Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18118/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th January 2015	**On 12th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS CHANAN KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Reid of Counsel
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of India born on 30th July 1928 and is therefore now aged 86 years. She appealed against a decision of the Respondent dated 21st August 2013 to refuse her entry clearance as an adult dependent relative of her son Mr Surender

Sandhu a British citizen who has been in the United Kingdom for 38 years ("the Sponsor"). The refusal was pursuant to Section EC – DR 1.1 of Appendix FM to the Immigration Rules which states that the following requirements must be met. Section E ECDR 2.4 provides that the applicant must as a result of age, illness or disability require long – term personal care to perform everyday tasks. Sub paragraph 2.5 provides that the applicant must be unable even with the practical and financial help of the Sponsor to obtain the required level of care in India because either (a) it was not available and there was no person in the country who could reasonably provide it or (b) it was not affordable. The burden of proof of establishing this rests on the Appellant and the standard of proof is the usual civil standard of balance of probabilities.

2. Her appeal was allowed at first instance by Judge of the First-tier Tribunal Colvin sitting at Taylor House on 19th September 2014. The Respondent appeals with leave against that decision. The matter thus comes before me in the first place to decide whether there is an error of law in the Judge's decision such that it falls to be set aside. For the reasons which I set out below I did so decide that there was an error of law and proceeded to remake the decision. For the sake of convenience therefore I shall continue to refer to the parties as they were known at first instance.

The Appellant's Case

3. The Appellant's case was that she became a widow two years ago and since then has been finding it increasingly difficult to carry out daily tasks such as cooking, cleaning and bathing for herself. She was unable to stand for more than a few minutes due to arthritis of the knees. Being alone and the thought of being alone caused her great anxiety and she was suffering bouts of depression. She was completely dependent upon her son the Sponsor for her financial, physical and mental wellbeing. Her wish now was to spend her final years with her son and his family.

4. The Sponsor who attended and gave oral evidence at first instance works for London Underground Limited as a station supervisor earning approximately £40,000 per annum. The Appellant would have her own bedroom in his home. The Sponsor has a brother in Canada who is said to have cut off all contact with the Appellant and she was thus unable to reside with that son. The Sponsor was the only family that the Appellant had left.

5. Care homes in the Appellant's area in India were situated in places where there was rubbish and where the sanitary system was not good. The Sponsor was told that one home in a neighbouring district was not a good place but had not made enquiries of anywhere else. There was a lady who came to clean his mother's house in the mornings, cooked her food and gave her a bath. This could continue but the Appellant would need moral and emotional support. When she was alone she had to crawl to the toilet she could not walk on her own. The Sponsor called her every day to remind her to take her medicines. He sent £100 per month to his mother but he himself was retiring in eight months' time. The carer who came in to look after his mother was paid approximately £8 to £10 per month.

The Explanation for Refusal

6. The Respondent refused the application arguing that there was no evidence that the Appellant or the Sponsor had conducted investigations into medical facilities in New Delhi, India to explore the option of the Appellant remaining in India. The Respondent was satisfied that there were cheap homes available in India. The Appellant was already in receipt of medical care from the Rawat Medical Centre. There was no obvious reason why this could not continue. The Appellant was in receipt of a widow's pension. Although the Appellant had said that was not sufficient to cover her cost of living the Respondent was satisfied that the Sponsor was able to provide financial support.

The Proceedings at First Instance

7. The Judge found that the Sponsor had been candid that the present care arrangements for his mother could continue and could be increased. He had not made enquiries of care homes other than visiting the outside of one in a neighbouring district. On the basis of that evidence the Judge held that the Appellant's circumstances meant she did not fall within the section EC-DR and the appeal under the Immigration Rules was dismissed.

8. The Judge went on to consider whether there were arguably good grounds for saying that there were compelling circumstances not sufficiently recognised under the new Rules. The Judge observed that under the previous Immigration Rules paragraph 317, the Appellant at aged 86 would only have needed to show she was financially dependent on her son and she had no close relatives in India who could financially support her. The issue previously had been about financial dependency but the new Rules brought in by Appendix FM were wider in its terms. The adult dependant relative was now required to show that that they were in need of long term personal care which was not available or unaffordable in their own country.

