



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20711/2016

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunals, Liverpool
On 13th August 2018

Decision & Reasons Promulgated
On 12th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS LAKSHMI RANI COOMER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Schwenk (Counsel)
For the Respondent: Mr M Diwncyz (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Morris, promulgated on 24th April 2017, following a hearing at Manchester on 19th April 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of India, and was born on 2nd January 1941. She appealed against the decision of the Respondent Secretary of State dated 10th August

2016, refusing her application for indefinite leave to remain in the UK on the basis of a private and family life with her son, Dr Somnath Kumar, who is a consultant cardiologist in the UK, and his family, consisting of his spouse and two children.

The Appellant's Claim

3. The background to this appeal is not contentious. The Appellant, who had a five year visit visa, during the course of which she had made regular visits to the UK, last arrived in this country on 12th October 2015 with a family visit visa, which was valid from 29th September 2015 to 29th March 2016. She claims that since her arrival on 12th October 2015 her health has significantly deteriorated and she now requires the care and support of her son and his wife in the UK. In support of her evidence, there were reports from the care and occupational therapy consultant, the consultant ophthalmologist, the consultant psychiatrist, to mention some of the leading pieces of evidence in her favour. The Appellant's application fell to be determined outside the Immigration Rules. She claimed that she requires the assistance of her son and his wife on a daily basis. She states that she will not be properly able to care for herself in India as she lives alone. She has been an insulin dependent diabetic for 40 years and her diabetes is well controlled at present, but she has significant visual symptoms mainly in the form of difficulty recognising faces and difficulty judging distances. Her mobility is poor and she has loss of memory, and she suffers from dementia. She has two daughters in India but they cannot care for her as they have their own families to look after. The refusal letter, however, concluded that Appellant could not succeed outside the Rules because the national portal of India now makes it clear that over the years, the government of India has launched various schemes and policies for older persons, which are designed to promote their health, wellbeing and independence of senior citizens around the country, and the Appellant can avail herself of these facilities.

The Judge's Findings

4. The judge had regard to the key aspects of the evidence of the Appellant's son, Dr Somnath Kumar (at paragraph 24) and the key aspects of his wife, Mrs Ushashi Coomer's evidence (at paragraph 25). In a well structured determination, the judge also set down the leading cases in this jurisdiction in relation to private and family life. The judge then concluded that he was not satisfied that the Appellant could succeed for two reasons. First, that the Appellant's daughters were not refused to care directly for their mother or to ensure that care was provided for her. Second, the recruitment of a carer to live in with the mother in a way similar to the Appellant's previous arrangements was something that could be arranged for (see paragraph 39(vi)). In terms of the viability and probability of such a course of action, the judge noted how "the Appellant previously lived in a supportive relationship with a woman who she referred to as her servant and who looked after daily needs" (paragraph 39(iv)). Given that this was the case, the possibility existed that the Appellant would be able to recruit another suitable person to undertake these functions. Finally, the judge had regard to the "**Razgar** principles" (paragraphs 54 to 64), and concluded that as a "key question in this appeal" (paragraph 64) the Appellant had not been able to demonstrate that she could not return back to India without a violation of her Article 8 rights. It was noted

that there was “considerable sympathy for the Appellant” (paragraph 65) but the case precedence in this area of law were clear (paragraph 65). The recent decision in **R (Agyarko)** meant that there was no evidence of there being “exceptional circumstances” in that it could not be shown that there will be “unjustifiably harsh consequences” for the Appellant were her application to be refused (paragraph 69).

5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge material erred in law in unfairly assessing the evidence and in failing to address the medical evidence, as well as failing to take into account the evidence of the Appellant’s son, Dr Kumar.
7. Permission to appeal was granted on 4th March 2018, by the Upper Tribunal, after an initial refusal by the First-tier Tribunal on 18th December 2017, and this was on the basis that the judge had erred (at paragraph 51) in stating that,

“given my decision that there are no compelling circumstances requiring me to consider this appeal outwith the Rules ... I need not go further. That notwithstanding, lest it be considered that my decision in that regard is wrong (and acknowledging the focus of the Appellant’s appeal) I consider that, exception, in this appeal it is appropriate that I should do so” (paragraph 51).

