**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA156282014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 20 April 2016** | **On 26 May 2016** |

**Before**

**UPPER TRIBUNAL JUDGE STOREY**

**Between**

**ENTRY CLEARANCE OFFICER, CHENNAI**

Appellant

**and**

**MRS HAREKAL USHA PRABHU**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Miss A Prabhu

**DECISION AND REASONS**

1. The respondent (hereafter the claimant) is a citizen of India aged 66. She had previously been granted leave to enter the UK from 1974 until 1982 where she lived with her husband. From January 2009 she was granted entry clearance on a family visit basis on a number of occasions up to 2 June 2014. On 27 August 2014 she applied for entry clearance as an adult dependent relative of her daughter Sangeetha Prabhu, a British citizen. Her application was refused by an Entry Clearance Officer (ECO) in Chennai on 6 November 2014. That refusal was reviewed by an Entry Clearance Manager on 29 January 2015, who maintained the refusal. The appellant

appealed. On 25 September 2015, the First-tier Tribunal (Judge R Cooper) dismissed her appeal under the Immigration Rules but allowed it on Article 8 ECHR grounds. The thrust of the judge's reasons for allowing the appeal on Article 8 grounds are set out in [44] – [45] of the judge's determination:-

> "44. I am satisfied that the Appellant's mental health will continue to be adversely affected by the on-going separation from each of her family members. Whilst she may be able to receive counselling and be treated with anti-depressents, her degree of social isolation in India is such that this does not constitute adequate care. Although no evidence was presented to confirm the claim made regarding the inadequacy, and even abuse suffered in care homes in India, I am satisfied that such provision would not usually be deemed appropriate for families from the subcontinent, either on religious or social grounds. I am satisfied that the decision will result in the sponsor, who is a British citizen by birth, having to leave the UK and her own children here in order to look after her mother. This will result in the loss of her employment (including the resultant loss of tax revenue), but more importantly will substantially interfere with her own family life with her husband and three children. Her eldest child is now engaged and lives independently, but the two youngest continue to live at home with the sponsor and her husband. In particular I consider the position of Aditya, who at the date of the decision was 17 years of age, and is therefore a child, whose interests must be a primary consideration (s55 Borders, Citizenship and Immigration Act 2009). At the time of the decision he was at a crucial stage of his education preparing to undertake A level examinations. I consider that the loss of his mother if she had to move to live in India would be detrimental to his best interests. When considering matters in the round I am not satisfied that family life for the Appellant, her daughter and grandchildren can reasonably continue in India, and nor can it be maintained adequately without regular personal contact between all the family members.
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> 45. In considering all of the evidence in the round and having made the findings of fact set out above, particularly in relation to the Appellant's deterioration in her mental health, I am satisfied that compelling circumstances do exist in this case and that the Appellant's personal and family circumstances are such that the decision constitutes a disproportionate interference in the Appellant's right to family life and as such breaches the UK's obligations under Article 8".

2. The appellant (hereafter the ECO) was successful in obtaining a grant of permission to appeal.

3. I granted permission to Miss Prabhu, the granddaughter of the claimant, to represent her at the hearing before me.

4. The grounds of appeal were essentially four-headed. First it was alleged that the judge had erred in jumping straight from consideration of the Immigration Rules to determining whether Article 8 was engaged, thereby failing to adopt the approach enjoined by the Court of Appeal in **SSHD v SS (Congo) and Others [2015] EWCA Civ 387** which was to deal with the Rules first, not just to see if its requirements were met but also so as "to assess the force of the public interest given expression in those Rules" (**SS (Congo)** at [44].

5. The second contention was that when finding that the claimant's mental health had been adversely affected by social isolation the judge had failed fully to consider the availability of social care in India. The judge was said to have discounted such care and made a finding as to the inadequacy of care homes in India that was not open to him on the evidence.

6. The third contention was that the judge had erred in giving weight to an immaterial matter, namely "the unsupported view that future [visa] applications from the [claimant] will be viewed with suspicion given that [she] had applied for settlement". It was agreed that this was "no more than mere speculation on the part of the judge". A similar criticism was levelled at the judge's comment that the claimant will be less able to visit in any event due to age and frailty.

7. The final ground of challenge was that the judge had incorrectly concluded that the ECO's decision was an interference with the claimant's family life because the claimant's personal relationships were presently being maintained by indirect means and could reasonably be continued in India.

