Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23057/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
on 11th April 2014	**On 11th April 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MANOJ KUMAR VISHRAM RATHOD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance.
For the Respondent: Mr Smart – Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a determination of the First-tier Tribunal Judge NMK Lawrence promulgated on the 10th January 2014, following a hearing at Hatton Cross on 3rd January 2014, in which he dismissed the Appellant's appeal under both the Immigration Rules and on human rights grounds.

Background

2. The Appellant is a national of Kenya born on 16th June 1972. On 21st October 2012 he was granted leave to enter the United Kingdom as a visitor with leave valid until 21st April 2013. On 5th March 2013 he applied for leave to remain outside the Immigration Rules claiming he needed to remain in the UK to care for his infirm mother. That application was refused by the Secretary of State on the basis that appropriate care for his mother, a British citizen, is available on the NHS.

3. There are some non-material errors of law in the determination such as (i) the statement in paragraph 5 that the Appellant bears the legal burden of proof "from start to finish" whereas if the case involved an assessment of proportionality under Article 8 (2) the burden passes to the Respondent, (ii) in paragraph 10 of the determination the Judge states he has been provided with a letter from the GP which asserts that the Appellant came to the United Kingdom to care for his mother. Having read the letter from the GP no such statement is made. The GP states is "I note that her son has come over from abroad who is taking care of her and has a visitor's visa to 1 April 2013", and (iii) in paragraph 11 the Judge states "I have considered the material put before me. I am satisfied that the appellant has demonstrated that he meets any of the Immigration Rules". This statement lacks clarity but it is clearly a typographical error or lack of attention to detail in proof reading the determination for in paragraph 14 the Judge states that the appeal under the Immigration Rules is dismissed.

4. Notwithstanding this being the Appellant's appeal he failed to attend the hearing, despite valid service of the notice of hearing. The Tribunal have received further correspondence from Community Logg Sewa, a group providing assistance to the Appellant in relation to the determination. The group have also provided evidence of developments since the date of the hearing but that is not relevant to the question of whether Judge Lawrence made a material error of law based upon information he was asked to consider.

Discussion

5. The Appellant enter the United Kingdom as a visitor which is a temporary status after which he is expected to leave. He states that was his intention and that his mother's deteriorating health was an event that occurred after he arrived. I have seen a copy of the visa application in which he states that he is married and that the purpose of the visit is to visit his sick mother. If he was claiming to be married in the visa application this appears to be an incorrect statement in light of the Decree Absolute of divorce that has been provided by his

lawyers in Kenya dated 18th March 2011. If he was claiming that he was coming to the United Kingdom to visit his sick mother his claim that her condition only arose after he entered the United Kingdom is not correct although his statement that her condition deteriorated may be.

6. The Judge found the Appellant could not succeed under the Immigration Rules and indeed the application was for leave to remain outside the Rules. The Judge considered a number of letters from the community group providing assistance and medical evidence confirming that the Appellant's mother is elderly and frail and suffers from a number of conditions for which she is receiving treatment.

7. The finding the Appellant was unable to succeed under the Immigration Rules has not been shown to be susceptible to legal challenge. In relation to the human rights element of the claim, it was necessary for the Judge to consider this in accordance with the approach set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. That approach is consistent with what the Court of Appeal said in MF (Nigeria) and with the approach of the House of Lords, particularly in cases such as Huang [2007] UKHL 11 and Razgar [2004] UKHL 27. In Shahzad it was found that where an area of the Rules does not have an express mechanism such as that found in the provisions relating to deportation appeals, the approach in Nagre ([29]-[31] in particular) and Gulshan should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

8. As the Appellant was not able to satisfy the Rules the question arises whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further. It has not been shown that there is a provision of the Rules that would enable an individual who entered as a visitor to switch into and to be granted leave to remain as a carer. The Article 8 case is based upon a claim that family life exists in the United Kingdom between the Appellant and his mother that her needs, based upon her medical condition, make the decision to remove him disproportionate.

9. In paragraph 13 of the determination it was found that the Appellant had not demonstrated any dependency beyond that which may exist between a mother and son. This is, in effect, a finding that the Appellant has failed to discharge the burden of proof upon him to the required standard to show that family life recognised by Article 8 exists. It is accepted that family life may continue between a parent and child even after the child has attained his majority. Cases such as AA v United Kingdom (application no 8000/08) found that a significant factor will be whether or not the adult child has founded a family of his or her own. In this case the Appellants mother lives in the United Kingdom and the Appellant in Kenya where he married and had children of his own and clearly formed an independent family unit.

10. There is however no limitation on when a period of dependency can arise and any assessment under Article 8 (1) is fact sensitive. On the facts of this case the Appellant's mother was living independently in the United Kingdom and he was living independently in Kenya. There was no evidence they continued to live together in a close-knit family relationship in the same household and enjoying each other's company on a daily basis. There is no evidence of financial dependency but it is now alleged that a need for practical and emotional support and guidance has arisen as the mother is now dependent upon the Appellant as her only child present in her home.

11. The Secretary of State's response in the refusal is that the Appellants presence is not required as other support services are available. It must be remembered that the key finding of the Judge is that the Appellant has not discharged the burden of proof upon him to the required standard to show that Article 8 was engaged. To assess whether this is the case it is necessary to follow the guidance provided in the case of Razgar [2004] UKHL 27, at paragraph 17, which poses five questions which are:
(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or (as the case may be) family life?
(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
(3) If so, is such interference in accordance with the law?
(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well- being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

12. It is said that the dependency that exists is such as to create ties between the Appellant and his mother based upon the need to meet her individual needs. If it is arguable that such needs can be met

elsewhere any interference with a right to respect for family private life will not result in consequences of such gravity as potentially to engage the operation of Article 8.

13. I accept that even if it was not proved that family life exists, the relationship between the Appellant and his mother will form part of his private life and so in any event the second of the Razgar questions needs to be considered. In relation to his private life, the private life he previously enjoyed with his mother was by way of indirect contact and visits. There is no evidence that could not continue in the future. In relation to the family life aspects there is no copy of any official needs assessment relating to the Appellant's mother identifying a need that requires his presence in the United Kingdom or that cannot be met by the NHS or other statutory services. There is a statement in letters that Social Services have been called to the property and have indicated that only limited assistance may be available but this is not supported by any official reply or formal assessment. If, as is now claimed, the Appellant's mother has been diagnosed as suffering from dementia it may be that what she requires is assistance and care in a residential home environment in any event.

14. The Appellant's mother is a British citizen and as such as a right to receive support and assistance from the NHS and Social Services. There was insufficient evidence before the Judge to support the claim that such services are not available or that his mother's needs will not be met. She clearly has the support and assistance of her GP. Whilst it may be thought to be preferable for a family member to provide such care and that to deny the Appellant the ability to do so will place an additional burden upon already stretched resources of the health professionals in the United Kingdom that is a matter for the Secretary of State. As it is not been proved that appropriate resources are not available to meet the Appellant's mother's needs, the finding the Appellant has not discharged the burden of proof upon him to the required standard to show that he can satisfy the second of the Razgar questions to prove that Article 8 is engaged is a finding within the range of those the Judge was entitled to make on the evidence.

15. Even, in the alternative, if it was found that the issue was one of proportionality the availability of care and support in the United Kingdom and the fact the Appellant entered as a family visitor with no legitimate expectation that he will been entitled to remain, adds considerable weight to the Secretary of State's position that the decision is proportionate in any event. On the basis of the material the Judge was asked to consider it has not been arguably made out that the decision will result in compelling circumstances giving rise to unjustifiably harsh consequences for the Applicant or any family member, such as to establish an arguable case at this time. The evidence does not establish that the effect of loosing the Applicant as a carer will result in such adverse consequences or that alternative

sources of care are not available to meet the Applicant's mothers needs, if required.

16. I find no error of law material to decision to dismiss the appeal established on the evidence.

Decision

17. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order as there is no application for anonymity which is not justified on the facts of this appeal in any event.

Signed…….
Upper Tribunal Judge Hanson

Dated the 11 April 2014