



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: OA/06415/2014

OA/06416/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3rd September 2015**

**Decision & Reasons Promulgated
On 15th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

**ENTRY CLEARANCE OFFICER
(CHENNAI)**

and

**MR MURUGASU THANABALASINGHAM
MRS PUVANESWARY THANABALASINGHAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondents

Representation:

For the Appellant: Mr Walker, a Home Office presenting officer

For the Respondent: Mr Musquit of counsel

DETERMINATION AND REASONS

Introduction

1. In this appeal, the Entry Clearance Officer appeals against a decision of the First-tier Tribunal (Judge Randall) allowing the appeal of Mr and Mrs Thanabalasingham ('the claimants') against decisions taken on 22 April 2014 to refuse them entry clearance as adult dependent relatives.

Background Facts

2. The claimants are citizens of Sri Lanka. Murugasu Thanabalasingham ('the first claimant') was born on 12 March 1942 and Puvaneswary Thanabalasingham ('the second claimant') was born on 20 March 1946. They applied for entry clearance as dependent relatives under appendix FM of the Immigration Rules HC 395 (as amended) ('the Immigration Rules'). In decisions dated 22 April 2014 the Entry Clearance Officer refused entry clearance. The decisions were based on similar reasons for refusal, namely, the Entry Clearance Officer was not satisfied that the claimants required long term personal care to perform everyday tasks and that they would be unable to obtain the required level of care in Sri Lanka.

Appeal to the First-tier Tribunal

3. The claimants appealed to the First-tier Tribunal. In a determination promulgated on 10 March 2015, Judge Randall allowed the claimants' appeals under the Immigration Rules and in the alternative under Article 8 of the European Convention on Human Rights.

Appeal to the Upper Tribunal

4. The respondent sought permission to appeal to the Upper Tribunal. On 30 April 2015 First-tier Tribunal Judge Pirota granted the respondent permission to appeal. Thus, the appeal came before me.
5. There were three main grounds of appeal namely; that the judge erred by i) taking into account and relying on post-decision evidence, ii) failing to take into account the Country of Origin Information Report when concluding that there is no-one available in Sri Lanka who could reasonably provide the required level of care and iii) in finding (in the alternative) that it would be disproportionate to exclude the claimants from the United Kingdom.

Discussion

Post decision evidence and need for personal care

6. The grounds of appeal assert that the First-tier Tribunal Judge erred by taking post-decision evidence into consideration (contrary to s85A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), that evidence of deterioration in the claimants' health conditions is not admissible simply because the condition was extant at the date of decision and that the correct approach is to make a fresh application on the basis of the changed circumstances. In support of that submission the respondent relies on the case of AS (Somalia) v SSHD [2009] UKHL 32.
7. Mr Walker made significant concessions at the hearing. He acknowledged that there was an apparent conflict in the grounds of

appeal in that the post-decision evidence concerns the condition of the second claimant at the date of decision. Mr Walker conceded that the post-decision evidence (in particular the letter dated 4 February 2015 from Dr Yathunathanan) did refer to the medical condition existing as at the date of the decision. On the basis of that concession, he also accepted the judge's finding that the second claimant was in need of long-term personal care at the date of decision.

- 8.** I do not need, therefore, to consider the grounds of appeal in relation to post decision evidence or the finding that the second claimant needed long-term personal care to perform everyday tasks.
- 9.** There are 2 grounds remaining for consideration. Firstly, whether the judge erred in finding that the claimants would be unable to obtain the required level of care in Sri Lanka, and secondly whether the judge erred in finding (in the alternative) that it would be disproportionate to exclude the claimants from the United Kingdom.

Availability of care in Sri Lanka

- 10.** Mr Walker relied on the grounds of appeal which assert that on the facts of the case it has not been demonstrated that there is no one available in Sri Lanka who could provide the required level of care. It is open to the claimants' children to visit and offer support or re-locate if necessary. Mr Walker submitted that the First-tier Tribunal Judge failed to take account of the Country of Origin Information Report which clearly states that mental health support is available and the second claimant's own evidence that she has received treatment. Whilst the second claimant may prefer to live with her children and whilst this might have a positive impact on her condition the claimants' children chose to leave Sri Lanka - preference of carer is not catered for under the Immigration Rules or Article 8. I raised the issue with both representatives as to what form of 'care' was in issue. Mr Walker (as did the grounds of appeal) referred to availability of medical care. The requirement for 'care' in the rules appears to relate to the care necessary for performing everyday tasks i.e. personal not medical care. This was considered to be the meaning of care by the First-tier Tribunal (see para 46) and no dispute has been taken with this point. Mr Walker was unable to refer to evidence that personal care was available in Sri Lanka to a person in the second claimant's position.
- 11.** Mr Musquit indicated that he would take advantage of the fact that the Entry Clearance Officer's representative has not referred to any evidence that personal care is readily available. He referred to the judge's findings on the witness evidence, the judge had found the witnesses to be credible and accepted that the sponsor had been unable to recruit someone to provide personal care. He accepted (in response to my questions on the appropriate type of care that is in

issue) that the judge had conflated availability of medical care with personal care but submitted that the two were not entirely dissociable as the second claimant's medical condition impacted on the ability to find personal care as she was resistant to intervention and uncooperative because of her mental health condition.

Material Error of law

- 12.** The burden of proof was on the claimants to demonstrate that they were unable to obtain the required level of care even with the practical and financial help of the sponsor. The evidence of this should be from a health authority, local authority, doctor or other health professional. The judge made a number of findings in respect of the inadequacy of the care that the claimants are receiving. Many of the findings relate to medical care. The judge relates the effect of the lack of care homes with appropriate facilities and medical treatment to the second claimant's need for long term care to perform everyday tasks. In the circumstances of the instant case this appears to be reasonable because the second claimant's mental health issues clearly have an impact on the accessibility and provision of personal care. With regard to the previous provision of private care, in paragraph 53, the judge sets out the evidence provided by the former carer and the witnesses' evidence finding that their evidence that *'they had been unable to recruit a replacement due to people's reluctance to work with the second appellant given her depression'* was credible. The judge accepted that the sponsor had *'done what she can to provide practical help, including sending her husband over to Sri Lanka to assist, in both finding a replacement carer, and in seeking out care homes that might obviate the need for long-term personal care in the UK, in both of which tasks he was unsuccessful'*.
- 13.** On the basis of the admissible evidence the judge found that there are no medical or institutional resources in Sri Lanka that obviate or satisfy the need of the second claimant for long-term access to personal care and that there is nothing of a practical nature that the appellant can do to provide care to the claimants (para 54).
- 14.** These findings of the judge were properly, intelligibly and adequately reasoned and based in the findings of fact made, after hearing and seeing the evidence. The Secretary of State has not established a material error of law in this respect.
- 15.** There is no material error of law in the findings of the judge and application of the Immigration Rules.
- 16.** Given my findings on the Immigration Rules I do not need to consider the ground of appeal in relation to Article 8.
- 17.** I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously.

Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

- 18.** The decision of the First-tier Tribunal to allow the claimants' appeals under the Immigration Rules does not contain a material error of law.
- 19.** The Secretary of State's appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed P M Ramshaw
Deputy Upper Tribunal Judge Ramshaw

Date 14 September 2015