Upper Tribunal
(Immigration and Asylum Chamber)

[2017] UKUT 00016 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 December 2016	**On 13 January 2017**

Before

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT

Between

TSERING LAMA

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr T Hodson, of counsel,instructed by Elder Rahimi Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

(i) Video recorded evidence from witnesses is admissible in the Upper Tribunal. Its weight will vary according to the context.

(ii) Alertness among practitioners and parties to the Upper Tribunal's standard pre-hearing Directions and compliance therewith are crucial.

(iii) There are no hard and fast rules as to what constitutes family life within the compass of Article 8 ECHR.

(iv) A person's value to the community is a factor which may legitimately be considered in the Article 8 proportionality balancing exercise.

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DECISION

Introduction

1. By this decision is remade the decision of the First-tier Tribunal (the "FtT") which, by earlier decision of this Tribunal promulgated on 18 October 2016, was set aside on account of error of law.

Framework of this appeal

2. The Appellant is a national of Nepal, born on 19 December 1989 and now aged 26 years. The origins of this appeal are traceable to an application made by the Appellant to the Respondent, the Secretary of State for the Home Department (the "Secretary of State"), dated 04 February 2015. In the decision which ensued, this is described as an application "*for leave to remain in the United Kingdom on the basis of private life in the UK*".

3. The Secretary of State's decision is in two parts. In the first part, consideration was given to whether the Appellant's application satisfied any of the material requirements of the discrete Article 8 regime contained in the Immigration Rules (the "Rules"), specifically paragraph 276 ADE. The decision maker concluded that the application did not satisfy the requirements of the Rules. The second part of the Secretary of State's decision is rehearsed under the rubric "Decision on Exceptional Circumstances". It states:

> "*It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 ……, might warrant a grant of leave to remain in the UK outside the requirements of the Immigration Rules. In support of your claim, you state you receive money from relatives or friends* [sic] *who give you money when needed. This arrangement could continue, the money could be transferred to you overseas and would provide financial support to you. Furthermore you have stated that you have established a wide network of friends in the UK however* [sic] *these friendships in the UK can continue from overseas via modern methods of communication. Furthermore, the option is open to your friends to visit you in Nepal. It has therefore been decided that there are no exceptional circumstances in your case. Consequently your application does not fall for a grant of leave outside the rules.*"

FtT Decision

4. The grounds of appeal to the First-tier Tribunal ("FtT") are also in two parts. The first is couched in diffuse, general and unparticularised terms. The second, entitled "Statement of Additional Grounds", repeats the defects in the first and additionally, includes a series of bare assertions.

5. The FtT made three principal conclusions. First, the Appellant's case could not succeed under the Rules (paragraph 276 ADE) as he was considered to have continuing ties to Nepal and had failed to demonstrate very significant obstacles to

his reintegration in that country. Second, the Tribunal concluded that the Appellant had failed to demonstrate any family life. Third, the Tribunal concluded that it would "*… pay no regard to the private life the Appellant has established in the United Kingdom, with Mr 'R' or with the community*". Mr R is the person upon whom the Appellant's case has at all times centred: see *infra*. The appeal was dismissed accordingly.

Error of law decision

6. Next, by its decision dated 18 October 2016 2016, this Tribunal decided that the decision of the FtT must be set aside by reason of error of law, reasoning thus:

> "*It is not clear why the Judge found that she would pay* ***no*** *regard to the private life the Appellant had established. The private life of the Appellant ought to have been weighed in the balance when conducting a proportionality exercise. The Judge clearly had found that the Appellant had established a private life. Whilst the fact that alternative care would be available* [to Mr R] *is a relevant factor (and therefore consideration of this issue by the Judge was not an error of law), it does not lead inexorably to a finding that the Appellant's right to respect for his private life would be outweighed by other factors such as effective immigration control.*"

In summary, the decision of the FtT was infected by material error of law as it "*… did not undertake an adequate proportionality balancing exercise*".

New Evidence

7. One evidential *tranche* of the Appellant's case is composed of a series of statements of assorted friends and supporters (nine in total) and a petition type document. This evidence is illuminated by the following extract from a letter from the Appellant's solicitors provided three working days in advance of the hearing:

> "*… The names of the persons who have provided a video statement in this appeal are ….* [**nine persons are named**] *….. Mr 'PS' will be attending the hearing to give evidence ….*
>
> *The statements made are all broadly along the same lines as the petition attached to Mr 'PS's' statement, namely each person sets out who they are, how they know the Appellant and 'Mr R', how important the Appellant is to Mr R and to his ability to continue with his acting career in particular and the likely impact on both if his appeal is dismissed.*"

8. The Upper Tribunal's directions to the parties, dated 25 August 2016, included the standard paragraphs drawing attention to the powers and procedures of the Upper Tribunal relating to the reception of fresh evidence (see the Appendix to this judgment). These include the following cautionary statement:

> *"A failure to comply with Rule 15(2A) will be regarded as a serious matter and may result in fresh or further evidence not being considered by the Tribunal."*

This is followed by a series of ancillary paragraphs giving detailed directions relating to fresh evidence applications. These standard Directions, substituting a predecessor, were introduced by the Upper Tribunal in February 2016. They are appended hereto for the attention of parties and practitioners generally.

9. There has been a wholesale failure by the Appellant's representatives to comply with this direction and an associated breach of rule 15(2A). These failures are inexcusable and must be deprecated. Furthermore, but for the Upper Tribunal's supplementary directions dated 07 December 2016, it is clear that the information and intentions intimated in the aforementioned solicitor's letter would not have emerged until the date of hearing. There was also a stark failure to appreciate that the mode of presentation of the Appellant's case required an application to the Upper Tribunal for a specific direction: see rule 5(1) and (2)(g) and rule 6, together with the definition of "hearing" in rule 1(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

10. Moreover, it is evident that no consideration was given to Upper Tribunal Immigration and Asylum Chamber Guidance Note No 2 of 2013 relating to the reception of evidence by video link and, in particular, [4] thereof. Finally, adherence to standard Direction number 6(vi) would have mitigated, if not cured, much of the procedural default which occurred. It is in these terms:

> *"Both parties shall,* ***at latest****, five working days prior to the scheduled hearing of the appeal, contact the Tribunal for the purpose of confirming that all bundles and any other materials considered by the FtT and/or as directed above, are available for distribution to the Judge/s and taking any other appropriate steps to this end."*

One of the virtues of adhering to this discrete direction is that it establishes dialogue in the immediate pre-hearing phase which has the potential to expose that certain necessary steps and preparations remain outstanding.

11. Fortunately for the Appellant's representatives, the Respondent's position regarding the reception of a substantial volume of new evidence by recorded video was one of neutrality and the Tribunal adopted a generous view. In order to facilitate a viewing of the new evidence time was, inevitably, wasted in consequence of lateness and inadequate preparation.

Evidence by video recording: weight

12. The question arises concerning the weight to be given to evidence adduced by video recording. The Upper Tribunal's competence to receive evidence via this medium is not in dispute. Rule 15 provides:

"15. — Evidence and submissions

(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Upper Tribunal may give directions as to—

(a) issues on which it requires evidence or submissions;
(b) the nature of the evidence or submissions it requires;
(c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;
(e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—

(i) orally at a hearing; or
(ii) by written submissions or witness statement; and

(f) the time at which any evidence or submissions are to be provided.

(2) The Upper Tribunal may—

(a) admit evidence whether or not—

(i) the evidence would be admissible in a civil trial in the United Kingdom; or
(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where—

(i) the evidence was not provided within the time allowed by a direction or a practice direction;
(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
(iii) it would otherwise be unfair to admit the evidence.

(2A) In an asylum case or an immigration case—

(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party—

(i) indicating the nature of the evidence; and
(ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.

(3) The Upper Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose."

In considering the question of weight, the temptation to prescribe a set of rigid rules must be resisted. The single, guiding principle must be that the weight to be attributed to all evidence, including the evidence of witnesses who do not attend the hearing and whose testimony is adduced by witness statements or video recording

or comparable mechanism, will vary according to the nature of the evidence and the context. it will always be necessary to take into account that such evidence has been untested by the conventional means of cross examination and judicial questioning, particularly (though not invariably) where it is contested in whole or in part. In this respect evidence by video link is to be contrasted. Furthermore, the customary judicial assessment of a witness's demeanour will be significantly affected. The technical quality of the recording will also be material.

13. Tribunals should attempt to satisfy themselves that the evidence is uncorrupted. Alertness to signs such as reading from a prepared text or being prompted by another person will be essential. Considerations of this kind highlight the lack of customary judicial control and oversight when evidence is adduced in this way.

The Decision Remade

14. As noted above, the protagonists in this appeal are the Appellant and Mr R. As already recorded, the Appellant is a national of Nepal, now aged 26. His presence in the United Kingdom, which has at all times been lawful, dates from January 2010 when he was granted leave to enter as a Tier 4 General Student. This was followed by several extensions. His application to the Secretary of State for further leave to remain in the United Kingdom was made timeously. His case has at all times been based on Article 8 ECHR, the reference point being the relationship which has developed between Mr R and him. The facts recounted in the summary which follows below are uncontroversial.

15. The Appellant duly pursued various courses of study, between January 2010 and December 2014. He has obtained a MBA and an accountancy qualification. If permitted to remain in the United Kingdom, he will resume an unfinished accountancy course with a view to securing a practitioner's qualification.

16. Mr R is a native of Ireland who has been living in England during most of his life. Prior to suffering a catastrophic accident in 2005, he had lived alone. He is an actor of some repute and continues to practice his profession, albeit intermittently and within the limits of his physical condition. Mr R's health and his disabilities and needs, both physical and emotional, coupled with his relationship with the Appellant, lie at the heart of this appeal.

17. The subject of Mr R's health and disabilities is addressed in the October 2016 report of a therapist based at the University College London. In brief compass, Mr R suffered a spinal cord injury in 2005 rendering him quadriplegic. His circumstances are summarised in the following terms:

> *"Mr R lives in a fully adapted ground floor property with a carer funded from direct payments. Mr R is an actor and continues to work with assistance from his carer to access his workplace and public transport …..* [he] *has a powered, standing chair at home which was funded by the Actor's Benevolent Society …..*

[He is] *dependent on carer to manage initial bed transfers, transfers to shower chair and lower body washing and dressing ….*

[He is] *dependent on carer to access community in a manual chair….*

[He] *does not have full active extension in his fingers (worse in left hand) and is unable to grasp or release items without relying on wrist extension or flexion to simulate a grip and release ….*"

Various measures to address Mr R's deteriorating hand function were devised.

18. A September 2016 report from Mr R's general medical practitioner provides the following information:

> "*Mr R has had deteriorating symptoms (in particular loss of use of his hands) over some years … which is common after spinal cord injury. In addition to the spinal cord injury Mr R has the following long term medical conditions:*
>
> - *Ulcerative colitis with ileostomy and stoma bag.*
> - *Long term in-dwelling catheter.*
> - *Recurring urinary tract infections (which have made him very unwell at times).*
> - *Previous bladder stone.*
> - *Multiple myeloma and cryoglobulinaemic vasculitis ….*
> - *Grade 4 pressure areas on sacrum (extremely painful) which require regular dressing and … regular turning over night ….*
> - *Recent admission to hospital with sepsis following development of a chest infection.*"

The report continues:

> "*…. He has come to rely on* [the Appellant] *to help him with his physical and emotional needs …..* [The Appellant] *fully undresses him and uses the required equipment to get him into and out of bed, he also turns him regularly at night to aid healing of his pressure sores. He manages Mr R's drug therapy regime. He empties and changes his ileostomy bag and empties his catheter bag.*"

The report also draws attention to the issue of <u>emotional</u> support:

> "*In addition to this* [the Appellant] *provides emotional support which Mr R tells me he cannot do without, especially as he has no family in the UK.*"

19. These reports also disclose that the nursing support which Mr R receives from the State consists of visits by a District Nurse three times weekly for dressing his pressure sores and once monthly to change his catheter. With the exception of six monthly reviews by an Occupational Therapist, Mr R receives no other state funded support, therapeutic or otherwise.

