Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06355/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th December 2018	**On 9th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

NADERA [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss P Heidar of AA Immigration Lawyers
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Afghanistan, appeals to the First-tier Tribunal against a decision of the Entry Clearance Officer dated 7th April 2017 refusing her application for entry clearance as an Adult Dependent Relative (ADR) under Appendix FM of the Immigration Rules. First-tier Tribunal Judge Mill dismissed the appeal in a decision promulgated on 12th July 2018. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Kelly on 16th October 2018.

2. The background to this appeal is that the Entry Clearance Officer refused the Appellant's application for entry clearance as an Adult Dependant Relative on the basis that, although medical letters had been supplied in support of the medical condition, there was no indication as to how long the Appellant had suffered with the medical conditions identified and no prognosis of her condition should she not receive operative intervention. The Entry Clearance Officer was not satisfied that the Appellant was unable to obtain the required level of care in Afghanistan or elsewhere other than the UK and refused the application under paragraph EC-DR1.1(d) of Appendix FM of the Immigration Rules with reference to E-ECDR2.5. The Entry Clearance Manager reviewed the decision after the appeal and concluded that the Appellant had not demonstrated that, as a result of illness, she requires long-term care to perform everyday tasks as required by E-ECDR.2.4 or that she had established that the care needed is unavailable to her even with practical or financial assistance in accordance with the requirements of E-ECDR2.5.

3. At paragraph 13 of his decision the First-tier Tribunal Judge noted that the Appellant's representative indicated in submissions that it was now accepted that the Appellant meets the provisions of E-ECDR.2.4. It is contended in the Appellant's Grounds of Appeal and by Miss Heidar at the hearing that this should read that it was the Respondent's representative who had conceded that the Appellant met the requirements of E-ECDR2.4. This approach was not disputed by Mr Lindsay.

4. Accordingly, it was for the judge to determine whether the Appellant met the test in E-ECDR2.5. The judge made a number of findings of fact set out at paragraph 14. The judge found it established that the Appellant requires 24 hour care and that there are no care home facilities in Afghanistan [17]. The judge found that the Appellant is being cared for as a matter of fact by her daughter-in-law. The judge considered the evidence that there is a significant emotional detachment between the Appellant and her daughter-in-law to the extent that she is being emotionally abused and is not receiving an adequate level of care but did not accept this evidence [19 to 21]. The judge reached his conclusions in relation to E-ECDR2.5 at paragraph 22 finding that it is possible to secure the services of hired carers for parts of each day together with the continued care by the Appellant's daughter-in-law and was satisfied that the Appellant's needs can be met in this way and that she can receive the required level of care in Afghanistan. The judge went on to consider Article 8 outside the Rules but found that there was nothing disproportionate about the refusal of the visa application.

5. The Grounds of Appeal contend that the judge erred in reaching the conclusion that the Appellant's daughter-in-law could look after her. It is contended that this is a matter which was not mentioned in the refusal notice and that the parties should have been allowed any appropriate adjournment in order to avoid injustice **(Kwok On Tong HC 395 para 320) India [2006] UKAIT 00039**. It is contended that the judge had not given adequate reasons why he came to this conclusion. It is contended

that the daughter-in-law has six children and that, prior to her fall, the Appellant was able to care for herself and was providing her daughter-in-law with assistance in running the family home and that the Appellant had given detailed evidence explaining that she was suffering from the emotional abuse that she was subject to from her daughter-in-law.

6. It is further contended that the judge failed to consider the medical evidence and in particular the report at page 33 of the Appellant's bundle stating that the Appellant's son works in the military and her daughter-in-law has six children and cannot look after her. It is therefore contended that the judge erred in saying that the medical evidence only said that there were no family members in Afghanistan to look after her. It is further contended in this context that the judge erred in that he gave weight to the Sponsor's evidence but failed to give any weight to the Sponsor's husband's evidence who had given a statement and oral evidence at the hearing. It is contended that the judge's finding that the Appellant can be cared for by her daughter-in-law is inadequate given the statements from the Appellant and her son who explained that, following her accident, her needs have increased and as the daughter-in-law has six children she cannot cope. It is contended therefore that it was not limited to the abuse he was receiving but also the difficulties due to her care needs following her accident. It is contended that the judge's reasons for finding the Sponsor not credible are inadequate and speculative.

Error of law

7. The judge made a number of relevant findings going to the requirements paragraph E-ECDR2.5. At paragraph 14(iii) the judge found that the Appellant is not independent and requires ongoing assistance, care and medical treatment and that her primary carer is her daughter-in-law with whom she resides. The judge found that the medical interventions, treatments and medications for the Appellant are accessible in Afghanistan and paid for by the Sponsor who lives in the UK with her husband and five children and whose financial circumstances are such that they are able to travel to Afghanistan at least twice a year to visit the Appellant and that the Sponsor proposed to employ a carer to look after her mother if she were to come to the UK. The judge found at 14(vii) the Sponsor and her husband are in a position to afford a full-time carer for the Appellant in Afghanistan. He found at 14(viii) that culturally it would be unacceptable for the Appellant to be attended on and cared for by a male carer in Afghanistan and that it is impossible and at 14(ix);

> "Culturally it is impossible to hire the services of a full-time female carer in Afghanistan due to the expectation that females will not stay overnight elsewhere other than with their family. It is however possible to hire female carers for a part or parts of each day".

8. The judge found that there were no care home facilities in Afghanistan. The judge referred to the expert report from Dr Giustozzi but found that the report was limited in value as it fails to recognise or discuss the de facto availability of the Appellant's own family in Afghanistan and in

particular her daughter-in-law. This was a finding open to the judge on the evidence.

9. The judge also considered a report by Dr Massouda Jalal but found that this did not address someone in the Appellant's particular circumstances as someone who has family support available.

10. The judge made findings at paragraph 19 in relation to the daughter-in-law finding that he was not satisfied with the evidence that the Appellant is being emotionally abused and is not receiving an adequate level of care saying that this was not supported by any independent form of evidence. This is an important finding because in my view the Appellant has not pointed to any evidence on the Appellant's behalf showing that the Appellant is being inadequately cared for at present.

11. At paragraph 20 the judge said "there is no medical evidence to support the assertion that the Appellant is not de facto receiving appropriate care currently." This is a finding open to the judge on the evidence too.

12. In my view paragraph 21 is crucial to the assessment of the evidence on this matter. There the judge referred to the Sponsor's witness statement and oral evidence. The judge found that the Sponsor was not a credible or reliable witness saying;

> "I found that she was vague and evasive at times in her oral evidence and sought to avoid answering simple, straightforward questions about the extent to which enquiries have been made to seek to employ a carer. She repeatedly avoided answering a question put to her about the research carried out into who may be employed and could give no specification as to who had been contacted other than stating that it was people in her home area. When asked whether it was possible to secure the services from any private hospitals or establishments she avoided answering the question on more than one occasion. She was vague about the provision of medical treatment and how her mother accesses the necessary medical appointments currently. When asked whether it might be possible for someone to be employed for part of the day, she referred to the fact that her sister-in-law would find it difficult because of the responsibility of looking after her own children. This is incredible. She importantly did not suggest that this would not be possible. The inference in her evidence is that part-time day carers *are* available."

13. I find that it was open to the judge to make the credibility findings made at paragraph 21. The judge heard from the Sponsor and made an assessment of her oral evidence based on the way she answered the questions. The credibility finding was absolutely open to the judge on the basis of oral evidence. In my view it is clear that the Appellant's case was significantly undermined by the judge's doubts about the credibility of the Sponsor. The judge clearly did not accept the Sponsor's evidence that the required level of care was not available in Afghanistan. In my view this goes to the heart of the matters to be determined by the judge.

14. In my view there are no inconsistencies between these findings and the earlier findings of fact at paragraph 14. The scenario considered by the judge was that the Appellant is currently being cared for by her daughter-in-law, that there is no evidence of inadequate care at the moment and that the Sponsor's evidence in relation to the options for care was not credible. The judge did not accept that the claims that there was emotional detachment or emotional abuse between the daughter-in-law and the Appellant and the judge gave adequate reasons for all of these findings. In these circumstances it was therefore open to the judge to go on to make the findings at paragraph 22 that the services of a day-time carer could be secured, that the Sponsor and her husband were able to fund such care, that hired carers could be brought in for part or parts of each day together with continued care by the daughter-in-law, and the needs could be met and she could receive the required level of care in Afghanistan. In my view these were findings open to the judge in light of the credibility findings and the findings made by the judge on the evidence.

15. I do not accept the submission that the Appellant's representatives were surprised by the issue of the existing provision of care by the daughter-in-law. This was specifically raised by the Entry Clearance Manager who referred to the Sponsor's declaration that the carer perpetrates emotional abuse towards the Appellant. The Entry Clearance Manager noted that these claims are unsupported by any objective evidence and that little weight was attached to them. The Entry Clearance Manager referred to Dr Giustozzi's report noting;

> "However, Dr Giustozzi fails to discuss whether he had any knowledge of the current care arrangements in place for the Appellant – for instance crucially who is helping her to be able to use the bathroom, and the doctor fails to acknowledge this limitation to his extremely brief report".

16. The Entry Clearance Manager said that he was not satisfied that the Appellant has provided a full picture of who currently provides personal care for her or corroborative evidence as to why that arrangement cannot continue. These are the very issues the judge went on to consider.

17. It has not therefore been established that the Appellant or her representatives were treated unfairly by consideration of this issue given that it was very much live in the Entry Clearance Manager's review.

18. In any event I accept the submission by the Respondent that there was no indication that the Appellant or her representative sought an adjournment or sought any further time to make any further submissions in relation to this issue given that it is clear from paragraph 21 that this issue was very much raised in the questions to the Sponsor.

19. The second ground put forward in the Grounds of Appeal and reiterated by Miss Heidar at the hearing is that the judge's conclusions have influenced his assessment under Article 8. However, as I have found above, the

judge made no error in his approach to the assessment of the Immigration Rules. In these circumstances I see no criticism established in relation to the Article 8 ground.

20. At the hearing both representatives relied on the decision of **Ribeli v Entry Clearance Officer (Pretoria) [2018] EWCA Civ 611**. There the Court of Appeal emphasised that the burden of proof is on the appellant and discussed the evidence as to care available in South Africa. In **Ribeli** the Court of Appeal cited from the decision in **BRITCITS v SSHD [2017] EWCA Civ 368** where Sir Terence Etherton MR said the following about the ADR Rules:

> "59. Second, as is apparent from the Rules and the Guidance, the focus is on whether the care required by the ADR applicant can be "reasonably" provided and to "the required level" in their home country. As Mr Sheldon confirmed in his oral submissions, the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations, which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course, to be objectively assessed."

21. The issue in this appeal is whether the Appellant has established that she is unable, even with the practical and financial help of the Sponsor to obtain the required level of care in Afghanistan because it is not available and there is no person in that country who can reasonably provide it or it is not affordable. The judge's conclusion that the Appellant had not met that requirement is in my view sustainable as it is based on findings of fact which were open to him on the evidence.

Notice of Decision

The decision of the First-tier Tribunal does not contain a material error of law. The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date: 18th December 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and therefore there can be no fee award.

Signed Date: 18th December 2018

Deputy Upper Tribunal Judge Grimes