The Upper Tribunal reasoned that it is well-known that the Rules are not a complete code and there are no provisions within the Rules for consideration of an in-country application by an elderly dependant relative. Second, insofar as the judge did then go on to consider Article 8 outside the Rules in the alternative, it was arguable that in finding that there were no disproportionate consequences, the judge failed to take into account the evidence of Dr Somnath Kumar which would be material to a consideration of the appeal pursuant to paragraph 276ADE(vi).

8. There was no Rule 24 response.

Submissions

9. At the hearing before me on 13th August 2018, Mr Schwenk, appealing on behalf of the Appellant relied upon the grounds of application. He submitted that the judge had failed to heed the evidence and wrongly concluded that there was no compelling circumstances outside the Immigration Rules in favour of the Appellant. The judge concluded that, “given the Appellant’s several medical conditions, she certainly has my sympathy ...” (paragraph 65), but there was no reference here to how the import of those medical reports in relation to the Appellant being incontinent, disabled, blind, suffering from dementia, and being insulin dependent, was to be evaluated. Although the judge does give consideration, as a matter of form to the “Appellant’s several medical conditions”, these are not set out (paragraph 65) and there is no valuation or assessment undertaken in relation to them.

10. Third, the sponsoring son, Dr Somnath Kumar had made it clear in his witness statement (at page 5) that his sisters in India were incapable of looking after their mother, and the judge rejected this contention (at paragraph 39(vi)) without explaining why, the Appellant's daughters who were married into their own families and had their own commitments including that of work, would be able to look after the Appellant on a 24 hour basis as was happening in the UK with the support from Mrs Ushashi Coomer.
11. Fourth, in circumstances where the sponsor, Dr Somnath Kumar, had not been found to be lacking in credibility in any respect whatsoever, it was not clear why his witness statement (at paragraph 10) that, notwithstanding the social provision for the care of the elderly in India, those who do not have the support of their own family members, are vulnerable and difficult to look after. The Appellant had already given a statement to the effect that she had been in a supportive relationship with a woman who she referred to as a servant who looked after her, but this lady left in 2015, and the Appellant had not been able to elicit any further reliable help again.
12. For his part, Mr Diwncyz stated that, in the absence of a Rule 24 response, he would rely upon the reasons for refusal by the First-tier Tribunal. Judge Morris did properly take into account the evidence of the sponsoring son and the medical practitioners. He did not fail to deal adequately with the rights and obligations conferred by Article 8. He did accept that family life existed between the Appellant and her son (at paragraph 56), but that was not enough. The findings of the judge as to care and support, which would be available to the Appellant in India, were open to him on the basis of the totality of the evidence (see paragraph 39). He gave reasons for his findings and he accepted that family life existed when carrying out the proportionality assessment, and although he did not set out each and every piece of medical evidence, he did state (at paragraph 65) that he had read and re-read the medical reports.
13. In reply, Mr Schwenk submitted that this appeal was as much about the Appellant's care as about her medical condition, and care also included emotional care. He referred to page 20 of the bundle and to Dr Ahmad's letter at page 21. He submitted that a chance of deterioration in the Appellant's health could lead to a heart attack, and her kidney problems were such that she was unable to comprehend her situation fully. Her dementia was such that she was physically incapable of looking after herself on a day-to-day basis. Ultimately, it could not be said that there were no "unjustifiably harsh consequences" to her return back to India.

Error of Law

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (paragraph 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. I come to this conclusion notwithstanding the otherwise generally well compiled, and thoughtfully constructed determination of Judge Morris. There are three reasons for this.
15. First, although the judge in this case sets out in ten numbered subparagraphs the evidence given at the hearing of Dr Somnath Kumar, the Appellant's son (at paragraph 24), and also then refers to the evidence given at the hearing by Mrs Ushashi Coomer

(at paragraph 25), he does not set out the import of the medical reports. It is not enough to say (at paragraph 64) that these have been read and re-read with considerable sympathy, particularly given that there is recognition by the judge of “the Appellant’s several medical conditions” (paragraph 65). This evidence was necessary to set out, so that it could be shown that specific attention was given to it, given that Dr Somnath Kumar had himself in his evidence stated that he was “very concerned about her day-to-day diabetes management”, in referring to his mother, the Appellant, and stating that “she has had life-threatening episodes of hypoglycaemia, which required prompt attention from his wife” and that “his mother is not able to measure her blood sugar nor interpret the values” and that “she needs twice daily supervision of the insulin dosage” (paragraph 24(iii)). It is significant that Dr Somnath Kumar’s evidence in this regard was not questioned, and nor was his credibility entuned at any stage.

