Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13484/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 January 2018 & 12 March 2019	**On 01 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DONALD ADOLPHUS GABBIDON
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms N Willock-Briscoe & Ms J Isherwood (Home Office Specialist Appeals Team)
For the Respondent: Ms L Appiah & Ms E Lanlehin (for JF Law Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 25 October 2017 to allow the appeal of Donald Adolphus Gabbidon, a citizen of Jamaica born 7 August 1951, itself brought against the decision of the Secretary of State of 13 May 2016 to refuse his human rights claim.

Introduction

2. Mr Gabbidon entered the country on a one month visitor visa on 21 December 2000, and made an application on private and family life grounds on 7 July 2012. That was refused on 9 August 2013, without a right of appeal; he requested reconsideration on 12 November 2013. On 10 March 2015 he was notified of his status as an overstayer and served with liability to removal on 8 March 2016.

3. Mr Gabbidon's application of 5 May 2016 was based on his relationship with his natural children Worezero Naomi, Donald and Miguel, and his stepchildren, and their grandchildren, who all lived in this country. He claimed that whereas in the UK the support they provided was central to meeting his care needs, he would have no family members to support him in Jamaica, any relatives having moved to the US, Canada and the UK, and lacking any other community ties; he had no accommodation there; he was prone to falls and needed supervision when using the toilet at night. He suffered from facial disfigurement and only his grandchildren's encouragement prevented him from remaining locked in his room. His daughter was his main carer. His grandson read the newspaper to him regularly.

4. The application was refused, on the basis that he was not suitable for the private life route having failed to pay outstanding NHS charges, and as it was not accepted that he had no extended family members or friends in Jamaica, albeit that it was accepted his close family were in this country. His family here would be able to accompany him to Jamaica to help him settle in and organise any necessary care arrangements. There were stroke rehabilitation and care units in Jamaica according to a MedCOI response of January 2013 referring to the Hyacinth Lightbourne Memorial Association and the University Hospital of the West Indies, and the Rehabilitation Institute of the Caribbean. He was not facing imminent death without medical care given his condition in the aftermath of his stroke was neither terminal nor life-threatening.

Findings of the First-tier Tribunal

5. The First-tier Tribunal noted Mr Gabbidon had a very poor immigration history, entering the UK around fifteen years ago as a visitor and then overstaying. It was accepted his claim could not succeed under the Immigration Rules.

6. The critical feature of his case was his medical condition. He had suffered a stroke. The First-tier Tribunal observed him in evidence, and evaluated his presentation in the light of the written reports closely, noting that he had a mental as well as a physical condition. He was paralysed down his right side and could not lift his right arm; he had a slight tick and found speech occasionally difficult. Overall his presentation, in the light of the other material, was generally not something which could not reasonably be thought contrived. Lewisham Social Services and his GP considered he had suffered mental

damage which had not recovered as well as his physical health; it was self-evident that his recovery from his stroke was not complete, because even some three years on he still suffered from significant physical disabilities. It was important to note that emotional intelligence would be particularly important in his declining years, even more so than reasoning intelligence.

7. The evidence from his children was that there was no family to support him in Jamaica, and any care home that they could afford would not be of a reasonable standard. He required one-to-one support for his health. Applying the staged approach identified in *Razgar*, he had established family life given his dependency on his children and his relationships with them and his grandchildren. It was disproportionate to remove him from this family, and from his friends. The public policy issues formed by the legitimate aim of maintaining the rule of law and the UK's economic interests were outweighed by these considerations.

Onwards appeal, including the "error of law" hearing

8. The Secretary of State appealed on the basis that the Respondent's claim would not have passed the Article 3 threshold and in those circumstances the First-tier Tribunal had erred in law in failing to demonstrate any aspect of the Appellant's claim which showed some separate or additional factual element, via the capacity to form and enjoy relationships, that brought it within the Article 8 paradigm. There was no evidence before the First-tier Tribunal that appropriate medical treatment could not be accessed in Jamaica, and the Tribunal had not made findings on the Appellant's degree of dependency on his family in the UK (and thus had not properly equipped itself to determine whether there was additional emotional dependency beyond the norm, as required by *Kugathas*), or upon the level of care required.

9. The First-tier Tribunal granted permission to appeal generally, specifically opining that the decision was seemingly at odds with *GS (India)*.

10. Ms Willock-Briscoe submitted that there was no reasoned engagement with the section 117B factors nor with the adult dependent relative route as an appropriate benchmark against which to measure proportionality. Furthermore the evidence upon which the First-tier Tribunal based its conclusions was not set out. As set out in *MM (Zimbabwe)* [2017] EWCA Civ 797, it was essential to clearly indicate what element of private and family life was relied on to differentiate a case with a health dimension from the normal Article 3 ECHR paradigm which recognised only imminent death without palliative care as sufficient. She also filed a 152A Notice requesting that, were an error of law to be established, that any reconsideration of the case take account of a caution for mistreating a child in April 2014 be taken into account.

11. For Mr Gabbidon, Ms Appiah conducted a close analysis of the evidence and argued that all relevant factors had been clearly identified by the judge, and

that his failure to engage with section 117B was a minor failing that was not material.

Findings and reasons – Error of law hearing

12. The essential finding of the First-tier Tribunal in this appeal was that the Respondent enjoyed close family life with those of his children who were directly involved with meeting his extensive care needs. It would not require very significant interpolation into the Tribunal's reasoning to read the decision as amounting to a conclusion that the removal of a person with significant care needs, presently provided by their immediate family and with no close relatives abroad who could replace that regime, is disproportionate. Such a conclusion might well be unexceptionable. However it needs to be reached via a structured consideration that has regard to the legal framework endorsed by Parliament. The question this appeal raises is whether it received sufficient consideration by the First-tier Tribunal.

13. The Secretary of State attacked the favourable finding on family life. The decision of the Strasbourg Court in *Advic v UK* (1995) 20 EHRR CD 125 is sometimes cited for the proposition that the normal emotional ties between a parent and an adult son or daughter will not, without more, suffice to constitute family life: *Kugathas* [2003] EWCA Civ 31. Buxton LJ emphasised in *MT (Zimbabwe)* [2007] EWCA Civ 455 at [11] that *Advic*, "whilst stressing the need for an element of dependency over and above the normal between that of a parent or parent figure and adult child, also stresses that everything depends on the circumstances of each case". The Upper Tribunal President wrote in *Lama* [2017] UKUT 16 (IAC) §32 that "at its heart, family life denotes real or committed personal support between or among the persons concerned."

14. Health problems may of course be highly relevant to the degree of dependency a migrant has upon their family here. As noted by Underhill LJ in *GS India* [2015] EWCA Civ 40 §111, "where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the "no obligation to treat" principle." Alongside him, Laws LJ wrote §86: "If the Article 3 claim fails … Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm."

15. A mixed family and private life claim, as where a parent is heavily dependent on their adult children for emotional as well as physical support, *might* satisfy that threshold: as was noted in *MM (Zimbabwe)* [2012] EWCA Civ 279 at [23], where "the appellant ha[s] established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, [may] together establish 'private life' under

Article 8 … Such a finding would not offend the principle … that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

16. It seems to me that the First-tier Tribunal effectively applied these considerations, albeit it did not cite the relevant authorities; its reference of *Huang* shows that it was aware of the proposition that extended life outside the family unit for some individuals can seriously inhibit their personal development.

17. However, the other grounds of appeal have rather more traction. This was an appeal considered outside the scope of the Immigration Rules. As stated by Lord Carnwath and Lady Hale in *MM (Lebanon)* [2017] UKSC 10 §66, it is now generally accepted that Article 8 considerations cannot be "fitted into a rigid template provided by the rules, so as in effect to exclude consideration by the tribunal of special cases outside the rules … this would be a negation of the evaluative exercise required in assessing the proportionality of a measure under article 8 of the Convention which excludes any 'hard-edged or bright-line rule to be applied to the generality of cases'".

18. However, the ability of a case to succeed outside the Rules' rigid template does not mean that there is not a certain minimum threshold to reach: hence the shorthand requirement for something "compelling", and it is necessary to follow through a structured assessment in order to come to a lawful conclusion to such effect. One notable feature of the decision below is the extreme brevity of the treatment of section 117B. The Upper Tribunal stated in *Forman* [2015] UKUT 412 (IAC) that:

> "In cases where the provisions of sections 117B-117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect."

19. In *Rhuppiah* [2016] EWCA Civ 803 §45, Sales LJ noted that "the starting point for consideration of the proper construction of Part 5A of the 2002 Act is that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with, and not in violation of, Article 8."