20. I turn to consider the role of the Appellant in Mr R's life. Having begun his studies in the United Kingdom in 2010, the Appellant soon befriended Mr R through his part time employment and their friendship grew. At this stage Mr R was becoming increasingly less independent. From mid-2011 the Appellant was a tenant in Mr R's home and, in parallel with Mr R's increasing dependency, their relationship developed. Mr R had (and still has) a paid carer, attending every morning and providing services during some two hours. The Appellant gradually assumed the role of Mr R's carer outside these hours viz during most of the day, seven days weekly and arrangements which accommodated his studies were devised.

21. The Appellant has been Mr R's primary carer during a period of some five years. In his evidence to the Tribunal, Mr R testified that the Appellant provides him with "*a huge amount*" of physical care. He described him as "*irreplaceable*". In his witness statement he says that the Appellant:

> "*… has proved to be exceptionally caring, thoughtful and dedicated to helping me manage … he is like a son to me …. We have become a small family unit ….* [He] *is superb in offering help … not least when panic attacks result from my reaction to antibiotics. He has also proved to be invaluable and so caring when he undertakes quite intimate care in emergency situations ….*
>
> *With his caring support and affectionate company, mentally I am happy and healthy ….*
>
> *He is as irreplaceable as a son or other close relation or partner might be.*"

On the issue of alternative care arrangements, the Appellant states:

> "*I do not believe I could adjust now to trying to find replacement helpers; and even if I could there would not be the emotional support that* [the Appellant] *provides me. For him not to be here would be for me (without exaggeration) devastating.*"

22. It is unnecessary to dilate on the details of the arrangements and relationship between the Appellant and Mr R. The core of the appeal is grasped from the summaries and extracts above.

23. The nature, strength and profundity of the bond between the Appellant and Mr R are apparent from the supporting evidence of a large cast of friends and professional colleagues. This evidence is in both documented and video recorded form. It is

encapsulated in the following passage in the witness statement of Mr Pigott-Smith, who attended the appeal hearing:

> *"If T is obliged to leave, J will be finished: neither he nor the State can afford to furnish the kind of personal care that T provides. This applies primarily to J's personal life, but losing T would also affect J's professional life – effectively, I suspect it would finish it. T understands J's professional needs: he knows about backstage life and pressure."*

["T" and "J" denote the Appellant and Mr R respectively.]

24. This evidence is supplemented by a letter signed by approximately 100 people which contains the following passages:

> *"J is an actor, much loved and widely admired within the profession ….*
>
> *As J's condition worsened, T gradually assumed the role of carer and their relationship has developed into one of great friendship and inter-dependence. T currently performs all J's intimate, personal and home care ….*
>
> *Financial savings to the NHS are not the point, but they are considerable …*
>
> *Refusing to give up his career, J has valiantly continued to work as an actor, offering real inspiration to other disabled performers. In order to keep this part of his life alive, he is totally dependent on T who has developed an understanding of the unusually high, specific demands of acting work. Without T, J's career would undoubtedly be over."*

The witness statement of the paid carer who attends Mr R for two hours every morning contains the following passage:

> *"As J is prone to ill health which is unpredictable, T has been at his side all the time. Therefore, their emotional attachment is very deep and there is also a great level of trust between them. J needs a live-in carer, so without T's constant care, J will be lost leaving his life in disarray, which will greatly affect his ability to work again."*

The Applicable Law

25. The starting point is that the Appellant is unable to secure leave to remain in the United Kingdom through the medium of the Immigration Rules ("the Rules"). His case is squarely based on both the private and family life dimensions of Article 8 ECHR. In contemporary parlance the immigration status pursued by him is sought "outside" or "outwith" the Rules.

