case. Those issues were helpfully developed in the respective arguments of Mr Symes and Mr McLellan before me and in their skeleton arguments.

## **Discussion**

16. I will first deal with ground 1, the public law challenge. What is said on behalf of the applicant is that the Secretary of State in her decision failed fully to take into account the evidence both from medical professionals and from Mrs Jost concerning the availability of alternative and adequate care for Mrs Jost if the applicant was unable to provide it. In addition Mr Symes submitted that the Secretary of State was wrong to assert something that was self-evidently and obviously not the case, namely that others such as relatives, the Josts have a daughter, or neighbours could step into the shoes of the applicant and provide the care required.
17. Mr Symes took me to the relevant material in the bundle. He took me to a number of letters from health professionals, first of all a letter from Dr Levy, at pages 59 to 66. The initial letter is dated 23 November 2012 and the more recent letters are dated 20 and 24 March 2014 and 12 May 2014 respectively. These letters identify, and it is not disputed, that Mrs Jost is an elderly lady who suffers from a number of conditions physical and mental including suffering from Alzheimer's Disease.
18. In his letter of 12 May 2014 Dr Levy describes the role that the applicant claims in relation to Mrs Jost's care overnight. For example, he says that it is particularly crucial that she is there because "Mrs Jost will often awake to go to the loo in the dark and in a drowsy state, hence probably at her most vulnerable". Dr Levy notes that the applicant is committed to caring for Mrs Jost overnight and that agency carers are a possibility but that they would not be able to provide continuity of care which is provided by the applicant.

19. In addition I was referred to a letter from Dr Patel at page 55 of the bundle. This is a little old in origin, it is dated 25 October 2011 but again describes Mrs Jost's condition and sets out her tendency to fall and suffer as a result of her physical and mental difficulties.
20. Dr Jost, Mrs Jost's husband, deals with her condition in his statement which begins at page 36 of the bundle but continues for these purposes at pages 37 to 40 and it is important that I set these out in some detail.

"My wife is now incapacitated to the extent that she cannot move around without help nor attend to her daily needs. She requires near 24 hour attention (see list of medical attention and medication). One of her biggest problems is that she is not only weak, but struggling to communicate her needs, including those relating to pain, which she suffers bravely and without complaint. By nature, not deliberately, she finds it difficult in her present condition to communicate even with a doctor or myself. Her previous doctor, Dr Thwaites, who retired three months ago, was intuitive and thus managed to help her in spite of her difficulties of communication.

During the day she is being attended to by a carer friend and also by a neighbour, both of whom have families. In the evenings and at night she is being looked after by Florentina Sison.

I would like to be able to look after her at night, but am unable to hear her when she calls out at night as I wear hearing aids which are taken out at night. Also, to enable me to sleep, I have been prescribed nitrazepam. I am, therefore, unable to attend to her requirements during the night.

Furthermore at 93 years of age, I do not have the strength to lift her should she fall. This has happened, when I have had to raise her onto a chair by lifting her successively with the help of mainly telephone directories until the seating height was reached. This was not good for her health or her dignity and took me about half an hour of really hard, physical work.

Starting when she was in a better state than she is now, my wife has, over a period of time, become very comfortable with Florentina's care. She trusts her totally and feels safe in her care. Her approach is highly professional, whilst at the same time very caring, assuring her dignity is maintained at all times.

Above all, Florentina has come to understand my wife when she is in pain or wants something. Over the time she has spent with her, she has come to understand what my wife needs, even when my wife cannot talk and express herself adequately. This is a most important feature of their relationship, which cannot be overstated.

She is medically qualified to the required degree, which will become more and more important, as with age, my wife's health is unlikely to improve significantly. Furthermore, my wife and I trust Florentina implicitly with our home and possessions - again an important reassurance for my wife. Anyone new would upset her and have detrimental effects, as was occasioned during our week's visit to the BUPA owned Richmond Retreat at Letcombe Regis, Oxfordshire.

My wife knows that Florentina also keeps an eye on me. The knowledge that I have been looked after - when needed - is a significant reassurance to my wife and helps to maintain her peace of mind and confidence.

My wife's condition has deteriorated during the past six months. In her present condition, neither she nor I (at 93) could train a new night time carer, even if we could

find one who satisfied my wife's unusually medical-based needs which we have not been able to obtain."

21. Then, shortly after Dr Jost goes on to state:

"Permanency is essential as my wife could not cope with a new (stranger) carer. Having to do so could be nothing short of catastrophic."
22. It is accepted by the Secretary of State that the respondent must take account of the impact upon Mrs Jost, and indeed Dr Jost, to the extent that is relied on, in deciding whether to exercise discretion outside the Rules.
23. The claim was initially put both under the Rules, under Art 8 relying upon the applicant's Art 8 rights and also upon an argument that discretion should be exercised beyond Art 8 outside the Rules. In the amended grounds, and Mr Symes made this clear at the hearing today, it is no longer suggested that the applicant's Art 8 rights would themselves be breached by the respondent's decision nor is it suggested that the applicant could succeed under any of the Immigration Rules.
24. When one looks at the respondent's decision it is relatively brief. The Secretary of State nevertheless has, in my judgement, lawfully considered the circumstances of the applicant and perhaps principally that of Dr and Mrs Jost. She has considered whether there are any compelling circumstances to justify the grant of leave outside the Rules. She recognises that the Josts are two elderly people for whom the applicant provides care. She also notes that Mrs Jost has a number of health problems.
25. The applicant is not, as the Secretary of State noted, the sole carer of Mrs Jost. There are other carers in the day. The Secretary of State took into account the possibility that adequate alternative care could be obtained other than from the applicant. It was part of the evidence that an advert had been placed - and the advert is before me - in the Hendon and Finchley Times on 1 May 2014 for a carer for Mrs Jost. The evidence also was that there was only one applicant and who was in the circumstances not appropriate for the post.
26. Nevertheless the Secretary of State was entitled to take into account, in my view, and clearly did take into account that the option of obtaining an alternative carer had not been fully exhausted yet. There was no evidence, for example, that any other adverts had been placed and further efforts had been made to obtain other carers. Dr Jost's own evidence that former carers had been employed who were adequate albeit that some who had been employed turned out not to be inadequate is entirely consistent with the respondent's view that alternative carers could be sought and there was every possibility that in time they could be obtained. One of the previous carers was described as being very good.
27. None of the medical or other evidence, in my view, required the Secretary of State to conclude that only the applicant was an adequate carer for Mrs Jost. Dr Levy does, as I have already pointed out, speak of the importance of continuity but also recognises that agency carers could, at least in the short term, provide some care satisfactorily whilst further advertisements were placed. It was not unreasonable, in

my judgement, for the Secretary of State to consider that the applicant might obtain a carer who could step into the shoes currently filled by the applicant and not take the view that the applicant was the only one who in the short or long term could provide adequate support for Mrs Jost at night.

28. It is worth noting that the applicant had only been employed since early January 2014. She does not work seven days a week and she has over five weeks' paid annual leave each year when the employment contract recognises that with notice she may take periods of leave so that "where necessary alternative arrangements with care providers can be put in place". Plainly, the Josts themselves have contemplated an alternative carer being engaged when the applicant was on leave.
29. It is also the case that, although the applicant's care currently provided is said to be essential and unique, at any time she could herself leave the employment of the Josts.
30. In my judgement, it was properly open to the Secretary of State to conclude that the applicant's care was not essential in the sense that it was the only adequate care which could be provided to Mrs Jost. The Secretary of State, having taken into account the evidence and considered Mrs Jost's needs, and I am satisfied that the Secretary of State has fully given her mind to the relevant evidence, her conclusion was not unlawful on public law grounds.
31. It was, in my judgement, not necessary for the Secretary of State in an administrative decision to set out seriatim each and every piece of evidence and deal with every matter that might more likely be expected in a judicial decision. The Secretary of State gave adequate and wholly sustainable reasons in law for her view that they were no compelling or compassionate circumstances to justify the grant of leave outside the Rules. The decision, of course, properly took into account the public interest in that the applicant had no lawful basis for being in the UK since 28 January 2013. Her relationship with Mrs Jost had been formed wholly during the period in which she had no lawful basis for being in the UK or indeed for working with the Josts.
32. For those reasons I reject ground 1.
33. It is convenient now to deal with ground 3, namely the policy argument raised on behalf of the applicant. In its initial guise the argument put forward in the skeleton argument by Mr Symes was that the policy was directly applicable to the applicant. That is not a tenable position and Mr Symes did not pursue that argument before me at the hearing.
34. The argument was based upon the terms of the policy which applies to carers of an individual who are that individual's "relatives" or "friends". Self-evidently the applicant is not Mrs Jost's "relative". The argument that she was or is her "friend" does not stand up. The policy is not concerned with a carer who is employed by an individual. It is concerned with those who voluntarily provide on an exceptional basis support for a person with whom they have an existing friendship. It cannot

apply to the applicant. I need say no more about this given that Mr Symes did not pursue that point before me.

35. Instead, Mr Symes submitted that the policy should apply by analogy and its terms should apply so that the nature of the matters that should be considered should be considered for consistency purposes even though the applicant was neither a relative nor a friend.

36. As Mr McLellan submitted there is no sound basis for a consistency argument here. The policy is not concerned with workers. It is concerned with the voluntary provision of care by friends and relatives. The consistency, if any, in any decision-making would be to compare the applicant's situation with other workers covered by the Rules rather than other care providers. In any event, even if that were not right the terms of the policy are such that in my judgement it could not rationally apply so as to benefit the applicant.

37. In para 17.9 headed "Leave to remain as carers for friends of a sick or disabled person" it is stated that leave to remain in order to care for a sick or disabled friend should "normally be refused". The provision then goes on to state that in "an emergency" where there is no-one else to care for the individual it may be appropriate to grant leave.

38. As the guidance point out, normally leave in this context would be refused even to a friend. In my judgement it cannot rationally be said that there was an emergency in this case given the prospect of potential support and care from others that could be obtained if further efforts were made to seek it.

39. For those reasons therefore nothing in the carers' policy assists the applicant to demonstrate that the Secretary of State's decision was unlawful.

40. Finally then I turn to the second ground, namely that the applicant says that the Secretary of State has failed to consider whether her decision not to grant her leave breached the Art 8 rights, the respect for private life, of Dr and Mrs Jost, in particular Mrs Jost. Reliance is placed by the applicant on s.6 of the Human Rights Act 1998 which provides in s.6(1):

"It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

41. Mr Symes submitted that the Secretary of State's decision must take account of the fact that the decision might be incompatible with Mrs Jost's Art 8 right to respect for her private life. He placed reliance upon the decision of the House of Lords in Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39 where the House of Lords held that, at least in the appellate context, a Tribunal hearing an appeal by an individual who relies upon his or her Art 8 right to respect for their family life should consider the family as a unit and consider the impact upon the family life of the other members of that family unit.



42. In this case the applicant relies on the impact on Mrs Jost in respect of her needs and the impact on her of the loss of a carer and submits that that falls within the ambit of her private life (see, for example, Pretty v UK [2002] 35 EHRR 1, at para 65).
43. In response Mr McLellan submitted that Beoku-Betts cannot be read across from a claim based on family life to one based on private life. Whilst a family may form a unit there is no equivalent comparator that can be used in private life. Likewise he relies upon s.7 of the Human Rights Act 1998 which states, so far as relevant in s.7(1):
- “A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by s.6(1) may -
- ...
- (b) rely on the Convention right or rights concerned in any legal proceedings,
- but only if he is (or would be) a victim of the unlawful act.”
44. In this case Mr McLellan submitted that the applicant cannot be said to be a “victim” of the unlawful act if there is a breach of Mrs Jost’s Art 8 right to respect for her private life. He submitted that the underlying purpose of the legislation was to restrict a court’s enquiry into the rights of the individual who suffered the breach of those rights rather than allowing a third party to do so such as the applicant in this case.
45. In any event, he submitted that there was no private life between the applicant and Mrs Jost that was engaged. Finally, he submitted that even if it was engaged then the public interest given the applicant’s immigration history outweighed any interference of Mrs Jost’s private life so as to justify a breach of her Art 8 rights.
46. This is a point which as far as I am aware has not previously been decided by this Tribunal or the Administrative Court or other higher court. Beoku-Betts is undoubtedly a case about family life but I see no reason in principle why private life existing between two individuals cannot be seen in the same way as family life in an appropriate case. For example usually, unless there are some exceptional circumstances, adult siblings will not have a family life between them but they will have private life and if one of them was to be subject to removal it would seem to me rather odd if their joint private life could not be considered following the approach in Beoku-Betts in determining whether or not the removal of one of them was a breach of Art 8. Likewise therefore the disruption to the relationship between the applicant and Mrs Jost and the impact upon Mrs Jost would seem to me potentially to be a matter which should be considered by the Secretary of State as the initial decision maker in determining whether the applicant should be refused leave.
47. Beoku-Betts is, in my judgement, inconsistent with the respondent’s argument that Mrs Jost’s private life rights cannot be examined in a claim by the applicant because Mrs Jost cannot be a “victim” under s.7 of the Human Rights Act. Although Mr McLellan submitted otherwise, in para 43 of his speech in Beoku-Betts Lord Brown, having adopted the approach of considering the family as a unit and that, at least in the appellate context, a Tribunal should consider the Art 8 rights of all family

members, concluded that “then each affected family member is to be regarded as a victim”. *Mutatis mutandis* the applicant is a “victim” if the private life of Mrs Jost is being considered.