16. Second, the judge stated, having considered the position under the Immigration Rules, that there were no compelling reasons requiring him to consider the position outside the Immigration Rules (paragraph 51), but this overlooks the position that the Rules are not a complete code and there are no provisions within the Rules for consideration of an in-country application by an elderly dependent relative such as the Appellant in this case. To express oneself in the manner that, for this reason, “I need not go further” is to prejudice the consideration of the position outside the Immigration Rules, even if the judge does then go on to say that, “that notwithstanding, lest it might be considered that my decision in that regard is wrong (and acknowledging the focus of the Appellant’s appeal) I consider that, exception, in this appeal it is appropriate that I should do so” (paragraph 51). It cannot be emphasised enough that given that an in-country application by an elderly dependant relative inevitably falls to be considered outside the Immigration Rules, it was unfortunate for the judge to have expressed himself in this way even though he does then go on to look at the position in precisely the manner that is suggested he need not.
17. Third, and perhaps most importantly, the real issue in this appeal was, whether the decision to require the Appellant to return back to India “is proportionate to the legitimate public end sought to be achieved”, and Judge Morris was clear about this (although highlighting it only towards the end of his determination at paragraph 64), when he stated that “this is probably the key question in this appeal”. That being so, the evidence of Dr Somnath Kumar, her son, who had not been found to be lacking in credibility, was critical. He had stated that

“It was not a question of paying a person to look after his mother in India: rather such people are not available or trustworthy. His mother needs care 24/7 from someone she can trust, such as his wife who is the daughter of a family friend and whom his mother had known for many years” (see paragraph 24(v)).

18. That evidence, and the issue as so defined by the judge himself, was critical to what the judge had to determine. Although neither of the representatives referred me to the Tribunal decision of **Timoro Nour Osman** (OA/18244/2012) it is of not inconsiderable importance, because it discusses the meaning of “long-term personal care to perform everyday tasks” (at paragraph 28). It is an unreported decision. It is not binding on

this Tribunal. Nevertheless, it goes on to explain that this must be as a result of “age, illness or disability” (paragraph 29). No definition of “long-term personal care to perform everyday tasks” is contained in the Immigration Rules. There are some examples given in the IDI (at paragraph 2.2.1), such that it is said that an individual is incapable of “washing, dressing and cooking” if he or she falls under this description.

19. The judge did not reject the evidence given by Dr Somnath Kumar that the Appellant’s health had “significantly deteriorated and she is now completely incapable of looking after herself and managing her affairs” (paragraph 24(ii)). In that case, the judge had concluded that the Appellant’s need for “personal care to perform everyday tasks” could be met inside Arabia through a carer from the local Somali community. In the instant case, Dr Somnath Kumar had given evidence that “his mother had previously had a person living in with her, that had been a longstanding relationship”.
20. However, “she had left a long time ago, in 2015 not because his mother had come to the UK, but because she did not want to continue working as her carer” (paragraph 24(v)). The emphasis on what Dr Somnath Kumar was saying was that there had been established a “longstanding relationship”. That was something, which he now regarded as difficult to replicate because people are either not available or not trustworthy.
21. In Osman, the Upper Tribunal had regarded the decision of the judge below to be unsustainable for two reasons. First, the judge below had assumed that whatever the needs of the Appellant, the carer could meet them, but this did not take into account the medical report, which had been coupled with the fact that, “the Sponsor’s evidence was also that the Appellant’s lack of mobility was very severely impaired by chronic arthritis to her knees and back” (paragraph 39). In that case also, the Upper Tribunal went on to say that, “everyday tasks” is a matter which “includes mobility, and as a matter of common sense, to include the ability to leave one’s home and interact with the world outside engaging in everyday living activities” (paragraph 40). In the instant case, there was a serious question mark in the Appellant’s ability to do the same (see paragraph 24(ii)), and she did not attend to give evidence at the hearing either.
22. Second, in Osman, the Upper Tribunal said that the suggestion that the carer was available at the date of the decision and thereafter, such as to be able to provide the Appellant’s mother with the necessary care was inadequately reasoned. In the instant case, of course, the carer is not available, and the evidence of Dr Somnath Kumar has been that it is difficult to find one who can indeed perform tasks on the basis of trust and reliability.

Notice of Decision

For all these reasons, the decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Morris, pursuant to Practice Statement 7.2(b).

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

10th September 2018