20. The key considerations identified by section 117B are language proficiency, precariousness of immigration status, and financial independence. It may well be the case that the Respondent has English as his first language, so that there was very little to be said on that score. However, there was significantly more to discuss vis-á-vis the precariousness of his immigration status, and his financial independence.

21. The Respondent entered the country as a visitor and then egregiously overstayed his leave. Clearly that counted against him. It would also appear that he had had significant recourse to Lewisham social services and to the NHS, and indeed had left NHS fees unpaid in the past. It was very unlikely that

he would ever work again. So the factors mandated by Parliament required careful treatment in order to determine whether there was a compelling case to overcome them based on the extent of the Respondent's private and family life ties in the UK. The correct approach in a health case, as shown by *Akhalu* [2013] UKUT 400 (IAC) addressing questions of Article 8, proportionality and health, is not to leave out of account the financial dimension of such a case: it is essential to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases.

22. I concluded, given the succinctness of the reasoning below, that there was no adequate assessment of the relevant public interest factors given the complexity of the factors in play.

23. Furthermore, there are of course Immigration Rules which address the circumstances of dependent relatives. An application made from abroad in the Respondent's circumstances would, had it been duly made under the Rules, have had to demonstrate that he required "long-term personal care to perform everyday tasks" due to "age, illness or disability"; and that such care must not be available "in the country where they are living" because it is not available in the sense that there is nobody who can reasonably be expected to provide it, or it is unaffordable. The latter aspects of that enquiry were dealt with very scantily here: it was unclear what healthcare would be available in Jamaica or indeed whether there were relatives there who might help the Respondent access it.

24. So though I accepted that the findings of the First-tier Tribunal as to there being extant family life were unassailable (indeed it appears that this was not contested below), I considered that more factual assessment of the alternative arrangements that might have been available in Jamaica was desirable. The strictures of the adult dependent relative route were a potential reference point in assessing the difference between the care arrangements in this country and abroad.

25. Those strictures are not insurmountable, but require objective assessment, as explained by Sir Terence Etherton MR in *Britcits* [2017] EWCA Civ 368 §59, who pointed out that it would be necessary to weigh the accessibility and geographical location of the provision of care and its standard, having regard to its emotional and psychological elements, verified by appropriate medical evidence.

26. I accordingly found that the decision of the First-tier Tribunal could not stand. As the fact-finding remaining was of relatively narrow compass though the legal issues were relatively complex, it was appropriate to retain the appeal in the Upper Tribunal.

Evidence at the Continuation hearing

27. It is now appropriate to set out the evidence that was previously before the First-tier Tribunal, and the additional evidence before me, in more detail. This included

    (a) A letter from Dr Batra, Mr Gabbidon's GP, confirming he had suffered a stroke on 30 April 2014, stating it would be difficult for Mr Gabbidon to look after himself without the help of his family.

    (b) A series of Care Act Overview Assessments from Lewisham Borough, from 2014 onwards. The first stated that he received long and short-term physical care support, at a critical eligibility level, due to his post-stroke right side weakness, poor mobility and balance, which left him prone to falls, such that he required the assistance of a formal carer, a role performed by his daughter Naomi, who assisted him with his personal hygiene and in maintaining a habitable environment where he could get around the home safely (a Link Line service had been established). It appeared he could cognitively and physically maintain his personal appearance independently, though he was not left at home for more than an hour. He had memory difficulties, and required prompting with medication; a January 2016 assessment stated that his physical health had been reported as having improved, and that he could now express himself better, though he sometimes struggled to find the right words; he could use the stairs in their block of flats, though he walked slowly indoors, remaining prone to falls due to a dropped right foot. He nevertheless continued to require a formal carer's help with washing because of his history of falls and his ongoing right side weakness, Naomi helping him with cooking, and reminding him to take his medication.

    (c) Various birth certificates, for the Appellant's grandchildren in the UK, and documents recording the registration and naturalisation of his children.

    (d) A joint letter, written by Romario, but signed by various of the Appellant's grandchildren stating that Mr Gabbidon had cared for them whilst their parents had worked following his original arrival in the UK, and that they had all subsequently been greatly saddened when they felt that their grandfather's state of health might threaten his life. Romario felt that his own schoolwork was affected by the worry he had about his sick and disabled grandfather facing return to Jamaica where they could not afford to visit him.

    (e) A letter of January 2019 explaining that attempts to obtain an independent social worker had foundered because of an inability to fund the report.

    (f) A Residents' checklist from the Home for the Aged, St Mary's District, Munro, St Elizabeth, bearing a handwritten note from one Roy Colmore Cuttleton stating that the starting point for fees was $40,000 monthly, with medical visits each costng $3,000; a letter from JF Law stated that this had

been obtained following a visit by the instructing solicitor whilst on holiday there.

28. The Appellant's witness statement set out that he had lived in the UK for over 15 years. He had nobody to support him in Jamaica. Here his children and grandchildren helped him; theywere all he had left in this world.

29. A witness statement from the Appellant's daughter Woizero Naomi Gabbidon states that she resided with the Appellant, and had been his main carer, since his stroke in 2014. Her teenage son, who saw the Appellant as a father figure, also helped her. She, her siblings and children all gave the Appellant emotional support. Her son stayed with him whenever Naomi was at college. They and their solicitor had sought a social work report but could not afford one. They had nobody to help care for their father in Jamaica and could not afford a nursing home. He needed help to take his medication as he was forgetful and confused, and his speech was not good; this would all be exacerbated if he had to live apart from his family members. He found medical treatment difficult, as he had a needle phobia, requiring individualised treatment from a nurse. He could not use a computer, email or a smart phone. The family here could not afford to pay for a care home in Jamaica, and even if they could, he could not survive there for long. They had many commitments in the UK; here together they could meet his needs. He spent a lot of time with his different relatives here, including her and her brother, in between the thrice daily care visits.

30. A witness statement from the Appellant's son Miguel Gabbidon was in similar terms. He feared for another recurrence of his father's original stroke. They took turns to visit him and take him to the barbers, and to lift his mood by playing dominoes. He believed his father's condition would deteriorate without his family to care for him.

31. Naomi Gabbidon gave evidence. She received income by way of child benefits for her two young children, income support and tax credit. She had three children, of whom two were dependent on her. She had around £20 spare income a month. Neither the costs of care in Jamaica nor travel costs could not be afforded from this figure.

32. Cross examined, she said that the quote obtained from the care home in Jamaica came from a person working there. She understood that her solicitor had obtained the figures. At this point, Ms Lanlehan intervened to say that she understood that the solicitor had visited Jamaica to obtain this information; the manuscript note had been written by the care home's employee with whom he spoke. It was put to Ms Gabbidon that $40,000 Jamaican dollars equated to £300-£400 monthly. She said that the family as a whole could not put up these sums of money; as it was they scraped together what they could in order to support the Appellant here. She had last been to Jamaica in 2013, with her friend Shyene Graham, and they stayed with a friend of Naomi there. It was put to her that her father would be wholly reliant on the State if he remained here;

she said that this was not necessarily the case, given that both she and the other family members would do everything they could to help him in any way possible.

33. Miguel Gabbidon gave evidence. He earned £21,000 annually. Their household contained seven people: him and his partner, and their five children. They would be willing to make any cuts in their budget that were necessary, but they had little spare income.

34. Mr Gabbidon gave evidence. He had three children. It was noted by his representative that one child was not present at the Tribunal; he said he did not know where that child was. Cross examined, he said that he could not say what family he had in America.

35. For the Secretary of State, Ms Isherwood submitted that this was not a case where emotional dependency exceeded the norm. The adult dependency relative Rule represented the appropriate benchmark against which the claim was assessed. Mr Gabbidon had obtained public funds to which he was not entitled. As stated in *Ribeli* §39, citing the earlier decision *Britcits*, those rules pursued an important public policy imperative. The family had blatantly defied the Immigration Rules and had accessed very significant NHS care for a lengthy period. The family members here could reasonably be expected to return to Jamaica abroad if they wanted to continue to care for him. The local authority's report showed he could walk down the stairs, and showed the level of cost he imposed on the public purse via his care plan, £151 weekly, more recently £181.80 weekly. There were tangible improvements in his health shown by the evidence, which had referred to dressing and eating independently.

Findings and reasons – Continuation hearing

36. It was readily apparent from the Appellant's oral evidence that he had serious problems with his memory and general cognition. I do not consider that that appearance could reasonably be feigned, and I join with the First-tier Tribunal Judge in observing that he was patently a person with serious difficulties in caring for himself and in understanding the questions he was asked. I would not make such a finding without a context of medical and other professional evidence to back it up, but I find that the GP's original letter relaying his presentation some time after the stroke, combined with the extensive care plan put in place by the local authority (and maintained overall multiple assessments) including thrice daily visits, is consistent with his presentation before me.