48. Likewise some of the points made by Lord Brown in paras 42 and 43 of his speech, telling in favour of a wide approach to considering the rights of others affected, appear to be equally applicable here: namely, the need to avoid multiple challenges and also accepting that the obligation to consider an individual’s family life even if not of the applicant was a matter that would, if left to multiple actions or such that could not be considered in a single instance, not be a position that Parliament in the appeal context contemplated. Whilst that was said in the context of an appellate tribunal’s role, it cannot be so limited. In para 43 of his speech when coming to that conclusion Lord Brown rhetorically sated:

“would it not be strange too that *the Secretary of State* (and the Strasbourg Court) should have to approach the appellant’s Art 8 claim to remain on one basis, namely considering all the rights but the appellate authorities on another?” (emphasis added)

49. Patently, there Lord Brown considered that the Secretary of State should consider all the rights of all the relevant individuals when family life was relied upon.

50. For the purposes of this claim, I am content to accept that the applicant’s arguments on this point are right.

51. Further, I do not accept Mr McLellan’s submission based upon case law concerning working relationships (e.g. Sidabras v Lithuania (2006) 42 EHHR 6) that a situation such as that between the applicant and Mrs Jost cannot give rise to private life. Clearly, the present case is potentially a different sort of situation from a pure employment relationship but, even there, relationships formed during the course of employment may give rise to ‘private life’ (see, Niemietz v Germany (1992) 16 EHRR 97 at [29]). Most importantly, however, the respondent’s argument fails to have regard to the impact upon Mrs Jost’s well-being and health which, in my judgement, undoubtedly falls within the purview of an individual’s private life as recognised in cases such as Pretty v UK (2002) 35 EHRR 1 and R(Razgar) v SSHD [2004] UKHL 27.

52. I am content to accept the applicant’s argument that Art 8.1 is engaged if Mrs Jost’s private life right is considered under Art 8. I am content to do so because even if it is correct (and I express no concluded view) in my judgement the applicant has failed to show that the decision breaches Mrs Jost’s Art 8 right.

53. I do not repeat the factors that I have already set out above in considering ground 1 and whether there were “compelling” circumstances: they are equally applicable here. The availability and adequacy of alternative carers for Mrs Jost were matters which I have considered under ground 1. The Secretary of State was entitled to reach the conclusion that the position was not as put forward by the applicant and support could be obtained. In addition, there is a significant public interest which weighed against any interference with Mrs Jost’s rights even if it can be said that Art 8.1 is engaged. The applicant has no leave – it expired in January 2013 – and has no basis under the Rules or policy to remain as a carer or on any other

basis. The respondent is entitled to give that considerable weight such that any interference with Mrs Jost's private life would be proportionate. For those reasons therefore I also reject ground 2.

54. Before I conclude this judgment the circumstances of Dr and Mrs Jost, especially Mrs Jost, are worthy of the empathy and respect for how they cope with their lives. It is entirely understandable that they should want to retain the applicant, who has proved herself as a carer of Mrs Jost in particular. This Tribunal, however, can only interfere with the respondent's decision if it is unlawful. The circumstances falling as they do outside the Rules and the carers' policy are such that I am unable to say that the respondent's decision was irrational or otherwise unlawful on public law principles or breached Mrs Jost's rights.

55. For those reasons this claim for judicial review is dismissed.

### Costs

56. I make an order for costs in favour of the respondent for a figure to be provided reflecting the total of £8,788 and whatever is the appropriate VAT. (Subsequent to the hearing a revised costs schedule was submitted by the respondent and I make an order for costs to be paid by the applicant in the sum of £9,618.00.)

57. No application for permission to appeal was made. I am not going to grant permission to appeal. It does not seem to me that my judgment discloses any arguable error of law or there is any other good reason to grant permission.~~~0~~~~