8. I am not persuaded that these grounds identify any legal error on the part of the judge.

9. As regards the judge's approach to the Rules, he himself cites **SS (Congo)** and makes very clear that he approaches the Article 8 assessment through the lens of the Rules. Thus at [6] – [7] the judge identifies as "The issues for the Tribunal":-

> "6. The Respondent's decision of 6 November 2014 refused the Appellant's application on a number of grounds;
>
> (i) Firstly, that she did not fulfill the relationship requirements of paragraph E-ECDR.2.4 of Appendix FM of the Immigration Rules (HC395 as amended) as the ECO was not satisfied that the Appellant required long-term personal care to perform everyday tasks, due to age, illness or disability.
>
> (ii) Secondly, that the application does not raise any exceptional circumstances warranting consideration by the Secretary of State of a grant of entry clearance outside the rules.
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> 7. In her grounds of appeal, the Appellant submits that the Respondent failed to adequately consider the exceptional circumstances which I accept is an appeal on the grounds that the decision is in contrary to s6(1) Human Rights Act 1998 as it is incompatible with the UK's international obligations to respect and not interfere with the Appellant's protected right to family life (Article 8)".

And at [40] the judge observes:-

> "In considering the balancing exercise, and whether the private wishes of the Appellant should outweigh the public interest for society as a whole in I consider, as I must, the matters set out in s117A-D Nationality, Immigration and Asylum Act 2002. I accept that weight must be given to the maintenance of effective immigration control, and I remind myself that to be effective, immigration control must be fairly applied between different applicants, and that contracting states have a right to control those to

admit. The Immigration Rules set out the UK government's approach to the circumstances in which it considers the balance is struck when allowing elderly relatives into the UK, namely where relatives are dependent on the UK resident for physical care that cannot be met by any other means in the country of origin. The rules make no provision in relation to mental health needs being met, only physical care. In relation to considerations of cost to the public purse, there was no documentary evidence submitted with the application indicating that the Appellant had obtained any private health insurance. However, I am satisfied from the evidence the sponsor gave to the Tribunal, that the Appellant owns property in India, namely the flat in which she lives, and another flat which is currently let out. Discussions were underway as to those properties being sold in order to meet the financial costs of the Appellant in the UK and I am satisfied on balance that the family would be able to afford private health insurance".

10. What the judge says in [40] shows a particularly clear understanding and application of the requirement emphasised in [44] of **SS (Congo)** (cited earlier) that the judge looks at the Rules first "to assess the force of the public interest given expression in those Rules ...".

11. It is also apparent that the judge very precisely identified the correct legal test for considering whether an Article 8 claim could succeed outside the Rules, reminding himself at [42] that:-

> "I remind myself that in SS (Congo) the Court held that the state has a wider margin of appreciation in determining the conditions to be satisfied before leave to enter is granted, and that the Immigration Rules maintain a reasonable relationship with the requirements of Article 8 (in contrast with the position in relation to decisions regarding leave to remain for persons with a non-precarious family life that is already established here in the UK). The Court confirmed that while there could be cases where the individual interests at stake are of a particularly pressing nature such that a good claim for leave to enter can be established outside of the Rules, to do so the Applicant must show that compelling circumstances exist (which are not sufficiently recognised under the Rules)".

12. In submissions, Ms Brocklesby-Weller argued that the judge's assessment of the Article 8 viability of the relevant Rules was one-sided because it wrongly assumed those Rules were only concerned with physical care rather than care understood to encompass physical and mental aspects. She drew attention to the sentence in [40] "[t]he Rules make no provision in relation to mental health needs being met, only physical care".

13. It seems to me, however, that the judge sought to undertake precisely the assessment enjoined by **SS (Congo)** and whilst his reasoning may not have been wholly precise about the concept of "care" in the Rules, it accurately identifies the limitation of the Rules when applied to the case of persons suffering from mental health issues (as was this claimant). In this regard it is pertinent to set out the relevant requirements of Appendix FM at paragraphs EC-DR and E-ECDR:-

> "**Adult dependent relative**
>
> **Section EC-DR: Entry clearance as an adult dependent relative**

EC-DR.1.1. The requirements to be met for entry clearance as an adult dependent relative are that –

(a) the applicant must be outside the UK;

(b) the applicant must have made a valid application for entry clearance as an adult dependent relative;

(c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability for entry clearance; and

(d) the applicant must meet all of the requirements of Section E-ECDR: Eligibility for entry clearance as an adult dependent relative.

**Section E-ECDR: Eligibility for entry clearance as an adult dependent relative**

E-ECDR.1.1. To meet the eligibility requirements for entry clearance as an adult dependent relative all of the requirements in paragraphs E-ECDR.2.1. to 3.2. must be met.

**Relationship requirements**

E-ECDR.2.1. The applicant must be the –

(a) parent aged 18 years or over;

(b) grandparent;

(c) brother or sister aged 18 years or over; or

(d) son or daughter aged 18 years or over of a person ('the sponsor') who is in the UK.

E-ECDR.2.2. If the applicant is the sponsor's parent or grandparent they must not be in a subsisting relationship with a partner unless that partner is also the sponsor's parent or grandparent and is applying for entry clearance at the same time as the applicant.

E-ECDR.2.3. The sponsor must at the date of application be –

(a) aged 18 years or over; and

(b) (i) a British Citizen in the UK; or

(ii) present and settled in the UK; or

(iii) in the UK with refugee leave or humanitarian protection.

E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.

E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, 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 can reasonably provide it; or

(b) it is not affordable.

..."

14. Whilst Ms Brocklesby-Weller may well be right that the term "care" encompasses mental as well as physical aspects, it is equally clear that the Rules at E-ECDR.2.2 impose on an applicant the necessity to show that they "require long-term personal care to perform everyday tasks". At an abstract level, it is easy to imagine cases where an applicant may have acute mental health problems but still be able to "perform everyday tasks"; indeed it is within my judicial knowledge that mental health experts have said of patients who have severe mental health problems that they can perform everyday tasks as a way of coping with their traumas. Certainly it was within the range of reasonable responses for the judge to find that these Rules did not cater specifically for persons with mental health issues that were closely connected with their isolation from close family members. Further in the particular circumstances of the claimant's case the judge was clearly entitled to attach particular importance to the fact that the claimant had very strong links with her grandchildren. As the judge noted at [34] – [35]:-

"34. I am satisfied on the basis of my findings set out above that there is a degree of dependency that goes beyond normal family ties of a daughter and mother, or grandchildren and grandmother. I am satisfied that the Appellant has a particular bond with her daughter and grandchildren as a result of the social isolation and stigma they faced as a family in India and the fact that the Appellant was the primary carer for her three grandchildren between 2005 and 2007 when Sangeetha and her husband came to the UK. I am satisfied, from the weeks or months that the Appellant has visited her family in the UK on visit visas, and the evidence of the grandchildren to the Tribunal, that those close relationships have continued to date despite the sponsor and her family coming to settle in the UK in 2005 and 2007 respectively. I am also satisfied from the medical evidence that there is dependency in the relationship, and that the Appellant, in relation to her mental health, is reliant on the contact with and support from her family members in the UK.

35. I find that the Appellant has played a substantial role in her grandchildren's lives between 1998 until 2005, and had sole responsibility for their upbringing for at least 2 years between 2005 and 2007. I am satisfied from the evidence of Aditya and Divya (which was not challenged by Miss Jones) of the closeness of their bond with the Appellant. For example Divya had chosen to spend her 20th birthday with her grandmother in India due to the Appellant's loneliness rather than celebrating with her family and friends in the UK. Both grandchildren provide credible accounts of a close and loving relationship akin to that between a child and parent, their need to have contact with the Appellant and their feelings of loss when she returns to India. I am satisfied from her oral evidence that the sponsor has telephone and skype contact with the Appellant three or four times a week, with calls lasting up to an hour, and that there is also

> telephone contact between the grandchildren and the Appellant on a very regular basis. I find that there has continued to be regular contact in the form of the Appellant's visits to the UK since at least 2009, and that the Appellant has stayed often for several months a year with her family in the UK, and she has her own room in the family home. I accept also that the sponsor and her children in addition visit the Appellant in India. I am satisfied on balance that this evidence demonstrates a closeness of ties and dependency between the Appellant and her grand-children which goes beyond the normal. I am satisfied, based on my findings of fact, that the purposes of Article 8 family life does exist between the Appellant and her daughter and grandchildren in the UK".

15. Ms Brocklesby-Weller is certainly right to highlight that the judge made very clear findings that the claimant did not meet the requirements of the Rules. The judge emphasised at [30] that she did not require long-term personal care to undertake daily tasks. But that finding was complemented by well-reasoned findings on Article 8 outside the Rules.

16. Turning to the second ground, I agree with Miss Prabhu that the issue of the inadequacy of social care in India was a red herring. It had never been suggested by the claimant or the ECO that the claimant could overcome the deficit in her private and family life in India by going into a care home. She was able to perform everyday tasks and do her own shopping etc. Her case has always been about her personal need to be with her family in India. To the extent that the judge became drawn into a discussion of care homes, he might be said to have erred, but any such error was clearly not material. What the judge found at [44] was clearly congruent with the evidence he accepted, namely that the claimant's social isolation had given rise to mental health problems and these could only reasonably be assuaged by her being able to settle with the family in the UK.

17. As regards the third ground, I see nothing immaterial about the judge's decision to weigh in the balance the prospects for the claimant being able to apply in the future for a visit under the Rules. By applying for settlement the claimant had evinced a firm intention to stay in the UK permanently, an intention flatly contrary to the requirements for visitors. It is true that in cases where a person has been refused settlement and then applies for a visit, an ECO cannot reject such an application out of hand. At the same time, it would be entirely remiss of an ECO not to treat such a person as someone who had a significant evidential burden to overcome, in explanation for why his or her intentions could have changed. Indeed, albeit it is post-decision and not therefore a matter I can take into account directly, an extremely good illustration of the difficulties facing applicants who seek to apply for a visit shortly after applying for settlement to consider is what actually happened to the claimant when she sought to come to the UK for a family wedding while her appeal – this appeal – was still pending. In rejecting her application the ECO wrote on 7 April 2016:-

> "You have stated you intend a visit of six months in order to attend your granddaughters wedding. Applicants are advised of the types of document to consider providing in support of their application for a visa. This is in order to

assess your intention in visiting the United Kingdom and to consider your own situation in India by taking into account not only the statements you have made in the visa application form but also the evidence that supports these statements.

- You have provided only limited evidence in support of your visa application that does not satisfactorily explain the intention of your visit to the United Kingdom. You applied under paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules in order to join your daughter in the United Kingdom as an adult dependent relative (Chennai/1696607). However that application was refused on 06/01/14. You have stated you appealed against the decision and that the First Tier Tribunal found in your favour but the Home Office sought permission to appeal to the Upper Tribunal which was granted in March 2016. You added you had since instructed your representatives to withdraw your appeal. Finally you stated that you lived in the United Kingdom between 1974 and 1982. In these circumstances, although you have stated you now wish only to visit your family, you have not explained satisfactorily your present circumstances in India to the extent you would intend to return to the country or why you only intend a visit on this occasion and not to join your daughter permanently in the United Kingdom as you originally intended. Because of this I am not able to adequately consider the purpose of your visit. As a result I have not been able to reach a position where, on a balance of probabilities, I can be satisfied your intention with regard to the visit is as stated in the visa application form.

I am therefore not satisfied you have presented a satisfactory explanation of your present circumstances in India and your future intention about where you will live which leads me to doubt your intention whilst in the United Kingdom. In view of the foregoing I am not satisfied you are genuinely seeking entry as a visitor and that you will leave the United Kingdom at the end of the visit (paragraph V4.2).

**Future Applications**

Any future UK visa applications you make will be considered on their individual merits; however you are likely to be refused unless the circumstances of your application change".

18. Coming to the ECO's fourth and final ground, I can be very brief because Ms Brocklesby-Weller did not seek to pursue it. She accepted – as seemingly had the ECO in the refusal decision under appeal – that the claimant had established a family life with her daughter and grandchildren in the UK. She also accepted that the decision did amount to an interference with the claimant's right to respect for family life. Insofar as the ground might be understood to be a challenge to the judge's findings on the disproportionate nature of the interference, it is clear that the essence of those findings was that in the particular circumstances of the claimant's case family life could not be properly continued by other means such as visits by her UK

family members to India. In this regard what the judge said at [41] was especially pertinent:-

> "I am satisfied, from the letter provided by the sponsor in support of the application, that she has been employed by Coral as a senior management accountant since 2012 and is a strong and crucial member of the finance team. She is described as '*an outstanding employee*' who the Director wishes to retain. I accept Sangeetha Prabhu's evidence that she earns around £50,000 per annum, that the Appellant has her own room in their 4 bedroomed house, that her husband is also a Senior Manager in the IT sector, and on balance I am satisfied the Appellant would not be a burden on the state if she were to be admitted to the UK. I give weight also to the fact that the Appellant speaks English, which is an indication of her ability to integrate into British society. I am satisfied that the Appellant has previously lived in the UK and had settled status, and had she not had to return to India in order to care for her own elderly and ill mother she may well have retained that status. I also take into consideration that her husband worked for the NHS in the past when they resided here".

19. For the above reasons I conclude that the ECO's grounds of challenge do not withstand scrutiny. The judge's decision is not vitiated by legal error. Accordingly his decision to allow the appeal on Article 8 grounds must stand.

No anonymity direction is made.

Signed Date 26th April 2016

Dr H H Storey
Judge of the Upper Tribunal