9. The Judge proceeded to allow the appeal on the basis that what she referred to as "the new Rules" (which had been in force over two years by the time she heard the appeal) did not make provision for the kind of dependency which the Appellant had on the Sponsor in this case. It was in the Judge's view a compelling factor particular to this case that could not be assessed from within the Rules but was nevertheless at the core of an Article 8 claim. Refusal to allow the Appellant to spend her remaining years in the care of the Sponsor would result in an unjustifiably harsh consequence for all the family members involved and therefore could not be considered to be proportionate. In a brief reference to Section 117A to D of the Nationality, Immigration and Asylum Act 2002 the Judge stated that this was so "even having regard to the public interest requirements included in the new part 5A of the 2002 Act".

The Onward Appeal

10. The Respondent appealed this decision making two main points. The first was that the Judge had failed to properly take into account the provisions of Section 117A to D of the 2002 Act when assessing the proportionality of the decision under Article 8. The second ground was that the Judge had failed to provide adequate reasons for finding that the Appellant's circumstances were either compelling or exceptional such that the appeal should be allowed outside the Rules. The finding that emotional dependency was a compelling factor was based on inadequate reasoning. The Appellant and Sponsor had chosen to live apart and could continue to do so. The refusal of entry clearance maintained the status quo it did not interfere with family life as currently established.

11. The application for permission to appeal came on the papers before Judge P J M Hollingworth on 26th November 2014. In granting permission to appeal he wrote in concise terms:

> "An arguable error of law has arisen in respect to the way in which the Judge has dealt with the application of Section 117. The reasoning in this context is arguably inadequate".

There was no response to this grant of permission from the Appellant.

The Error of Law Submissions

12. In oral submissions the Presenting Officer sought to rely on the case of **McLarty [2014] UKUT 315**. Although this was a decision on the proportionality exercise in deportation appeals it was cited by the Respondent due to the observations made by the Upper Tribunal on the meaning of the phrases "exceptional" and "compelling" in an Article 8 context. The exceptional or unusual position of an individual was a factor to be placed on the scales and weighed against the public interest. Thus the phrases were no more than a part of the wider weighing process. In some cases the phrase exceptional or compelling was used to describe the end result, i.e. that the position of the individual is exceptional or compelling because having weighed their very unusual facts against the public interest the former outweighed the latter. Thus exceptional or compelling was the end result of the proportionality weighing process.

13. The Judge in the instant case had paid only lip service to the public interest in assessing the proportionality of the interference. It had not been shown that care could not be arranged in India. The effect of the change in the Rules was that it was not just a question of finance or maintenance but also whether the Appellant required the care of UK based relatives. The Judge had found it compelling that the Rules had changed but that was not open to her. The Rules were not designed to enable people to choose where to live. Article 8 was not there to facilitate that. There was no lawful identification by the Judge of compelling factors regardless of who would pay for the Appellant's own care.

14. In response Counsel argued that the Respondent had identified two grounds in her onward appeal. The Judge had had regard to Section 117A to D and there was a requirement upon her to go through 117B to show that she had conducted that exercise. Who was to pay for the maintenance and accommodation of the Appellant was not an issue to be determined the only issue was the question of the Appellant's long term personal care. The Appellant would not be a burden on the tax payers. Even if the Judge was required to carry out a full consideration of Section 117B it would not have made any difference.

15. The Judge went through a detailed consideration of the evidence in this case and found an emotional dependency by the Appellant on her son in the United Kingdom. These were compelling circumstances. Whether the Appellant's physical welfare would be catered for was not enough. The issue was not recognised within the Immigration Rules. The Sponsor was asking for his elderly mother to come and spend the last period of her life in the United Kingdom. This was exceptionally compelling, it was a rare situation. The Sponsor had showed very genuine distress when giving evidence at first instance about the plight of his mother. It was not in every case of a mother and adult child that there was such a high level of emotional dependence.

The Error of Law Decision

16. I considered the grounds of appeal and the oral submissions made in this matter and concluded that there was a material error of law in the Judge's decision such that it fell to be set aside and the decision remade. The Judge had allowed the appeal outside the Rules but had made no more than a passing reference to Section 117A to D of the 2002 Act and had given no reasons why she placed little weight on the considerations contained therein. The Judge appeared to be heavily influenced by the fact that the present Rules did not allow for the position in which the Appellant and Sponsor found themselves in. It was hard to see how that could be a significant factor that would weigh heavily in the proportionality exercise. It was not open to the Tribunal to rewrite the Immigration Rules using Article 8.

17. The Judge granting permission had not commented either way on the second ground raised by the Respondent that the First Instance Tribunal had inadequately reasoned why emotional dependency was found to be such a compelling factor that the appeal fell to be allowed. That the law had changed since July 2012 could not be said to be an arguably good ground for saying that this raised an Article 8 issue of itself. It was difficult to see how it was a compelling factor that this case did not succeed under the post-July 2012 Rules. I therefore set the decision aside and proceeded to rehear the matter preserving the Judge's record of the evidence given at the hearing at first instance.

The Substantive Re-hearing

18. I heard evidence from the Sponsor who adopted his previous evidence. When asked by his Counsel in examination-in-chief what he wished to add he reiterated that he was the only family member the Appellant had left who could look after her. She

did not want to go into a care home and had said as much many times. If she came to the United Kingdom he could take her to the park, give her meals and his presence would add years on his mother's life. There was no care for his mother at the moment the cleaner came in in the morning. His mother had no one to talk to. He himself was age 63 and when he had fallen ill with a cold last week his wife was there to look after him. However there was no one there to look after an 86 year old lady. He would ring her in the early hours of the morning to ensure that she was taking her medicine. Whilst his father was alive his father and his mother were happy but his father had died three years ago. It was then that his mother's condition had deteriorated. He would be the only person who would live in guilt if she died.

19. In cross-examination he was asked why if his mother's condition had deteriorated since his father had died in 2011 it was only in June 2013 that he had applied for his mother to come to this country. The Sponsor replied that his mother was coming to terms with her loss. He had not taken his mother to a doctor in India to have depression formally diagnosed. She had lived in New Delhi for the last fifteen to seventeen years in a flat. There were people living in the area but they minded their own business. The Sponsor was asked whether if his mother came to the United Kingdom and had problems with her health would she avail herself of the services of the National Health Service? The Sponsor did not answer the question replying instead that he had been buying medicines for her. The point had to be put to the Sponsor five times before finally he replied "If she can use it yes I'm there for her". His mother had no contact with his, the Sponsor's brother her other son. Her late husband had got on well with the older brother but the older brother had never got on with his mother the Appellant.

20. In re-examination the Sponsor stated that the Appellant was continuing to receive her husband's pension which would continue whether she was in India or the United Kingdom. If his mother could use the NHS "we will do that". If he could afford the medical care he would. At retirement he would receive a company pension from London Underground. His wife had retired some time ago she was now receiving a pension from British Airways. There was no mortgage on his property. He had made no enquiries for the cost of private healthcare.

Closing Submissions

21. In closing for the Respondent it was argued that the Rules did allow for people to enter as dependent adult relatives if there was a particular dependency and their needs could not be met. It was said that the Appellant had depression but there was no medical evidence to support that. If the Appellant was suffering from depression medical evidence could have been supplied. Her wellbeing could be dealt with in India. The Appellant had lost her husband and was suffering from arthritis. She wanted to be with her family but the Rules did not allow for that. The emotional connection she had to her son in the United Kingdom did not come close to a compelling circumstance. Article 8 was not designed for people to pick and choose where to enjoy their family life. The Sponsor had not considered what the financial

consequences would be of treatment for the Appellant in the United Kingdom. The reality was that the Appellant would seek National Health Service care for arthritis and other related ailments. That would weigh against the Appellant.

22. In closing for the Appellant it was argued that there were very compelling circumstances in this case which were not recognised by the Immigration Rules which looked solely at the circumstances of the country in which the Appellant was living. That was an exceptionally high bar and did not take account of the Appellant's emotional wellbeing. The Sponsor had given evidence of that today and at the previous hearing. It was a very compelling situation. The Appellant was at the very end of her life, one could not say whether she had years or months to live. In any event it was not going to be a particularly long time. The Appellant had been happy living in India with all the support she needed but since the death of her husband she had not had that. Whilst there was no official medical diagnosis of depression there was evidence from both the Appellant and the Sponsor that the Appellant was suffering from depression.

23. The Sponsor was emotionally upset at the separation from his mother. The care which the Sponsor could provide for the Appellant could never be equalled by someone who was hired to provide care. It could not match the mother and son relationship. There had been a change in circumstances namely the death of the Appellant's husband which had had a significant impact on her. The only factor weighing against the Appellant in the balancing exercise was the cost of the Appellant's care in the United Kingdom. The Sponsor would be willing to pay for that care if he could afford to. He was earning £40,000 per annum and was entitled to a pension when he retired. He currently sent £100 per month to India. He was paying for medical care there. He would be able to afford care in the United Kingdom. In any event the cost of care was not an issue which the Entry Clearance Officer had raised as he was of the view that care could be provided in India. The appeal should be allowed.

Findings

24. There was no cross appeal by the Appellant against the decision that she could not come within Section EC-DR of Appendix FM of the Immigration Rules. The issue in this case therefore is whether the Appellant should succeed outside the Immigration Rules. There is clearly family life between a mother and her son even if both are adults aged 86 and 63 respectively. It is difficult to see in this case however how that relationship can be said to go beyond normal emotional ties. I have no doubt that the Sponsor is concerned about his mother. He gave emotional evidence to the Judge at first instance and made clear in his evidence to me the level of his concern. Whilst it is possible to have a degree of sympathy for the position in which the Appellant and Sponsor find themselves, the desire which the Appellant and Sponsor have to live in the same household in the United Kingdom does not establish a kind of dependency emotional or otherwise which takes this case beyond normal emotional ties.

25. The parties chose to live their lives in two separate locations and Article 8 is not there to be used by parties to enable them to choose where to enjoy their family or private lives. Where the parties have chosen to live separately the burden upon this country to promote family life between them is necessarily reduced.

26. Family life could be continued elsewhere. Even if the Sponsor did not wish to relocate to India given his family and other connections to this country, the evidence before the Judge at first instance was that adequate care arrangements could be made for the Appellant in India and indeed were being made at the present time. Someone was going in to assist the Appellant with her daily needs. That was why the Judge dismissed the appeal under the Rules. Whilst therefore it is a low threshold to engage Article 8, it is difficult to see what the interference is with established rights which is being caused in the present case by the exclusion of the Appellant from the United Kingdom. It is simply as the Respondent puts it a preservation of the status quo.

27. To the extent that there is any interference with the relationship between the Appellant and the Sponsor that interference is pursuant to the legitimate aim of immigration control, particularly given the fact that the Appellant would need to use the public resources of the National Health Service for her health needs. The Sponsor's evidence after some hesitation was that if the Appellant could use the National Health Service she would. She would thus potentially be a burden on the tax payer such that the economic wellbeing of the country would be the legitimate aim being pursued in this case.

28. Even if the Appellant and Sponsor could show there was an interference in their family life I do not find that they could show it was disproportionate. Matters would continue as they are at present. The Sponsor would continue to send money to his mother to pay for the person who comes in to look after her. They would maintain their communication and the Sponsor would have the option of visiting the Appellant. That the Appellant could not meet the Immigration Rules is a relevant factor because it means that the Tribunal must proceed to look to see whether there are compelling or compassionate circumstances in the case to allow the appeal outside the Rules. It is not a compelling or compassionate factor that the Rules are such that the Appellant cannot meet them. Where the Appellant's care needs are being met by the provision of someone who goes into the Appellant's property there are no such compelling or compassionate factors. Refusal of the application by the Respondent was merely the preservation of the status quo. The end result is not unjustifiably harsh. It would not be disproportionate to interfere in the family life of the Appellant and Sponsor by dismissing the Appellant's appeal against the Respondent's decision. I dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I have remade the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to grant entry clearance.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 11th day of February 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal having set aside the decision at first instance, I set aside the decision in this case to award one half of the appeal fee of £70 meaning that there is no fee award in the Appellant's favour.

Signed this 11th day of February 2015

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Deputy Upper Tribunal Judge Woodcraft