



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/07897/2013

THE IMMIGRATION ACTS

Heard at Field House

On 17th June 2014

**Determination
Promulgated**

On 3rd July 2014

Before

**LORD MATTHEWS SITTING AS JUDGE OF THE UPPER TRIBUNAL
DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD**

Between

MS TAPOSI GHOSH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Fortescue, Counsel instructed by Sheratons Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of India who made application for entry clearance to come to the United Kingdom as the dependent relative of her son Himadri Ghosh who is present and settled here. That application was refused by the Entry Clearance Officer and her subsequent appeal

dismissed by First-tier Tribunal Judge Deavin in a determination promulgated on 3rd March 2014.

2. Grounds of application for permission to appeal to the Upper Tribunal were lodged, essentially submitting that the judge had ignored important medical evidence and permission to appeal was granted by Upper Tribunal Judge Deans, who noted a doctor's letter before the judge which said that the Appellant "is unable to perform her daily chores like changing her clothes and taking a shower".
3. While the Secretary of State initially lodged a Rule 24 notice contending that the judge had directed himself appropriately, the position of Ms Everett for the Home Office before us was that she agreed that there was an error in law because the judge had not properly considered the medical evidence. As such, she accepted that the decision should be set aside and remade by us.
4. We therefore found that there was an error of law for the reasons stated.
5. Ms Fortescue for the Appellant asked us to hear oral evidence from Mr Ghosh and his wife and we agreed to do so. It is helpful at this point to set out, briefly, the terms of their joint witness statement.

Joint Witness Statement of Himadri Ghosh and Debarati Ghosh

6. Himadri Ghosh first entered the UK on 2nd June 2004 and he was granted ILR on 16th May 2009. His mother lives alone in India and his sister, who is married, lives in the USA. He works here as a head chef.
7. He visits his mother in India on a regular basis once or twice a year and has provided continuous care and support for her. He provides for her basic financial needs namely food, shelter and clothing.
8. His mother's health has been deteriorating rapidly and she has been in a lot of pain. She suffers from cervical dorsal, lumbar degenerative disease, with limited mobility of the spinal chord. She also suffers from osteoarthritis and Auditory Processing Disorder (APD). She has trouble performing her daily chores because of her chronic orthopaedic and medical problems. She suffers from depression and severe anxiety. She cries all the time and gets frequent panic attacks.
9. At this point she requires emotional support that only he can offer. A domestic help is for household chores which is not sufficient to provide her with the emotional support to recover from her depression.
10. It is customary in India for sons to take responsibility and care for their elderly parents. There is nobody else that his mother can turn to for the support she requires. Since July 2010 his mother has been living alone.
11. He cannot return to India to take care of his mother because he has family here and cannot uproot everyone. His wife is a secondary school science

teacher here and has a degree and postgraduate certificate in education. They asked the court to consider the compassionate circumstances when deciding this appeal.

The Oral evidence

12. We heard their oral evidence which is as recorded in our Record of Proceedings.
13. Mr Ghosh adopted his witness statement as true and correct. He spoke to his mother at least five times a week. She was taking about ten to twelve tablets daily and was doing so as at the date of the decision. With regard to hospital records at pages 40 to 47 of the first bundle, his mother had been taken to the hospital as an emergency appointment.
14. In cross-examination he said that no-one was looking after her. Her condition was deteriorating. Asked if she was on medication for depression, he said she was on many tablets and the doctor could not give her any more. He had tried to contact nursing agencies and care homes but the response was that they could not help. The domestic help was for cleaning and washing up only. There was no re-examination of the witness.
15. Debarati Ghosh also adopted her witness statement as true and correct. Asked in cross-examination why they could not employ someone to be her carer she said that they had considered that option. The primary need was psychological and emotional and there was no way that could be arranged in India. Her doctor had explained that it was her psychological need that had to be considered. Nothing material emerged in re-examination.

Submissions for the Home Office

16. Reliance was placed on the reasons given for the refusal of the Appellant's application. There was now a lot more evidence than was before the Entry Clearance Officer. Nevertheless it was not suggested that we could not take this further evidence into account.
17. The evidence did suggest that the Appellant's medical needs were being taken care of. It was not clear what further care she required. It was not accepted that a carer could not be obtained given that a huge section of the Indian workforce was self-employed. We were asked to dismiss the appeal.

Submissions for the Appellant

18. Reliance was placed on the skeleton argument. There was considerable medical evidence both from Dr Bharat Chaubey, orthopaedic and spine surgeon and Dr Sarkar the family physician, that the Appellant had chronic medical problems. In particular it was said she could not walk more than a few steps and was unable to sit up for long. She was suffering from acute

depression and the evidence from Dr Sarkar before the First-tier Tribunal was that she was unable to perform her daily chores like changing her clothes and taking a shower.

19. Her mental health condition interlinked with her physical condition. She needed the emotional support of her family.
20. The requirements for entry clearance were set out in Appendix FM Section FM 6.0. There was no dispute that the Appellant met the eligibility, financial and suitability requirements. The issue in this case was if the Appellant met the following "relationship" requirements.
21. Under E-ECDR2.4 the applicant must as a result of age, illness or disability require long term personal care to perform everyday tasks.
22. Under E-ECDR2.5 the applicant 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 could not reasonably provide it; or
 - (b) it is not affordable.
23. Under paragraph E-ECDR2.4, the evidence proved on the balance of probabilities that the Appellant required long term personal care to perform everyday tasks. The body of medical evidence clearly set out that she was unable to perform everyday chores and that her mobility was severely restricted. Her orthopaedic and spinal condition and osteoarthritis, which severely restricted her mobility, were degenerative conditions. Taking into account her age and advancing years it could properly be inferred that the care needed to be long term.
24. In terms of E-ECDR2.5 the medical evidence and evidence from emails set out at paragraphs 37 to 44 of the appeal bundle showed that the type of care required is not available in India. The Appellant's care requirements involve both her physical and mental health. The medical evidence stated that her mental health needs could only be met with the involvement and emotional support of a family member. There are no family members in India to provide that support.
25. At present her care did not meet her needs and in particular her mental health needs and her mental health issues stemmed from her limited mobility and feelings of abandonment. In India it is the culture for sons to care for elderly parents. Her mental health condition would not improve without care needs being met by her son and family.
26. As such the Appellant met the terms of the Immigration Rules and the appeal should be allowed. Separately she enjoyed family life with the Sponsor and his wife and by remaining in India without the emotional support of family members her private life in the sense of her mental and

physical integrity was compromised. Her continued exclusion from the UK was a disproportionate interference in all the circumstances and this was a case where there were exceptional and compelling circumstances that would mean it is unjustifiably harsh for the Appellant to remain in India.

Conclusions

27. At the end of the hearing we indicated to parties that we would be allowing this appeal for reasons to be given subsequently and we now give those reasons.

Reasons

28. As noted in **DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 00038** there is no simple exclusion of evidence arising after the date of decision as we are entitled to take into account “circumstances appertaining” at the date of decision in terms of Section 85(5) of the Nationality, Immigration and Asylum Act 2002.
29. As it is, the medical evidence at around the date of decision is clear that the Appellant was suffering severely from anxiety and depression because of her physical disability and lack of emotional support.
30. None of the medical evidence is disputed. We accept it. Nor were we invited to find that either witness who gave evidence before us was telling anything but the entire truth about the Appellant. We have no hesitation in concluding that both witnesses were credible and reliable and we accept what they said about the particular needs of the Appellant to be with her family.
31. From the oral evidence we have heard it seems clear that even with the practical and financial help of the Sponsor she cannot achieve the required level of care in her country of nationality. We accept the evidence of the Sponsor that he did contact nursing agencies and care homes but they could not be of assistance. We also accept that there is no family member in India who can provide the emotional level of support to the Appellant which the medical evidence indicates is required.
32. The requirements of paragraphs E-ECDR2.4 and E-ECDR2.5 are set out above and there is no need to repeat them. It is clear from the totality of the evidence presented to us that in terms of paragraph E-ECDR2.4, on a balance of probabilities the Appellant does require long term personal care to perform everyday tasks. To the same standard it is established under paragraph E-ECDR2.5 that the Appellant cannot reach the required level of care in her country of nationality because of the terms of the undisputed medical evidence allied to the evidence of the Sponsor and his wife. We are therefore allowing the Appellant’s appeal under the Immigration rules and there is no need to consider Article 8 ECHR.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision.

We re-make the decision in the appeal by allowing it.

Signed
Deputy Upper Tribunal Judge J G Macdonald

Date