26. The interplay between Article 8 ECHR and the Article 8 regime contained in the Immigration Rules (the "*Rules*") has been clarified by the recent decision of the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016]

UKSC 60. First, the Court restated the principle that the Rules are a statement of executive policy and are not black letter law. Per Lord Reed, at [17]:

> *"The Rules are not law …. but a statement of the Secretary of State's administrative practice …*
>
> *Nevertheless, they give effect to the policy of the Secretary of State, who has been entrusted by Parliament with responsibility for immigration control and is accountable to Parliament for her discharge of her responsibilities in this vital area. Furthermore, they are laid before Parliament, may be the subject of debate and can be disproved under the negative resolution procedure. They are therefore made in the exercise of powers which have been democratically conferred and are subject, albeit to a limited extent, to democratic procedures of accountability."*

Next, Lord Reed emphasised that in Huang v Secretary of State for the Home Department [2007] UKHL 11, the House of Lords formulated the correct approach in these terms:

> *"An applicant's failure to qualify under the rules is, for present purposes, the point at which to begin, not end, consideration of the claim under Article 8. The terms of the rules are relevant to that consideration, but they are not determinative."*

Per Lord Bingham at [6].

27. Lord Reed continues, at [46]:

> *"It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law.* ***But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment ...****"*
>
> [My emphasis.]

Continuing, Lord Reed states, at [49]:

> *"It is necessary to feed into the analysis the facts of the particular case and the criteria which are appropriate to the context and, where a Court is reviewing the decision of another authority, to give such weight to the judgment of that authority as may be appropriate."*

This is followed by a helpful summary of the correct approach to the proportionality balancing exercise in the particular context of the deportation of foreign offenders: see [50].

28. Finally, the Supreme Court reviewed the "*complete code*" thesis contained in MF (Nigeria) [2014] 1 WLR 544, highlighting the error in the concept that the Rules alone govern appellate decision making. In the judgment of the Court, this issue is addressed most fully by Lord Wilson, who endorsed unreservedly the "*general rule*" formulated by the Court of Appeal in [43] – see [66] – and, at [80], rejected the "*complete code*" notion in pithy terms:

> "*It is one thing to suggest that the Secretary of State's rule 398 is relevant to the weight which the Tribunal should give to the public interest ….*
>
> *But it is another thing altogether to suggest that the rules provide the legal framework within which the Tribunal should determine the appeal.*"

29. There being no element of deportation in the present case, the test to be applied is that of "compelling circumstances": see Haleemudeen v SSHD [2014] EWCA Civ 558, at [44] and more emphatically Rhuppiah v SSHD [2016] EWCA Civ 803, at [44], together with the discussion in Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test) [2017] UKUT 00013, at [43] – [47]. At [43], this Tribunal adverted to:

> "*…… the imperative …. of identifying clearly the characteristics and conduct of the person against whom removal or deportation action is proposed.*"

30. At this juncture I address the discrete question – one of law – of whether there exists, within the compass of Article 8 ECHR, family life vis-à-vis the Appellant and Mr R. There is no definition of "family life" in Article 8 itself. Nor is any definition to be found in the now extensive jurisprudence, both domestic and European. The absence of such definition is consistent with, and characteristic of, the elastic nature of the rights protected by Article 8.

31. This issue was reviewed to some extent in the recent decision of the Court of Appeal in PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612. The Court began its review with what has come to be regarded as the leading authority in this field, Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. In that case, the Court, at [14], concurred with the formulation of the Commission in S v United Kingdom [1984] DR 196:

> "***Generally,** the protection of family life under Article 8 involves co-habiting dependants, **such as**, parents and their dependent, minor children. **Whether it extents to other relationships depends on the circumstances of the particular case**.*"
>
> [The emphasis is mine.]

In the same passage, the Commission employed the linguistic formula of "*further elements of dependency, involving more than the normal emotional ties*". The appeal in

Kugathas failed. Notably, the consideration that there was no blood relationship between the Appellant and one of the three members of the "family unit" involved, namely his sister in law, was not ranked an obstacle to the existence of family life.

32. Strikingly, in PT (Sri Lanka) v Court of Appeal highlighted the need for a "*fact sensitive approach*": see [26]. Notably, the Court quoted without demur the assessment of "dependency" in Kugathas at [17], referring to the argument that a finding of family life does not entail an absolute requirement of dependency:

> "*That is clearly right in the economic sense. But if dependency is read down as meaning 'support', **in the personal sense**, and if one adds, echoing the Strasbourg jurisprudence, 'real' or 'committed' or 'effective' to the word 'support', then it represents in my view the irreducible minimum of what family life implies.*"

[my emphasis]

Thus, at its heart, family life denotes real or committed personal support between or among the persons concerned. Such persons need not necessarily be related by blood and, in that sense, are not a family in the traditional or conventional senses. However, they are readily embraced by one of the dictionary definitions of "family", namely "*a group of things that are alike in some way*". Mere likeness is not, of course, sufficient for Article 8 purposes. The "likeness", in Article 8 terms, is constituted by committed support, emotional bonds and, very frequently, a strong sense of duty.

33. In harmony with my comment about Article 8 in [30] *supra*, the case law is replete with statements which are the antithesis of hard edged rules or absolute principles. This is illustrated by the terms in which Baroness Hale expressed herself in a short concurring judgement in Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39, at [4]:

> "*The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, **normally** a spouse or minor children, with whom that family life is enjoyed.*"
>
> [My emphasis.]

Thus, in the Strasbourg jurisprudence, family life has been extended beyond relationships of blood, marriage and adoption (Clayton & Tomlinson, The law of Human Rights, 2nd ed, 13.148)

34. The next ingredient in the legal framework is the public interest. In every Article 8 proportionality balancing exercise, it is essential to begin by identifying the public interest in play: per Lord Thomas at [83] and, more clearly, per Lord Kerr at [165] in Hesham Ali. Indeed, this approach is reflected in the new Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"). At the apex of this discrete statutory regime, Parliament has proclaimed, in section 117B (1):

"The maintenance of effective immigration controls is in the public interest."

This public interest, with its various ingredients, is the public interest engaged in the present case. It provides the starting point in the proportionality balancing exercise.

My Findings and Conclusions

35. I have outlined in [14] - [24] above the salient features of the evidence. Both the Appellant and Mr R testified at the hearing and were cross examined. They were also subjected to appropriate judicial questioning. I find no hint of invention or exaggeration in the evidence adduced and none was suggested by the Secretary of State's representative. The core factual elements of the Appellant's case have been clearly established. I make findings of fact accordingly.

36. Based on those findings, I consider firstly the question of whether there is family life between the Appellant and Mr R. I can identify no legal obstacle to an affirmative finding on this issue. Their relationship is characterised by profound bonds of friendship, support, respect and dependency. Furthermore, as regards the Appellant, there is a clear sense of duty. I consider it important not to view dependency through an inappropriately narrow lens. I am satisfied that the element of dependency in this relationship is mutual. It is both of the emotional (bilaterally) and physical (unilaterally) variety. The abundance of documentary evidence, some of which I have highlighted above, bears eloquent testament to the quality, potency and profundity of this relationship.

37. My finding that there is family life between the Appellant and Mr R might be viewed by some as controversial. It is not, however, a necessary pre-condition of this appeal succeeding, given that there is no dispute that the Appellant has a highly developed private life in the United Kingdom, the elements and components whereof are significantly based on his relationship with Mr R. The Appellant's private life extends beyond that relationship to encompass matters such as his involvement in charitable activities, about which there is uncontested documentary evidence. Thus, irrespective of whether one views the Appellant's case through the prism of family life or private life or a combination of both, the ultimate question of law is unaffected, namely whether the impugned decision of the Secretary of State represents a disproportionate interference.

38. Disregarding those provisions of Part 5A of the 2002 Act which are of no relevance to the present context, I give effect to the legislature's instruction to have regard to the specified considerations in the following way:

    (i) The public interest in the maintenance of effective immigration controls is engaged: section 117B (1).

(ii) It is not disputed that the Appellant is a capable English speaker, with the result that the public interest which is engaged in cases where the person concerned does not possess this ability does not arise: section 117B (2).

(iii) I find that the Appellant is financially independent and is likely to remain so indefinitely, with the result that the public interest which would otherwise be engaged does not arise: section 117B (3).

(iv) It is not disputed that the Appellant has at all material times been lawfully present in the United Kingdom. However, it is incontestable that his immigration status, detailed in [14] above, was precarious throughout. Thus it qualifies for the attribution of little weight. I consider that the Appellant's case lies at the upper end of the notional "little weight" scale: see Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC) at [25].

39. At this stage of the analysis, I remind myself that I am entitled to take into account considerations other than those specified in section 117B. This follows from the words in parenthesis – "*(in particular)* – in section 117A (2). This, I observe, is one of the themes clearly identifiable in the Hesham Ali decision. This is not, of course, a freewheeling exercise. Rather, any additional considerations which the tribunal may legitimately evaluate must be material. This I consider an elementary principle.

40. In preparing the balancing exercise scales, certain discrete factual issues arise for consideration. First, I accept that Mr R will probably be the recipient of some form of substituted care service in the event of the Appellant's departure from the United Kingdom. However, it is appropriate to emphasise that the evidence bearing on this issue is non-existent. In particular, the Secretary of State has adduced no evidence about the likely form of enhanced state funded care and attention, if any, which might be available in such eventuality. Given the complexities of the laws, discretions and policies which this issue engages, I take care to avoid speculation. The evidential doctrine of judicial notice has no purchase in this discrete context. Given the state of the evidence, it is not possible for me to make any finding more extensive than that R, at most, may benefit from some modest increase in the very limited state funded services which he receives at present.

41. Next, I find that the Appellant is not irreplaceable, in the narrow sense that Mr R, with the assistance of others, self-funded or State sponsored, may be able to find a substitute carer. However, taking into account the nature and longevity of the relationship which has developed and having regard to Mr R's advanced years and progressive disabilities, I consider that the Appellant is irreplaceable in the broader, more nuanced and emotional sense. Linked to this, I readily find that the arrangements involving the Appellant and Mr R will continue indefinitely and will not be terminated until Mr R reaches a stage where independent living is no longer medically and physically possible. Mr R's motivation and determination are admirable.

42. Next, I readily find that the departure of the Appellant from the United Kingdom will almost certainly signal the end of Mr R's acting career. In this context I consider it legitimate to weigh in the balancing exercise the factor described in UE (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 975 as "[loss of] *value to the community in the United Kingdom …. loss of public benefit*": see [30] and [33]. The evidence clearly establishes that, through his lifelong acting career, Mr R has made a significant contribution to the arts and, consistent with his physical and medical limitations, has continued to do so. One noteworthy, discrete feature of what he has achieved during the past eleven (quadriplegic) years of his life, is the inspiration provided to other disabled actors. As noted in UE (Nigeria), a factor of this kind is unlikely to be decisive in the majority of cases. That is true of the present case: it does not tilt the balance in the Appellant's favour. However, it is one of the building blocks in the proportionality balancing exercise.

43. Thus, to summarise, the Appellant is an immigrant with an impeccable immigration history who (disregarding any question of family life) has a highly developed private life in the United Kingdom; is financially independent; speaks and writes perfect English; has had an indispensable role in the life of an elderly, acutely disabled United Kingdom national for several years; and whose continued involvement in Mr R's life perpetuates the significant (in the sense of greater than minimal) contribution which Mr R, through his acting, makes to the community in general and to the cohort of disabled people in society. Viewed through an artificially narrow lens, the Appellant can be substituted in Mr R's life. However, in qualitative and emotional terms, he is irreplaceable.

44. On the other side of the scales is the public interest. The Appellant's case is not one involving illegal entry, unlawful over-staying, benefits or passport fraud, illegal working or criminality of any kind. Thus, within the framework of Part 5A of the 2002 Act, the public interest pitted against him, though intrinsically strong and possessing the additional imprimatur of Parliamentary endorsement, does not have the increased potency which applies to cases of the kind just noted. In short, the public interest in play is rooted in the long established "population control" right of sovereign states, namely the right (in this case) to select those who, having lawfully entered and remained on its territory on finite terms, can lawfully continue to do so.

45. As emphasised in recent decisions such as Treebhawon and Kaur, the crucial task for courts and tribunals in every proportionality exercise is to prepare the scales correctly in law. This involves identifying all material facts and factors, disregarding everything that is immaterial (or illegitimate) and forming a balanced view, giving due respect to the executive's formulation of the public interest viz the legitimate aim in Article 8(2) terms. Correct self-direction in law is also, self-evidently, an indispensable requirement.

46. Balancing the main facts and factors identified above against the strong public interest in play, I conclude that the Secretary of State's refusal to grant indefinite leave to remain to the Appellant does interfere disproportionately with the right to respect to private life guaranteed to the Appellant and Mr R under Article 8 ECHR, via section 6 of the Human Rights Act 1998. I consider that the special, unique and

compelling features of the relationship and arrangements under scrutiny combine to outweigh the public interest. This is my evaluative assessment in this highly unusual and intensely fact sensitive cases. The public interest must yield in the circumstances.

47. As this decision demonstrates the judgement to be made in cases of this *genre* is never clear cut and is frequently positioned in close proximity to the notional borderline. The fusion of immigration law and human rights law produces such cases with some regularity.

Conclusion

48. The appeal is allowed accordingly.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 30 December 2016

APPENDIX

DIRECTIONS

Note: *In these directions, "Appellant" means the party (including any representative) who has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (the "FtT") and "Respondent" means any other person (including any representative) who was a party before the FtT.*

1. These Directions of the Upper Tribunal ("the Tribunal") apply in this case in which permission to appeal has been granted. They must be followed unless varied, substituted or supplemented by further directions.

2. The parties are reminded that any failure to comply with these directions may result in the Tribunal making an adverse order pursuant to its power under Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules").

3. These Directions seek to give effect to the requirement in Rule 2 of the Rules to deal with cases fairly and justly and all other aspects of the overriding objective. The parties are reminded of their obligation pursuant to Rule 2(4) to help the Tribunal to achieve that objective and to co-operate with the Tribunal generally.

4. There is a presumption that, in the event of the Tribunal deciding that the decision of the FtT is to be set aside as erroneous in law, the re-making of the decision will take place at the same hearing. The fresh decision will normally be based on the evidence before the FtT and any further evidence admitted (see [5] below), together with the parties' arguments. The parties must be prepared accordingly in every case.

5. The Tribunal is empowered to permit new or further evidence to be admitted in the re-making of a decision. In any case where this facility is sought the parties must comply with Rule 15(2A) which is in these terms:

> *In an asylum case or an immigration case –*
>
> *(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –*
>
> *(i) indicating the nature of the evidence; and*
>
> *(ii) explaining why it was not submitted to the First-tier Tribunal; and*
>
> *(B) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.*

A failure to comply with Rule 15(2A) will be regarded as a serious matter and may result in fresh or further evidence not being considered by the Tribunal.

6. The following timetable has been set for this appeal:

   (i) If the Respondent wishes to provide a response pursuant to Rule 24 the time limit for doing so is one month from the date of these Directions. If the Respondent decides not to provide a response, this must be notified in writing to the Tribunal and the Appellant within the same time limit.

   (ii) If a response is provided pursuant to (i) above the Appellant must provide any reply within ten working days before the hearing of the appeal **at latest.**

   (iii) Any notice by the **Respondent** pursuant to Rule 15(2A) must be sent with any Rule 24 response within the time limit specified in (i) above or with the notification that no response is proposed.

   (iv) Any notice by the **Appellant** pursuant to Rule 15(2A) must be sent ten working days before the hearing of the appeal **at latest.**

   (v) All notices pursuant to Rule 15(2A) must be accompanied by an indexed and paginated bundle of documents, including all the material that was before the FtT together with a supplementary indexed and paginated bundle of the proposed new evidence **or** where feasible, an extended version of the FtT bundle.

   (vi) Both parties shall, **at latest** five working days prior to the scheduled hearing of the appeal, contact the Tribunal for the purpose of confirming that all bundles and any other materials considered by the FtT and/or as directed above are available for distribution to the judge/s and taking any other appropriate steps to this end.

7. Where a skeleton argument is directed by the Tribunal or considered appropriate by a party this will be filed and served **no later than** three clear working days before the scheduled hearing date together with copies of any relevant authorities.

8. Any request for the services of an interpreter must be made to the Tribunal in writing, **at latest** seven days in advance of the scheduled hearing date.

9. The parties will receive written notification of the hearing date in due course. All hearings in the Tribunal are listed at 10.00 hours unless otherwise notified.

B Dawson
Principal Resident Judge

Dated: