Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09908/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th May 2017	**On 24th May 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

MRS FATMA AHMED PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Presenting Officer
For the Respondent: Ms S Akinbolu, Counsel instructed on behalf of the Respondent

DECISION AND REASONS

1. The Entry Clearance Officer appeals, with permission, against the decision of the First-tier Tribunal (Judge Obhi) who, in a determination promulgated on 18th October 2016 allowed the appeal of the Respondent on human rights grounds. Whilst the Appellant in these proceedings is the Entry

Clearance Officer, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the appellant by Counsel.

2. The Appellant is a citizen of India. She made an application for entry clearance as a dependent relative under Appendix FM of the Immigration Rules. The application was refused in a decision made on 11th October 2015. The Appellant had sought entry clearance as an elderly adult dependent relative as the widowed mother of the Sponsor, Mr Patel. The Appellant's appeal against the Respondent's decision to refuse entry clearance came before the First-tier Tribunal (Judge Obhi) on 7th October 2016. It is common ground that as a result of the new appeal provisions that the only right of appeal against that decision was on human rights grounds. In a determination promulgated on 18th October 2016, Judge Obhi allowed the appeal on human rights grounds, having considered that issue in the light of the Appellant's compliance with the Immigration Rule in question.

3. The Respondent appeals against that decision on two grounds, first of all that the judge made a material misdirection of law at paragraph 27 whereby the judge found that the Appellant lacked family support in India. It was submitted that the judge had failed to consider that the Appellant would be able to live in her own home with personal care paid for by the Sponsor. The grounds challenge the Sponsor's evidence at [16] and that the judge erred in law by relying on such a bare assertion. Ground 2 related to the judge's failure to give adequate reasons. This related to the finding at [27] that the Sponsor and his family were unable to relocate to India in order to provide the necessary care for the Appellant there.

4. Permission was granted by the First-tier Tribunal on 21st March 2007.

The Decision of the First-tier Tribunal

5. The judge had the opportunity of hearing oral evidence from both the Sponsor and his wife. Their oral evidence was recorded at paragraphs 13 to 18 of the determination. It is plain from reading the findings of fact made by the judge set out at paragraphs 22 to 27 that the judge found both the Sponsor and his wife to be entirely credible witnesses (see paragraph 22 of the determination). In addition, the judge had been provided with a comprehensive bundle of documentation which included detailed witness statements from the family members in the UK but also and importantly, evidence from family members in India and also medical evidence in the form of medical reports, medical receipts and also evidence relating to the costs and availability of care in India. There does not appear to be any dispute between the parties relating to the Sponsor's financial circumstances and there were substantial documents relating to that at pages 217 to 310 of the bundle. The financial support provided for the Appellant is set out at pages 311 onwards.

6. The judge correctly identified that the starting point for the consideration of the appeal was a previous decision made at the First-tier Tribunal in July 2009. This is a decision of Designated Immigration Judge Garratt who considered an appeal against the decision of the Secretary of State to refuse an application for the Appellant to remain in the UK on the basis of her dependency as an elderly parent. Those were in the earlier provisions of paragraph 317 of the Immigration Rules. The judge set out at paragraph [21] the circumstances at that time namely that she had come to the UK as a visitor, shortly before the expiry of that had applied for indefinite leave to remain as an elderly relative. The application was refused and at that time the Appellant was 74 years of age. The judge noted that the Appellant's husband had died in 2008 and that she had no one to support her in India. The judge recorded the evidence at that stage that her son, the Sponsor, had supported her from that date onwards and had gone back to care for and support his mother in September 2008. He then brought her to the UK for a visit and it was when she was there that he decided she could not return. The First-tier Tribunal Judge was not satisfied that the Appellant had demonstrated that she met the Rules and made reference to inconsistencies in the evidence.

7. Judge Obhi properly had regard to that decision as a starting point however, the judge found at [22] that that was a decision that was made seven years earlier and that the Appellant, to her credit, had returned to India. He therefore considered the fresh evidence that dealt with the period since the decision made by the First-tier Tribunal.

8. It is important to set out the judge's observations at [22]. Whilst I have already set out that it was plain from the determination that the judge accepted the evidence of the Sponsor and his wife finding them to be wholly credible witnesses, the judge also recorded that it had been accepted on behalf of the Respondent that the cultural attitudes of Indian society did present difficulties for married women in caring for their elderly parents. The judge set out that that was not an issue challenged by the Respondent at the hearing and further observed that that did form part of the Secretary of State's IDIs at one time. He further recorded that the evidence of the Sponsor had shown that attitudes had not changed and importantly, the evidence before this Tribunal differed from that of the earlier Tribunal and that now there was further evidence concerning the accommodation occupied by the Appellant's daughter in India and in the light of that evidence the judge also noted that the Respondent did not challenge the claim that the Appellant is financially dependent on the Sponsor.

9. At paragraph 23 the judge properly set out the amendments introduced by the 2014 Immigration Act observing that the Appellant's rights of appeal were limited to human rights grounds. The judge's findings then are set out at paragraphs 24 to 27. The judge noted that the question in the present case regarded entry clearance and that he was satisfied that the refusal did amount to an interference of the rights of the Appellant and her son and that there had been family life, that the interference was a grave

one given the Appellant's age and her poor health and the judge found that he was satisfied on the evidence that she was living alone, dependent on her neighbours for support for her very basic needs. The judge also noted that he had to consider whether the decision was in accordance with the law and if so, whether it was necessary in a democratic society for the reasons given. The judge noted that the ECO's assessment of the circumstances at the date of decision was such that he was justified in refusing the application. This was on the basis that he was not satisfied that the Appellant's other relatives in India could not care for her. However, the judge found that in the light of the evidence before him and in particular having seen the photographs which the judge found demonstrated "quite clearly" that they did not have the accommodation to care for her. Furthermore, the judge found that the Sponsor's claim that his sisters could not look after their mother because of the cultural expectations of Indian society in the area and the social class in which his mother lives, were findings that were plain from the evidence. As to the cultural attitudes, as set out in paragraph 22, that was not challenged by the Respondent in any event. The judge further noted that the photographic evidence to which he had referred simply confirmed what had been said before the previous Tribunal and in the application are that the photographs were simply proof of that claim and thus could be taken into account in reaching the decision.

10. Further findings made by the judge were set out at paragraph 25. The judge set out that he had considered the statement of the Sponsor and the evidence in relation to his sisters, the Appellant's daughters in India. In addition he had considered their affidavit evidence and a further witness statement at page 35 of the Appellant's bundle from a previous carer. The evidence relating to the two daughters was that they were not in a position to care for their mother. At [26] the judge summarised the Appellant's medical health and her current physical situation. That made reference to the extensive medical evidence that was set out in the bundle to which I have referred and the medical conditions to which the Appellant was suffering from. The documentation also confirmed that she had had a fall on 17th March 2016 which had resulted in a wound. It is right to observe that there is no challenge made by the Respondent to that medical evidence either before the First-tier Tribunal or to this Tribunal.

11. Having considered the evidence referred to at paragraphs 25 and 26 the judge made a finding that he was satisfied that there was no person in India who could reasonably be expected to care for the Appellant. The judge went on to consider the Sponsor's evidence concerning the availability of alternative care noting that the Sponsor had made enquiries in India of the availability of care homes but found that he would not be able to afford to send his mother to live in such a facility. The judge set out the Sponsor's circumstances, including his financial circumstances and also the fact that he was married with three children and a fourth child to be born. The judge considered the trips that he had made to India and found that they were indicative of the level of responsibility that is assumed for his mother and that this was all at a cost for him.

Importantly, the judge at paragraph 26 noted that the point made also in the Sponsor's evidence was that there was no one who could care for his mother 24 hours a day.

12. At paragraph 27 the judge undertook the proportionality balance in the light of the findings of fact that he had made. The judge gave consideration to the public interest considerations set out at Section 117B of the 2002 Act (as amended by the Immigration Act 2004) which the judge referred to as "important factors which cannot be ignored". The judge noted that the Section 117 factor related to the precariousness of a private life did not apply but noted that it was relevant that the Appellant had respected a previous decision of the Respondent and had returned to India despite her difficulties. The judge found that there would be little impact on the UK's economy, if she came to live with her son who would provide for her and whilst she might need health care, in a humane society the impact of that for a woman of her age was minimal when everything was taken into account. The judge reminded himself that there was no evidence of her breaching any permission to enter and remain. Having balanced the public interest factors against the findings of fact that he had made including her age, her lack of real family support in India, her dependence on her son, whose limited income and inability to provide residential care for her in India, the complete inability of the Sponsor and his family to return to India without massive disruption to their lives, he found that the interests of the Appellant outweighed those of the public and therefore the proportionality balance was in favour of allowing the appeal.

13. Thus the appeal came before the Upper Tribunal. Ms Akinbolu, who appeared on behalf of the Appellant provided a Rule 24 response. Mr Tufan was given time to consider it. Thereafter he made the following submissions. He referred to the two Grounds of Appeal in the light of the Rule 24 response that had been provided and the guidance that was attached to it that dealt with Ground 2 of the matters advanced on behalf of the Entry Clearance Officer. Ground 2, referred to the judge's findings at [27] that the Sponsor and his family are unable to relocate to India to provide the necessary care for the Appellant. The grounds submitted in that respect that there was no evidence that the Sponsor would not be able to find employment and that whilst the children did not want to return to India that was open to the family. However given the guidance that had been produced by Ms Akinbolu and the factual elements namely that the children were all British citizens, Mr Tufan submitted that he was not going to press this ground of appeal and that the Secretary of State could not require the British citizen children to leave the UK. Thus he did not seek to elaborate further on that ground. Dealing with the first ground, he submitted that this ground turned on the issue of the provisions of care in India and that at paragraph 16 of the determination the judge recorded the Sponsor's evidence of renting a flat for his mother near to where his sisters lived would be too costly and that they would have to employ a nurse. He submitted it was not clear what evidence there had been to make such a finding and that it would not be difficult to find

accommodation near to a grownup daughter and that that was not considered in the necessary detail by the judge. Thus the judge's consideration of this issue was not satisfactory.

14. Ms Akinbolu relied upon the Rule 24 response that she had filed. In relation to the submissions made by Mr Tufan, she submitted that at paragraph 19 of the determination the judge noted that the Presenting Officer had accepted the evidence as to why others could not care for the Appellant in India and whilst that this was not an express concession, that was not a point that was relied upon before the First-tier Tribunal. She set out that the Presenting Officer at the hearing had taken the view that the questions of qualification under the Rules had arguably been addressed and that this position was taken following the cross-examination of the witnesses in court and that no challenge was made to the credibility of the evidence produced (see paragraph 19 and paragraph 22). Thus she submitted the Respondent now sought to argue matters that were not in issue before the judge.

15. As to Ground 1 and the finding at [26] that there was no person in India who can reasonably be expected to care for the Appellant, was a finding that was fully open to the judge to make and who had given full reasons in the preceding paragraphs. In particular, that the judge accepted the evidence of the Sponsor and his wife as entirely credible and further, took into account the evidence of Mr Goddard, and the doctor at pages 55 to 60 and the evidence confirming the affordability of care homes in India set out in the bundles at pages 173 – 216. None of that had been challenged by the Respondent at the hearing consequently the finding that the judge made in that respect was entirely open to the judge to make. As to Ground 2, whilst Mr Tufan did not press that ground, she submitted that the judge's determination did not make it clear that he found the Appellant to have met the Rules because this had been a human rights appeal. However the findings of the judge when taken together make it clear that the Appellant did meet the Rules and thus the question of relocation of the family to India in those circumstances did not apply, in any event, as set out in the Rule 24 response such a claim would be unreasonable in the light of the policy guidance appended to the Rule 24 response and confirmed by Mr Tufan and the decision of **SF and Others (Guidance – post – 2014 Act) Albania [2017] UKUT 00120 (IAC)**.

Discussion:

16. Dealing with Ground 1, as Ms Akinbolu submits it was not in dispute before the First-tier Tribunal Judge that the Appellant could meet the requirements of EC-DR to Appendix FM save for paragraph E-ECDR2.5 dealing with the availability of care in India.

17. Under ECDR2.5 (a) there are two elements which need to be satisfied. First it must be established that the care is not available, and secondly, that there is no person in the country who can reasonably provide it. If the Appellant is able to establish that the required level of care is not available

and secondly that there is no other person in India who can reasonably provide it, the Appellant would have satisfied the requirements of the Rule.

18. In terms of the decision, it was a careful reasoned decision in which the judge plainly had regard to the evidence and found both the Sponsor and his wife, both of whom gave evidence before the Tribunal to be entirely credible and upon whose evidence he placed weight and acceptance. The judge was entitled to reach that particular view of the credibility of the evidence and thus it was open to him to accept the factual matters that formed the basis of that evidence. The judge found that there was no one who could reasonably provide for the applicant's care. This finding which was made at paragraph 26, was based on the earlier finding at paragraph 25 that he accepted the evidence of the Sponsor and that relating to the Appellant's daughters' evidence that they were unable to provide the care required due to their own circumstances (see paragraph 24) and further in the light of the medical condition supported by the medical reports at [26]. In conjunction with this, the judge accepted the Sponsor's evidence that she required 24 hour care. Also the judge was entitled to rely upon the point accepted by the Presenting Officer that there were cultural difficulties in the married sisters providing support (see paragraph 22). Thus it was one to the judge to reach the conclusion that there was no close family member in India who could reasonably provide the required care. Part of the sponsor's evidence was that she require assistance for intimate tasks and that it was not appropriate for this type of care to be carried out by strangers and it was open to the judge to take into account such cultural factors (see paragraphs 24 and 26).

19. Whilst the grounds at paragraph 1 refer to the judge being in error in relying on what was described as a "bare assertion" made in the Sponsor's evidence at paragraph 16, that he could not employ a nurse, this submission fails to take into account that the judge was entitled to accept the Sponsor's evidence as credible which would include this point raised in his evidence. Furthermore, it failed to take into account the evidence given by the Sponsor relating to the provision of care homes that was set out in the bundle at pages 172 onwards upon which the judge was entitled to rely. In view of the judge accepting the evidence of the Sponsor that the applicant required 24 hour care the alternative suggestion made in the grounds that a nurse could be provided, is contrary to that finding. The Sponsor and his wife both gave evidence in accordance with their witness statements that there was no care home available in the applicant's home town and in other locations, the evidence, which the judge accepted, was that the care homes were not obtainable due to cost. (See paragraph 24 and paragraph 18 of their respective witness statements). This being an alternative ground (see paragraph E-ECDR.2.5 (b)).

20. I am therefore satisfied that Ground 1 is a disagreement with the findings of the judge which were open to him to make on the evidence before him and does not demonstrate any arguable error of law.

21. Dealing with Ground 2, as set out above, it is not a ground that has been advanced by Mr Tufan on behalf of the Entry Clearance Officer for the reasons set out earlier and by reference to the Rule 24 response and in particular the guidance that was annexed to that document. Mr Tufan observed that it would not be reasonable to expect the children, all of whom were British citizens to be required to leave the United Kingdom. As Ms Akinbolu submitted, the judge had not clearly set out in the findings of fact that on his analysis the Appellant met the Rules as this was a case which fell under the new appeal provisions. In those circumstances, I consider that the submission made by Ms Akinbolu is right and therefore the question of relocation was not relevant. Even if it were, the fact that the applicant could meet the Rules would be a weighty consideration in the proportionality balance as it would on the facts of the case necessarily outweigh the public interest.

22. Whilst Mr Tufan did not press this ground, I do not find there is any error in the judge's reasoning. The judge properly took into account all the evidence relating to the family circumstances; that he was married with three children and a fourth child to be born in March 2007. He had not resided in India since he was 26 years of age and there was no evidence that there were any links upon which he could rely upon to obtain housing or employment. That was the factual background upon which the judge found that there would be "massive disruption". Thus contrary to the grounds, the judge did properly consider this aspect within the determination. Consequently it has not been established that the judge made any error of law in his overall decision and therefore the decision shall stand. No application has been made for an anonymity direction to be made or grounds advanced on behalf of the applicant.

Decision:

The decision of the First-Tier Tribunal did not involve an error on a point of law. The decision to allow the appeal therefore stands.

Signed Date: 22/5/2017

Upper Tribunal Judge Reeds

No fee is paid or payable and therefore there can be no fee award.

Signed Date 22/5/2017

Upper Tribunal Judge Reeds