IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19498/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 February 2016	**On 15 April 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SHARANJEET KAUR KOCHAR

Respondent

Representation:

For the Appellant: Ms R Pettersen, Home Office Presenting Officer
For the Respondent: Mr J Wells, Counsel instructed by Hudson McKenzie, Solicitors

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, I refer to the parties as they were before the First-tier Tribunal ("FtT).

2. The appellant is a citizen of India born on 25 November 1950. On 1 August 2013 she made an application for entry clearance as a dependent relative under Appendix FM of the Immigration Rules. That application was refused in a decision dated 30 September 2013. The application was in fact made at the same time as that of her husband, Gurcharan Singh Kochar. Sadly, the appellant's husband died after the application was made.

3. The appellant's appeal against the respondent's decision to refuse entry clearance came before a panel of the FtT consisting of Judges Church and Kamara, whereby the appeal was allowed. The respondent appeals against the decision of the FtT asserting errors of law in the FtT's decision.

The decision of the First-tier Tribunal

4. The FtT noted that it was accepted on behalf of the respondent that the appellant met the requirements of E-ECDR.2.4 (parent of sponsor requiring long-term personal care to perform everyday tasks as a result of age, illness or disability).

5. The FtT referred to a number of witness statements that it had before it and set out the evidence of the sponsor. At [20]-[39] a number of findings of fact were made, with the FtT finding at [40] that the sponsor was a credible witness and that the written evidence of the other witnesses was also credible.

6. Further findings of fact were made from [44] in terms of the nature of the care that the appellant requires, the availability of that care in India and whether it is affordable. Article 8 proper was considered from [65].

The grounds of appeal and submissions before the Upper Tribunal

7. The respondent's grounds, in summary, criticise the FtT's assessment of the cultural imperative of the sponsor, as distinct from the appellant's daughters, caring for his mother. It is argued that the FtT's conclusions fail to take into account evidence that was inconsistent with their conclusions in this regard.

8. Furthermore, the conclusion that there is no personal care available to the appellant in India on the basis of the appellant's claim that she would feel humiliated to ask for such personal care, does not mean that care is not available in the appellant's home country.

9. It is further argued that it was not open to the FtT to conclude that the sponsor would be unable to pay for the required levels of care in the absence of evidence on that issue. In addition, other members of the family could be asked to assist, including the sponsor's sister who had previously travelled from Canada to India to care for the appellant.

10. The asserted errors on the part of the FtT in relation to its assessment under the Immigration Rules are said to be replicated in the Article 8

analysis. In essence, it is argued that the refusal of entry clearance would not change the present relationship amongst the family members. Further, it is contended that the FtT failed to consider section 117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") in terms of the impact on public resources of the appellant's ongoing medical treatments.

11. The 'rule 24' response on behalf of the appellant rejects the criticisms made on behalf of the respondent, contending that in all respects the FtT made a decision that was properly reasoned on the evidence and made findings that was open to it. In particular, attention is drawn to the evidence that the care that had been provided by the appellant's daughter in the past had been provided on an emergency basis. The FtT had found the witnesses credible and made their assessment on the basis of that evidence.

12. In submissions Ms Pettersen relied on the grounds. She reiterated that care had previously been provided by the appellant's daughter and a neighbour. There clearly was local assistance available, for example from the neighbour who provided a witness statement, even if only on an emergency basis.

13. So far as Article 8 is concerned, although the FtT concluded that there would be significant disruption to the sponsor's family life in the refusal of entry clearance, it was the sponsor's choice to send his wife to look after his mother.

14. Mr Wells referred me to various aspects of the FtT's decision in support of the submission that the FtT had made properly reasoned findings. It was submitted that the FtT was entitled to take into account cultural issues in terms of the availability of care for the appellant. Including with reference to the Immigration Directorate's Instructions ("IDI's").

15. Other care had been provided on an exceptional or temporary basis, for example by the neighbour, Mrs Singh, and the appellant's sister.

16. The respondent's grounds fail to take into account the FtT's reasons as a whole.

17. So far as any burden on the NHS is concerned, at the time of the application for entry clearance the sponsor had provided an undertaking in that regard to the Secretary of State, which was legally binding. The sponsor had also told the FtT that the present arrangements are putting their marriage under considerable strain.

18. In reply Ms Pettersen submitted that the FtT had not set out the extent of any separation that the respondent's decision entails in terms of care provided to the appellant. Similarly, the FtT had not taken into account the possibility of the sponsor's wife and child travelling with the sponsor if he felt it necessary to visit the appellant to provide care for her.

My Conclusions

19. Paragraphs E-ECDR.2.4 and E-ECDR.2.5 provide as follows:

> "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."

20. It was conceded on behalf of the respondent before the FtT that E-ECDR.2.4 was satisfied. It is nevertheless, important to recognise what the appellant's particular circumstances were in terms of her needs. These are set out at [24]-[25] of the FtT's decision as follows:

> "24. Due to the Appellant's arthritis, limited mobility, dementia, depression, impaired eyesight and hypertension she requires help with intimate tasks such as bathing, showering and dressing, as well as pushing her wheelchair, cooking, shopping, housework and other day-to-day activities with which she struggles due to her impaired mobility. She also requires encouragement to carry out day-to-day tasks due to her depression;
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> 25. The Appellant requires basic medical treatment such as pharmacological treatment and regular check-ups."

21. The FtT was required to make an assessment of whether the appellant was able to obtain the required level of care in India. Under E-ECDR.2.5(a) there are two elements which need to be satisfied. Firstly it must be established that the care is not available, and secondly that there is no person in the particular country who can reasonably provide it. If the appellant is able to establish that the required level of care is (i) not available and (ii) that there is no other person in India who could reasonably provide it, she will have established that she meets that requirement of the Rules. Under E-ECDR.2.5(b) (affordability), this is an alternative way of meeting that requirement of the Rules.

22. In terms of the FtT's reasons for its decision, it is to be observed that the decision is a detailed, careful and thoughtful assessment of the evidence before it. On the crucial issue of the availability of care in India, between [48] and [59] there is a detailed assessment of the different elements of the appellant's care needs. Thus, for example at [48] there is consideration of "medical care". At [49] the issue of "non-medical care" is

assessed. From [50] there is what is described as the "personal care element", referred to again at [54].

23. The FtT, in summary, concluded that the necessary medical care was available in India and affordable. It concluded that the non-medical care, for example in terms of cooking, shopping and cleaning, was also available and affordable. In relation to the latter, the FtT took into account the sponsor's concerns about strangers being in the appellant's house but nevertheless concluded that it would be reasonable for the appellant to hire domestic help to assist her with those tasks.

24. In relation to the personal care element, the FtT referred to the IDI's and what is said there about taking into account relevant cultural factors. In this context it is important to note that at [26] it was found that in accordance with Indian Sikh culture the sponsor, as the only son of the family, and his wife, are expected to care for the appellant, and his sisters are expected to care for their respective husbands' parents. It was also found at [27] that neither of the appellant's daughters would be willing or able to provide care for the appellant on a "sustained" basis due to cultural considerations. At [51] it was again concluded that the expectation in Indian Sikh culture that married daughters should not be responsible for their parents' care was a relevant factor to be taken into account when assessing whether the appellant's daughters, and in particular the daughter who lived in Canada, could reasonably provide care. It was concluded that they could not.

25. At [52] the conclusion was that there was no close family member in India who could reasonably provide the required help and that therefore it needed to be considered whether there was another person who could provide such care. It was decided at [53] that the appellant's neighbours may be able to provide "emergency care" on an ad hoc basis when the family network was unable to do so, but they could not reasonably be expected to do so on a sustained basis.

26. This conclusion in relation to one of the neighbours, Mrs Asha Singh, reflected her witness statement, referred to by the FtT at [16], which was accepted at [29] in terms of her not being willing to continue providing care to the appellant on a sustained basis.

27. At [54] the FtT said that at first glance the kind of help that the appellant requires, that is the personal care element, could be expected to be available at reasonable cost in India. The submission on behalf of the respondent to the effect that this was 'domestic' help was considered. However, it was noted that the sponsor had attempted to find appropriate help for his parents in India but all the options available were inappropriate and it was accepted that the sponsor found the prospect of leaving the care of his parents in the hands of strangers to be inappropriate and unacceptable.

28. Crucially at [56] the FtT said that it had been persuaded that due to the "intimate nature" of tasks such as washing, bathing and dressing, the personal care needed to be provided by family members or at least someone with whom the appellant is vary familiar, such as the neighbour Mrs Singh. It was also noted however, that there was a requirement for "conversation and encouragement" as a result of the appellant's worsening depression.

29. At [57] reference was made to the appellant's late husband's witness statement to the effect that Sikh faith and culture made it impossible for him and the appellant to ask even their own daughters for help and that it would be extremely shameful for them to do so. At [58] the Tribunal concluded that Sikh faith and culture places a great deal of importance on personal dignity and family honour and the expectation that the son of the family will provide whatever care his parents needed. Reference was also made in that paragraph to the appellant's witness statement in relation to the intimate tasks that she requires help with; that she would feel very uncomfortable if a stranger were to help in that way, that it was already quite humiliating having to ask someone to help, and that it would be worse if this were not a family member.

30. At [59] the findings were summarised to the effect that the appellant's medical requirements could be met in India, as could her needs in terms of shopping, housework and cooking. It was concluded however, that there is no person in India who could reasonably provide the personal care element of the appellant's "requirements" at any price. This was because of the "humiliation" the appellant would feel at having intimate tasks such as washing, bathing and dressing carried out by a stranger when, according to Sikh culture, she should be cared for by her only son's family.

31. It was thus concluded that the requirements of E-ECDR.2.5 were satisfied.

32. As I have already observed, the FtT's decision comprises a detailed assessment of the evidence. It seems to me however, that there is some conflation of the requirements of the Rules in terms of E-ECDR.2.5 with reference to sub-paragraph (a). This, it seems to me, could have been avoided if the FtT's decision had set out the relevant requirements of the Rules and more obviously demonstrated a methodical analysis of them. By this I mean in particular that there is conflation of the two requirements I have referred to at E-ECDR.2.5(a), namely availability of care and no person who can reasonably provide it.

33. Nevertheless, because of the detailed analysis of the evidence, in particular the helpful separation of the different elements of the appellant's care needs, it is possible to deduce from the FtT's decision that it concluded that in fact the required level of care was not available, *and* that there was no person who could reasonably provide it.

34. Although the FtT took into account the IDI's, that guidance relates to the issue of whether there is a person in the country who can reasonably

provide the care, rather than whether the care is available. Nevertheless, it was in my view legitimate for the FtT to take into account cultural factors in terms of whether the care needed in terms of the "intimate nature of tasks" was available. The FtT was careful to make a distinction between that element of the appellant's care needs and the other elements to which I have referred. The FtT concluded that this was more than "domestic help" as suggested on behalf of the respondent.

35. The respondent's grounds suggest that the FtT had failed to consider a discrepancy in the evidence as highlighted by the Presenting Officer at the hearing in terms of the cultural issue of the availability of care. In that respect reference is made in the grounds to a question asked of the sponsor whereby the sponsor confirmed that if a person does not have a son they would be left to die alone with no help from any daughters. The complaint is that the FtT did not record this information in its decision. The argument is developed in the grounds in terms of the sponsor's sister having travelled from Canada to care for the appellant when the UK sponsor was not available. This, it is said, is inconsistent with the alleged cultural prohibition on care from daughters, and is inconsistent with the appellant's evidence that a daughter would leave her mother to die rather than offer assistance.

36. In the first place, it was not encumbent on the FtT to set out every aspect of the evidence. Secondly, the Tribunal noted at [15] that the circumstances in which the sponsor's sister who lived in Canada went to India to care for the appellant and her husband were "truly exceptional" in that the sponsor had used up all his holiday entitlement at work and his employer would not allow him time to take any unpaid leave. The sponsor explained that he had paid for his sister's plane ticket because it was his responsibility to care for them. He also explained that his sister could not be expected to care for his mother on an ongoing basis as her responsibility was to her husband's family in Canada. In any event, at [16] the sponsor's evidence is noted to the effect that if his mother had had no sons, her daughters would still not be expected to care for her. This would appear to be a reference to the evidence referred to by the respondent in the grounds.

37. The help provided by the neighbour, Mrs Singh, was explained to the FtT on the basis that this was not able to be provided on a sustained basis as Mrs Singh said in her witness statement. The FtT made a specific finding on this issue at [29]. Again, at [53] it was concluded that the neighbours may be available for emergency care on an ad hoc basis but could not reasonably be expected to provide that care on a sustained basis.

38. Although the respondent's grounds contend that every person who requires hospital treatment or the services of a care home would require the care of strangers, and that this is a matter of personal choice, it is clear that the FtT's consideration of this issue went much deeper than merely deciding that this was a matter of personal choice. It considered the evidence on this issue with great care and in detail.

39. Once the FtT had decided under E-ECDR.2.5 that the required level of care for the appellant in India was not available and that there was no person there who could reasonably provide it, issues arising in terms of affordability under sub-paragraph (b) are neither here nor there. The appellant had established that she met the requirements of the Rules.

40. In terms of affordability therefore, the FtT's findings were in the alternative, considering that issue on the hypothetical basis that its conclusions in terms of the availability of care were incorrect.

41. Likewise, the Article 8 assessment was also made on an alternative basis. Once it had been established that the appellant met the requirements of the Rules, any criticisms of the FtT's conclusions in respect of Article 8 are not to the point.

42. I am not satisfied that it has been established that there is any error of law in the decision of the FtT. As already indicated, in my judgement its conclusions are soundly based on the evidence, taking into account the competing considerations and reflecting a nuanced assessment of the appellant's care needs. What I have referred to as some conflation of the requirements of the Rules in its reasons, does not affect its decision and does not constitute any error of law, or at least none that is material to the outcome.

Decision

43. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal therefore stands.

Upper Tribunal Judge Kopieczek 23/03/16