Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/17192/2013
OA/17193/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 January 2015	**On 30 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

MOHAMMAD FAGHIRZADEH (1)
NORIA FAGHIRZADEH (2)
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation:
For the Appellant: Ms J Vijayatunga, Legal Representative
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Afghanistan, born on 7 January 1945 and 3 June 1946. At the date of application they were residing in Pakistan. They have appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Powell, promulgated on 15 September 2014, dismissing their appeals against decisions of the respondent, made on 31 July 2013, refusing to issue them entry clearance to enable them to join their adult

son, Mr Sefattullah Faghirzadeh ("the sponsor"), in the UK.

2. The respondent refused the applications by reference to the Immigration Rules for adult dependents relatives, found in Appendix FM. The appellants are a married couple and they live together. In their visa application forms they both confirmed that they could look after themselves. They both stated they had no special medical conditions other than old age. The respondent found that neither of the appellants had shown that they required long term personal care to perform everyday tasks (E-ECDR.2.4). Nor had they shown care could not be provided in Pakistan (E-ECDR.2.5).

3. The appellants submitted grounds of appeal arguing the rules were met. A letter was submitted from Dr Tariq Khan (Hashim) from the Northwest General Hospital & Research Center in Peshawar, dated 19 August 2013, stating the first appellant was suffering from an intestinal illness and the second appellant was suffering from stroke. Both were weak, in poor condition and suffering from stress. They were old and ill and desired to join their sons for physical assistance and help in their daily lives. The grounds added that the son on whom the appellants had relied for assistance in Pakistan had moved to Canada. Finally, the grounds argued that the refusals were an unlawful interference with the appellants' right to private and family life under article 8 of the Human Rights Convention. The decisions to refuse were maintained by the entry clearance manager who found that no new information of evidential significance had been added.

4. The appellants were represented by counsel at the hearing. The judge identified the sole issue for hearing was whether the appellants met paragraph E-ECDR.2.4 of the rules, which required them to show that one or both of them, as a result of age, illness or disability required long-term personal care to perform everyday tasks[1]. The judge heard evidence from the sponsor. He found it was not credible that the failure to mention health problems in the applications was the fault of the agent employed to compete the application forms. He noted the sponsor had also failed to mention specific health needs in his sponsorship declaration submitted and no medical evidence accompanied the applications. However, he accepted the appellants were, at the date of decision, affected by illnesses for which they were both receiving treatment and medication. The first appellant's intestinal illness was longstanding. The second appellant was suffering from the effects of a stroke in 2006. The appellants had returned to Afghanistan. They required financial support. It was not surprising they wished to settle in the UK. The judge expressed sympathy for the appellants. However, on these facts, he found the rule was not met.

5. The application for permission to appeal was prepared by new representatives. It is not necessary to summarise all the grounds, which are very widely drawn. The first ground alleges the Tribunal's decision was irrational because no reasonable Tribunal could have come to the same conclusion and the Tribunal

[1] "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."

had failed to consider relevant factors. Additionally, the Tribunal erred by failing to determine one of the grounds of appeal, namely the article 8 ground.

6. The appellants were granted permission to appeal by Judge of the First-tier Tribunal Pooler. His order stated that it was arguable the judge had erred by failing to consider the article 8 ground. It was unlikely the other grounds disclosed an arguable error of law but he granted permission to argue all the grounds.

7. The respondent filed a response opposing the appeal. This argued the Judge had given clear reasons for finding the rules were not met. There were no good arguable grounds for considering article 8 outside the rules. This was a "mundane case" and there were no compelling circumstances outside the rules. An outcome favourable to the appellants would have been "perverse".

8. I heard submissions from the representatives as to whether the Judge made a material error of law in his decision. I have recorded the submissions in full in my record of the proceedings and I only set out a summary here. Ms Vijayatunga maintained both that the decision on the rules was erroneous and that the failure to consider article 8 was a material error. Greater emphasis was placed on the second of those arguments. She maintained that the correct approach to article 8 was to carry out a two-step process, whereby the judge ought first to consider the rules and then article 8, following the *Razgar*[2] steps. Mr Walker did not seek to argue that there was no error on the part of the Judge in failing to consider article 8 outside the rules but he argued that any such error could not have been material on the facts found.

9. I reserved my decision as to whether the Judge made a material error of law such that his decision has to be set aside.

10. There is nothing in the first ground. The Judge directed himself correctly in law, took into account all the evidence and reached a conclusion which it was entirely open to him to reach on the available information. In other words, he was entitled to find the appellants did not have long-term care needs as at the date of decision. It was entirely reasonable for him to infer from the absence of any reference to care needs in the applications that no such care needs existed. The Judge gave sympathetic consideration to the subsequent evidence regarding the appellants' family circumstances and health problems. However, he was perfectly entitled to conclude that it had not been established that the rule was met as at the date of decision.

11. Ms Vijayatunga's argument that the Judge failed to take into account the sponsor's oral evidence that his cousin was providing temporary assistance in Jalalabad is unarguable given the Judge's reference to it in paragraph 29. In any event, these findings and those in the following paragraph are not circumstances appertaining as at the date of decision[3].

[2] [2004] UKHL 27.

[3] Section 85A(2) of the 2002 Act provides that the tribunal may consider only the circumstances appertaining at the time of the decision to refuse. This applies also to human

12. Although not apparently drawn to the Judge's attention, the rules also impose evidential requirements in paragraph 34 of Appendix FM-SE[4]. The only evidence adduced by the appellants emanating from a doctor or health professional consisted of the two letters from Dr Khan, dated 19 August 2013 and 20 August 2014. These letters contain similar information and neither states that the appellants are unable to perform everyday tasks.

13. The Judge's decision under the rules contains no error.

14. On the face of it, the Judge gave no separate consideration to article 8. The question is whether this is a material error. The grounds of appeal to the First-tier Tribunal were drafted by solicitors. In respect of both appellants, they stated as follows:

> "5. The Appellant has a vast network of family in the UK. It is submitted that denying the Appellant entry clearance is an unlawful interference with the appellant's rights to family and private life under article 8 ECHR."

15. The entry clearance manager responded that these grounds did not specifically state how it was alleged the appellants' article 8 rights had been breached. Article 8 only has extra-territorial effect in its family life aspect[5]. Article 8 did not confer a right on individuals to choose where they prefer to live and States are permitted to control entry. The entry clearance manager was not satisfied the appellants' right to family life had been affected in any way.

16. The Judge was under an obligation to determine any matter raised as a ground of appeal by virtue of section 86(2)(a) of the 2002 Act. The grounds of appeal did raise article 8. The appellants' counsel does not appear to have abandoned the ground. I think there must therefore be en error of law on the part of the judge in failing to address it. Even if he considered there was no need to consider article 8 outside the rules, he was under an obligation to the parties to say so. The question becomes whether his error was material to the outcome of the appeal.

17. The express purpose of Appendix FM of the rules is to give application to the UK's obligations with respect to family life[6]. As Ms Vijayatunga reminded me, there has been judicial consideration of whether there is a two-stage

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rights ground of appeal (*AS (Somalia) (FC) and another v Secretary of State for the Home Department* [2009] UKHL 32).

[4] "34. Evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of:

(a) Medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and

(b) This must be from a doctor or other health professional."

[5] *Sun Myung Moon (Human rights, entry clearance, proportionality) USA* [2005] UKIAT 00112.

approach in article 8 cases and whether the rules are a complete code.

18. It is now clear there is no "threshold test" and the task of the Judge is to consider whether there are compelling circumstances, which might justify a favourable decision on article 8 grounds, not already catered for by the correct application of the rules. In *R (Oludoyi & Ors) v SSHD (Article 8 – MM (Lebanon) and Nagre)* IJR [2014] UKUT 00539 (IAC), the Tribunal explained as follows:

> "20. There is nothing in Nagre, Gulshan or Shahzad that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the IRs and which could lead to a successful Article 8 claim. If, for example, there is some feature which has not been adequately considered under the IRs but which cannot on any view lead to the Article 8 claim succeeding (when the individual's circumstances are considered cumulatively), there is no need to go any further. This does not mean that a threshold or intermediate test is being applied. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. The guidance given must be read in context and not construed as if the judgments are pieces of legislation."

19. Having carefully considered the arguments put forward against the findings of fact made by the Judge, I have concluded his error was not material. That is because it was not conceivable that the Judge could have allowed the appeal on article 8 grounds outside the rules.

20. The rule in issue in these appeals is precisely one which considers compassionate circumstances, albeit the threshold for success is set very high. It is the will of Parliament, shown by the enactment of the rules replacing paragraph 317 of the previous rules, for there to be a tightening of immigration controls in respect of elderly dependent relatives, such as these appellants. It is no longer enough to show dependency on the sponsor. The only people now permitted to join UK sponsors are those who cannot look after themselves in their own countries because they cannot obtain the long-term care which they need.

21. As said, the Judge was entitled to find that, as at the date of decision, the appellants did not require personal care with their every day tasks. Whilst the factual issues for considering the proportionality of refusal under these circumstances are wider, the starting-point must be that this elderly couple has each other to support them and their physical frailties had not yet reached the

[6] See paragraph GEN.1.1: "**Purpose** GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules). It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others. It also takes into account the need to safeguard and promote the welfare of children in the UK."

stage that care was required from another person. There is no suggestion the Judge limited the evidence which could be called. As the Judge noted, the appellants were able to travel to Peshawar to receive treatment and medication, which was paid for by the sponsor. The Judge was not satisfied that the cousin's support would not continue in Jalalabad. He noted that, in addition to the sponsor's support, they derived some income from a shop and agricultural land. In short, there was nothing in the evidence which could have led a rational decision-maker to conclude these were compelling circumstances justifying a decision outside the rules in favour of entry clearance.

22. It is, of course, the case that the appellants have the option to re-apply if their circumstances change.

23. The decision of the First-tier Tribunal does not contain a material error of law and shall stand. The appellants' appeals are dismissed.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeals shall stand.

Signed Date 30 January 2015

Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal