Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19890/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 20th November 2014	**On 3rd December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS MAEK SULTAN BAHADURALIA TRIKAM
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Brown, Counsel
For the Respondent: Miss C Johnstone, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Kenya, born on 13th January 1948. She applied for entry clearance to the United Kingdom as an adult dependent relative under Appendix

FM. Her application was refused by the Entry Clearance Officer on 11th October 2013 on the grounds initially that she was not considered suitable for entry clearance requirements, a matter which was not subsequently pursued on appeal and latterly on the basis that she did not meet the provisions for eligibility for entry clearance as an adult dependent relative. The Appellant appealed and the appeal came before Immigration Judge Edwards sitting at Manchester on 29th May 2014. In a determination promulgated on 19th June 2014 the Appellant's appeal was dismissed under the Immigration Rules and was not allowed under the Human Rights Act. The Appellant on 7th July 2014 lodged Grounds of Appeal to the Upper Tribunal. On 20th August 2014 Designated First-tier Tribunal Judge Zucker granted permission to appeal. Judge Zucker noted that the grounds included the submission that in stating at paragraph 25 of the determination that he could not say with any degree of certainty what the needs of the Appellant were suggested that the wrong standard of proof had been applied and that the judge had failed to have regard to the medical evidence upon which the Appellant relied. In particular Judge Zucker considered that the judge had not had sufficient regard, if any, to the medical evidence and granted permission to appeal.

2. It is on that basis that the appeal comes before me initially to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel Mr Brown. Also in attendance on her behalf are her Sponsor and daughter Mrs Reshma Janmohammed. The Secretary of State appears by her Home Office Presenting Officer Miss Johnstone.

The Facts and the Current Position

3. It is important to acknowledge in this determination the factual approach that is necessary for me to adopt. The matter comes before me by way of an appeal that there is a material error of law in the decision of the First-tier Tribunal Judge. Consequently it is addressing those issues that has to be the starting point. However it is appropriate before considering the submissions therein to acknowledge the current position in this matter. At the time of the application and the appeal the Sponsor who is a pharmacist lived in Manchester. She has four children aged between 6 and 6 months. Both she and her husband are British citizens. Her mother who is a Kenyan citizen has no family left in Kenya. She is suffering from Alzheimer's. That medical fact is not disputed by the Secretary of State. The main thrust of Mr Brown's submissions so far as there is an error of law relates to the purported failure of the First-tier Tribunal Judge to consider the medical evidence.

4. Following the failure of the Appellant's appeal Mrs Janmohammed moved to County Kildare, Ireland. She moved as an EEA citizen exercising treaty rights and she has temporary employment there as a pharmacist. She lives there with her children. She applied in Ireland for a visa for her mother to join her as a dependent relative of an EEA citizen exercising treaty rights and this has been granted until mid-December. As a result her mother currently resides with her, as does her husband. The family home in Manchester is being rented but it is the Sponsor's wish that the family returns to that home.

5. I note therefore that there is a change in both the Appellant's and the Sponsor's circumstances as at today's date. I am also conscious of the fact that so far as the appeal under the Immigration Rules is concerned the relevant date is the date of decision, whereas any appeal under Article 8 the relevant date would be the date of hearing. That is of relevance to submissions made to me and described later herein.

Submissions/Discussion on the Error of Law

6. Mr Brown submits that the issues in dispute relate to whether or not the Appellant can meet the requirements of paragraph E-ECDR.2.4 and 2.5 of Appendix FM of the Immigration Rules and pursuant to Article 8 of the European Convention of Human Rights. He points out to me that at paragraph 24 of the First-tier Tribunal Judge's determination the judge has dealt with satisfactorily the issue by which entry clearance was refused on the basis of suitability and entrance clearance requirements under EC-DR.1.1(c) and that Article 8 is engaged on the basis that this was in fact referred to in the Grounds of Appeal to the First-tier Tribunal.

7. He turns to the judge's findings at paragraphs 25 and 26. He points out that the judge has only looked at E-ECDR.2.4 and that he has not gone on to consider 2.5. Miss Johnstone in response interjects by stating that in order to reach paragraph 2.5 it is necessary for the judge to be satisfied under 2.4 and as he was not satisfied the First-tier Tribunal Judge was entitled not to proceed further.

8. Mr Brown's response is to concentrate very much on the submission that the judge has failed to give any or due consideration to the medical evidence that has been produced. He refers me in particular to the letter from Dr Pius Kigamwa, a consultant psychiatrist which refers to the Appellant's Alzheimer's dementia. He points out that the letter from Dr Kigamwa indicates that the Appellant needs 24 hour care. The response to this from Miss Johnstone is that even though that letter is not referred to, it is not material because the judge has given due consideration to the nursing care that is available and being provided in Kenya to the Appellant.

9. Mr Brown contends that it is not possible to draw any conclusions from paragraphs 25 and 26 of the judge's findings and that there is no way in knowing how the judge came to his conclusions. His challenge is consequently a "reasons" challenge and that it is not sufficient merely to say that she can receive care in a care home and that the care she requires has not been properly considered.

10. He also goes on to point out that the judge has failed to give any analysis to Article 8 and has not engaged with Article 8 submissions. He points out that the only reference to Article 8 in the findings is to be found at paragraph 28 and that the judge is wrong to conclude that no human rights point was raised in the Notice of Appeal and none appeared to him to be obvious. He asked me to find that there is a material error of law and to set aside the decision.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

13. The findings are found at paragraphs 25, 26 and 28 of the First-tier Tribunal Judge's determination. It is clear from paragraphs 25 and 26 the judge has made no reference to, nor does he appear to have given any due and proper consideration to, the medical evidence produced by Dr Kigamwa. That consists of two letters. The judge appears to have failed to engage with the requirements of paragraph E-ECDR.2.4 and as such has materially erred in law. Had he done so he certainly would have gone on to consider the case under 2.5.

14. In addition the judge was wrong to find that no human rights points were raised in the Notice of Appeal and whilst he may be entitled to conclude that there are no sufficiently compelling circumstances outside the Rules for allowing the appeal it is incumbent upon him to give reasons. For all these factors I find that there are material errors of law in the decision of the First-tier Tribunal and set aside that decision.

The Current Position

15. I am very conscious of the fact that the Sponsor has travelled all the way from Ireland to hear this appeal. I am anxious in such circumstances that a further hearing is not necessary. Mr Brown urges me to rehear the matter today both under the Immigration Rules and under Article 8. Miss Johnstone strongly objects to a rehearing under Article 8 taking place today. The basis for her argument is that there

is a completely different change of circumstances to that that originated at the date of decision and that the Sponsor is currently an EEA national exercising treaty rights in Ireland and that that raises difficulties of jurisdiction and of hearing this matter today, particularly bearing in mind that the Appellant herself is currently resident in Ireland. I find Miss Johnstone's view on this aspect persuasive and I therefore ruled that the appeal pursuant to Article 8 would remain extant and adjourned to be restored only and if the Appellant's solicitors made application. The reason for that was I proceeded today to rehear the appeal under the Immigration Rules.

The Relevant Rules

16. *E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.*

E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because-

(a) it is not available and there is no person in that country who can reasonably provide it; or

(b) it is not affordable.

Submissions on Rehearing

17. Miss Johnstone relies on the original Entry Clearance Officer's decision. She submits that it is incumbent upon the Appellant to show that she is not able to perform everyday tasks and that she cannot get the level of care required where she is living. She submits that care is available in Kenya, taking me to the fee schedule for home nursing from Tel-a-Nurse Limited and to the terms and conditions attached to that schedule. She points out, that carers were paid for to go into the Appellant's home and that financial help is also available. She submits that the Sponsor is a professional lady and therefore under 2.5 can afford to meet the care fees that would be necessarily generated in looking after her mother in Kenya. She asked me to dismiss the appeal. Mr Brown submits that on the evidence it is clear that the Appellant was at date of decision living outside the UK (and that indeed whilst in different circumstances she continues to do so) and that she meets the requirements of long-term care as set out in 2.4 and that she has extra medical needs as required by paragraph 2.5 which justify the bringing in of the Appellant to this country to live with her daughter. He takes me to the Tel-a-Nurse terms and condition and submits that the required level of care for the Appellant is not met therein and that the Appellant needs someone to assist in her care on a 24 hour round the clock basis.

18. I took evidence from the Sponsor with regard to the regime that was necessary for the Appellant's day-to-day care. Ms Janmohammed advises that the Appellant needs care on a 24 hour a day basis in cooking, cleaning and making sure she has

drinks and that it is also very important that she has familiar faces around her. She advises that 24 hour care is provided by a family member. She further points out that the Appellant has no sense of responsibility over money and she cannot be left on her own or indeed in a country where she would be on her own. She reminds me that the Appellant has no other family in Kenya and that her (Ms Janmohammed's) brother lives in Watford.

19. Mr Brown seeks to impress upon me and to highlight the importance of the significant factors that have not been addressed in this case, namely the care requirements of the Appellant. He acknowledges that under the old Rules – in particular Rule 297 – it was difficult for elderly parents to meet the Rules, but that these Rules were changed quite deliberately to avoid elderly parents being left where their needs cannot be met and he submits that the Appellant's needs cannot be met by what is available in Kenya. He asked me to allow the appeal under the Immigration Rules.

Findings

20. The starting point in this matter has to be whether or not the Appellant can meet the provisions of paragraph E-ECDR.2.4. In this instance the question to be asked as a starting point is whether as a result of age, illness or disability the Appellant requires long-term personal care to perform everyday tasks. I am satisfied that that is the case. In reaching that conclusion I have given due consideration to medical evidence that has been made available. Firstly I have considered Dr Kigamwa's consultant psychiatric report/letter of 3rd May 2013. This letter predates the Entry Clearance Officer's Notice of Refusal by some five months. It is a letter of some substance. It points out that the Appellant has even at that time radiological and clinical diagnosis of dementia, most probably of the Alzheimer's type and has clinical depression. Dr Kigamwa has considerable knowledge and understanding of the Appellant. He had been seeing her for almost two years when this letter was written on a two monthly basis and states therein that he has noticed a deteriorating condition and that a care plan has been put in place. He emphasises that the Appellant's cognitive functions have declined to a point where she has proved to be a danger to herself and that she needs care around the clock. As long ago as May 2013 he has emphasised that this care is better provided by a close family member of the family to prevent further triggers and for better support of the patient. He stresses that activities of daily living, like bathing, dressing and assistance with toileting, require total assistance and that the Appellant will need 24 hour care at this stage of her condition and that because she is diabetic, the risks of not taking medication may on its own make her ill, not to mention the deteriorating nature of the condition emphasises the importance of care with a close and familiar member of the family and in familiar environments and in his considered opinion she would benefit from close family care.

21. Dr Kigamwa updates his analysis a year later by way of letter dated 28th April 2014. Therein he states that the Appellant's dementia has progressively gotten worse to a point where she is not able to remember much but she still recognises family

members. In addition he notes that she has developed features of a depressive illness and often threatens suicide, and thus requires to be constantly watched. He emphasises that the Appellant is looked after, at time of his report, by family members, in particular his son-in-law and that at her stage of dementia it is his opinion that she requires family support and care and that she would need 24 hour care and help with activities of daily living, like bathing, dressing and toileting. He emphasises therefore those aspects of the care that Mrs Janmohammed has provided in her testimony and he has emphasised the very considerable support that both Mrs Janmohammed and her husband Zilad have provided by travelling to and from Kenya. He has concluded by emphasising the significance and importance of care with a close and familiar member of the family and in familiar environments and that with dementia the loss of memory puts more strain on the individual when they are in unfamiliar surroundings.

22. In addition to that I have given due consideration to, albeit that it postdates the date of hearing, the letter from Dr Sheila Dobell who is a GP in County Kildare and who does no more than reiterate the view expressed by Dr Kigamwa that the Appellant requires 24 hour care and help and that she requires a full-time carer and will benefit from close family care.

23. Having previously concluded that the Appellant meets therefore the requirements of E-ECDR.2.4 in that it is clear from the medical evidence that she requires long-term personal care to perform everyday tasks, I proceed to look at this matter pursuant to E-ECDR.2.5. I am satisfied that the Appellant is unable to obtain the required level of care in Kenya because it is not available and there is no person in that country who can reasonably provide it. Cost is not a relevant factor herein. The Appellant comes from a very caring family and I have gleaned from my hearing of this matter and consideration of the evidence the exceptional family care that has been provided by the Sponsor and her husband and the support that is also provided by the Appellant's son. It is clearly totally impractical where there are no other family members and the Appellant is subject to a care regime provided by a nursing service that the care and attention that she requires can be adequately provided in Kenya. What is particularly emphasised by Dr Kigamwa and enlarged upon by Dr Dobell is firstly the 24 hour care that the Appellant requires and secondly the importance of that care being provided by close family members. I am completely satisfied that that can only be obtained by her residing with the Sponsor whose devotion to her mother is to be most highly commended.

24. In all the circumstances I am consequently therefore satisfied that the Appellant meets the requirements of Appendix FM of the Immigration Rules and the Appellant's appeal is allowed under the Immigration Rules.

25. I was asked by Mr Brown to give a direction under the 2002 Act that entry clearance be expedited by the Entry Clearance Officer. On due consideration I am not of the view that this is a matter that needs to be either remitted to the Entry Clearance Officer or for any direction under the 2002 Act. It is sufficient merely to allow the appeal. Further even though I am dealing with the matter as at the date of hearing

under the Immigration Rules the practicality of the position remains that the matter has to be looked at on the parties' behalf from where they are currently positioned. It seems to me it would be ridiculous to even remotely suggest that the Appellant in her condition should have to return to Kenya to obtain entry clearance. The Appellant is a family member of a UK national and the situation in which the family find themselves in is covered by the Immigration (European Economic Area) Regulations 2006, paragraph 9. The Sponsor would be returning to the UK as a UK national currently residing in an EEA state as a worker or self-employed person or was so residing before returning to the United Kingdom. In such circumstances it would seem appropriate that that may well be a factor for the Appellant's instructed solicitors wish to consider when arranging for the appropriate entry clearance. In any event for clarification I consider that the correct decision is that the appeal be allowed under the Immigration Rules.

Decision

26. The appeal is allowed under the Immigration Rules.

27. The First-tier Tribunal did not make an order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris