Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06196/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th November 2017	**On 23rd November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CLOYD VALENTINO ULANGCA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Ms F Beach, Counsel instructed by Selvarajah & Co, Solicitors

DECISION AND REASONS

1. Although the Appellant is the Secretary of State I refer to the parties as they were in the First-tier Tribunal.

2. The Appellant, a Filipino national, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 15th September 2015 to refuse his application for leave to remain on the basis of his private and family life in the UK. In a decision promulgated on 13th February 2017 First-tier Tribunal Judge M R Oliver allowed the Appellant's appeal. The Secretary of State appeals to this Tribunal with permission granted by First-tier Tribunal Judge McGinty on 16th August 2017.

3. The background to this appeal is that the Appellant entered the UK on 10th March 2008 with a student visa valid until 31st August 2009. His further application for leave to remain as a student was granted until 30th July 2012. He made an application for a Tier 1 (Entrepreneur) application which was withdrawn in June 2013 and on 13th January 2013 he made an application for leave to remain outside the Immigration Rules which was refused on 12th June 2013 with no right of appeal. In July 2013 and March 2014 he made applications for a residence card under the Immigration (EEA) Regulations. These applications were refused in February and May 2014. On 21st July 2015 he made an application for leave to remain on the grounds of private and family life. The basis of that application was that the Appellant was a carer for Mrs Benjamin. The Secretary of State refused that application on 15th September 2015. At the time of the appeal in the First-tier Tribunal the Appellant's situation had changed Mrs Benjamin had died on 26th June 2016. The Appellant's case was that after Mrs Benjamin's death he undertook caring duties for Mrs Benjamin's brother, Mr Garfield, and his wife. The First-tier Tribunal Judge decided that the Appellant could not meet the requirements of paragraph 276ADE of the Immigration Rules, however the judge considered the appeal in terms of Article 8 and allowed the appeal on human rights grounds.

4. In the Grounds of Appeal the Secretary of State contended that the judge erred in law in failing to properly assess Article 8 in that he failed to follow the steps set out in **R v SSHD ex parte Razgar [2004] UKHL 27**. It is contended that the judge failed to make any findings in relation to the nature, if any, of the Appellant's private life in the UK. It is further contended that the judge failed to adequately consider the state's responsibility to provide care to the Garfields. It is contended that the judge failed to adequately consider and weigh the fact that the Appellant is an overstayer and failed to adequately consider public interest. It is therefore contended that the judge's consideration of the proportionality element of the Article 8 assessment is lacking.

5. In granting permission to appeal First-tier Tribunal Judge McGinty considered it arguable that the First-tier Tribunal Judge has materially erred in his approach to Article 8 and has failed to follow the five stage approach set out in **Razgar**. It is further considered arguable as a **Robinson** obvious point that the judge had not adequately explained how there can be family life between the Appellant and Mr and Mrs Garfield. It was also considered arguable that the judge had not considered Section 117A to D of the Nationality, Immigration and Asylum Act 2002.

6. At the time of the hearing before me the circumstances had further changed in that Mr Garfield died in January 2017.

7. In his submissions Mr Bramble contended that the judge's consideration of Article 8 in paragraph 12 of the decision is insufficient. He submitted that the focus in the assessment was upon the Garfield family rather than upon the Appellant and that the judge had undertaken no analysis of the relationship between the Appellant and the person he is caring for. He submitted that the judge had failed to assess the impact on the public purse and failed to assess whether the family could pay for any care required. He submitted that the judge's findings at paragraph 9 show that, as the Appellant is being paid less than agency care, he provides cheap labour in comparison. In his submission the judge had engaged in speculation as to the cost to the public purse of providing alternative care to the Garfields. In his submission the judge had not set out all of the competing factors at paragraph 12.

8. In her submissions Ms Beach relied on the Rule 24 response. She submitted that the judge set out the evidence before him at paragraphs 8, 9 and 10 and it was clear from the analysis there and at paragraph 12 that the judge was aware that the Appellant's status had been initially precarious and latterly unlawful. It was clear that the judge had this in mind in his assessment. She referred to the evidence before the judge as to the relationship between the Appellant and the family and submitted that the evidence showed that this was more than an employment relationship as the Appellant is viewed as a member of the family. She submitted that the Appellant had therefore established some form of private life in the UK. She submitted that the judge had taken into account the evidence in relation to Mrs Garfield and her difficulties in coping with caring for her husband. In terms of the evidence of the cost to the public purse Ms Beach referred to the Appellant's bundle where at page 146 there is a reference to the Garfields' savings being over the threshold but that they would run out as care is very expensive. She referred to page 123 of the Appellant's bundle where there is a statement from Mr and Mrs Garfield's three children which states that it would not be financially viable to employ a full-time agency carer due to the enormous agency costs which would not be sustainable. In terms of the Appellant's pay she referred to page 22 (the application for leave to remain) which showed that the Appellant was being paid £1,700 per month as well as being provided with rent-free accommodation at the employers' house.

Error of Law

9. As acknowledged by both parties the judge's assessment of Article 8 is contained in paragraph 12 of the decision. The judge's conclusion that the Appellant cannot bring himself within paragraph 276ADE of the Rules as he has skills which he can utilise upon return to his family and he has not lost ties with the Philippines was not disputed. The judge did take into account that the Appellant's immigration status "has been at best precarious, but recently unlawful". The judge went on to consider the appeal outside of the Rules because "the circumstances of the care arrangements are such that the sheer practicality of the comparative arrangements warrants consideration of article 8 outside the rules".

10. The judge's proportionality assessment is carried out in the following passage in paragraph 12:-

> "Although the Appellant's immigration history deserves no reward, the public interest in upholding the importance of fair but firm immigration control has to be balanced against the very significant saving to the public purse in keeping Mrs Garfield well enough to remain at home and to avoid the high cost to the public purse in providing care to both her and Mr Garfield, especially at this time when resources are critically stretched. In coming to the judgement that the Appellant's removal would in these circumstances be disproportionate I have taken into consideration the quality of the care as well as its quantity and that it is provided to 2 British citizens who have, I assume, lived not only long but also uncriticised lives, paying taxes and observing their civic duties".

11. It is apparent to me from reading this assessment that a very significant factor tipping the balance in favour of the Appellant in this case is the "very significant saving to the public purse" in keeping the Garfields at home. However, Ms Beach was unable to direct me to any direct evidence in relation to the Garfields' finances. In fact the evidence before the First-tier Tribunal Judge indicated that the Garfields had resources which would provide for care for a certain period of time and that the Garfields' savings were above the threshold for benefits, though would go below that threshold over "the next couple of years", although the Garfields' daughter said at that time she did not know the exact amount of their savings (Social Services' assessment of August 2016 at page 146 of the Appellant's bundle before the First-tier Tribunal). On the basis of the evidence before the judge therefore, there was no basis on which to conclude that there would be a "high cost to the public purse" in providing care to the Garfields. In fact, the evidence indicated that the couple did have resources which may well pay for care in the absence of the Appellant. In these circumstances the judge made a finding at paragraph 12 which was simply not based on the evidence before him.

12. It is clear from reading paragraph 12 that this was the primary factor tipping the balance in favour of the Appellant. In these circumstances the assessment at paragraph 12 has no basis in the evidence and cannot stand. Accordingly, in my view the judge's decision contains a material error of law and I set it aside.

Remaking the Decision

13. In advance of the hearing the Appellant had submitted an Upper Tribunal bundle containing the documents already before the First-tier Tribunal and updated statements and evidence. I take this into account in remaking the decision. I also heard oral evidence from the Appellant and from two witnesses, Mrs Garfield's daughter, Jenny Lazarus, and her niece, Paulette Jaffe. Each witness confirmed their statements contained in the Appellant's bundle.

14. In his oral evidence the Appellant said that he is paid £400 a week by Mrs Garfield for looking after her and he said that he had not returned to the Philippines since coming to the UK in 2008. In cross-examination the Appellant said that he is the only one who looks after Mrs Garfield, he is the main carer. He has breaks during the day

if she is sleeping or watching television. He also helps out with Mrs Garfield's son who has Multiple Sclerosis and lives about five minutes walk away. I asked the Appellant if he works seven days a week and he said that he works five days a week and that the other two days Mrs Garfield's daughters visit her or she is at their house. He confirmed that he has no other connections in the local community or in the UK apart from the Garfield family.

15. In her oral evidence Mrs Lazarus said that since her father's death her mother has suffered from anxiety, depression and is lonely, unsettled and struggling. She described her relationship with the Appellant as "lovely". She described him as being like a son and said that she has known him for eight or nine years and that he is a wonderful companion for her as well as her carer. In cross-examination she said that the Appellant helps out with her brother if his family is away or if he is having difficulties, but he said that this is not very often as they live very close by and he sometimes helps out for a short period. She said that her mother needs someone to be there in the night-time in case she gets up and in the morning she needs someone to encourage her to get out of bed. She needs someone to prepare her meals and medication and help with her shopping. When asked if Social Services had been involved since the death of her father Mrs Lazarus said that they had replaced her mother's bathchair. She said that the Appellant had been with her aunt and uncle for seven or eight years and that her parents were very close to them and would have seen the Appellant often in their company.

16. In her oral evidence Ms Jaffe described the relationship between the Appellant and Mrs Garfield as being very close. She said that since Mr Garfield died Mrs Garfield has become more dependent on the Appellant. She described him as "an angel" and says that he goes far beyond what is expected of him. She said that he had worked for her mother for seven years and had been like a son to her parents.

My Findings

17. There was no submission that the Appellant meets requirements of Appendix FM or paragraph 276ADE of the Immigration Rules or any other provisions of the Rules. In these circumstances I go on to consider the appeal under Article 8.

18. I follow the steps set out in the case of **Razgar**. The first issue is whether the Appellant has established private or family life in the UK. Mr Bramble accepted that the Appellant has developed private life as he has been in the UK since 2008. In his view any private life established is narrow and limited as the Appellant has at this point been a carer for the Garfield family since July 2016 and only for Mrs Garfield since the death of Mr Garfield in January 2017. Ms Beach submitted that there is a qualifying family relationship between the Appellant and the wider Garfield family members and that he has developed a real relationship with all of them. She did not submit that he had established family life with them. The Appellant is an adult who is paid to look after Mrs Garfield, having previously looked after her husband and

before that his sister. The relationship is essentially one of employee and employer. The evidence does not establish that this relationship amounts to family life.

19. I accept on the basis of the evidence that the Appellant has developed a private life in the United Kingdom. Given that he has not developed any connections in the UK outside of the Garfield family, his private life is one based on his ties with that family only. In considering the nature and extent of the private life I note that he has been living with Mrs Garfield since July 2016. I take into account the nature of the duties undertaken by the Appellant for Mrs Garfield as set out in Mrs Lazarus's statement and in their oral evidence. I accept that the Appellant prepares meals, administers medication, takes her out for walks, takes her to the doctor, helps her with bathing and general household duties and with shopping and that he encourages her to get up in the mornings. I accept that he is a companion for her. The Appellant appears to have a good relationship with the wider family members. I accept that he has developed a private life on this basis.

20. If he were to be removed from the UK I accept that his removal would interfere with the private life he has developed with the family members and with the private life of those family members. As accepted by Ms Beach the decision is in accordance with the law in that the Appellant cannot meet the requirements of the Immigration Rules.

21. The issue therefore is whether the decision to refuse the Appellant's application for leave to remain is justified, necessary and proportionate. I take account of paragraph 117B of the Nationality, Immigration and Asylum Act 2002. The Appellant gave oral evidence to me in English and I accept that he speaks English. The Appellant is financially independent because of his employment with Mrs Garfield. The Appellant's private life with Mrs Garfield's in-laws and extended family began at a time when he had limited leave and therefore his immigration status was precarious. Mr Bramble submitted that the Appellant has had no leave to remain since 12th June 2013. It may well be from his immigration history that he has had no leave to remain since July 2012 as I note that, despite making applications, he was not granted any leave to remain after that date. In any event he has had no leave to remain since at the latest June 2013, therefore his private life with Mr and Mrs Garfield was established while he was in the UK unlawfully. I accept that little weight does not mean no weight but I attach little weight to the Appellant's private life in light of his precarious then unlawful status.

22. I take into account the evidence in relation to Mrs Garfield. I note the letter from her GP of 26th October 2017 where the GP says "I have been asked by the family to write a short summary of her medical history which necessitates a carer full time". The GP said that he wholeheartedly supported the carer remaining in place and said it would be "extremely unhelpful for her to have to find another carer". The GP details Mrs Garfield's history of type 2 diabetes, degenerative changes in her lower back and a pacemaker having been fitted for an AV heart block. He also says that she suffers with significant anxiety and is under the care of a psychiatrist. He says that a carer is required and that he wholeheartedly supports the continuation that it continues. I

also take into account the report from the Consultant Psychiatrist, the Medical Director of the Priory Hospital in North London, dated 24th October 2017 which states that Mrs Garfield has been his patient since July 2016 and has a history of depression and anxiety which started in 2012. It also says that she has severe arthritis and can be in a lot of pain and her mobility is severely limited. She was admitted to The Priory Hospital with severe depressive illness in July 2016 and is taking anti-depressant medication. The psychiatrist refers to the fact that the Appellant is a full-time live-in carer and says:-

> "If Mr Ulancga were not there to look after Mrs Garfield, her health would deteriorate, she would become more depressed, more anxious and she would require hospital admission. The care that Mrs Garfield gets from Mr Ulancga contains her depression and keeps her out of hospital".

23. I take into account the Appellant's evidence as set out in a statement that he is a companion for Mrs Garfield and that she benefits from his presence. I take into account the evidence about the health difficulties of Mrs Garfield's son and the fact that her two daughters "both visit their mother occasionally" (paragraph 10 of the Appellant's statement). I take into account also the letter from Mrs Garfield herself dated 17th October 2017. She says that she is 80 years old and talks about her health problems and the medication she takes. She talks about her depression and the fact that the Appellant has been a big help to her and that she is close to him. She describes how he helped her after the death of her husband. She sets out his duties. She too says that if were not for the Appellant her health would have deteriorated and in particular her depression. It is clear from this evidence that Mrs Garfield benefits from a companion and carer. However there is nothing in the evidence to indicate that this care cannot be provided by someone else.

24. On the basis of the evidence before me I do not accept that Mrs Garfield would be reliant upon the state for support in the absence of the Appellant. There is no evidence before me as to her funds. There is no evidence to indicate that she could not arrange for alternative care on a private basis, perhaps by employing another live-in carer or coming to some other arrangement. It appears from the Appellant's own evidence that there are times when Mrs Garfield does not need care; when she is watching television or when she is sleeping, and it is clear that he has time off at times during the day. I also note that he does not work at weekends when care is provided by Mrs Garfield's daughters. Whilst Mrs Garfield has formed a bond with the Appellant she could replace the care he provides and could develop a bond with another carer employed on a similar basis.

25. Whilst it appears that Mrs Garfield has funds to employ another carer, it appears that there have been no further applications for assistance from Social Services. Accordingly it is not clear what, if any, care might be provided for Mrs Garfield having carried out a proper and full assessment of her current needs. Whilst the family may prefer that Mrs Garfield has a live-in carer, it may well be that such care is not considered strictly necessary by Social Services. Further, it appears that the report from the GP supporting the care provided at the moment to Mrs Garfield does

not in terms say that she needs a full-time carer. In any event, the GP says that it would be "extremely unhelpful" for her to have to find another carer. This does not mean that it cannot be done or that she would not benefit from another carer.

26. I must also take into account that it must have been known to Mrs Garfield and her family at the time that the Appellant became the carer for the family that he did not have leave to remain in the UK. This is a factor they should have taken into account in coming to the current arrangement as should the Appellant. I also take account of the letter from the Psychiatrist and note the opinion that if the Appellant were not there to look after Mrs Garfield her health would deteriorate. However, there is no opinion that this care must be provided only by the Appellant rather than another carer, whether full-time or otherwise, and the Psychiatrist undertook no analysis as to whether the care provided by the Appellant could be provided by someone else.

27. Therefore in weighing the public interest of the maintenance of immigration control in circumstances where the Appellant has been here unlawfully whilst developing the caring relationship with Mrs Garfield, and taking into account the fact that the care could be provided from other sources, whether privately or through Social Services or a combination of both, in my view it is clear that public interest is not outweighed by the impact of the Appellant's departure upon Mrs Garfield and the wider Garfield family.

28. Whilst the Appellant has developed friendships with the other Garfield family members, there is no reason why these friendships and connections could not be continued even if he leaves the UK.

29. In conclusion, in remaking the decision I have considered the Appellant's private life under Article 8 and I conclude that the decision to refuse the application is proportionate to the Appellant's private life.

Notice of Decision

30. The decision of the First-tier Tribunal contained a material error of law and I set it aside.

31. I remake the decision by dismissing the appeal on human rights grounds.

32. No anonymity direction is made.

Signed Date: 22nd November 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 22nd November 2017

Deputy Upper Tribunal Judge Grimes