Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07409/2018
HU/08423/2018

THE IMMIGRATION ACTS

Heard at UT (IAC) Cardiff CJC	**Decision & Reasons Promulgated**
On 7 March 2019	**On 21 March 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SAREL [M]
MARIA [M]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr E Da Silva, Fountain Solicitors
For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of South Africa born in 1935 and 1934 respectively. They are husband and wife. They arrived in the UK on 17 October 2016 with entry clearance as visitors valid until 15 April 2017. On 20 April 2017 they applied for leave to remain “outside the Rules because of compelling compassionate circumstances” stating that both are elderly persons with chronic illnesses who would have no family care and support

© CROWN COPYRIGHT 2019

available to them in South Africa and their rental property, having been demolished, would no longer be available to them. It was requested that regard be had to their relationship with the first appellant's daughter and son-in-law, with whom they have a strong and close relationship.

2. In a decision made on 14 March 2018 the respondent refused their claim. They appealed. In a decision sent on 20 September 2018 Judge Solly of the First-tier Tribunal (FTT) dismissed their appeals.

3. The grounds of appeal were twofold. The first alleged that the judge had erred by failing to perform a proper assessment of the family life rights of the appellants, confining her assessment to the care situation in South Africa and the appellants' immigration status and failing to weigh in the balance the couple's relationship with the daughter and son-in-law and the grandson and great-grandson. As part of the grounds it was argued that the judge acted in a procedurally unfair manner by virtue of making a finding that the couple's ties with family members in the UK did not constitute family life within the meaning of Article 8(1) ECHR, even though it had been agreed between the parties that the only issue was proportionality. It was noted that the judge did not invite submissions on the **Razgar** questions 1 and 2.

4. The appellants' second ground contended that the judge erred by failing to take into account the best interests of the child, namely the great-grandchild, L, and whether his emotional needs were being met.

5. I had helpful submissions from Da Silva and Mr Howells.

6. It will assist to set out at this stage what the judge said at paragraphs 38 – 39.

> "38. I have not however looked at this appeal simply on the basis of the issues of care. I accept that being in the UK has enabled the appellants to develop a closer relationship with their great grandson and grandson as well as the Huxtables. They are presumably also near the other family members referred to in the visa application.
>
> 39. Nevertheless, in **S v UK** [1984] 40 DR 196 Sedley LJ made it clear that 'Neither blood ties nor the concern and affection that ordinarily go with them are, by themselves altogether, in my judgment enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we have a family life with them in any sense capable of coming within the meaning and purpose of Article 8'. In **Kugathas v SSHD** (2003) INLR 170 the CA said that, in order to establish family life, it is necessary to show that here is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough."

7. Having set out these paragraphs it is convenient to deal first of all with the allegation of procedural unfairness. It is also pertinent to set out what the judge set out at paragraphs 29 and paragraphs 35 and 38:

> "29. The first three steps of **Razgar** are satisfied in this case and I therefore turn to the last two and in particular to the issue of proportionality. I bear in mind that the appellants do not satisfy the immigration rules. The statutory presumption is that the maintenance of effective immigration controls is in the public interest. This is an issue of weight to be applied in against them in the issue of proportionality.
>
> …
>
> 35. What is put to me is that they are an elderly couple with a number of chronic illnesses reliant on the care and support of their family members in the UK. It is said that such family members support would not be available to them in South Africa. I have looked at this carefully in the light of all of the evidence before me. There is no medical evidence that the 1st appellant requires care from others and I find he does not. The 2nd appellant does require care and/or supervision. Mr Huxtable said that he would sell the UK house and move to South Africa to care for the appellants and if he did so, care and accommodation would be available. I bear in mind the recent news that the South African daughter is shortly to lose her job which may mean that she will be at home and available to provide some caring responsibilities however the other option is to purchase care. In this respect the appellants are in no different position now to what they would have been in had they remained in South Africa. I accept that family provided care will be less expensive than purchased care however it is clear from the evidence that purchased care is certainly available in South Africa from the evidence produced by the appellant. I find that a combination of family and purchased care is available in South Africa.
>
> …
>
> 38. I have not however looked at this appeal simply on the basis of the issue of care. I accept that being in the UK has enabled the appellants to develop a closer relationship with their great grandson and grandson as well as the Huxtables. They are presumably also near the other family members referred to in the visa application."

8. I am not persuaded that there is an inconsistency in the judge's treatment of the issue of family life. The grounds are wrong to say that the judge went "back on herself" in addressing the issues of family life (and seemingly not accepting family life) when the parties had agreed at the hearing that the only issue was proportionality.

9. The fact that the judge stated at paragraph 29 that the "(the first three steps of **Razgar** are satisfied in this case" was strictly correct because, whilst seemingly not accepting that the appellants had family life ties with their relatives in the UK, she clearly accepted that their right to respect to private life was engaged by the circumstances of the case. The

respondent's decision letter had also taken a similar view as to the basis in which Article 8 (1) was engaged, namely private life.

10. Mr Howells stated that the HOPO's note contains no reference to any agreement. However, even assuming the agreement between the parties at the hearing was that the proportionality assessment encompassed family as well as private life, I do not consider that the judge fell into material error. First of all, the appellants were clearly able at the hearing to give evidence regarding the strength of their family ties in the UK (the first appellant and the son-in-law gave evidence) and their representative clearly made submissions highlighting the strength of these ties; see e.g. paragraph 35.

11. Secondly even though seemingly not prepared to treat their ties with family in the UK as family life ties within the meaning of Article 8(1), the judge clearly did consider these ties as relevant to their private life circumstances. (I accept that paragraph 39 is unclear, although the fact that it begins with the word "Nevertheless" does tend to suggest the judge was rejecting family life). At paragraph 38 she expressly stated that she was not confining the appeal "simply [to] the case of care" and acknowledged that "being in the UK had enabled the appellants to develop a closer relationship with their great-grandson and grandson as well as the Huxtables". At paragraph 41 she referred to "a family life and private life established during such time". Clearly when deciding what weight to accord to such ties the judge was obliged by S117B(5) of the NIAA 2002 so far as private life was concerned to attach "little weight" because of their precarious immigration status, but such an assessment was also open to her in respect of these ties even if considered in terms of family life: see **Rajaedran** [2016] UKUT138 (IAC).

12. Thirdly, the grounds fail to make my challenge to the judge's findings at paragraph 39 that the appellant's ties did not constitute family lie ties and at best imply a disagreement with those findings.

13. Reverting to the principal basis of challenge raised in the first ground, I disagree with its contention that the judge unduly limited her proportionality assessment to the issues of care and precariousness of immigration status. As noted already at paragraph 38, she also considered the appellants' relationship with the great-grandson, the grandson and the Huxtables. Alongside a holistic assessment of the appellants' circumstances in the UK was a very detailed assessment of the couple's circumstances in South Africa, concluding at paragraph 35 that

> "35. What is put to me is that they are an elderly couple with a number of chronic illnesses reliant on the care and support of their family members in the UK. It is said that such family members support would not be available to them in South Africa. I have looked at this carefully in the light of all of the evidence before me. There is no medical evidence that the 1st appellant requires care from others and I find he does not. The 2nd appellant does require care and/or supervision. Mr Huxtable said that he would sell the UK

> house and move to South Africa to care for the appellants and if he did so, care and accommodation would be available. I bear in mind the recent news that the South African daughter is shortly to lose her job which may mean that she will be at home and available to provide some caring responsibilities however the other option is to purchase care. In this respect the appellants re in no different position now to what they would have been in had they remained in South Africa. I accept that family provided care will be less expensive than purchased care however it is clear from the evidence that purchased care is certainly available in South Africa from the evidence produced by the appellant. I find that a combination of family and purchased care is available in South Africa."

14. I would add that the grounds nowhere raise any challenge to the findings regarding the couple's care needs and how they would be met.

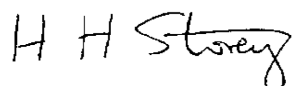
15. As regards the appellants' second ground, it is true that the judge did not conduct a best interest of the child assessment of the child. However, the appellants' ties with L had not even been raised in the appellants' application for leave made in April 2017 and were not raised specifically in the grounds of appeal. It appears that the appellants' representatives barely touched on this question. Further, there was no evidence produced whatsoever to suggest that L was not receiving full parental care from his father and mother. The appellants had not been admitted to the UK as adult dependent relatives and came purely as visitors. On the judge's finding they had no legitimate expectation that they could remain in order to deepen, in contravention of immigration law, ties with their great-grandson. I reject this ground unhesitatingly.

16. For the above reasons I conclude that the judge's decision is not vitiated by material error of leave and accordingly it must stand.

17. Having read the file I would observe that I do not see this as a case in which the fact that the appellants have attempted to stay by way of a human rights appeal should count against them, if in future they are able to show they meet the dependent relatives rule in the context of an application for entry clearance. But clearly they are not able to meet that rule's requirements presently.

No anonymity direction is made.

Signed Date: 14 March 2019



Dr H H Storey
Judge of the Upper Tribunal