37. I consider that Mr Gabbidon's family gave honest evidence as to their circumstances. I was unimpressed by Ms Isherwood's submission that family life was not established here. The findings of the First-tier Tribunal accepting the existence of family life had not in fact been put in doubt at the error of law hearing. But in any event, if family life is not established where an elderly parent lives amongst their children and grandchildren for 18 years, and is

assessed by a local authority as requiring their daughter's care following a stroke, it is hard to imagine how it could ever be established. I accept that family life is in play here, given the dependency of Mr Gabbidon on those around him and the strong emotional feelings they plainly have upon him.

38. There is no reason to think that there is extended family living in Jamaica who would be motivated to provide the very significant care that he now needs, having lived abroad for the greater part of two decades. In any event, he has long been embedded in a care regime, in its fifth year of operation, in which his children and grandchildren play a very significant part. This includes not just the receipt of physical care but the provision of emotional and social support of a kind that it is impossible to see replicated outside the family unit.

39. Nor is there any reason to infer that the family has some undisclosed source of funds that could allow them to remit hundreds of pounds monthly to Jamaica. They are either living on benefits or reliant on earnings at the most precarious level. I do not consider they were evasive on this issue: indeed, Miguel was anxious to emphasise that they would do all they could to make ends meet if they had to make remittances abroad. It seems to me that he was doing so more out of pride than realism, given the lack of funds available.

40. Ms Isherwood set great store on the reasoning in *Ribeli*. There the Court of Appeal found that in a conventional adult dependent relative appeal, the assessment of the proportionality of any interference with private and family life must bear in mind the possibility that the Sponsor could relocate back to their country of origin to provide emotional and practical support to an aged relative. That would be a realistic alternative in many cases that might prevent the refusal of entry clearance being considered disproportionate.

41. But here there are multiple minor children embedded in the UK education system, some at a critical stage of their development. The notion that the different family members presently involved in Mr Gabbidon's care could realistically uproot their broader family units seems to me untenable. Immigration decision making must consider the best interests of children affected by a decision, a consideration reinforced by GEN.3.2(2) of Appendix FM requiring regard to whether a refusal "would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application."

42. Having regard to the statutory criteria identified by section 117B of the 2002 Act, I note the Appellant speaks English, though it is hard to imagine him integrating much outside the family unit given his mental and physical limitations. He has been a burden on public funds, though his family have done all they can to reduce the burden on social services by providing a significant input into his care. He is not housed at public expense, being accommodated by family members. His presence in the UK has long been

precarious, but the true reason rendering return to Jamaica unrealistic is the relatively recent misfortune of his stroke.

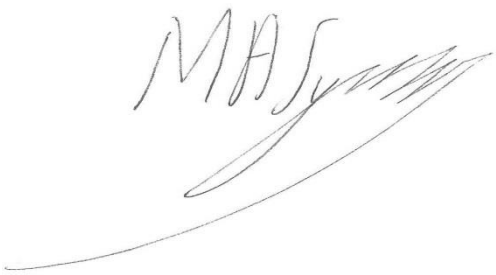
43. Were the Appellant to be returned to Jamaica, on balance of probabilities I accept that the family could not afford durable residential care for him. In the event that some limited care could be afforded and arranged, it would represent the replacement of life in an extended family unit where numerous relatives clearly surround him with love and affection, with an institutional arrangement motivated principally by money. There would be a risk, given his problems with caring for himself, that he would suffer a very real decline in his well-being if his present care routines now came to an end. He needs the prompting of his family who he clearly trusts to take his medicine. Given the extended period over which he has developed very extensive dependency on the care of family members, I consider that it is likely that his physical and moral integrity, to use the language of the Strasbourg Court, would be very seriously damaged by having to relocate to Jamaica. I accordingly consider that the refusal of his human rights claim is disproportionate to the family life with which it interferes.

Decision:

The decision of the First-tier Tribunal contained a material error of law.

I remake the appeal and in so doing allow Mr Gabbidon's appeal against the refusal of his human rights claim.

Signed: Date: 12 April 2019



Deputy Upper Tribunal Judge Symes